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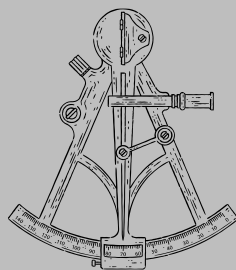


**EUROSCEPTICISM AND THE FADING DREAM OF A “FEDERAL” EUROPE: THE DRIVING FORCES BEHIND THE CONFLICT BETWEEN EU LAW AND INVESTMENT ARBITRATION?**

*Emma Iannini\**

## ABSTRACT

After nearly eighty years as a key promotor of public international law, European law, and the values of individual human rights, democracy, and the rule of law more generally, why has the Court of Justice of the European Union (“CJEU” or “the Court”)—with other European Union (“EU”) institutions and Member States—rendered a series of decisions in the last five years dismantling one of the post-World War II public international legal system’s crowning achievements in Europe: the system of investor-State investment dispute settlement (“ISDS”) before independent arbitral tribunals? This piece argues that the Court, as well as the European Commission’s, recent hostility towards ISDS, is in part a well-intentioned but potentially misjudged effort to bolster the EU against perceived threats to its “supremacy.” These threats have been lifted to the CJEU’s direct attention through the *courant* of Euroscepticism that has rushed across Europe since the defeat of the referenda on the draft European Constitution in the Netherlands and France in 2005 and culminated in Brexit and efforts in Poland, Germany, Hungary, and elsewhere to disregard the EU law principle of primacy. The Court’s impulse to wield its jurisprudential might to block rule of law “backsliding” through strict application of Articles 267 and 344 TFEU and Article 19 TEU (which the CJEU deploys to delineate EU courts’ “exclusive” jurisdiction over issues of EU law) and its application of this philosophy to ISDS can be witnessed through the similar reasoning and references present in the Court’s “anti-ISDS” decisions *Slovak Republic v. Achmea*, *Republic of Moldova v. Komstroy*, and *European Foods*, as well as *Portuguese Judges* and other decisions aiming to curtail misbehavior of “backsliding” governments in Poland, Hungary, and other EU Member States. Despite the CJEU and the EU’s seemingly positive intentions to reinforce the “rule of law” in the EU through these actions, this article queries whether the CJEU’s increasing *volonté* to unilaterally expand the jurisdiction of EU courts and issue decisions that ostensibly violate bedrock principles of customary public international law, such as *pacta sunt servanda*, is a healthy development for the post-World War II international legal order.



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## I. INTRODUCTION

It is a premise that provokes little doubt: Jean Monnet, Robert Schuman, Konrad Adenauer, Alcide De Gasperi and the other fathers of the European Union (“EU” or “Union”), whose “messianic” vision of an integrated Continent on which destructive war on the scale of the mid-20<sup>th</sup> century would “never again” be possible, would abhor the suggestion that the political community they established is undermining the principles of public international law, human rights, and the rule of law.<sup>1</sup> What would Monnet and his fellows think of *Slovak Republic v. Achmea*, *Republic of Moldova v. Komstroy*, *Poland v. PL Holdings*, and other recent decisions of the European Court of Justice (“CJEU”) which encourage, and presume to oblige in the name of the “supremacy” of EU law, EU Member States’ nonobservance of their international legal obligations under *intra*-EU bilateral investment treaties (“BITs” or “BIT”), the Energy Charter Treaty (“ECT”), and other multi-lateral investment agreements (“MIAs”)?

This piece does not dare suggest an answer to this question on the part of Jean Monnet, Robert Schuman or the other founding fathers of the EU. The less audacious, yet perhaps more prescient inquiry for international lawyers, EU citizens, and advocates of human rights, democracy and the rule of law generally is: why has the CJEU, supported by the European Commission and many EU Member States, sought to inflict a potentially damaging blow to the legitimacy of public international law in (and perhaps beyond) the EU Member States in the early 21<sup>st</sup> century? What has led us to this clash of legal regimes? This piece will suggest one possible answer to that question.

The analysis in this paper proceeds as follows: **Section II** sets the stage with a brief discussion of the history of European integration from approximately 1951 to the present, with a key focus on the crucial role of the CJEU as a *moteur d’intégration* through its doctrines of primacy<sup>2</sup> and direct effect; **Section III** details the concurrent rise of political and legal Euroscepticism since the mid-2000s, the CJEU’s mounting disdain for investor-State dispute settlement (“ISDS”) and public international law more generally, and how the court’s analysis in “anti-ISDS” decisions such as *Achmea*, *Komstroy* and *PL Holdings* curiously track its reasoning in its so-called Article 19 TEU “rule of law” jurisprudence rebuking democratically backsliding EU Member States; **Section IV** concludes with a brief summary of arguments and speculates upon the possible implications of EU law’s clash with ISDS and public international law, both within the Union and abroad.

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<sup>1</sup> See e.g. Joseph H.H. Weiler, *In the Face of Crisis – Input Legitimacy, Output Legitimacy, and the Political Messianism of European Integration*, 1 PEKING U. TRANSNAT’L L. REV. 292, 307 *et seq.* (2013); Thomas Hoerber, *The Nature of the Beast: the Past and Future Purpose of European Integration*, 1 L’EUROPE EN FORMATION 17 (2006); Franco Piodi, *From the Schuman Declaration to the Birth of the ECSC: The Role of Jean Monnet*, CVCE, <https://www.cvce.eu/en/education/unit-content/-/unit/c3c5e6c5-1241-471d-9e3a-dc6e7202ca16/aa47bf8a-e49a-4318-9489-c4c61deff0bd/Resourses> (last visited Mar. 12, 2022).

<sup>2</sup> The author will refer interchangeably throughout this piece to the doctrine of “primacy” (“*primauté*” is the French word employed by CJEU itself, whose working language is French) as well as the doctrine of “supremacy” (the term for the same doctrine from *Costa v. ENEL* developed by English-speaking scholars interpreting Luxembourg’s jurisprudence).



## II. *PAX EUROPA (1951-2004): THE DREAMS OF MONNET TO THE “END OF HISTORY”*

Ideas about uniting Europe and projects for doing so trace back to the Roman Empire and run both triumphantly and tragically through the course of history, from Charlemagne, Otto I, Immanuel Kant, Jeremy Bentham, Napoléon, Jean-Jacques Rousseau and the Third Reich, up until the present day’s EU.<sup>3</sup> In 1951, after nearly four decades of devastating war from the assassination of Archduke Franz Ferdinand of Serbia in June 1914 until the surrender of the Third Reich to the Allies in May 1945, six countries, France, Italy, the Federal Republic of Germany, Belgium, the Netherlands, and the small kingdom of Luxembourg, came together to establish the European Coal and Steel Community (“ECSC”).<sup>4</sup> By delegating and monopolizing production and control over fundamental industrial resources—coal and steel—to a neutral supranational entity, European leaders such as Robert Schuman, the foreign minister of France, and Konrad Adenauer, then the Prime Minister of West Germany, aspired to make war in Europe not only unthinkable, but physically unachievable.<sup>5</sup> Increased and centralized production of the vital materials for war would also aid the ECSC countries’ ally, and critical benefactor for European reconstruction through the Marshall Plan, the United States, in its endeavor to push back communism in the newly begun conflict over the Korean Peninsula.<sup>6</sup> The United States, France, Western Germany, Italy and other Western European nations additionally hoped that the existence and strength of the ECSC would deter Soviet encroachment beyond the Eastern bloc.<sup>7</sup>

In light of the initial success of the ECSC and with the support of the United States for further European integration, in 1956, the six founding member states of the ECSC signed two new treaties in Rome, Italy, collectively known as the Treaty of Rome.<sup>8</sup> Together, the two treaties established the European Economic Community (“EEC”), which endeavored to develop common economic policies and merge national markets into a single market for goods, people, capital and services, and the European Atomic Energy Community, which would replace the old ECSC and assume its functions.<sup>9</sup> Another key EU institution birthed by the Treaty of Rome was the Court of Justice of the European Communities, which, since the 1993 Treaty of Maastricht, has assumed the official title of the CJEU.<sup>10</sup>

Founded with the explicit mandate to “improv[e] continuously the standards of living and working of [European] peoples... in conformity with the principles of the Charter of the United Nations” through its jurisprudence, the CJEU in the early days of the European Communities established itself as arguably the most effective of the Community institutions

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<sup>3</sup> See Dan Vataman, *History of the European Union*, 17 LEX ET SCIENTIA INT’L J. 107, 107-08 (2010) [hereinafter *History*]; Gerard Labuda, *The Concepts of “Eternal Peace” and the Unification of Nation States in European History*, 3 POL. FOREIGN AFF. DIG. 53, 56 (2003).

<sup>4</sup> *History*, at 114-15.

<sup>5</sup> *Id.* at 112-14.

<sup>6</sup> Dean Rusk, *Perspectives on European Unification*, 37 L. & CONTEMP. PROBS 221, 221-22 (1972).

<sup>7</sup> *Id.*

<sup>8</sup> *History*, *supra* note 4, at 116.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

at actually achieving European “integration.”<sup>11</sup> Less than a decade after the signing of the Treaty of Rome in 1963, the CJEU held in *Van Gend en Loos* that the European Community (“EC”) constituted a “new legal order of international law” that had a “direct effect” in Member States.<sup>12</sup> That is to say that citizens or legal entities of Member States could, independently of their governments, rely upon any provision of EC law in national court if that provision was sufficiently clear, precise, and unconditional to be considered justiciable. Leaping beyond the traditional rule of public international law, which obliged individuals and legal persons to rely on the support of their home States to bring claims before international tribunals in the system known as “diplomatic protection,”<sup>13</sup> the CJEU held that:

**Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage... According to the spirit, the general scheme, and the wording of the EEC Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.**<sup>14</sup>

In the 1964 *Costa v. ENEL* decision, the CJEU proclaimed that the exclusive force of EC law could not vary from one State to another in deference to domestic laws. Incongruence between Member State laws would jeopardize one of the key goals of the EC Treaties, which was to create an “ever closer Union” amongst the peoples of the Member States.<sup>15</sup> The CJEU warned in *Costa v. ENEL* that a Member State unyielding to the doctrine of “primacy” of EC law would give rise to discrimination in violation of Article 7 TEU.<sup>16</sup> In a series of decisions in the 1970s, the court confirmed the non-negotiable and sweeping application of the primacy doctrine to all lower courts within the EC. In the 1970 judgment *Internationale Handelsgesellschaft mbH* (also known as *Solange I*), the CJEU held that not even a fundamental rule of a Member State’s constitution could displace a directly applicable provision of EU law.<sup>17</sup> Likewise, in *Simmenthal*, the court opined that even domestic courts of first instance, not only appeals courts or courts of cassation, must immediately give effect to EC law without awaiting the decision of a higher national body.<sup>18</sup>

<sup>11</sup> Paul Craig, *Constitutions, Constitutionalism and the European Union*, 7 EUR. L.J. 125, 129 (2001).

<sup>12</sup> Case 26/62, *Van Gend & Loos*, 1963 E.C.R. 13 [hereinafter *Van Gend & Loos*].

<sup>13</sup> See ANDREW NEWCOMBE AND LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* 6 (2009).

<sup>14</sup> *Van Gend & Loos*, at ¶¶ 3–4 (emphasis added).

<sup>15</sup> Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 594 [hereinafter *Costa v. ENEL*].

<sup>16</sup> *Costa v. ENEL*, at 594 (“The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.”)

<sup>17</sup> Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide*, 1970 E.C.R. 1126.

<sup>18</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, ¶ 4 (“A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting

The CJEU's potency in this early period of the EC's existence was crucial in fostering "integration through law" when European integration through politics and economics faced significant hurdles.<sup>19</sup> With the President of the French Republic, Charles de Gaulle, opposed to several of the EC's key "federal" projects, such as the establishment of any European defense force, the approval of a Community power for direct taxation, and the expansion of the EC to include prospective Member States such as the United Kingdom, the European Council and Commission achieved little progress from approximately the mid-1960s to the early 1980s.<sup>20</sup> France under de Gaulle's stead adopted the "Empty Chair" policy and refused to participate in European Council meetings - a stubborn political strategy that torpedoed most progress since the Council's intergovernmental structure required unanimity of Member States for approving Council decisions.<sup>21</sup>

With Brussels mired in this intergovernmental quagmire, the CJEU in Luxembourg made significant contributions to European integration with decisions like *Van Gend & Loos*, *Costa v. ENEL*, and their progeny, adopting a "teleological methodology" reminiscent of the doctrinal approach of early international criminal law tribunals (e.g., Nuremberg) and the International Court of Justice.<sup>22</sup> In this way, the CJEU filled gaps in the EC treaties to clarify and evolve the aims of the EC enterprise as a whole and became, as its own institution, the key motor of European integration between approximately 1964 and 1989.<sup>23</sup> Observers commended the court's achievements during this period as an encouraging example of how public international law could overcome political and economic stagnation and advance the rule of law, democracy, and respect for human rights through its own persuasive force and clever procedural adaptations.<sup>24</sup> Overall, the CJEU in these decades was an institution pioneering and propelling public international law's legitimacy not only within the EC

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provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.")

<sup>19</sup> See, e.g., PAUL CRAIG AND GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 163 (4th ed. 2008) (stating that much of "the development of the Community's legal system has been brought about not by the express agreement of the States which founded the Community nor by means of a detailed plan for an integrated legal system, but through the interpretative practice and influence of the European Court of Justice."); Craig, *supra* note 11, at 129.

<sup>20</sup> Dean Rusk, *Perspectives on European Unification*, 37 L. & CONTEMP. PROBS. 221, 222-23 (1972).

<sup>21</sup> David M. Cohen, *The Cold War and the Peaceful Settlement of Disputes: A Comment*, 6 DUQ. U.L. REV. 117, 121 (1967).

<sup>22</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Barrie Sander, *The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts*, 19 MELB. J. INT. L. 299, 308, 316, 322 (noting the teleological, gap-filling method employed by judges at the International Military Tribunal at Nuremberg, the International Military Tribunal in the Far East in Tokyo, and later by the ICTY, SCSL and ICTR).

<sup>23</sup> Craig, *supra* note 11, at 129.

<sup>24</sup> Peter Hay, *The Contribution of the European Communities to International Law*, 59 AM. SOC'Y INT'L L. PROC. 195, 195, 200-01 (1965) ("The European Communities have made many specific contributions to the development of international law... Potentially the greatest contribution of the Communities lies in their policies and in the value goals [e.g., the maintenance of treaty obligations and a potential "the existence or emergence of a principle of international responsibility of states to promote international development"] which they give to the international community."); Jean Allain, *The European Court of Justice Is an International Court*, 68 NORD. J. INT. L. 249 ("The achievements of the European Court of Justice in instilling the rule of law within the domain of economic integration is to witness to what extent public international law can be dynamic."); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 354 (1997).

Member States but beyond their borders: the CJEU engaged in frequent and mostly harmonious legal dialogue with the International Court of Justice, the European Court of Human Rights, and other international tribunals.<sup>25</sup>

The fall of the Berlin Wall in 1989 and the dismantling of the Soviet Union in 1991 ushered in a wave of hope across the West that the values of liberal democracy, human rights, and free markets had achieved a historic victory and would soon sweep across and transform the remaining “non-free” States of the world. Famously (or perhaps infamously, in retrospect), scholar and political scientist Francis Fukuyama proclaimed in a 1992 book entitled *The End of History and the Last Man* that humanity had reached “not just... the passing of a particular period of post-war history, but the end of history as such: That is, the end-point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”<sup>26</sup> Unsurprisingly, a renewed fervor for integration also began to stir in the EC capital of Brussels; the potential expansion of the EC to include the Eastern and Central European States of the former Soviet bloc was a particularly exciting and inspiring prospect and would unite the formerly divided Continent to complete Monnet and Schuman’s vision.<sup>27</sup> It was time to re-welcome the Eastern and Central European States into the grand project of European integration, and the EC’s values of liberal democracy, human rights, and the rule of law, now that the Iron Curtain had been lifted.

Propelled by this *courant* of optimism, in 1989 a committee chaired by French Foreign Minister Jacques Delors set out a three-stage plan for a common currency that would be known as the “Euro” and would launch across the EC Member States at the turn of the new millennium in 2000.<sup>28</sup> Four years later, in 1993, the Treaty on the European Union (also known as the Maastricht Treaty or the “TEU”) came into effect, renaming the former EC to become the modern-day European Union (“EU”). Among its other achievements, the Maastricht Treaty established the Eurozone and the European Central Bank and delegated new areas of competence to the EU such as culture, public health, consumer protection and trans-European networks.<sup>29</sup> In 1995, the Schengen Agreement, which had originally been

<sup>25</sup> See, e.g., Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen*, 1992 E.C.R. I-6048, ¶ 10 (citing *Gulf of Maine (Canada v. United States)*, *Continental Shelf (Libya v. Republic of Malta)* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*); Case T-115/94, *Opel Austria GmbH v. Council of the European Union*, 1997 E.C.R. II-43, ¶ 77 (noting that the Vienna Convention on the Law of Treaties of 1969 had been found to represent customary international law for the ICJ and “hence the Community [was] bound by the rules codified by the [Vienna] Convention” under the rules of public international law, which was part of binding EU law); Case C-400/10 PPU, *J. McB v. L.E.*, 2010 E.C.R. I-8992, (citing the Eur. Ct. H.R.); Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, 2010 E.C.R. I-11117 (same); Case C-351/04, *IKEA Wholesale Ltd. v. Comm’rs of Customs & Excise*, 2007 E.C.R. I-7771 (citing the WTO Appellate Body).

<sup>26</sup> Francis Fukuyama, *The End of History?*, 16 THE NAT’L INT. 3, 4 (1989).

<sup>27</sup> See, e.g., Heather Grabbe, *EU Expansion and Democracy*, 5 GEO. J. INT’L AFFAIRS 73, 74 (2004); Craig, *supra* note 11, at 135-36.

<sup>28</sup> *The Delors Report*, CVCE, <https://www.cvce.eu/en/education/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/021072be-929c-4ca0-ad76-32760b5dc2ff> (last visited Mar. 12, 2022).

<sup>29</sup> See Neil B. Murphy, *European Union Financial Developments: The Single Market, the Single Currency, and Banking*, 13 FDIC BANKING REV. 1, 6 (2000); Christian Salm & Wilhelm Lehmann, *Jacques Delors: Architect of the modern European Union*, EUROPEAN PARLIAMENT (2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652009/EPRS\\_BRI\(2020\)652009\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652009/EPRS_BRI(2020)652009_EN.pdf); Michael

signed in June 1985 by only five of the ten Member States of the EEC, was officially made into EU law, eliminating the requirement for individuals traveling within EU borders to show passports or visas at the signatories' common borders.<sup>30</sup> In that same year, Austria, Finland, and Sweden acceded to the EU.<sup>31</sup>

Meanwhile, the EU and its Member States explicitly encouraged Central and Eastern European States such as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and others to sign bilateral investment treaties (“**BITs**” or “**BIT**”) and MIAs in order to foster respect for the rule of law, liberal democracy, and human rights, including and importantly, the property rights of EU investors.<sup>32</sup> That the Central and Eastern European States sign BITs and MIAs with EU Member States and offer ISDS to foreign investors was seen as a key and necessary step for those States to prepare themselves for eventual EU accession.<sup>33</sup>

Further, the EU itself in 1994 became a party to the Energy Charter Treaty (“**ECT**”) along with all its then-Member States and most of the former Soviet bloc States. The European Commission, the executive arm of the EU's governing structure, was a key proponent of the ECT, which it saw as a crucial tool for protecting its Member States' investments in Central and Eastern Europe following the collapse of the Soviet Union and considering the unstable nature of the new, post-communist legal orders in former Soviet bloc countries.<sup>34</sup> In order to discourage these States and their newly established—and often tumultuous—democratic institutions from taking arbitrary, discriminatory, and financially harmful measures towards investors from EU Member States, Article 26 ECT granted investors the right bring claims to vindicate their property rights before international investment arbitration tribunals, which would decide disputes in accordance with the ECT and applicable rules of public international law.<sup>35</sup> At the time of the ECT's conclusion, there was no hint that the EU considered the ECT inapplicable as between EU Member States *inter*

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H. Abbey & Nicholas Bromfield, *A Practitioner's Guide to the Maastricht Treaty*, 15 MICH. J. INT'L L. 1329, 1331-34 (1994).

<sup>30</sup> Elizabeth Whitaker, *The Schengen Agreement and Its Portent for the Freedom of Personal Movement in Europe*, 6 GEO. IMMIGR. L.J. 191, 192 (1992).

<sup>31</sup> *The accession of Austria, Finland, and Sweden to the European Union*, CVCE, <https://www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/ff4dba1b-7691-48a8-b489-51393c82c951> (last visited Mar. 12, 2022).

<sup>32</sup> See e.g. Ioan Micula v. Rom., ICSID Case No. ARB/05/20, Final Award, ¶¶ 324-25 (Dec. 11, 2013) (noting that Article 74 of Romania's Europe Agreement with the EU, which paved the way for its later accession to the Union, encouraged Romania and then-EU Member States to conclude “Agreements for the promotion and protection of investment [...]” [hereinafter Micula Final Award]; Nikos Lavranos, *Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence to Permanent Conflict*, KLUWER ARB. BLOG (Jan. 13, 2022), <http://arbitrationblog.kluwerarbitration.com/2022/01/13/regime-interaction-in-investment-arbitration-eu-law-from-peaceful-co-existence-to-permanent-conflict/> [hereinafter *Regime*].

<sup>33</sup> See *Regime*, *supra* note 32; Micula Final Award, *supra* note 32; Kenneth R. Propp, *Bilateral Investment Treaties: The U.S. Experience in Eastern Europe*, 86 AM. SOC. INT'L L. PROC., 540, 542-43 (1992) [hereinafter *Bilateral Investment*]; Andrew E.L. Tucker, *The Energy Charter Treaty and Compulsory International State/Investor Arbitration*, 11 LEIDEN J. INT'L L. 513, 514 (1998) [hereinafter *Energy Charter*].

<sup>34</sup> See *Regime*, *supra* note 32; *Bilateral Investment*, *supra* note 33, at 542-43; *Energy Charter*, *supra* note 33, at 514.

<sup>35</sup> The Energy Charter Treaty, art. 26(3)-(6), Apr. 16, 1998, 2080 U.N.T.S. 100.

*se.*<sup>36</sup> Nor was there any concern, with the accession of many former Soviet bloc States in 2004 to the EU—including the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, and Slovakia as well as Cyprus and Malta—that those countries' hundreds of now *intra*-EU BITs posed a problem from the perspective of EU law and *Costa v. ENEL*'s supremacy doctrine.<sup>37</sup>

### III. THE RISE OF EUROSCEPTICISM AND THE EU'S OPPOSITION TO INTERNATIONAL INVESTMENT ARBITRATION (2005-PRESENT)

The early 2000s dealt the first significant blow of the post-Cold War period to the EU's burgeoning confidence that further European integration was inevitable and might even transform the Union into a world hyperpower on par with the United States.<sup>38</sup> In 2002, with Brussels' blessing, former French president Valéry Giscard d'Estaing, along with Giuliano Amato, the former Prime Minister of Italy, and Jean-Luc Dehaene, the former Prime Minister of Belgium, convened and presided over the Convention on the Future of Europe, which produced a draft Constitution for Europe in 2004.<sup>39</sup> The draft Constitution contained 448 articles, most notably an explicit Supremacy Clause, Article I-6.<sup>40</sup> The Convention adopted the draft Constitution in October 2003 and outlined a schedule for the document to be put before the national legislatures of the then 25 Member States for ratification in the spring and summer of 2005.<sup>41</sup> In April and May 2005, however, during national referenda taken within less than a week from each other, voters in France and the Netherlands rejected the draft Constitution on 29 May 2005 and 1 June 2005 respectively.<sup>42</sup>

Although the draft Constitution received the support of the major center-right and center-left political parties in each country and initial polling predicted the document would be approved by voters with significant majorities,<sup>43</sup> the French and Dutch electorates revealed certain profound and long-harbored anxieties about the delegation of further authority to Brussels. In both countries, exit polling and retrospective analysis revealed citizens' skepticism for the admission of more Central and Eastern European countries and

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<sup>36</sup> One of the most convincing pieces of evidence in this regard is the lack of inclusion of a disconnection clause in the ECT; a disconnection clause has been included in certain treaties to make them, in whole or in part, inapplicable between EU Member States. *See e.g.*, THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 91 (2011); Christian Tietje, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, MARTIN LUTHER UNIV. INSTITUTE OF ECON. L. (2008), <https://ssrn.com/abstract=1625323>.

<sup>37</sup> *See Regime*, *supra* note 32.

<sup>38</sup> *See generally, e.g.*, T.R. REID, THE UNITED STATES OF EUROPE: THE NEW SUPERPOWER AND THE END OF AMERICAN SUPREMACY (2005).

<sup>39</sup> Ina Sokolska, *The Treaty of Nice and the Convention on the Future of Europe*, FACT SHEETS ON THE EUROPEAN UNION, <https://www.europarl.europa.eu/factsheets/en/sheet/4/the-treaty-of-nice-and-the-convention-on-the-future-of-europe> (last visited Mar. 12, 2022).

<sup>40</sup> Treaty Establishing a Constitution for Europe art. I-6, Dec. 16, 2004, 2004 O.J. (C-310/1), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:C2004/310/01&from=EN>.

<sup>41</sup> European Parliament, Brochure on the European Constitution, 10 Jan. 2005, 6.

<sup>42</sup> Sara Binzer Hobolt & Sylvain Brouard, *Contesting the European Union? Why the Dutch and the French Rejected the European Constitution*, 64 POL. RSCH. Q. 309, 309 (2011).

<sup>43</sup> *See e.g., id.* at 312 (a December 2004 poll taken in France shortly after President Chirac announced there would be a referendum on the draft Constitution showed 60% approval for the document).

even potentially a non-Judeo-Christian Member State, Turkey, into the Union.<sup>44</sup> Voters also perceived Brussels, EU leaders, and even their own *européiste* domestic politicians as removed and alienated from the potential damage that expansion and immigration would inflict upon Member States' unique national identities, local languages, and the quality of social services.<sup>45</sup> Lacking the unanimous consent from all Member States required for ratification, EU leaders abandoned the draft Constitution project within several months and instead resolved to negotiate a watered-down version of the Constitution, a new TEU which would be called the Lisbon Treaty.<sup>46</sup> Four years later, in 2005, the Lisbon Treaty was finalized and ratified without significant opposition by all of the EU Member States. The Lisbon Treaty granted Brussels new competences (including, importantly for this piece, competence over foreign direct investment ("FDI") and trade negotiations) and retained many of the Constitution's original provisions.<sup>47</sup> However, Article 4 TEU, in an explicit rebuke to the supporters of a more federalist and integrated Europe, obliged the Union to:

**respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including the territorial integrity of the State, maintaining law and order and safeguarding national security.** In particular, national security remains the sole responsibility of each Member State.<sup>48</sup>

The rejection of the draft Constitution presaged the gravest blow that the 2016 Brexit referendum would deal to EU leaders' dream of an "ever closer union" and put into the global spotlight many EU citizens' growing disillusionment with Brussels. Although participation rates in European Parliamentary elections since their inception in 1979 dropped nearly twenty percentage points (from 62% in 1979 to 43% in 2009),<sup>49</sup> as Fukuyama's 1992's book and its widespread popularity among global elites and the academy demonstrated, many EU leaders before the 2005 referenda believed the achievement of Schuman and Monnet's vision of an "ever closer Union" and establishing a federal "United States" of Europe to be the inevitable and natural result of the West's

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<sup>44</sup> *Id.* at 315.

<sup>45</sup> *Id.* at 315–17.

<sup>46</sup> Eeva Pavy, *The Treaty of Lisbon*, FACT SHEET ON THE EUROPEAN UNION, <https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon> (last accessed Mar. 12, 2022).

<sup>47</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 188 C(4), Dec. 13, 2007, 2007, O.J. (C 306) 1 [hereinafter TEU].

<sup>48</sup> *Id.* art. 4. This provision has been described by scholars as an "identity lock" or "identity clause." See e.g., Elke Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, 45 NETH. J. OF LEGAL PHIL. 82, 84 (2016).

<sup>49</sup> *Quality of life indicators – governance and basic rights*, EUROSTAT, [https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=420994#Voter\\_turnout](https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=420994#Voter_turnout) (last accessed July 13, 2023).

triumph over communism and the fall of the Soviet Union.<sup>50</sup> The very public eruption of French and Dutch voters' long-simmering Euroscepticism was a rude awakening for *européiste* leaders in Brussels and national capitals as well as the judges of the CJEU in Luxembourg, whose rulings had been so crucial to the integration process since *Van Gend & Loos* in 1963.

Indeed, before the referenda of 2005, the thought that Eurosceptic politicians would ever occupy executive offices in key European capitals or that national courts would expressly disapply long-settled principals of *Costa v. ENEL* (supremacy of EU law) or *Van Gend & Loos* (direct effect) was not seriously considered. In France, for example, when the far-right politician Jean-Marie Le Pen shocked both domestic and international political elites by reaching the final, *deuxième tour* of the French presidential election in April 2002, Le Pen was a Holocaust denier and ridiculed for his suggestion that France would be better off leaving the EU.<sup>51</sup> A month later, French voters would reject Le Pen and re-elect incumbent President Jacques Chirac by an overwhelming margin of 82% to 18% in May 2002.<sup>52</sup> Twenty years later, in the second round of the 2022 French presidential election, Marine Le Pen, Jean-Marie Le Pen's daughter, scored just seventeen percentage points behind incumbent President Emmanuel Macron, doubling her father's score from 2002.<sup>53</sup> Like her father, Le Pen disfavors a federal Europe and has previously supported France's exit from the Union and/or the Eurozone.<sup>54</sup> Le Pen's gains and her now near-constant presence in the final rounds of French presidential elections demonstrates how Euroscepticism, in merely two decades, has gone from a fringe to a very much mainstream political ideology in France and elsewhere across the EU.

Elsewhere, since the 2005 rejection of the draft Constitution, voters have elected Eurosceptic politicians to high executive offices in Member States such as Hungary, Poland, Italy, and of course, the UK.<sup>55</sup> Eurosceptic political parties in the past decade have also garnered significant shares of the vote in national and regional elections in Germany, Greece, Austria, Slovenia, Spain, Denmark, Sweden and other Member States.<sup>56</sup> Even the

<sup>50</sup> See, e.g., *Dutch say 'devastating no' to EU constitution*, THE GUARDIAN, <https://www.theguardian.com/world/2005/jun/02/eu.politics> (last updated June 2, 2005).

<sup>51</sup> Angelique Chrisafis, *Jean-Marie Le Pen fined again for dismissing Holocaust as 'detail'*, THE GUARDIAN, <https://www.theguardian.com/world/2016/apr/06/jean-marie-le-pen-fined-again-dismissing-holocaust-detail> (last updated Apr. 6, 2016).

<sup>52</sup> *2002: Chirac-Le Pen, le choc inattendu*, RADIO FRANCE INTERNATIONALE, (2017), available at <https://savoirs.rfi.fr/fr/comprendre-enrichir/histoire/2002-chirac-le-pen-le-choc-inattendu>.

<sup>53</sup> *Présidentielle 2022 : Résultats nationaux, 2ème tour, Mis à jour le 28/04/2022 à 14h24*, BFMTV, <https://elections.bfmtv.com/resultats-presidentielle/> (last updated Apr. 29, 2022).

<sup>54</sup> See *France's Marine Le Pen hails Brexit, urges 'Frexit' vote*, AGENCE FRANCE PRESS, <https://news.yahoo.com/frances-marine-le-pen-hails-brexit-urges-frexit-003751371.html> (last updated June 23, 2016). In preparation for the 2022 presidential election, in moves termed by the French political press as a "dédiabolisation," Le Pen has rescinded her previous support for "Frexit" and the return to the franc, France's pre-Euro currency. See Anne Damiani & Mathieu Pollet, *Abandon du Frexit et écologie : pourquoi le programme du Rassemblement national fait peau neuve*, EURACTIV, <https://www.euractiv.fr/section/elections/news/abandon-du-frexit-et-ecologie-le-programme-du-rassemblement-national-fait-peau-neuve/> (last updated Apr. 7, 2021).

<sup>55</sup> Jon Henley, *Support for Eurosceptic parties doubles in two decades across EU*, THE GUARDIAN (Mar. 2, 2020, 2:15 PM), <https://www.theguardian.com/world/2020/mar/02/support-for-eurosceptic-parties-doubles-two-decades-across-eu>.

<sup>56</sup> See *id.*; see also Georgina Proshan, *Austria's Freedom aims to enlarge Eurosceptic bloc*, REUTERS (Dec. 14, 2013, 1:58 PM), <https://www.reuters.com/article/us-europe-right-austria-idUSBRE9BD0DD20131214>;



European Parliament has not been immune to the wave of Euroscepticism sweeping the Continent in the early 21<sup>st</sup> century.<sup>57</sup> Belief in the theory of the “end of history” and a federal Europe being the natural result of the victory of the West over fascism and communism has quickly been dampened—if not wholly extinguished—in certain corners.

#### A. EU NATIONAL COURTS CONTEST *COSTA V. ENEL*’S DOCTRINE OF SUPREMACY

Coinciding with the rise of Eurosceptic political parties has been national courts’ pushback on the CJEU’s perceived jurisdictional overreach and the core EU law doctrines of primacy and direct effect. The constitutional court of Germany, the Bundesverfassungsgericht (“BVerfG”), since 1994 has produced a series of decisions cautioning Brussels and Luxembourg not to overstep their mandates under the EU Treaties. In *Brunner v. the European Treaty*, the BVerfG rejected the petitioner’s argument that Germany’s ratification of the Maastricht Treaty constituted a breach of Article 38 of the Constitution of the Federal Republic of Germany, which prohibits the Bundestag from surrendering its general legislative powers; however, in this carefully worded decision, the BVerfG also warned European lawmakers, as well as the CJEU, that the BVerfG would not abandon its constitutional duty to ensure that the EU did not stray beyond the express competences delegated to it by the Member States in the Maastricht Treaty.<sup>58</sup> The BVerfG stated that it would continue to monitor EU institutions’ exercise of power to verify that regulations, decisions, and other presumptive forms of lawmaking complied with the terms of the EU Treaties and the German Constitution.<sup>59</sup>

In a 2009 decision nearly fifteen years after *Brunner* on a petition challenging the legality of Germany’s ratification of the Treaty of Lisbon, the BVerfG again emphasized that European integration on the basis of the EU Treaties’ must not be undertaken in such a way that there was not sufficient space for Member States to construct the political formation of unique economic, cultural, and social living conditions.<sup>60</sup> This judgment, resonant with the spirit of the French and Dutch referenda of 2005, noted that domains of

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Nikolaj Nielsen, *Anti-immigrant party wins Slovenia election*, EU OBSERVER (June 4, 2018, 9:29 AM), <https://euobserver.com/eu-election/141981>; Danielle Lee Tomson, *The Rise of Sweden Democrats: Islam, Populism and the End of Swedish Exceptionalism*, THE BROOKINGS INSTITUTION, <https://www.brookings.edu/research/the-rise-of-sweden-democrats-and-the-end-of-swedish-exceptionalism/> (last updated Mar. 25, 2020); Robin-Ivan Capar, *Wall in: The Eurosceptic challenge in Croatia*, EUR. COUNCIL ON FOREIGN REL., [https://ecfr.eu/article/commentary\\_wall\\_in\\_the\\_eurosceptic\\_challenge\\_in\\_croatia/](https://ecfr.eu/article/commentary_wall_in_the_eurosceptic_challenge_in_croatia/) (last updated Jan. 16, 2019); Sabina Zawadzki & Teis Jensen, *Danish centre-right opposition wins election, PM quits party*, REUTERS (June 18, 2015, 8:18 PM), <https://www.reuters.com/article/us-denmark-election-idUSKBN0OY0T120150619>.

<sup>57</sup> *Eurosceptic Parties Gains in European Parliament Elections*, NBC NEWS (May 25, 2014, 8:48 PM), <https://www.nbcnews.com/news/world/eurosceptic-parties-gains-european-parliament-elections-n114361>.

<sup>58</sup> Cases BvR 2134/92 & 2159/92, *Brunner v. Eur. Union Treaty*, 1 C.M.L.R. 57 (1994).

<sup>59</sup> *Id.*

<sup>60</sup> BVerfGE, June 30, 2019, 2 BvE 2/08, ¶ 1, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630\\_2bve000208en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html).

citizenship; civil and military monopoly on the use of force; taxation; protection of national languages and culture; family and education; freedom of the press and association; and religion, would continue to come under the exclusive law-making and regulatory competence of the Member States.<sup>61</sup>

More explicit challenges to *Costa v. ENEL* and the CJEU's primacy doctrine have also sprung forth from the Danish, German, Italian, Polish, and Hungarian courts in the last decade. The Danish Supreme Court ("SCDK") in 2016, after receiving orders from the CJEU after an Article 267 TFEU reference to disapply contrary provisions of the Danish Salaried Employees Act ("DSEA") to give primacy to Directive 2000/80/EC, held instead that it would not yield to the CJEU's conclusion that the "judge-made" general principles of EU law on non-discrimination could be binding upon Denmark.<sup>62</sup> In the so-called *Ajos* case, the claimant, Mr. Rasmussen, was a former industrial worker who had been dismissed by his employer, Ajos, at age sixty, without any severance.<sup>63</sup> Mr. Rasmussen's heirs argued in trial court that Mr. Rasmussen's employer's refusal to provide Mr. Rasmussen with at least three months' severance amounted to discrimination on the ground of age, in violation of Directive 2000/80/EC and the general principle of non-discrimination for reasons of age in EU law.<sup>64</sup> Ajos objected to Mr. Rasmussen's heirs' request in court by relying on the DSEA, which does not require an employer to pay severance to dismissed employees when they are (i) entitled to an old-age pension under Danish law; and (ii) had joined a pension scheme before the age of fifty.<sup>65</sup> The case reached the SCDK, which referred two questions on these issues to the CJEU through Article 267 TFEU's preliminary reference mechanism.<sup>66</sup>

In its response to the CJEU's Article 267 TFEU decision, the SCDK justified its findings by noting that the general principle of EU law on non-discrimination on grounds of age had no basis in any specific provision of either the TEU or the TFEU.<sup>67</sup> The SCDK opined that it had a duty under the Danish Constitution to interpret the EU Treaties and so-called "general principles of EU law" in light of the limited competences delegated to the EU under the Danish EU Accession Act.<sup>68</sup> Thus, even after the Article 267 TFEU reference encouraged the court to allow the claimant to rely on Directive 2000/70/EU to force his employer to grant him three months' severance, SCDK demurred and validated the employer's defense based on the DSEA.<sup>69</sup> This was one of the first explicit rebukes of the CJEU's doctrine of primacy emanating from the court of a Western European Member State.

In a judgment that same year, the BVerfG also engaged in a tense conversation with the CJEU regarding the legality of the European Central Bank ("ECB")'s Outright

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<sup>61</sup> See, e.g., *id.* ¶¶ 249–53.

<sup>62</sup> Martina Benackova, *Ajos (Dansk Industri) – A Challenge to the Primacy of EU Law?* KSLR EU L. BLOG, <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1150> (last updated Sept. 4, 2017).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

Monetary Transactions Program (“**OMT Program**”).<sup>70</sup> The ECB, which is an independent and neutral body according to Article 282(3) TFEU, devised the OMT Program in 2012 with the goal of preventing the break-up of the Eurozone in the wake of the Greek, Italian, Portuguese, and Spanish debt crises; under the auspices of the OMT Program, which received near-unanimous approval from the Governing Council of the ECB (the sole dissenting vote being from the President of Germany’s federal bank, the Bundesbank), the ECB would purchase bonds of struggling EU Member States in secondary markets in order to decrease borrowing rates for those countries.<sup>71</sup> In Germany, a country where the risk of irresponsible fiscal and monetary policy has haunted the national psyche since the hyperinflation of the 1920s and early 1930s during the Weimar Republic, the OMT Program was met with more skepticism than any other EU Member State. Bundestag representative Peter Gauweiler and the left-wing socialist party Die Linke quickly challenged the compatibility of the OMT Program with the EU Treaties and the German Constitution in German trial court.<sup>72</sup> Their case, *Gauweiler*, eventually made its way to the BVerfG, which referred several questions on the OMT Program to the CJEU in January 2014.<sup>73</sup>

After receiving the Article 267 TFEU reference back from the CJEU affirming the legality of the OMT Program under EU law, the BVerfG, in its *Gauweiler* judgment, did not hesitate to voice its doubt on the correctness of Luxembourg’s decision. The BVerfG cautioned that should EU organs such as the ECB act beyond their mandates, the German court would not hesitate to rule that such acts would not be democratically legitimate and would violate the principle of popular sovereignty as enshrined in the German Constitution.<sup>74</sup> In such a scenario where an EU institution acted in breach of the German Constitution, the BVerfG would exert its duty to render the disputed act void in Germany, regardless of whatever the CJEU had to say according to the doctrine of primacy under *Costa*.<sup>75</sup> The court opined that Article 38(1) of the German Constitution would additionally grant a right to German petitioners to challenge alleged *ultra vires* acts of the EU before the BVerfG in a situation where the EU organ’s transgression of competences was sufficiently serious.<sup>76</sup> Although this time the BVerfG accepted the CJEU’s holding that the ECB’s OMT Program did not violate either the EU Treaties or the German Constitution, it criticized the CJEU for not properly analyzing policymakers’ contention that the program pursued proper monetary policy objectives and failing to strictly review the extent of the ECB’s competences.<sup>77</sup> The CJEU’s failures were even more troubling, according to the BVerfG, in light of the non-elected character of ECB officials.<sup>78</sup> The court

<sup>70</sup> Case C-62/14, *Gauweiler v. Deutscher Bundestag*, 2015 E.C.L.I. 400 [hereinafter *Gauweiler*].

<sup>71</sup> Mehrdad Payandeh, *The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture*, 13 EUR. CONST. L. REV. 400, 400-02 (2017).

<sup>72</sup> *Gauweiler*, *supra* note 70, at ¶¶ 1-3, 19-24.

<sup>73</sup> *Id.* at ¶¶ 1-2.

<sup>74</sup> *Id.*

<sup>75</sup> BVerfG, 2 BvR 2728/13, June 21, 2016, ¶ 81,

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621\\_2bvr272813en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html).

<sup>76</sup> *Id.* at ¶¶ 83-88.

<sup>77</sup> *Id.* at ¶¶ 181-89.

<sup>78</sup> *Id.* at ¶ 189.

also warned the CJEU that it would reserve the right to review and declare EU organs' to have exceeded their competences in the EU Treaties even if the CJEU delivered a "thorough and well-reasoned interpretation" to the BVerfG in an Article 267 TFEU preliminary reference response.<sup>79</sup>

In a May 2020 decision, the BVerfG followed through on its warning that it would declare actions of EU institutions *ultra vires* even if the CJEU had ruled to the contrary in an Article 267 TFEU reference.<sup>80</sup> In this decision, for the first time since *Ajos*, the highest court of an EU Member State declared that it would disapply *Costa*'s supremacy principle with regard to the OMT Program. In its ruling, the BVerfG held that the CJEU had "exceed[ed] its judicial mandate" since its interpretation of the EU Treaties was "not comprehensible," "arbitrary" and thus lacked the "minimum of democratic legitimation necessary" under Germany's Basic Law.<sup>81</sup> The court added that it was highly concerned that the CJEU only analyzed the ECB's actions according to a "limited standard of review," a practice it feared might lead to the "continual erosion of Member State competences."<sup>82</sup> As a result, the BVerfG declared that neither it nor any of the German lower courts would be bound by the CJEU's finding that the ECB had not exceeded its competences in promulgating the OMT Program.<sup>83</sup> It also ordered Germany's Central Bank, the Bundesbank, to withdraw from the OMT Program unless a new proportionality assessment was undertaken by the ECB within three months.<sup>84</sup>

The Italian Constitutional Court similarly clashed with the CJEU over a question of fundamental rights, the principle of legality, and the doctrine of supremacy of EU law in the 2017 *Taricco II* judgment. In 2015, the CJEU issued a judgment, known as *Taricco I*, after a preliminary reference from the trial Court of Cuneo ordering Italian courts to disapply the domestic statute of limitations barring prosecution for individuals accused of VAT fraud to uphold the supremacy of Article 325 TFEU, which protects the financial interests of the EU.<sup>85</sup> Apparently concerned that the Italian judicial system was working too slowly to prosecute financial miscreants and that such delay should not prejudice EU entities' proper collection and redistribution of taxes, the CJEU in *Taricco I* omitted any consideration of the principle of legality, under which the State must treat accused persons in a fair and non-arbitrary manner and conduct prosecutions within the set timeframe according to the applicable law.<sup>86</sup> The Italian Constitutional Court observed this gross

<sup>79</sup> *Id.* at ¶ 150.

<sup>80</sup> BVerfGE, 2 BvR 859/15, May 5, 2020, ¶¶ 1-10, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html).

<sup>81</sup> *Id.* at ¶ 2.

<sup>82</sup> *Id.* ¶ 4.

<sup>83</sup> *Id.* ¶ 10.

<sup>84</sup> See also Nick Kenny, *The German Constitutional Court vs the European Court of Justice: The Fracturing of the European Legal Order?*, JURIST, (June 2, 2020, 3:22 PM), <https://www.jurist.org/commentary/2020/06/nick-kenny-german-constitutional-court-eu/>.

<sup>85</sup> Case C-105/14, *Ivo Taricco and others*, E.C.L.I.:EU:C:2015:555, ¶¶ 49-52 (Aug. 9, 2015).

<sup>86</sup> In Italy as in many other countries, the statute of limitations increases in magnitude with the perceived gravity of the crime, allowing the State more leeway to prepare cases against those accused of having committed severe infractions vis a vis those accused of lesser crimes. See Giovanni Zaccaroni & Francesco Rossi, *Settling the dust? An analysis of Taricco II from an EU constitutional and criminal law perspective*, EUR. L. BLOG,

lacuna in *Taricco I* and, in the *Taricco II* judgment of January 2017, sent its own Article 267 TFEU preliminary reference to the CJEU, inviting Luxembourg to overturn or refine its *Taricco I* judgment.<sup>87</sup> The Italian Constitutional Court, like the BVerfG and the SCDK, fired a direct warning shot across the bow of the CJEU and *Costa v. ENEL*'s doctrine of primacy:

It is not disputed that, when it comes to criminal law, the principle of legality does amount to a supreme principle of the legal order aimed at protecting inviolable rights of individuals to the extent that it requires criminal provisions to be precise and it prevents criminal provisions from having any retroactive effects in peius [i.e., the State cannot try and convict an accused after the statute of limitations set by law has run]...

If Article 325 of the Treaty on the Functioning of the European Union results in a legal norm that is contrary to the principle of legality... **the Constitutional Court will have the duty to prohibit it.**<sup>88</sup>

After a second review, the CJEU noted the warnings of the Italian Constitutional Court and allowed Italian courts' effective disapplication of the doctrine of supremacy if granting Article 325 TFEU precedence in certain VAT fraud prosecutions would jeopardize the rights of Italian defendants under Articles 160(3) and 161(2) of the Italian Criminal Code and Article 25 of the Italian Constitution (both of which define the principle of legality as a fundamental right).<sup>89</sup>

The two latest EU Member States who have revolted against the doctrine of primacy of EU law are Poland and Hungary, whose far-right leaders have undertaken targeted measures to encourage (or even oblige) national courts to disapply certain decisions of the CJEU and other EU institutions.

On 7 October 2021, the Polish Constitutional Court rendered a long-awaited judgment in which it held that certain provisions of the EU Treaties would not be given precedence over the Polish Constitution.<sup>90</sup> The court specifically targeted two provisions of the TEU: Article 1, which establishes the EU and provides for the transfer of certain competences from the Member States to Brussels, as well as Article 19, which grants the CJEU the

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<https://europeanlawblog.eu/2018/04/12/settling-the-dust-an-analysis-of-taricco-ii-from-an-eu-constitutional-and-criminal-law-perspective/> (last updated Apr. 12, 2018).

<sup>87</sup> Corte cost. [Constitutional Court], 23 novembre 2016, n. 24, Racc. uff. corte cost. 2017, n.5, ¶ 2 (It.); see also Pietro Faraguna, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*, VERFASSUNGSBLOG, <https://verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna/> (last updated Jan. 31, 2017).

<sup>88</sup> Marco Bassini & Oreste Pollicino, *The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution*, VERFASSUNGSBLOG, <https://verfassungsblog.de/the-taricco-decision-a-last-attempt-to-avoid-a-clash-between-eu-law-and-the-italian-constitution/> (last updated Jan. 28, 2017) (emphasis added).

<sup>89</sup> *Id.*; see also Zaccaroni & Rossi, *supra* note 86.

<sup>90</sup> Renata Uitz, *The Polish Constitutional Tribunal Asserts the Primacy of National Constitution over EU Law—In Words with No Legal Force*, DUBLIN CITY U.: THE BREXIT INST., <https://dcubrexitinstitute.eu/2021/10/poland-constitution-eu-law/> (last updated Oct. 8, 2021).

authority to ensure EU law's uniformity and "full effectiveness" across the Member States.<sup>91</sup> In essence, and expanding upon the BVerfG's May 2020 decision that decided that at least one decision of the CJEU regarding the OMT Program would not be applied in Germany, the Polish Constitutional Court declared that *Costa v. ENEL* and the doctrine of supremacy of EU law were no longer fully in force in Poland.<sup>92</sup> In response to this decision and other intransigencies of the current Polish government, which is dominated by the far-right and Eurosceptic Law and Justice Party, the Commission and the CJEU have rebuked Poland by ordering it to pay Brussels EUR 1 million each day that Poland refuses to recognize the supremacy of EU law.<sup>93</sup>

Two months later, in December 2021, the Hungarian Constitutional Court in Budapest also questioned the doctrine of supremacy, albeit more obliquely than its Polish counterpart. In a ruling on a petition from Prime Minister Viktor Orbán's government challenging the legality of the CJEU's order that Hungary cease and desist barring all asylum seekers from the country and deporting them without due process, the court held that in areas of shared competence between a Member State and the EU, Hungary maintained the right to set the prerogative for immigration policy.<sup>94</sup> Although the court declined to specifically rule on the government's petition or to challenge *Costa v. ENEL* in anything but *obiter dicta*, President Orbán later declared in a press conference that Hungary would continue to ignore the CJEU's decision ordering Hungary to abide by the EU Treaties and the EU Charter on Fundamental Rights.<sup>95</sup> Such is the latest instance of an EU Member State and its Eurosceptic executive, assisted by its national courts, defying the doctrine of primacy of EU law.

Taken together, the decisions of Danish, German, Italian, Polish, and Hungarian courts have led commentators to observe that the EU and the CJEU particularly face the greatest "rule of law" crisis in the European integration project begun by Monnet, Schuman, de Gasperi, and the other founders in the early 1950s.<sup>96</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; see also Polexit? Fury in Brussels after Warsaw court rules Polish Constitution overrides EU law, EURONEWS, <https://www.euronews.com/2021/10/07/polish-court-rules-some-eu-laws-clash-with-country-s-constitution> (last updated Oct. 8, 2021).

<sup>93</sup> *EU court fines Poland 1 mln euros per day in rule of law row*, REUTERS, (Oct. 27, 2021, 9:28 AM), <https://www.reuters.com/world/europe/eu-top-court-orders-poland-pay-1-million-euros-day-rule-law-row-2021-10-27/>.

<sup>94</sup> Zoltan Simon & Marton Kasnyik, *Hungarian Top Court Ruling Emboldens Orbán in Fight With EU*, BLOOMBERG, (Dec. 10, 2021, 10:33 AM), <https://www.bloomberg.com/news/articles/2021-12-10/hungary-court-opens-way-to-challenge-eu-law-in-nuanced-ruling>.

<sup>95</sup> Justin Spike, *Orbán: Hungary will defy EU court ruling on asylum policy*, YAHOO! NEWS, [https://news.yahoo.com/orban-hungary-defy-eu-court-155211592.html?soc\\_src=social-sh&soc\\_trk=ma](https://news.yahoo.com/orban-hungary-defy-eu-court-155211592.html?soc_src=social-sh&soc_trk=ma) (last updated Dec. 21, 2021).

<sup>96</sup> See e.g. Swedish Institute of European Policy Studies, *Webinar December 3<sup>rd</sup> The rule of law, the European Court of Justice, and the future of the EU*, YOUTUBE, at 13:15 (Dec. 22, 2021), <https://youtu.be/TQKLx0h4sG4>.

**B. THE CJEU AND COMMISSION'S REINFORCEMENT OF THE DOCTRINE OF SUPREMACY AND OPPOSITION TO THE "THREAT" OF ISDS AND PUBLIC INTERNATIONAL LAW**

As the primacy of EU law has become increasingly threatened within the Union's borders and the Article 267 TFEU preliminary reference mechanism has ceased to always yield results in the EU's favor, the Commission and the CJEU together have attempted to reinforce the EU's legal supremacy in other ways. One method is a newly emerged hostility towards ISDS and public international law more generally. This shift in attitude on the part of both the Commission and the CJEU, which has revealed itself in a series of actions over the past fifteen years, is perhaps viewed in the best light as a well-meaning attempt on the part of the EU and its highest court to shield the Union from perceived "threats" to the EU's legitimacy and primacy originating outside the EU legal order. Although the CJEU in its early decades maintained a mostly harmonious and collaborative relationship with public international law, it does not seem to be a coincidence that EU law's attempted "divorce" from its public international law origins has coincided with the rise in Euroscepticism and national court backlash towards *Costa v. ENEL*'s doctrine of supremacy seen in the early 21<sup>st</sup> century, most especially after the draft Constitution's defeat in 2005. Luxembourg's combative and dismissive approach towards public international law and principles of treaty interpretation has perhaps most famously manifested itself in the CJEU and the Commission's attempt to dismantle ISDS within the EU since 2006.

**i. MID-2000S: THE COMMISSION ANNOUNCES OPPOSITION TO INTRA-EU BITS**

Despite the fact that Article 21(1) TEU itself mandates the EU to promote democracy, human rights, the principles of solidarity and equality, as well as "the principles of the United Nations and international law" and that the Commission itself in the 1990s had encouraged many Central and Eastern European States aspiring to EU membership to sign BITs and MIA,<sup>97</sup> certain EU Member States, and eventually the Commission, began to shift their attitudes with respect to the EU's relationship with international investment law starting in the mid-2000s.

In *Eastern Sugar v. Czech Republic*, a case which concerned French and British sugar companies' investments in the Czech Republic through a Dutch subsidiary and the Czech Republic's alleged violation of the Netherlands-Czech Republic BIT, the Czech Republic exhibited a letter from the European Commission to support a unique and new jurisdictional objection that had never been seen before in ISDS: the Czech Republic claimed on the basis of the Commission letter, addressed to the Czech Minister of Finance in January 2006, that *intra*-EU BITs such as the Netherlands-Czech Republic BIT, were contrary to the principles of uniformity and primacy of EU law and should thus be

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<sup>97</sup> See *Regime*, *supra* note 32; Consolidated Version of the Treaty on European Union, art. 21(1), 2012 O.J. (C 326) 13, 28.

terminated by Member States in accordance with the termination procedure outlined in the BIT.<sup>98</sup>

Although the Commission in its letter did not (yet) contend that investment disputes concerning facts before an EU Member State's accession to the EU Treaties should fall within the exclusive jurisdiction of Member State courts, it advised that any arbitral tribunal constituted under the Netherlands-Czech Republic BIT (and presumably other BITs) should not opine on any area falling under EU competences.<sup>99</sup> Furthermore, the Commission announced its concern that the existence of the-then 150 *intra*-EU BITs might lead to discriminatory treatment in favor of investors of certain Member States having BIT-covered investments in other Member States as opposed to EU investors from and into States lacking BIT coverage, which would also be a violation of the EU Treaties.<sup>100</sup> The Czech Republic also submitted a November 2006 internal communication of the Commission in which the Commission warned that the continued existence of *intra*-EU BITs would lead to questions of EU law being considered and determined by *ad hoc* investment tribunals instead of by the CJEU, in violation of Article 344 TFEU.<sup>101</sup> However, in its March 2007 Preliminary Award, the *Eastern Sugar* tribunal dismissed the Czech Republic's *intra*-EU objection, finding that the Commission's communications had, at best, persuasive authority and that, regardless, the Commission had not even taken the view that *intra*-EU BITs were automatically suspended on a Member State's accession to the Union, as the Czech Republic argued during the course of the arbitration.<sup>102</sup>

In yet another arbitration brought by the Dutch investor Eureko B.V. (later Achmea B.V., famously, in the CJEU case of 2018) against Slovakia under the Netherlands-Slovakia BIT in October 2008, Slovakia and the Commission both urged the tribunal to dismiss jurisdiction based on the *intra*-EU objection.<sup>103</sup> The Commission, on behalf of Slovakia, contended the tribunal should find the CJEU's ruling in the *MOX Plant* case dispositive of the *intra*-EU issue: in *MOX Plant*, the CJEU had held that "exclusive jurisdiction in resolving a dispute between two EU Member States that was at least partially covered by EU law" and that, as a result, a dispute resolution mechanism conferring jurisdiction over EU law issues to an external tribunal was in breach of Article 344 TFEU.<sup>104</sup> In a particularly striking contravention of public international law and the principles of treaty interpretation under the VCLT, the Commission asserted that "where there is a conflict with EU law, the rule of *pacta sunt servanda* does not apply to agreements between EU Member States," because under *Costa v. ENEL* and the doctrine of supremacy, EU law and the EU Treaties supersede both national legal systems but also other "lesser" treaties concluded between the Member States.<sup>105</sup>

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<sup>98</sup> *Eastern Sugar B.V. (Neth.) v. Czech*, SCC Case No. 088/2004, Partial Award, ¶ 119 (Mar. 27, 2007).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* ¶ 126.

<sup>102</sup> *Id.* ¶¶ 121-125, 128-129.

<sup>103</sup> *Achmea (formerly known as Eureko B.V.) v. Slov. (I)*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability, and Suspension, ¶ 133 (Oct. 26, 2010).

<sup>104</sup> *Id.* ¶ 178.

<sup>105</sup> *Id.* ¶ 180.



By contrast, the government of the Netherlands, which had also been asked by the tribunal to provide comments upon Slovakia's *intra*-EU objection as the home State of the investor and the other Contracting State to the BIT, noted that the EU according to the EU Treaties themselves and various CJEU decisions of the 1990s "must respect international law in respect of its powers, in particular with respect to the termination and suspension of international treaties."<sup>106</sup>

In its Award on Jurisdiction, the *Eureko* tribunal rejected Slovakia and the Commission's *intra*-EU objection, finding that, under the applicable law provision of the Netherlands-Slovakia BIT, the tribunal was only empowered to determine breaches of the BIT itself in accordance with the VCLT and general principles of public international law and treaty interpretation: the question of whether there had been a breach of EU law was not something the tribunal had the authority or jurisdiction to consider under the BIT.<sup>107</sup>

**ii. LATE 2000S: THE CJEU INVOKES THE "SUPREMACY" PRINCIPLE TO CONTEST THE UN SECURITY COUNCIL & EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS ("ECHR")**

The pushback began in the mid-2000s against public international law and principles of treaty interpretation by EU institutions and the CJEU was not limited to ISDS. In the so-called *Kadi* judgment of the Grand Chamber of the CJEU of 3 September 2008, the CJEU declared that a resolution passed under Chapter VII of the UN Security Council—which aimed to automatically freeze bank accounts and other financial assets of suspected Al-Qaeda officials determined by Security Council review—violated fundamental individual rights of due process as enshrined in the EU Treaties and the EU Charter on Fundamental Rights and thus would not have automatic, binding effect within the EU Member States.<sup>108</sup> Notwithstanding Article 103 of the UN Charter's supremacy clause, which stipulates that the UN Member States' obligations under the Charter prevail in event of conflict with Member States' obligations under any other international agreement, the CJEU purported to exercise judicial review over Security Council Resolution 1390 (2002) and its implementing measure, Regulation No. 881/2002, which had been proposed by the Commission and passed by the European Parliament.<sup>109</sup> Foreshadowing the later arguments it would make in its *Slovak Republic v. Achmea* and *Republic of Moldova v. Komstroy* judgments in 2018 and 2021 respectively, the CJEU justified Member States' non-compliance with the UN Charter on grounds that supremacy and "autonomy" of EU law required the EU Treaties to trump other binding treaty obligations of Member States under public international law.<sup>110</sup>

<sup>106</sup> *Id.* ¶ 157 (citing Case C-162/96, *Racke GmbH & Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-03655, ¶¶ 45-46 and Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen*, 1992 E.C.R. I-06019, ¶ 9).

<sup>107</sup> *Achmea B.V. (formerly Eureko B.V.) v. Slovk. (I)*, PCA Case No. 2008-13, ¶¶ 290-93.

<sup>108</sup> *Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi v. Council of the European Union & Comm'n.*, 2008 E.C.R. I-06351, ¶ 1.

<sup>109</sup> *Id.* ¶¶ 1, 168, 176-78, 183, 185, 187-91, 193.

<sup>110</sup> *Id.* ¶¶ 4, 281-82, 286-88.

Likewise, in its 2014 decision on the compatibility of the EU's draft agreement for accession to the ECHR, the CJEU ruled that the EU's accession to the Convention was inadvisable because the draft agreement, again, did not take into account the "autonomy" of EU law.<sup>111</sup> Again deploying many of the arguments it would make in the *Achmea*, *Komstroy*, and *PL Holdings* decisions to deemphasize the EU and the CJEU's alleged obligations to render judgments in accordance with public international law and international human rights law, the CJEU remarked that the draft agreement suffered from several crucial flaws, namely: (i) the agreement violated Article 19(1) TEU and Article 344 TFEU, which confers upon the CJEU exclusive jurisdiction to decide disputes between Member States involving EU law;<sup>112</sup> (ii) the ECHR would require each Member State of the EU to "check" one another to ensure compliance with fundamental rights, which would undermine the principle of "mutual trust" under EU law;<sup>113</sup> and (iv) the agreement provided no mechanism for coordinating the preliminary reference mechanism to the CJEU under Article 267 TFEU and the newly proposed reference mechanism for Member State national courts to the ECtHR under Protocol 16 of the agreement, a *lacunae* that the CJEU warned would damage the uniformity and autonomy of EU law.<sup>114</sup> The CJEU made such findings despite the fact that the 2009 Lisbon Treaty (*i.e.*, the TEU) Article 6 obligates the EU to accede to the ECHR.<sup>115</sup>

### iii. EARLY 2012S-PRESENT: THE ROAD TO *ACHMEA*, *KOMSTROY*, AND FULL-ON CONFLICT BETWEEN ISDS AND EU LAW

The relationship of the CJEU with public international law and ISDS in particular came under further strain during the jurisdictional phase of the *Electrabel v. Hungary* ECT arbitration in 2012. Once again, the Commission intervened on behalf of Hungary to argue that the tribunal should dismiss the Belgian investor's claim on grounds that since Hungary's accession to the EU in 2004, any *intra*-EU arbitration was disallowed under the EU Treaties pursuant to Articles 267 and 344 TFEU, Article 19(1) TEU and also generally under the principle of supremacy of EU law derived from *Costa v. ENEL*.<sup>116</sup> The Commission further contended that the tribunal should consider the distinct possibility that the investor would never be able to enforce an arbitral award in EU courts, given that the

<sup>111</sup> Case Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2014 E.C.L.I. 2454, ¶¶ 72, 82, 120, 170.

<sup>112</sup> *Id.* ¶¶ 93, 100, 163.

<sup>113</sup> *Id.* ¶¶ 168, 191-94, 258.

<sup>114</sup> *Id.* ¶¶ 90, 131-38, 176, 195-200; see also Antoine Buyse, *CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law*, ECHR BLOG, <https://www.echrblog.com/2014/12/cjeu-rules-draft-agreement-on-eu.html#:~:text=In%20what%20can%20be%20characterized%20as%20a%20legal,to%20the%20ECHR%20is%20incompatible%20with%20EU%20law> (last updated Dec. 20, 2014); Georgi Gotev, *Court of Justice rejects draft agreement of EU accession to ECHR*, EURACTIV, <https://www.euractiv.com/section/justice-home-affairs/news/court-of-justice-rejects-draft-agreement-of-eu-accession-to-echr/> (last updated Jan. 14, 2015).

<sup>115</sup> Treaty on European Union art. 6, Feb. 7, 1992, 92/C 191/01.

<sup>116</sup> *Electrabel v. Hung.*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability, ¶ 5.17 (Nov. 30, 2012).

“ICSID Convention is not binding on the EU” and that EU courts would be obligated under *Costa* to yield to the doctrine of supremacy of EU law.<sup>117</sup> The *Electrabel* tribunal rejected the Commission’s *intra*-EU objection and held that:

This Tribunal is an international tribunal established under the ECT and the ICSID Convention. From its perspective under international law, the Tribunal notes the establishment under international law of the Parties’ consent to international arbitration under the ICSID Convention and also the effect of Article 26 of the ICSID Convention, providing for ICSID arbitration “to the exclusion of any other remedy.” **It is therefore no answer for the European Commission to submit that the “proper avenue” for the Claimant lies only in “the Community courts,” whether its own national courts or the ECJ (even assuming the Claimant’s locus standi under the ECJ).**<sup>118</sup>

The Commission’s stance against the compatibility of ISDS with Articles 267 and 344 TFEU became more entrenched following the *Eastern Sugar v. Czech Republic*, *Eureko v. Slovak Republic*, and *Electrabel v. Hungary* decisions. On 18 June 2015, the Commission issued a press release formally asking the then-28 EU Member States to terminate all of their *intra*-EU BITs.<sup>119</sup> In this press release, the Commission also announced its decision to refer Austria, Romania, Slovakia, Sweden, and the Netherlands to the CJEU for failure to heed the Commission’s request to terminate their *intra*-EU BITs and its intention to initiate an “administrative dialogue” with the then-21 other EU Member States who still maintained *intra*-EU BITs.<sup>120</sup> While conceding that many EU Member States had signed these BITs with the intention of securing substantive protections for their investors in the 1990s as the former Soviet Republics of Central and Eastern Europe prepared for accession to the EU, the Commission now viewed these treaties as “out of date” and a threat to the supremacy of EU law within the Union.<sup>121</sup> Additionally, the Commission reasoned with investors that since the “EU 13”—including Hungary, Poland, Bulgaria, Romania, and other countries that the Commission and the CJEU now view as the prime instigators of the assault on the “rule of law” and the doctrine of primacy under *Costa v. ENEL*—had now completed their accession process through the EU enlargements of 2004, 2007, and 2013 respectively, such “‘extra’ reassurances” for the rule of law and non-discrimination were no longer “necessary.”<sup>122</sup>

From the *Electrabel v. Hungary* Decision on Jurisdiction in 2012 to spring of 2018, the Commission sought to intervene in over a dozen investment arbitrations under both

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<sup>117</sup> *Id.* ¶ 5.19.

<sup>118</sup> *Id.* ¶ 5.38 (emphasis added).

<sup>119</sup> European Commission Press Release IP/15/5198, Commission Asks Member States to Terminate Their *Intra*-EU Bilateral Investment Treaties, (June 18, 2015), 1.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

*intra*-EU BITs and the ECT to plead the *intra*-EU jurisdictional objection: the Commission's arguments, however, were unanimously rejected by investment tribunals, all of which ruled that under the principles of public international law and treaty interpretation under the VCLT, it was impossible to retroactively vitiate Contracting States' consent to treaty arbitration with covered investors, regardless of if, when, or how those States' had acceded to the EU.<sup>123</sup> Even if the Lisbon Treaty of 2009 had conferred competence over FDI to Brussels, under public international law, it was clear to the over twenty tribunals that examined this issue that the EU Treaties could not have *ab initio* effect as an *inter se* agreement among the EU Member States to nullify their other, equally binding treaty commitments.<sup>124</sup> Such a finding would be a direct contravention of the termination of treaty principles codified by the VCLT, *pacta sunt servanda* and other binding principles of customary international law.

Finally, after nearly ten years of the Commission and certain Member States' pressing the court to clarify its own views on the *intra*-EU issue, the CJEU threw down the gauntlet with its judgment in *Slovak Republic v. Achmea* in June 2018.<sup>125</sup> In this landmark decision, the CJEU held that an *intra*-EU agreement such as the Netherlands-Slovakia BIT conferring jurisdiction over issues potentially governed by EU law (such as FDI) to *ad hoc* investment tribunals instead of Member States' national courts was not compatible with Articles 267 and 344 TFEU or the principles of supremacy, autonomy and uniformity of EU law.<sup>126</sup> In contrast to its past jurisprudence, nowhere in the *Achmea* judgment did the CJEU attempt to reconcile the alleged conflict between the Netherlands-Slovakia BIT and

<sup>123</sup> See, e.g., I.C.W. Eur. Inv. Ltd. (U.K.) v. Czech, No. 2014-22, PCA Case Repository ¶ 38 (2019) (Procedural Order No. 2, 27 Feb. 2015, granting the European Commission's leave to intervene as *amicus curiae*); Voltaic Network GmbH (Ger.) v. Czech, No. 2014-20, PCA Case Repository ¶ 38 (2019) (Procedural Order No. 2, 27 Feb. 2015); Photovoltaik Knopf Betriebs-GmbH (Ger.) v. Czech, No. 2014-21, PCA Case Repository ¶ 38 (2019) (Procedural Order No. 2, 27 Feb. 2015, same); Charanne B.V. v. Kingdom of Spain, Case No. 062/2012, Final Award, SCC Arb. (Jan. 21, 2016); RREEF Infrastructure (G.P.) Ltd. and RREEF Pan-European Infrastructure Two Lux. S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, ¶ 16 (June 6, 2016); Isolux Infrastructure Neth. B.V. v. Kingdom of Spain, No. V2013/153, SCC Arb. ¶ 29 (July 12, 2016); Blusun S.A., Jean-Pierre Lecorcier v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 15 (Dec. 27, 2016); Eiser Infrastructure Ltd. & Energia Solar Lux. S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 59, (May 4, 2017); Novenergia II -Energy & Env't (SCA), SICAR v. Kingdom of Spain, No. 2015/063, Final Arbitral Award, SCC Arb. ¶ 43 (Feb. 15, 2018); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶ 12 (May 16, 2018).

<sup>124</sup> See, e.g., Ioan Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶ 318 (Dec. 11, 2013); Charanne B.V. v. Kingdom of Spain, No. 062/2012, Award, SCC Arb. (Jan. 21, 2016); RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, ¶¶ 71 (June 6, 2016); Isolux Infrastructure Neth., B.V. v. Kingdom of Spain, No. V2013/153, SCC Arb. ¶ 622 (July 12, 2016); Blusun S.A., Jean-Pierre Lecorcier v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 277 (Dec. 27, 2016); WNC Factoring Ltd. v. Czech No. 2014-34, PCA Case Repository ¶ 293 (2017); I.P. Busta v. Czech, No. V 2015/014, Final Award, SCC Arb. ¶ 113 (Mar. 10, 2017); Anglia Auto Accessories Ltd. V. Czech, No. V 2014/181, Final Award, SCC Arb. ¶ 113 (Mar. 10, 2017); Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, (May 4, 2017); Novenergia II – Energy & Env (SCA), SICAR v. Kingdom of Spain, SCC Arb. No. 2015/063, Final Arbitral Award, (Feb. 15, 2018); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (May 16, 2018).

<sup>125</sup> Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2017).

<sup>126</sup> *Id.* ¶ 31.

the EU Treaties by applying the rules of conflict of treaties as outlined in the VCLT.<sup>127</sup> In fact, *Achmea* did not mention the VCLT or the concept of “public international law” at all. Instead, the court recalled its opinion against the EU’s accession to the ECHR and stated:

[A]ccording to settled case-law of the Court, **the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law**, relating in particular to the constitutional structure of the EU and the very nature of that law. **EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.** Those characteristics have given rise to a structured network of principles, rules, and mutually interdependent legal relationships binding to the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (accession of the EU to the ECHR) of 18 December 2014, EU :c:2014:2454, paragraphs 175 to 167 and the case-law cited).<sup>128</sup>

Later in the judgment, the CJEU curiously cited to its ruling in *Portuguese Judges* to recall that Article 19 TEU conferred exclusive responsibility to the CJEU and the domestic courts of Member States to “ensure the full application of EU law” and “judicial protection of the rights of individuals under that law.”<sup>129</sup> It should not go unnoticed that the court has relied primarily upon Article 19 TEU and *Portuguese Judges* in nearly all of its major decisions responding to the “rule of law” crises in Poland and Hungary discussed above: for instance, in *Commission v. Poland*, a decision of 24 June 2019, the CJEU held that Poland was in breach of Article 19(1) TEU by (i) lowering the retirement age of judges appointed to Poland’s Supreme Court and (iii) granting the Polish President discretion to extend certain judges’ terms beyond the newly fixed retirement age.<sup>130</sup> The CJEU invoked

<sup>127</sup> See Hay, *supra* note 24; Allain, *supra* note 24; Weiler & Trachtman, *supra* note 24; see also, e.g., Case C-286/90, *Anklagemyndigheden*, 1992 E.C.R. I-6019, ¶ 10; Case T-115/94, *Opel Austria GmbH*, 1997 E.C.R. II-39, ¶ 77; Case C-400/10 PPU, *J. McB v. L.E.*, 2010 E.C.L.I. 582; Cases C-92/09 and C-93/09, *Volker*, 2010 E.C.R. I-11063; Case C-351/04, *IKEA Wholesale Ltd*, 2007 E.C.R. I-7723.

<sup>128</sup> Case C-284/16, *ELCI:EU:C:2018:158*, ¶ 33 (Mar. 6, 2018) (emphasis added).

<sup>129</sup> *Id.* ¶ 36.

<sup>130</sup> Case C-619/18, *European Commission v. Republic of Pol.*, *ECLI:EU:C:2019:531*, ¶ 42 (June 24, 2019). Further demonstrating the relationship between *Achmea*, the CJEU’s opposition to *intra*-EU investment treaty arbitration, and the “rule of law” backlash, the court in this case also recalled its judgment in *Achmea* to state that the “[EU] Treaties have established a judicial system intended to ensure consistency and uniformity” and the “autonomy of the EU legal order.” See *id.* ¶ 45. The court would also rely upon the *Portuguese Judges* decision in its holding in *Poland v. PL Holdings Sàrl* that even contract-based investment arbitration between EU Member States was in violation of Articles 19(1) TEU and Articles 267 and 344 TFEU. See Case C-109/20, *Pol. v. PL*

Article 19(1) in similar decisions against the Hungarian government for its attempts to bar Hungarian courts from exercising the Article 267 TFEU preliminary reference mechanism without the permission of the Hungarian Supreme Court in contravention of Article 2 TEU.<sup>131</sup> That the court placed *Achmea* within the same line of “rule of law” protection jurisprudence as its judgments against the wayward Central and Eastern European Member States by invoking Article 19(1) TEU is striking. From a certain point of view, the CJEU acted in *Achmea* to stave off what it and the Commission had come to regard as another serious (and perhaps more easily thwarted) threat to the supremacy of EU law: ISDS and public international law more generally.

Even as investment tribunals in the wake of *Achmea* unanimously rejected the Commission and respondent EU Member States’ invocation of the decision as grounds for arbitral tribunals to decline jurisdiction, the CJEU further demonstrated its will to suppress another public international law “threat” to the supremacy of EU law, this time emanating from ECT tribunals. In the *Republic of Moldova v. Komstroy* judgement of September 2021, the CJEU extended the logic of *Achmea* to investment arbitrations between EU investors and EU Member States under the ECT, holding that Articles 344 and 267 TFEU as well as Article 19(1) TEU did not permit *intra*-EU arbitration under Article 26 of the ECT.<sup>132</sup> The court’s approach in *Komstroy* was arguably more extraordinary compared to *Achmea* for several reasons: (1) ostensibly the dispute between Moldova and Komstroy, a Ukrainian company, was not an *intra*-EU dispute and did not touch upon issues of EU law;<sup>133</sup> (2) the *intra*-EU issue had not been raised by the parties during their pleadings before the Paris Cour d’Appel; (3) after the Cour d’Appel bowed to requests from the French, Spanish and Italian governments *inter alia* to refer several questions concerning the tribunal’s *ratione materiae* under the ECT the case to the CJEU under Article 267 TFEU, the parties were not asked to brief the *intra*-EU issue either in oral or written form to the CJEU;<sup>134</sup> and (4) the CJEU raised the *intra*-EU issue *sua sponte*, as the three questions posed to it by the Cour d’Appel itself did not mention EU law or the *intra*-EU issue;<sup>135</sup> and (5) the CJEU declined to cite to any principles of public international law or treaty interpretation under the VCLT.

Most significant is perhaps this last above-mentioned point: the CJEU declined to put forth *any* argument to convince international investment tribunals—which will inevitably hear renewed and reinforced jurisdictional objections from EU Member States based upon *Komstroy*—that the CJEU’s ruling can or should revoke or invalidate EU Member States’ consent to arbitrate under the ECT and the ICSID Convention under international law. In

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Holdings Sàrl, ECLI:EU:C:2021:875, ¶ 45 (Oct. 26, 2021), [https://curia.europa.eu/juris/document/document\\_print.jsf?mode=DOC&pageIndex=0&docid=248141&part=1&doclang=EN&text=&dir=&occ=first&cid=1830593](https://curia.europa.eu/juris/document/document_print.jsf?mode=DOC&pageIndex=0&docid=248141&part=1&doclang=EN&text=&dir=&occ=first&cid=1830593) [hereinafter *Pol. v. PL Holdings*]. The cross-fertilization and common motivations of the CJEU to protect its “supremacy” within these lines of jurisprudence is clear and recognizable.

<sup>131</sup> Case C-564/19, Criminal proceedings against IS, ECLI:EU:C:2021:949, ¶ 83 (Nov. 23, 2021).

<sup>132</sup> Case C-741/19, Republic of Mold. v. Komstroy, ECLI:EU:C:2021:655, ¶ 66 [hereinafter *Komstroy*].

<sup>133</sup> *Id.* ¶¶ 8-11.

<sup>134</sup> *Id.* ¶ 20.

<sup>135</sup> *Id.* Rather, all the questions referred to the CJEU by the Cour d’Appel concerned the meaning of an “investment” under Articles 1(6) and 26(1) ECT and implicitly whether the tribunal had properly found itself to have subject matter jurisdiction under the ECT.

light of investment tribunals' unanimous rejection of the *intra*-EU objection based on *Achmea*, it was surprising that the Court did not seize its chance in *Komstroy* to fortify and at least somewhat anchor its reasoning in principles of public international law and treaty interpretation. By bowing even slightly to the hermeneutical approach of international investment tribunals,<sup>136</sup> the CJEU might have imbued the *Komstroy* decision with more persuasive force and credibility from an international law perspective. However, once again, in trend with its recent retreat from cooperative dialogue with other courts, institutions, and tribunals of public international law, the court declined to engage in any conversation in the "language" of the ECT tribunals empowered to determine the decision's initial force under international law.

Instead, the CJEU opined that since the ECT itself was an "act of EU law" and any investment tribunal constituted under the ECT was in its view "required to interpret and, even apply, EU law," it had jurisdiction to answer the *intra*-EU question even in this dispute between non-EU parties.<sup>137</sup> For the court, this was especially so in light of the fact that the seat of the arbitration between *Komstroy* and Moldova was France, an EU Member State, and that a French court had exercised its obligation under Article 267 TFEU to make the reference to the CJEU.<sup>138</sup> Again basing its decision on *Achmea*'s reasoning that only EU Member State courts and the CJEU are able to "ensur[e] the full effectiveness of the rules of the European Union," Article 26(6) ECT's provision of investment arbitration between EU investors and EU Member States could not be permitted under Article 19(1) TEU and the logic of *Portuguese Judges*.<sup>139</sup> For the sake of the protection of the autonomy and supremacy of EU law, Member States could not be deemed to be allowed to "agree to remove the jurisdiction of their own courts, and hence from the system of judicial remedies" under the EU Treaties and to instead vest authority in *ad hoc* investment tribunals to potentially decide issues of EU law under Article 26 of the ECT.<sup>140</sup>

Two recent further decisions of the CJEU on the legality of *intra*-EU investment treaty arbitration, *Poland v. PL Holdings* and *Commission v. European Food*, highlight several other points at which the CJEU has brought itself into direct conflict with the principles of public international law and treaty interpretation. In *PL Holdings*, the CJEU held that even consent to arbitration with an EU investor given from an EU Member State in a contract independent from the relevant BIT/MIA was prohibited under EU law, as removal of disputes concerning EU law from Member State courts and the CJEU would potentially damage the supremacy, autonomy, and uniformity of EU law.<sup>141</sup> Again, the CJEU declined to engage with any general principles of public international law or treaty interpretation according to the VCLT in its decision. In *European Food*, the CJEU opined that "with the effect from Romania's accession to the European Union, the system of judicial remedies provided for by the [TEU and TFEU] replaced that arbitration procedure, the consent given

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<sup>136</sup> *Id.* For instance, by referencing the principles of treaty interpretation under the VCLT, which the court has done numerous times in the past, or discussing how *Komstroy* would or may impact EU Member States' unconditional consent to arbitration under the ECT according to Article 25(1) of the ICSID Convention.

<sup>137</sup> *Id.* ¶¶ 49-50.

<sup>138</sup> *Id.* ¶ 52.

<sup>139</sup> *Id.* ¶ 59.

<sup>140</sup> *Id.*

<sup>141</sup> *Pol. v. PL Holdings*, ¶¶ 54-56.

to that effect by Romania, from that time onwards, lacked any force.<sup>142</sup> This finding, again made without any discussion of the VCLT and its rules on conflict of treaties, contravenes Article 25(1) of the ICSID Convention, which prohibits a Contracting State from unilaterally withdrawing its consent (for any reason, including EU accession) once it has been given.<sup>143</sup>

It is curious and perhaps troubling that the CJEU instructed the investors in the *PL Holdings* and *European Food* cases that the proper place for them to seek redress for their grievances against Poland and Romania, respectively, was in the national courts of those Member States. As mentioned above, the Commission and the CJEU have sought infringement proceedings against Poland for violations of Article 19(1) TEU and failing to ensure the “full effectiveness” of EU law and the independence of its judiciary since 2017.<sup>144</sup> Indeed, *the very day after* that the CJEU told PL Holdings it was obliged to go to the Polish courts to resolve its dispute against the State in accordance with Articles 19(1) TEU and Articles 267 and 344 TFEU, the court nevertheless held Poland to be in breach of Article 19(1) and approved the Commission’s request to fine Poland EUR 1 million a day for this breach.<sup>145</sup> Romania is also not immune to the EU’s concerns with its respect for the “rule of law” and fundamental values under the EU Treaties. The Cooperation and Verification Mechanism, which was established at the time of Romania’s accession to the EU in 2007 and under which the Commission engages in frequent fact-finding missions and dialogue with political leaders, judicial, and civil society organizations in Romania to ensure compliance with the EU Treaties, remains in force as of the spring of 2022.<sup>146</sup> Though the Commission has not launched any infringement proceedings for violation of Articles 2 or 19(1) TEU against Romania, widespread corruption and lack of judicial independence continue to provoke anxiety in Brussels and Luxembourg.<sup>147</sup> As recently as May 2021, the CJEU issued a press release reminding Romania, *inter alia*, of the “principle of primacy of EU law” under *Costa v. ENEL* and Romania courts’ obligations

<sup>142</sup> Commission v. European Food, 2022 ECLI. 50, para. ¶145.

<sup>143</sup> See Paschalis Paschalidis, *Op-Ed: ‘Micula: European Food for Thought’*, EU L. LIVE, <https://eulawlive.com/op-ed-micula-european-food-for-thought-by-paschalis-paschalidis/> (last updated Feb. 17, 2022).

<sup>144</sup> See David R. Cameron, *EU-Poland dispute over courts deepens and the EU brings new infringement cases vs. Poland and Hungary*, YALE UNIV. MACMILLAN CTR., <https://macmillan.yale.edu/news/eu-poland-dispute-over-courts-deepens-and-eu-brings-new-infringement-cases-vs-poland-and-hungary#:~:text=While%20the%20rule%20of%20law%20dialogue%20was%2C%20at,those%20provisions%20on%20the%20independence%20of%20the%20judiciary> (last updated Jul. 21, 2021); see also Case C-619/18, Comm’n v. Pol., 2019 ECLI 531 (in which the CJEU decided upon the Commission’s claim against Poland and ruled in favor of the Commission). The CJEU deemed that Poland’s law imposing new mandatory retirement rules for judges and granting exclusive powers to the Polish president to appoint and/or remove judges was in violation of Article 19(1) TEU and Article 344 TFEU. See *id.*

<sup>145</sup> See *supra* p. 15; *EU court fines Poland 1 mln euros per day in rule of law row*, REUTERS, (Oct. 27, 2021, 9:28 AM), <https://www.reuters.com/world/europe/eu-top-court-orders-poland-pay-1-million-euros-day-rule-law-row-2021-10-27/>. The *Pol. v. PL Holdings* decision was released on 26 October 2021, one day before the CJEU approved the EUR 1 million per day fine against Poland for its violation of Article 19(1) TEU.

<sup>146</sup> *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism*, at 1, COM (2021) 379 final (Aug. 6, 2021).

<sup>147</sup> Jan Strupczewski, *EU threatens legal steps against Romania over rule of law*, REUTERS, (May 13, 2019, 5:37 PM), <https://www.reuters.com/article/us-eu-romania-idUSKCN1SJ1DL>.



under that doctrine to “disapply” any provisions of national law contrary to the EU Treaties.<sup>148</sup> It is also worth noting that Slovakia, the EU Member State against which the Dutch investor brought its investment arbitration that became the subject of the CJEU’s *Achmea* ruling in 2018, has also come under fire from the Commission and the CJEU for “rule of law” issues, including corruption, lack of judicial independence, and inadequate protection of the free press.<sup>149</sup>

Even in the wake of CJEU decisions such as *Achmea* and *Komstroy* that purport to have binding, *ab initio* and retroactive validity, no investment arbitration tribunal has ever declined jurisdiction on grounds of the *intra*-EU objection. As has been noted by other scholars and practitioners, however, the prospect for successful enforcement of *intra*-EU investment awards, in EU Member State courts as well as abroad, has perhaps become significantly bleaker.<sup>150</sup> Especially in the EU’s newest Member States in Eastern and Central Europe, which the CJEU and the Commission have critiqued for years now as having actively biased and unreliable judiciaries, foreign investors can no longer avow themselves of any certain means of judicial redress and reparation for expropriation, unfair and inequitable treatment, and other violations of the general principles of international investment law and EU law. As a consequence of the Commission and CJEU’s quest to put an end to *intra*-EU investment arbitration in the last fifteen years, there is perhaps no longer any neutral and widely respected forum—either domestic EU courts or investment treaty tribunals—to adjudicate these disputes. So continues the fragmentation of EU law from international investment law and public international law more generally, arguably to the detriment of foreign investors, individual human rights, and the rule of law even beyond the Union’s own borders.<sup>151</sup>

#### IV. CONCLUSION

Insecurities resulting from the EU “rule of law” crisis and the backlash against the CJEU’s doctrine of supremacy seem to have in part propelled the Commission and the CJEU’s opposition to *intra*-EU investment arbitration and public international law more

<sup>148</sup> Press Release No. 82/21, Court of Justice of the European Union, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 on *Romanian reforms in the areas of judicial organization, the disciplinary regime applicable to judges, and the financial liability of the State and the personal liability of judges as a result of judicial error* (May 18, 2021), at 2.

<sup>149</sup> See *Rule of Law in Slovakia: MEPs carried out a monitoring visit*, EUROPEAN INTEREST, (Sept. 22, 2021, 2:00 PM), <https://www.europeaninterest.eu/article/rule-of-law-in-slovakia-meps-carried-out-a-monitoring-visit/>; *Slovak Government’s Sinking Fortunes Could Yield the EU’s Latest Rule of Law Problem*, EU POLICIES, <http://eu-policies.com/news/slovak-governments-sinking-fortunes-yield-european-union-latest-rule-law-problem/> (last updated Feb. 4, 2022).

<sup>150</sup> NURLANA DUNYALIYEVA, ENFORCEMENT OF INTRA-EU INVESTMENT ARBITRATION AWARDS IN THE UK: *ACHMEA, MICULA AND BEYOND*, COMMENT ON ‘MICULA AND OTHERS V. ROMANIA UKSC JUDGMENT, 19 FEBRUARY 2020’ (2021), <https://ssrn.com/abstract=3833339>; Seung-Woon Lee, *Enforcing Intra-EU Dispute Awards in the United States after Achmea*, KLUWER ARB. BLOG, <http://arbitrationblog.kluwerarbitration.com/2020/05/26/enforcing-intra-eu-dispute-awards-in-the-united-states-after-achmea/> (last updated May 26, 2020).

<sup>151</sup> Int’l Law Comm’n., Rep. on the Study Group of the International Law Commission in its Fifty-Eighth Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (2006), ¶¶ 157, 218.

generally in the past decade and a half. As the EU has seen its own institutions come under threat internally from backsliding democracies and frustrated national courts and electorates, the Commission and CJEU have fixed their fire on an external “threat” more easily neutralized than the wayward executives of Central and Eastern European Member States: the system of *intra*-EU ISDS. In this fight, the CJEU has deemphasized principles of public international law and treaty interpretation that it once embraced and jealously guarded and sought to expand its jurisdictional authority over disputes touching upon EU law. Through *Achmea*, *Komstroy*, *PL Holdings*, and *European Food*, the Commission and CJEU have encouraged and ordered Member States to disavow their binding treaty obligations under international law—including the principles of *pacta sunt servanda* and non-retroactivity under the VCLT—and void consent to arbitration under any *intra*-EU BIT and the ECT.

On one hand, the defensive reaction of the CJEU to the rising *courant* of Euroscepticism within Member State courts and executive branches is understandable: the court has long considered itself the supreme and “constitutional” court of a federal-type union in the original vision of Jean Monnet, Robert Schuman and the other EU founders. But, on the other hand, as the ambition and will of the Member States to construct a “United States of Europe” has receded, so the CJEU has clutched more fervently at its messianic vision of a federal Europe, to the point of engaging in questionable jurisdictional “land grabs” (e.g., finding itself competent in *Komstroy*, a dispute between a non-EU investor and a non-EU Member State, to hold that the tribunal’s award constituted a threat to the supremacy and autonomy of EU law) and lashing out against ISDS and public international law itself. That the seemingly ideologically friendly regimes of EU law and international investment arbitration—both grounded in the rule of law, democracy, and individual human rights—have come to perhaps fatal blows inside the EU is not an encouraging development for the legitimacy of international law.

Although the Commission, the European Parliament and the CJEU have lately taken unprecedented measures to curb the slipping respect for Article 2 TEU values and judicial independence in Hungary, Poland, and elsewhere, it is intriguing that the CJEU’s message to EU investors through decisions such as *Achmea*, *Komstroy*, *PL Holdings*, and *European Food* is that, regardless of what the Court has said to the contrary in its “rule of law” decisions, the courts of these backsliding Member States are the only place where the “full effectiveness” of EU law and the protection of investments in accordance with Article 2 TEU values and other individual property rights may be guaranteed. Such discordance in the CJEU’s jurisprudence perhaps jeopardizes the attractiveness of the EU’s Central and Eastern European Member States as destinations for “foreign” investment, even from within the Union itself. Why should investors of other EU Member States, or third-party States, trust Polish or Hungarian courts when the CJEU and Commission itself have themselves admitted they are not independent?

Furthermore, and as noted by Professor Gary Born,<sup>152</sup> the damage that decisions such as *Kadi*, *Achmea*, *Komstroy*, *PL Holdings* and other CJEU decisions has dealt to the

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<sup>152</sup> Gary Born, ‘Court-Packing’ and Proposals for an EU Multilateral Investment Court, KLUWER ARB. BLOG, <http://arbitrationblog.kluwerarbitration.com/2021/10/25/court-packing-and-proposals-for-an-eu-multilateral-investment-court/> (last updated Oct. 25, 2021).

legitimacy of public international law may not be contained to the interior of the Union. The very nature of the *Komstroy* decision—which nominally did not even involve issues of EU law apart from the seat of the arbitration being Paris, France—presaged the Commission and the CJEU’s willingness to seek the unraveling of the ISDS even in an *extra*-EU context. Indeed, Spain in the *European Food* case argued to the CJEU that the court might consider voiding even *extra*-EU BITs on grounds that such agreements would permit or require investment tribunals to interpret EU law in contravention of Articles 344 and 267 TFEU.<sup>153</sup> Moreover, in the United States, the United Kingdom, and elsewhere, the Commission has pursued an aggressive intervention strategy to try to persuade courts outside the EU not to enforce *intra*-EU investment arbitration awards.<sup>154</sup> In doing so, it has encouraged such courts to also disavow the principle of *pacta sunt servanda* and Contracting States’ obligation under the ICSID Convention to treat awards issued under the treaty as having the same force as domestic judgments.

The reverberating effects of the EU’s undermining of ISDS and certain principles of public international law more generally should not be underestimated. These developments not only put into serious question whether foreign investors will still regard EU Member States as promising and safe jurisdictions for investment but also may compromise the legitimacy of public international law and its core values in areas beyond ISDS and international human rights law specifically. It is one thing for the CJEU to hold that *pacta sunt servanda*—literally the premise of “*Agreements must be kept*”—means nothing with regard to approximately one hundred and fifty *intra*-EU BITs and MIAs; but, stretching this principle just a bit further, is it not perhaps problematic that one of the world’s most admired champions of international law and human rights, the EU, is sending the message that it is OK, at times, for States to disregard or declare null and void their treaty commitments under international law? Does *pacta sunt servanda* still apply fully to Article 5 of the NATO Treaty? To Article 2(4) of the UN Charter?

The founders of the European Union, whose foremost wish was to make war on the Continent physically and politically “impossible” through the tools of international law and diplomacy, would likely be uncomfortable with these very questions. But in light of the Commission and the CJEU’s recent treatment of ISDS and public international law in the last decade and a half, such questions should be asked. Can the world and the international bar afford to let the EU and its institutions—in perhaps what is a well-meaning response to the Union’s own “rule of law” crisis—deal such potential damage to

<sup>153</sup> See Paschalis Paschalidis, *Op-Ed: ‘Micula: European Food for Thought,’* EU LAW LIVE, <https://eulawlive.com/op-ed-micula-european-food-for-thought-by-paschalis-paschalidis/> (last updated Feb. 17, 2022).

<sup>154</sup> See, e.g., Sherina Petit & Charlotte Hornby, *Investment protection post-Achmea*, NORTON ROSE FULBRIGHT, <https://www.nortonrosefulbright.com/en/knowledge/publications/949b462f/investment-protection-post-achmea#:~:text=The%20Commission%20recently%20intervened%20in%20a%20review%20by,policy%20implications%20of%20the%20allowing%20enforcement%20of%20intra-EU%20awards> (last visited July 13, 2023); Mark W. Freidman, et al., *Achmea Reaches the ECT: CJEU Rules That Intra-EU Arbitration under the ECT is Also Incompatible with EU Law*, DEBEVOISE & PLIMPTON, <https://www.debevoise.com/insights/publications/2021/09/achmea-reaches-the-ect> (last updated Sept. 8, 2021).

the legitimacy of public international law? The answer to that question goes far beyond ISDS itself and to the very cornerstones of our post-World War II international legal order.



**VEILING LAWS THROUGHOUT IRANIAN HISTORY: THE RELATIONSHIP TO RELIGION,  
BEFORE AND DURING ISLAMIC LAW**

*Nicolas Garon\**

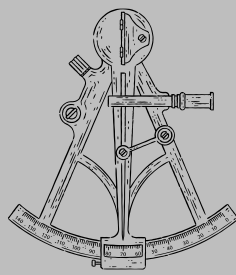
## **ABSTRACT**

The international community continues to observe the publication and media coverage of human rights concerns in Iran, as manifested through protests and anti-hijab sentiment. The Iranians' call for justice reverberates loudly and is frequently sparked by concerns surrounding the hijab, which has spawned a multitude of human rights issues involving detention, prosecution, and court misconduct, breaching the country's constitution.

Iran, a nation whose former state religion was replaced with another during the Sasanian Period due to invasion and concessions, is statistically deficient in religiosity and identity, potentially as a result of this post-colonial conflict.

Today, informal internet bloggers discuss whether Islam is the origin of clothing restrictions for women or not, and if Zoroastrian Persia still maintained religious dress laws for women, or if it had comparable dress requirements regarding women's modesty. Obviously, it should be determined if these two religious nations had significantly different policies, as more thorough and broad comparisons and contrasts are possible; therefore, I opted to investigate this topic.

Additionally, I wish to emphasize how flagrantly Iran's laws and legal and prison systems are violated, which is directly related to hijab concerns, as well as the consequent profiling of and discrimination against individuals who chose not to veil.



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## I. INTRODUCTION: VEILING LAWS OF IRAN AND ITS LATEST CRACKDOWN (AUGUST 2022)

On August 15, 2022, Iranian President Ebrahim Raisi implemented additional rounds of restrictions toward women regarding the enforced obligation of wearing hijabs/headscarves.<sup>1</sup> The day before, Iranian state-run media announced that women who do not comply with the Islamic principle of covering their hair will “be fined, while female government employees will be fired if their social media profile pictures do not conform to Islamic laws.”<sup>2</sup> The country’s officials have also gone as far as extending this mandate beyond its borders; Iranian women, over the age of nine, if vacationing abroad, who are found to have posted photos without wearing a hijab, shall be “deprived of some social rights for six months to one year.”<sup>3</sup> This highlights one of the many blatant constitutional violations imposed in modern Iranian society. The aforementioned extrajudicial intrusion of privacy from the Iranian Government infringes on the Constitution of Iran, Article 22, which states, “The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law.”<sup>4</sup> Despite the Iranian Government’s effort to constitutionally strengthen its grasp on citizens, it is still violative as it attempts to limit the rights of citizens on foreign soil. The government’s illegitimate expansion of their jurisdiction to legal issues committed on foreign soil, runs afoul of the territorial principle of international law.

Before the 1979 revolution, which introduced a new constitution based on Islamic principles and departed from secularism, Iran was seen as a Western society especially regarding women’s freedom.<sup>4</sup> This was understandably so, as its 1953 coup d’état was supported in great force by the United States’ Central Intelligence Agency (C.I.A.) and the United Kingdom.<sup>5</sup> The West’s motivation for supporting Mohammad Reza Pahlavi, Iran’s last Shah, was precisely reflexive of strategic westernization. By placing a Westernized and progressive ally in power, relative to America’s liking, regional cooperation and a new alliance can be seen as fruits ripe for the taking.

A spotlighted issue of post-revolution Iran is religious dress obligations for women, specifically the headscarf. Often adorned with a colorful scarf, or sometimes a hijab or chador, Iran’s entire female population is required to conceal their hair beneath fabric.

In post-revolution Iran, the legal punishment of being unveiled as a woman is specified in the Islamic Penal Code of the Islamic Republic of Iran – Book Five, Chapter Eighteen (Crimes against public prudency and morality), Article 638. When translated to English, it

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<sup>1</sup> RFE/RL’s Radio Farda, *Iranian President Signs Decree Further Restricting How Women Can Dress*, <https://www.rferl.org/a/iran-women-dress-restrictions-raisi/31989759.html> (last visited Aug. 15, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Jeremy Bender & Melia Robinson, *25 photos show what Iran looked like before the 1979 revolution turned the nation into an Islamic republic*, BUSINESS INSIDER (Sept. 9, 2022, 3:08 PM), <https://www.businessinsider.com/iran-before-the-revolution-in-photos-2015-4>.

<sup>5</sup> Lawrence Wu & Michelle Lanz, *How The CIA Overthrew Iran’s Democracy In 4 Days*, NPR (Feb. 7, 2019, 12:00 AM), <https://www.npr.org/2019/01/31/690363402/how-the-cia-overthrew-irans-democracy-in-four-days>.

reads “Note- Women, who appear in public places and roads without wearing an Islamic *hijab* shall be sentenced from ten days to two months’ imprisonment or a fine of fifty thousand to five hundred Rials.”<sup>6</sup>

## II. SHIFTING REGIONAL INCONSISTENCY ON THE VEILING REQUIREMENTS, IRAN’S PERTINACIOUS POSTURE, AND A COMPARISON OF REGIONAL NEIGHBOR’S STANCES

Iran’s upholding of the hijab law is becoming a regional anomaly. Compared to neighboring Islamic governments, Iran’s stance on the issue is singular relative to its size and influence. In the Muslim World, the two other largest countries in the Middle East by land mass greatly differ from Iran on this policy. One of these nations is Turkey, which is secular and, accordingly, has no hijab mandate. Like Iran, the other largest nation, Saudi Arabia is a nation with state religion and religious law.<sup>7</sup> Though rivaled on sectarian lines,<sup>8</sup> Iran and Saudi Arabia are considered the Middle East’s two powerhouses.<sup>9</sup> Despite their firm adherence to religious law, the nations are not congruent on the issue in contemporary times.

Iran houses the highest percentage and population of Shia Muslims and is home to the holy city of Mashhad.<sup>10</sup> Saudi Arabia, home to Mecca and Medina, is the birthplace of the Sunni majority of Islam and Wahhabism. The two countries are rivals engaged in proxy fighting for regional influence.<sup>11</sup> Saudi Arabia, though evolving under recently crowned Prince Mohammed Bin Salman, is known for enforcing the strictest Islamic punitive and legal system in the Ummah (Muslim World).<sup>12</sup> Despite this, the country’s monarchy has recently lifted the requirement for women to cover their hair and wear the black abaya dress to reform previous customs.<sup>13</sup>

Through examining the 1992 Constitution of Saudi Arabia, it is evident that Sharia is the basis from which the laws of the nation are formulated, although Sharia has not been

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<sup>6</sup> Islamic Penal Code of the Islamic Republic of Iran – Book Five, IRAN HUMAN RIGHTS DOCUMENTATION CENTER, <https://web.archive.org/web/20180310195447/http://iranhrdc.org/english/human-rights-documents/iranian-codes/1000000351-islamic-penal-code-of-the-islamic-republic-of-iran-book-five.html#18> (last visited Aug 24, 2022).

<sup>7</sup> Robert J. Barro & Rachel M. McCleary, *Which Countries Have State Religions?*, 120 Q. J. OF ECON. 1331 (2005), available at: [https://dash.harvard.edu/bitstream/handle/1/3710663/Barro\\_WhichCountries.pdf?sequence=2](https://dash.harvard.edu/bitstream/handle/1/3710663/Barro_WhichCountries.pdf?sequence=2) (last visited Aug 24, 2022).

<sup>8</sup> Najat AlSaied, *Sectarianism and ideology: The cases of Iran and Saudi Arabia*, MIDDLE EAST INSTITUTE, <https://www.mei.edu/publications/sectarianism-and-ideology-cases-iran-and-saudi-arabia> (last visited Aug 24, 2022).

<sup>9</sup> *Iran and Saudi Arabia Battle for Supremacy in the Middle East*, WORLD POL. REV., <https://www.worldpoliticsreview.com/israel-iran-saudi-arabia-battle-for-supremacy-in-the-middle-east/> (last updated May 15, 2023).

<sup>10</sup> *Mapping the Global Muslim Population*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/2009/10/07/mapping-the-global-muslim-population/> (last updated Oct. 7, 2009).

<sup>11</sup> Jonathan Marcus, *Why Saudi Arabia and Iran are bitter rivals*, BBC NEWS, <https://www.bbc.com/news/world-middle-east-42008809> (last updated Sept. 16, 2019).

<sup>12</sup> Galina Yemelianova, *Explainer: what is Wahhabism in Saudi Arabia*, THE CONVERSATION (Jan. 30, 2015, 1:25 AM), <https://theconversation.com/explainer-what-is-wahhabism-in-saudi-arabia-36693>.

<sup>13</sup> *Saudi crown prince says abaya not necessary*, GULF NEWS (Mar. 19, 2018, 5:11 PM), <https://gulfnews.com/world/gulf/saudi/saudi-crown-prince-says-abaya-not-necessary-1.2190993>.

codified within the law.<sup>14</sup> Saudi judges often formulate their conclusions and rulings from legal sources such as the Hanbali code<sup>15</sup> and the book of 'Kasshaf al-Qina'.<sup>16</sup> These books provide a framework for clarity on repercussions and punishment.

The issue of the hijab and its enforcement through Saudi Arabian law lacks clarity. Unlike Iran, there is no written law stating the hijab is mandatory, yet there are streamlined consequences for offenses. Rather, judges in Saudi Arabia have the authority to implement "Ta'azir (deterrence)", meaning punishment can be issued for something that violates no established Quranic law, but is determined to be morally wrong.<sup>17</sup>

When issues arose regarding hijab violations in Saudi Arabia, judges procedurally consulted Fiqh (jurisprudence) to address Suffur issues, which translates to "lack of modesty". The punishment was fully decided by the judge as there is no prescribed punishment.

Suffur, before written or verbal accusation and judicial judgment, was enforced by the commissioned Committee for the Promotion of Virtue and the Prevention of Vice (Saudi Arabia), who are also known as the Mutawaeen. The Mutawaeen is a policing organization which addressed these issues of immorality. The group was commissioned by the King, in his capacity as Prime Minister. The Mutawaeen had the capacity to arrest, investigate, and pursue those whom they accused.<sup>18</sup> In 2016, the Monarchy of Saudi Arabia relinquished their investigative ability. Today, they have no ability to arrest and pursue any accused person(s).<sup>19</sup>

Whether the changes regarding the hijab and women's rights are caused by a true desire for gender equality in the nation, a readdressing of the criterion of Islamic Law (or simply, a more codified and progressive legal system to ameliorate foreign investment as the nation works towards their 2030 economic "Vision"), Saudi Arabia is willing to adapt to the modern issues of veiling and abaya requirements, despite their firm adherence to Islamic law and jurisprudence.<sup>20</sup> Iran's stubborn stance begs the question of its true intentions to maintain the veil mandate and determine whether religion is strictly the sole guiding factor.

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<sup>14</sup>Basic Law of Government [Constitution] Mar. 1, 1992, (Saudi Arabia), [https://www.constituteproject.org/constitution/Saudi\\_Arabia\\_2013?lang=en](https://www.constituteproject.org/constitution/Saudi_Arabia_2013?lang=en) (last visited Aug 24, 2022).

<sup>15</sup> *Islamic Jurisprudence & Law*, UNC CTR. FOR EUROPEAN STUDIES, <https://veil.unc.edu/religions/islam/law/> (last visited Aug. 24, 2022).

<sup>16</sup> Muhammad Ibn Muhammad Ibn Al-'Aṭṭār, *Kashf al-qinā' fī waḍ' al-arbā' min al-Jihat al-sitt fī 'ilm al-falak.*, (Apr. 5, 1737), The Library of Congress, <https://www.loc.gov/item/2008401690/> (last visited Aug. 24, 2022).

<sup>17</sup> Susan C. Hascall, *Restorative justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?*, 4 BERKLEY J. OF MIDDLE EASTERN & ISLAMIC L. 35 (2011).

<sup>18</sup> Naif Al-Qahtani, *The Procedures of Committee for the Promotion of Virtue and the Prevention of Vice (CPVPV) with the New System in Saudi Arabia*, HG.ORG, <https://www.hg.org/legal-articles/the-procedures-of-committee-for-the-promotion-of-virtue-and-the-prevention-of-vice-cpvvp-with-the-new-system-in-saudi-arabia-46681> (last visited Aug. 24, 2022).

<sup>19</sup> *Saudi cabinet decree prevents 'religious police' from pursuit, arrest*, AAL ARABIYA NEWS ENGLISH, (May 20, 2020, 1:05 PM), <https://english.alarabiya.net/features/2016/04/13/Saudi-cabinet-decree-preventing-Religious-Police-from-pursual-and-arrest>.

<sup>20</sup> *Id.*

### III. DECREE OF KASHF E HIJAB AND THE LEGAL HIJAB FREEDOM UNDER SECULAR IRAN 1936-1979

Refocusing on Iran, equal rights activists have often spotlighted the lack of enforcement of the hijab rule between 1963 and 1979.<sup>21</sup> The decree of Kashf e Hijab set into action by Reza Shah Pahlavi, former Shah of Iran, relinquished any legally-bound requirements for wearing a hijab.<sup>22</sup> Yet, after Islam was fused into Iran as its state religion and culture with legal authority, the hijab obligation was reinstated - a switch which still divides the nation of Iran.<sup>23</sup>

### IV. IS THE HIJAB IN IRAN EXCLUSIVE TO ISLAM AND ISLAMIC LAW?

Apart from the post-revolutionary regime's intentions behind maintaining the veil, whether it is in good faith via a religiously persistent stance, or merely advantageous and authoritative, another question arises: During the Islamic Conquest, did Muslims introduce the veil to Zoroastrians in Iran? And was a veiling mandate unheard of in Zoroastrian law?

A well-informed accusation is that the veil in Iran, along with its mandate, are indicative only to Islam. This is because since before the Islamic conquests spawned the religion of Islam in Persia, documented accounts and paintings from the Sasanian period, (the period directly preceding the Islamic period) have shown Zoroastrian women without veils.<sup>24</sup>

Additionally and more recently, both Reza Shah Pahlavi and Mohammad Reza Pahlavi's reigns, were secular and thus not observant of hijab mandates.<sup>25</sup> After all, during the reign of the second Shah, "Mohammad Reza Pahlavi doubled down on his father's secular, pro-Western orientation, and in the 1970s, as anti-government activism gained momentum, many women consciously adopted headscarves or all-enveloping *chadors* as tangible rejections of the monarchy."<sup>26</sup> This furthers speculation that only during periods of Islamic Law in Iran were its citizens subject to these requirements.

Did the non-enforcement of the hijab in secular Iran prove the hijab is an issue of Islam for Iran? The link between the hijab and Islam in Iran appears mutually exclusive as those women in Zoroastrian Persia were accounted with unveiled heads.<sup>27</sup> Such pondering on

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<sup>21</sup> Ava Homa, *Why Iranian women are protesting now against the hijab*, AL ARABIYA NEWS ENGLISH, (May 20, 2020, 10:54 AM), <https://english.alarabiya.net/features/2018/02/04/Why-Iranian-women-are-protesting-against-the-hijab>.

<sup>22</sup> Ashraf Zahedi, *Concealing and Revealing Female Hair: Veiling Dynamics in Contemporary Iran*, in THE VEIL: WOMAN WRITERS ON ITS HISTORY, LORE, AND POLITICS 250, 260 (Jennifer Heath, ed., 2008).

<sup>23</sup> Maryam Sinaee, *Eighty Five Years On, The Shah's Ban On Hijab Still Divides*, IRAN INT'L, <https://www.iranintl.com/en/202201070683> (last updated Jan. 7, 2022).

<sup>24</sup> MATHIAS WIRTH, ET AL., SEXUAL VIOLENCE IN THE CONTEXT OF THE CHURCH: NEW INTERDISCIPLINARY PERSPECTIVES (2021).

<sup>25</sup> Saeid Golkar & Asha Sawhney, *Dictators and civilizational thinking in Iran: From the Great Civilization to Islamic Civilization*, MIDDLE EAST INSTITUTE, <https://www.mei.edu/publications/dictators-and-civilizational-thinking-iran-great-civilization-islamic-civilization> (last updated Sept. 28, 2020).

<sup>26</sup> Suzanne Maloney & Eliora Katz, *Iran and the headscarf protests*, BROOKINGS (Jan. 24, 2019), <https://www.brookings.edu/opinions/iran-and-the-headscarf-protests/>.

<sup>27</sup> MUSEUM OF SASSANID IRAN, <http://www.persianguelfstudies.com/en/index.asp?p=pages&id=234> (last visited Feb 20, 2023).

whether conducive links can be proven shall be understood with further exploration of facts and other periodical legal review. The Sasanian Empire, which produced depictions of unveiled women, and directly preceded the Islamic conquest of Iran, will be the empire of analysis for such review.

**V. OBSERVING PERSIA'S ZOROASTRIAN LAWS AND PLURALISM BEFORE ISLAM, AND ANSWERING WHETHER ISLAM'S LINK TO VEILS IN IRAN WAS REFLECTIVE OF ITS PREVIOUS ZOROASTRIAN STATE RELIGION**

Before the Islamic conquest of Persia in the mid-600s, Iran/Persia was a Zoroastrian nation in the Sasanian Empire.<sup>28</sup> Zoroastrianism was declared the official religion, and the Sasanian Empire used a legal system that was heavily based on Zoroastrian law and customs, though Sasanian and Zoroastrian law were not identical.<sup>29</sup> The Sasanian legal system was a six-layered system that provided: (1) Zoroastrian law as a personal law; (2) royal law as a territorial law; (3) laws of the members of the tolerated religions as personal laws; (4) *kardag* as the legal practice of the courts; (5) local variants of customs in particular regions and towns; (6) customs of nomadic peoples.<sup>30</sup> The Zoroastrian system applied only to followers of that religion, although tolerated religions such as Judaism and Christianity were allotted different personal laws. Local customs and nomadic principles as well as regionally specific laws were also integrated into its legal system where the system of *Kardag* acted as a procedural rulebook.<sup>31</sup>

There were no historical codes within the legal system of this empire, although the most influential legal book was the “*Mādigān ī Hazār Dādestān* (Book of a Thousand Judgements), a law book of compiled legal cases of private law matters, including topics of family, inheritance, obligations, and private procedural law.”<sup>32</sup> If a legal issue was not covered in this de-facto guiding document, one could consult the Syriac Acts of Martyrs, religious works, scriptures of kings, and other historical writings for clarity.<sup>33</sup> Laws were enforced by the *kōy-bān* (street-keeper) who policed and arrested violators, and the *gizār* (patrol) who acted as patrol officers with lesser authoritative power.<sup>34</sup>

An analysis of veiling requisites in Iranian history reveals that veiling requirements were not exclusive to Islamic Iran; however, religious justification and broad, gender-based requirements did not exist in pre-Islamic Iran. Veiling practices and stipulations did exist in the Zoroastrian period of Persia, but the first group to establish these customs were the

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<sup>28</sup> *History of Iran: Islamic conquest*, IRAN CHAMBER SOC’Y, [https://www.iranchamber.com/history/islamic\\_conquest/islamic\\_conquest.php](https://www.iranchamber.com/history/islamic_conquest/islamic_conquest.php) (last visited Aug 24, 2022).

<sup>29</sup> Jany Janos, *Sasanian Law*, [https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/c/347/files/2020/09/vdocuments.mx\\_sasanian-law-janos-2010.pdf](https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/c/347/files/2020/09/vdocuments.mx_sasanian-law-janos-2010.pdf) (last visited Feb 20, 2023).

<sup>30</sup> Janos, *supra* note 29.

<sup>31</sup> Janos, *supra* note 29.

<sup>32</sup> Janos, *supra* note 29.

<sup>33</sup> Janos, *supra* note 29.

<sup>34</sup> *Judicial and Legal Systems ii. Parthian and Sasanian Judicial Systems*, ENCYCLOPEDIA IRANICA FOUNDATION, <https://iranicaonline.org/articles/judicial-and-legal-systems-ii-parthian-and-sasanian-judicial-systems> (last visited Aug. 24, 2022).

Assyrians.<sup>35</sup> The Assyrians allowed only privileged women to veil, thus forbidding veiling from other women deemed lesser in society, such as prostitutes and concubines.<sup>36</sup>

The adoption of the veil in Persia was introduced during the Achaemenid Empire, two empires prior to the Sasanian Empire, following observations of Babylonian society and customs.<sup>37</sup> In Zoroastrian Persia, like in Assyria, the veil was a status symbol, and it was reserved for women of high status.<sup>38</sup> Women of lower classes were ineligible to wear veils.<sup>39</sup> Due to this system, an absolute requirement of all women to veil never existed in Assyria<sup>40</sup> nor in Zoroastrian Persia, from its first to final empire.<sup>41</sup> Additionally, unlike post-Islamic Iran, veiling seemed to be more dependent on social status rather than religious adherence. Therefore, Islam was not the birthing of Iran's inception of veils; however, it seems to be the first religion in Iran that intertwined itself (as the majority state religion) within law as justification for legally enforcing the veil.

Forced veiling for all, based on gender or religion, did not exist prior to contemporary veiling mandates in Islamic Iran. It is unclear if women who were privileged to veil in Zoroastrian Persia were penalized for not veiling their hair and if such veiling was forced by law. It has been reported that during the early years of the Achaemenid Empire, noble families secluded the women within, and those women *had* to be covered when exiting such seclusion.<sup>42</sup> However, the *Mādigān ī Hazār Dādestān* is the only legal work from the Zoroastrian period of Persia that has survived,<sup>43</sup> and it does not specify any enforcement in veiling violations.<sup>44</sup>

## VI. CONCLUSION

The issue of veiling as a legal requirement in Iran has ebbed and flowed through its long and ongoing history. One can extract legal, social, religious, and secularist contingencies on why it was enforced, depending on the period. When observing both Zoroastrian and Islamic Iran, we understand that the introduction of Islamic law to Iran did not bring with it a new concept of veiling; rather, what *is* unique, in post-Islamic Conquest Iran, is its scope and that its enforcement is strictly religious in its cause and justification, as well as not based on social

<sup>35</sup> *History of Veil*, <https://rootshunt.com/aryans/historyofveil/historyofveil.htm> (last visited Mar 6, 2023).

<sup>36</sup> ENCYCLOPEDIA IRANICA FOUNDATION, *supra* note 36.

<sup>37</sup> Janos, *supra* note 29.

<sup>38</sup> LEILA AHMED & KECIA ALI, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE (1993).

<sup>39</sup> Massoume Price, *Women's lives in ancient Persia*, [https://www.parstimes.com/women/women\\_ancient\\_persia.html](https://www.parstimes.com/women/women_ancient_persia.html) (last visited Feb 22, 2023).

<sup>40</sup> KNUT L. TALLQVIST, OLD ASSYRIAN LAWS (2012).

<sup>41</sup> JENNIFER HEATH, THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE, AND POLITICS (2008).

<sup>42</sup> Alexandra Kinias, *History of the Veil. Part One: Veil in the Ancient World*, ALEXANDRA KINIAS, <https://alexandrakinias.wordpress.com/2010/06/27/history-of-the-veil-part-one-veil-in-the-ancient-world/> (last updated June 27, 2010).

<sup>43</sup> Maria Macuch, *MĀDAYĀN Ī HAZĀR DĀDESTĀN*, ENCYCLOPÆDIA IRANICA, <http://www.iranicaonline.org/articles/madayan-i-hazar-dadestan> (last visited Feb 22, 2023).

<sup>44</sup> *Judicial and Legal Systems ii. Parthian and Sasanian Judicial Systems*, ENCYCLOPÆDIA IRANICA FOUNDATION, <https://iranicaonline.org/articles/judicial-and-legal-systems-ii-parthian-and-sasanian-judicial-systems> (last visited Feb 22, 2023).

status like under the legal systems of Zoroastrian Persia. Punishment and enforcement are clearly laid out in today's post- revolution Iran, whereas this was not symmetric in the Zoroastrian-Sasanian Persia. Additionally, when compared to Iran's Muslim neighbors who have implemented reform on veiling requisites, Iran has yet to mirror their actions.

Of course, freedom to veil can extrapolate and provide religiosity toward those who desire to wear it but at the same time, the legal requisite of veils blockades women who wish to have a choice.<sup>45</sup> Possibly more importantly, veiling laws subject violators to hazards visible in Iran's current justice system, specifically regarding their constitutional protections, due process, and carceral system.

The enforcement of hijabs, when prosecuted, will add to Iran's constitutionally non-abiding penal system. Regarding the increased hijab protests in recent months, over 500 women have been incarcerated in the country.<sup>46</sup> In addition to those carceral overcrowding and/or false imprisonment claims, let us examine the constitutional breaches relative to those protesting the hijab.

Incarceration of women who either purposefully or intentionally break the hijab mandate are subject to Iran's unscrupulous criminal justice system which has encountered constitutional infringement issues. Women's rights activists in the country have been subject to "arbitrary prison sentences, torture in detention, banishment to harsher prisons far from their families, and added sentences on the verge of release."<sup>47</sup>

These 500+ detained women are under clear due process violations of Iranian Constitution Article 23, which reads:<sup>48</sup>

No one may be arrested except by the order and in accordance with the procedure laid down by law. In case of arrest, charges with the reasons for accusation must, without delay, be communicated and explained to the accused in writing, and a provisional dossier must be forwarded to the competent judicial authorities within a maximum of twenty-four hours so that the preliminaries to the trial can be completed as swiftly as possible. The violation of this article will be liable to punishment in accordance with the law.<sup>49</sup>

Article 38 of the Constitution was also violated, with its first sentence reading "All forms of torture for the purpose of extracting confession or acquiring information are forbidden." Not only does incarceration for women mean violations of due process, but also coerced confessions.<sup>50</sup>

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<sup>45</sup> Kalpana Jain, *Why some Muslim women feel empowered wearing hijab, a headscarf*, RELIGION NEWS SERV., <https://religionnews.com/2021/09/06/why-some-muslim-women-feel-empowered-wearing-hijab-a-headscarf/> (last updated Sept. 6, 2021).

<sup>46</sup> Dr. Ewelina U. Ochab, *More Than 500 Women Human Rights Defenders Unjustly Imprisoned in Iran*, FORBES (Aug. 13, 2021, 02:45 AM EDT), <https://www.forbes.com/sites/ewelinaochab/2021/08/13/more-than-500-women-human-rights-defenders-unjustly-imprisoned-in-iran/?sh=1654fcd321c9>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 32.

<sup>50</sup> *Id.* art. 38.

In the latter months of 2022, an Iranian woman by the name of Sepideh Rashno was seen arguing with a woman over the laws regarding the hijab/headscarf requirements.<sup>51</sup> She then publicly disappeared and after a social media frenzy demanding her whereabouts, a video confession was released of a “pale-faced Rashno... shown for a few seconds in what looked like a studio setting saying lines that appeared to have been written by authorities.”<sup>52</sup> Rashno’s non-violent actions of speech were enough for authorities to violate her liberties and the very principles of Iran’s legal instruments.

The forced confession, which blasphemed the authority and diligence of prudent-law and constitutional protection, proved to be a violation of Iranian Constitution article 38’s second sentence, which reads, “Compulsion of individuals to testify, confess, or take an oath is not permissible; and any testimony, confession, or oath obtained under duress is devoid of value and credence.”<sup>53</sup> In the 21<sup>st</sup> century, the unsettling divide on the issue of morality behind legally enforcing the veil in Iran still pulsates as the world watches demonstrations demanding gender equality from male and female protesters in Iran.<sup>54</sup>

While the authenticity of religious intentions cannot be empirically verified, and the intent is never to accuse any government of falsely banistering religion for something other than authentic and good intent, there is data that the hijab mandate in Iran does discriminate against its citizens, while providing a position of power to the government, whether convenient to the regime or not.

Iran’s history of enforcing a veil mandate for women has always been, before and during Islamic rule, a means of placing authority over groups on which it wishes to exert power. While other strictly Islamic countries in the region address the legality of hijab issues with flexibility, Iran maintains its stubborn posture. The mandate adds to Iran’s current structural bias against women, which the Human Rights Watch has listed as hindrances on, ‘their ability to travel, prohibitions on entering certain jobs, and an absence of basic legal protections.’<sup>55</sup> It has also been suggested that the hijab mandate allocates control over Iran’s female population by being used to “exclude women from various areas of public life, either by explicitly banning women from certain public spaces such as some sports stadiums, or by adding restrictions on their education and workplace etiquette.”<sup>56</sup>

That said, the mandate either directly or indirectly provides structural inequity to its female population and its own government has reported 49% of its citizens are against veiling

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<sup>51</sup> RFE/RL’s Radio Farda, *Hijab Protester Beaten Before 'Confession' Aired On TV, Says Rights Group*, RADIOFREEEUROPE/RADIOLIBERTY, <https://www.rferl.org/a/iran-hijab-protest-rashno-beaten-tv-confession/31975727.html> (last updated Aug. 5, 2022).

<sup>52</sup> RFE/RL’s Radio Farda, *Iranian Broadcast of Woman's 'Confession' Sparks Outrage on Social Media*, RADIOFREEEUROPE/RADIOLIBERTY, <https://www.rferl.org/a/iranian-broadcast-womans-forced-confession-sparks-outrage/31969195.html> (last updated Aug. 1, 2022).

<sup>53</sup> I ISLAHAT VA TAQYIRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 38.

<sup>54</sup> Jessie Van Amburg, *Men in Iran Are Wearing Hijabs in ISolidarity With Women*, TIME (Jul. 29, 2016, 3:21 PM EDT), <https://time.com/4430645/iran-hijab-morality-police/>.

<sup>55</sup> Sarah Leah Whitson, *Iran: Women Face Bias in the Workplace*, HUMAN RIGHTS WATCH (May 25, 2017, 12:00 AM), <https://www.hrw.org/news/2017/05/25/iran-women-face-bias-workplace>.

<sup>56</sup> Moujan Mirdamadi, *How Iran uses a compulsory hijab law to control its citizens – and why they are protesting*, THE CONVERSATION, <https://theconversation.com/how-iran-uses-a-compulsory-hijab-law-to-control-its-citizens-and-why-they-are-protesting-91439> (last updated Feb. 8, 2018).



by law.<sup>57</sup> Wearing the hijab is linked to support of the regime during its pre-revolutionary era when the hijab was not obligatory. Therefore, refusal to wear one is known as having a “bad-hijab” and puts those into the crosshairs for structural disenfranchisement as they are profiled as being against the regime.<sup>58</sup> This has led to refusal of service in banking institutions,<sup>59</sup> to measures as extreme as immediate arrests after subsequent police raids on social gatherings, merely for not veiling.<sup>60</sup>

The grounds behind the Iranian veil mandates, from Zoroastrian Persia to today’s Iran, have never been uniform. The reasoning ranges from religious to classist and/or sexist justifications. The only comparable observations regarding veiling requirements in Zoroastrian Persia and today’s Iran include the requisite base for profiling, which leads to reflective controlling over the “have-nots” in these discriminatory systems.

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<sup>57</sup> Eliza Mackintosh, *Iran publishes report saying 49% of Iranians against compulsory veil*, CNN (Feb. 6, 2018, 3:15 AM), <https://edition.cnn.com/2018/02/05/middleeast/iran-hijab-law-report-intl/index.html>.

<sup>58</sup> Maya Oppenheim, *Iranian women removing headscarves to protest mandatory hijab laws*, THE INDEPENDENT, <https://www.independent.co.uk/news/world/asia/iran-women-headscarves-remove-hijab-chastity-day-b2121243.html> (last updated Jul. 12, 2022).

<sup>59</sup> *Id.*

<sup>60</sup> Mirdamadi, *supra* note 45.

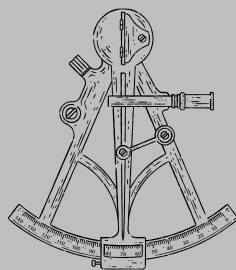


**THE EXCLUSIONARY EFFECT OF MULTILATERAL GLOBAL TAX REFORMS AND THE  
PLIGHT OF DEVELOPING STATES**

*Alexander Ezenagu and Ilias Bantekas\**

#### **ABSTRACT**

Countries have come to accept the wide application of international tax rules in both their domestic and international tax affairs. However, where international tax rules fall short of the legitimate expectations of states and fail to provide necessary guidance, impacted states may be compelled to seek other sources of guidance. In this paper, we argue that in the absence and failure of international tax rules to provide adequate guidance and encourage a fair tax system, states should not be prevented from exercising their fiscal sovereignty and submit themselves to new rules and a new sovereign. These observations come in the wake of recent initiatives by the OECD and the G7 which aim to reform global taxation by preventing base erosion and profit shifting in a manner that allows developed states to collect more taxes to the detriment of developing states.



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## I. INTRODUCTION

On July 1, 2021, the Organization for Economic Cooperation and Development (OECD) secured the votes of 130 members out of 139 members of the Inclusive Framework on a two-pillar plan to reform the global tax rules.<sup>1</sup> On October 8, 2021 OECD announced that 136 members of the Inclusive Framework had agreed to a two-pillar solution to address the tax challenges arising from the digitalization of the economy.<sup>2</sup> The OECD also stated that a small number of the Inclusive Frameworks have not yet joined the two-pillar solution.<sup>3</sup> Notably, two African countries—Kenya and Nigeria—, active members of the Inclusive Framework, withheld their support for this plan, which has been described by many as “historic.”<sup>4</sup>

Nigeria is a major economic force in West Africa and the largest economy by GDP on the African continent. Kenya is East Africa’s gateway and the region’s largest economy. What must have influenced their decisions not to support a historic global tax reform, and what are the consequences of such action?

A bit of history. The current rules that govern international taxation were designed a century ago, under the auspices of the League of Nations, and subsequently deposited within the OECD.<sup>5</sup> The OECD is a 38-member country club that has no African country members, just as the League of Nations had no African members. Through the OECD Model Tax Convention, commentary, guidelines, and other relevant documents, this 38-member club legislates on the tax practices of countries across the globe, both domestically and internationally.<sup>6</sup> Agitation of the power, non-inclusivity and bias of the OECD led to the introduction of the United Nations Model Tax Convention, commentary, and guidelines in

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<sup>1</sup> *130 countries and jurisdictions join bold new framework for international tax reform*, OCED, <https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm> (last updated Jan. 7, 2021).

<sup>2</sup> *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm (last updated June 9, 2023).

<sup>3</sup> *OECD/G20 Base Erosion and Profit Shifting Project: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD (2021), <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>.

<sup>4</sup> Holly Ellyatt, ‘The beginning of a long road’: Global tax reform will take sweat and tears to implement, experts say, CNBC (June 7, 2021, 9:46 AM), <https://www.cnbc.com/2021/06/07/global-tax-reform-deal-will-take-time-negotiation-and-cooperation.html>.

<sup>5</sup> See *Double Taxation and Evasion: Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.562M.178.1928.II (Geneva, Oct. 31, 1928) for a history of tax treaties; J. David B. Oliver, *The Relevance of Tax Treaty History*, 33 INTERTAX 484 (2005); Lara Friedlander & Scott Wilkie, *Policy Forum: The History of Tax Provisions—and Why It Is Important to Know About It*, 54 CAN. TAX J. 907 (2006); Reuven S. Avi-Yonah, *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, 25 VA. TAX REV. 313 (2005).

<sup>6</sup> Attiya Waris, *How Kenya Has Implemented and Adjusted to the Changes in International Transfer Pricing Regulations: 1920-2016*, INT’L CTR. FOR TAX & DEV., Working Paper 69, [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13401/ICTD\\_WP69.pdf](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13401/ICTD_WP69.pdf).

the 1970s, though some may argue that the difference between these treaties is not significant.<sup>7</sup>

While there are other model tax conventions, especially at the national level, the OECD and the UN model tax conventions have become law in the tax space (the question of whether they are hard or soft law, in many respects, is academic).<sup>8</sup> States negotiate bilateral tax treaties on the basis of these tax conventions and by virtue of Article 26 of the Vienna Convention on the Law of the Treaties. Additionally, states are bound by tax treaties entered and are expected to perform them in good faith. However, due to its history and wide acceptance, the OECD's Model Tax Convention is the most used treaty among the two.<sup>9</sup> Some may argue that it has elevated itself to become hard law and is no longer in the realm of persuasive soft law.<sup>10</sup> Such an argument will not be misplaced when one considers the recent use of multilateral instruments in reforming domestic tax laws of countries. As argued, these soft laws have had tangible impacts on countries, and countries have been known to change their tax regimes to align with the transactional legal order of international taxation established by these bodies.<sup>11</sup>

Let us return to the model treaties and their purpose. At the end of the First World War and with the resumption of international trade, firms trading abroad feared that their income and capital would be taxed more than once—by the country where they reside (home country) and the country where they trade or invest (host country). To avert this double taxation and encourage foreign direct investment and international trade, these firms lobbied their countries to sign bilateral tax treaties with other countries for the sole purpose of preventing double taxation of taxpayers, as seen in model tax conventions and tax treaties entered into by countries in the 20<sup>th</sup> century.<sup>12</sup> For example, Article 1 of both the London and Mexico Model Tax Conventions drafts of the League of Nations expressly state that the

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<sup>7</sup> Reuven S. Avi-Yonah, *International Tax as International Law*, 57 N.Y.U. TAX. L. REV. 483, 497 (2007).

<sup>8</sup> Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law: What Have We Learned?*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: INSIGHTS FROM INTERDISCIPLINARY SCHOLARSHIP (Cambridge University Press, 2012); also available as Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law: What Have We Learned*, Minn. Legal Stud., Research Paper No. 12-17, <https://ssrn.com/abstract=2044800>.

<sup>9</sup> Alberto Vega, *International Governance Through Soft Law: The Case of the OECD Transfer Pricing Guidelines*, MAX PLANCK INST. FOR TAX L. & PUB. FIN., Working Paper No. 2012-05 (2012), <https://ssrn.com/abstract=2100341>.

<sup>10</sup> Thomas Dubut, *The Court of Justice and the OECD Model Tax Conventions or the Uncertainties of the Distinction between Hard Law, and Soft Law, and No Law in the European Case Law*, 40 INTER TAX 2, 2 (2012).

<sup>11</sup> Frederik Heitmüller & Irma Mosquera, *Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future*, 24 J. INT'L ECON. L. 473 (2021).

<sup>12</sup> During that time, individuals possessed no international legal personality and hence double tax disputes were scarce as they would have required the rather expensive mechanism of diplomatic representation. One of the few cases known to this author that found its way to an international tribunal, in this instance the PCA, is the *Japanese House Tax* case, for which an award was rendered in 1905. See *Ger. v. Japan (Japanese House Tax case)*, Award ICGJ 407 (Perm. Ct. Arb. 1905). It should, of course, be noted that the PCIJ in the *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz.), Judgment, 1932 P.C.I.J. (ser A/B) No. 46 (June 7), was asked to decide whether art. 435 of the Versailles Peace Treaty had abrogated prior customs agreements between the two nations. See also Ilias Bantekas, *Inter-State Arbitration in International Tax Disputes*, 8 J. INT'L DISP. SETTLEMENT 507 (2017).

“present convention is designed to prevent double taxation in the case of taxpayers of the contracting States. . . .”<sup>13</sup>

Not long after countries agreed on a model tax treaty for the prevention of double taxation, they realized that they may have empowered firms to create “homeless income”, leading to the non-taxation of firms, in addition to the prevention of double taxation. This is when the problems began. Early debates recognized that the flaw in the foundational premise was that multinational entities (MNEs) could create holding companies in tax favorable jurisdictions that could produce income not materially taxed in any country.<sup>14</sup> The creation of “homeless income” by tax treaties caused countries to introduce domestic tax base safeguarding measures, such as Controlled Foreign Corporation (CFC) rules,<sup>15</sup> foreign tax credit (FTC) limitation,<sup>16</sup> earnings stripping prevention rules,<sup>17</sup> thin capitalization rules and other general anti-avoidance rules (GAAR).<sup>18</sup> In the absence of uniform tax reform at the global level, tax competition and tax spillover could lead to conflict among countries, despite the fact that it is a strong tenet of sovereignty that states possess an entitlement to tax as a matter of regulatory power,<sup>19</sup> despite a few exceptional judgments to the contrary.<sup>20</sup> It is here that the OECD comes in.

<sup>13</sup> *Annex Text of the Model Bilateral Tax Convention*, THE UNIV. OF SYDNEY AUSTRALIAN DIGITAL COLLECTIONS, <https://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-15.xml;chunk.id=d2395e1647;toc.depth=1;toc.id=d2395e1647;database=;collection=;brand=default> (last visited Mar. 5, 2023).

<sup>14</sup> Bret Wells & Cym H. Lowell, *Income Tax Treaty Policy in the 21st Century: Residence vs. Source* 5 COLUM. J. TAX L. 1 (2014).

<sup>15</sup> Reuven S. Avi-Yonah & Oz Halabi, *US Subpart F Legislative Proposals: A Comparative Perspective*, LAW & ECON. Working Paper 69 (2012), [https://repository.law.umich.edu/law\\_econ\\_current/69](https://repository.law.umich.edu/law_econ_current/69).

<sup>16</sup> Michael Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1043 (1997).

<sup>17</sup> Craig Elliffe, *Interest Deductibility: Evaluating the Advantage of Earnings Stripping Regimes in Preventing Thin Capitalisation*, 2 N.Z. L. REV. 257, 257 (2017).

<sup>18</sup> See Reuven S. Avi-Yonah, *Bridging the North/South Divide: International Redistribution and Tax Competition*, 26 MICH. J. INT’L L. 371 (2004).

<sup>19</sup> *Mobile v. Kimball*, 102 U.S. 691, 703 (1880); see also *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915), Mr. Justice Hughes expressly stated that a state’s power to tax is ultra vires if it is abusive and “as a result of its arbitrary character is mere confiscation of particular property”. Equally confirmed in *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934).

Most international investment treaties (IITs) whether bilateral or multilateral subject their expropriation provisions to the host state’s regulatory measures in the field of tax. See The United Nations Conference on Trade and Development, *INVESTOR-STATE DISPUTE SETTLEMENT UNCTAD Series on Issues in International Investment Agreements II*, 133, UNCTAD/DIAE/IA/2013/2 (2014). Of course, tax-related regulatory measures are lawful when they are legitimate and applied without discrimination and in good faith. See *Yukos Universal Ltd. (Isle of Man) v. Russia*, Hague Ct. Rep. (Scott) 227 (Perm. Ct. Arb. 2014).

In this case, however, the tribunal found that Russia’s tax measures against Yukos were expropriatory; see also *Les Laboratoires Servier SAS Arts et Techniques du Progres SAS v. Poland*, (Fr. v. Pol.), Hague Ct. Rep. (Scott) 569 (Perm. Ct. Arb. 1989), which reiterated that a state was validly exercising its regulatory (police) powers where it was acting: in good faith; reasonably; without discrimination; and in proportion to the public aim pursued. This applies mutatis mutandis to taxation measures.

<sup>20</sup> For example, *Kügele v. Polish State*, Case No 34, Annual Digest 24, 69 (1932), rejected the argument that an increase in taxes (a license fee in the case at hand) may be confiscatory, although the tribunal did not necessarily reach the conclusion that this was generally impossible under all circumstances. See Ali Lazem & Ilias



This brief article is organized as follows: Section Two explores the impact of tax practices on the enjoyment of fundamental rights, highlighting the need for a mutually acceptable multilateral approach. Section Three then attempts an analysis of the 2020 OECD/G7 initiative to create an inclusive framework and how this has fared in relation to past initiatives by the world's superpowers.

## II. A BRIEF ACCOUNT ON THE IMPACT OF HARMFUL TAX PRACTICES ON HUMAN RIGHTS

Not surprisingly, domestic general anti-avoidance measures (GAAR) by states acting individually did not holistically address problems associated with base erosion and profit shifting, or the harmful tax practices of corporations, aided in some instances by jurisdictions through tax laws and policies. Base erosion is the tax planning arrangement of companies geared at reducing a company's taxable profit in a jurisdiction.<sup>21</sup> A common arrangement is the use of loan agreements at high interest rates to lower the taxable profits by deducting large interest payments from the profits of the company.<sup>22</sup> Profit shifting, on the other hand, is the practice by which MNEs shift profits from high-tax jurisdictions to low-tax or secrecy jurisdictions to avoid paying taxes or to pay low, significantly reduced taxes in the low tax jurisdictions, or to not disclose tax information in secrecy jurisdictions.<sup>23</sup> This has had a detrimental effect on the ability of persons in developing countries to enjoy not only socio-economic, but also civil and political rights. It has also allowed governments in fragile, impoverished states to rely on their regulatory power to tax by regressing on their duty to collect taxes from MNEs at the appropriate rate in respect of profits generated on their territory.<sup>24</sup> Such tax practices violate states' obligation to make the maximum use of their resources.<sup>25</sup> In most cases states fail to make the best use of their resources, something that is often pointed out by judicial institutions and intergovernmental entities.<sup>26</sup> One poignant

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Bantekas, *The Treatment of Tax as Expropriation in International Investor-State Arbitration*, 8 ARB. INT'L 85, 91 n.35 (2015).

<sup>21</sup> Annet Wanyana Oguttu, *Tax Base Erosion and Profit Shifting in Africa – Part I: Africa's Response to the OECD BEPS Action Plan*, INT'L CTR. FOR TAX AND DEV. 54 (2016), [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD\\_WP54.pdf](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD_WP54.pdf).

<sup>22</sup> Sebastian Beer et al., *International Corporate Tax Avoidance: A Review of the Channels, Effect Sizes, and Blind Spots*, INT'L MONETARY FUND 2018/168 (2018), <https://www.imf.org/en/Publications/WP/Issues/2018/07/23/International-Corporate-Tax-Avoidance-A-Review-of-the-Channels-Effect-Size-and-Blind-Spots-45999>.

<sup>23</sup> Clemens Fuest & Nadine Riedel, *Tax Evasion and Tax Avoidance in Developing Countries: The Role of International Profit Shifting*, OXFORD UNIV. CENTRE FOR BUS. TAX'N 10/12 (2010), <https://oxfordtax.sbs.ox.ac.uk/sitefiles/wp1012.pdf>.

<sup>24</sup> See Magdalena Sepúlveda-Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. on Extreme Poverty and Human Rights*, U.N. Doc. A/HR C/26/28 (May 22, 2014), noting that fiscal policies and unfair tax systems are among the major determinants in the enjoyment of human rights.

<sup>25</sup> See Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights*, 16 HUM. RTS. Q., 693 (1994).

<sup>26</sup> In *Settlement Agreement between AJIC and the City of Buenos Aires* (Arg.) 23.360/0 (2008), (2 September 2011), decided by the Superior Tribunal de Justicia, the local government had under-utilised its financial resources by 32 per cent in respect of financing early childhood education. Ultimately, the parties reached a settlement, following findings of violations by lower courts regarding the right to education. The settlement contained an

concern with tax base erosion is the distributive failures of so-called regressive tax regimes, although this is largely an indirect outcome of tax base erosion and profit shifting. Its effect is felt in both developed and developing countries, albeit at different ends. These regimes generally rely on the assumption that the rich will invest money in the economy if their personal and property taxes are reduced, taking into account that they already pay some corporate tax and provide significant employment. As a result, regressive regimes balance their shortfall by imposing higher taxes on goods and services, which are, however, consumed by low and middle-income households. Thus, they generate inequitable outcomes and fail to distribute wealth across the population because the poor end up paying more of their income as taxes than the rich.<sup>27</sup> Countries adhering to regressive regimes are not making the maximum use of their resources and should consider reverting to progressive taxation where the wealthy are taxed according to their real income. Such a system, however, cannot work if the global financial system allows the wealthy to emigrate to a handful of tax havens, an issue addressed in a following section of this article and the subject matter of recent OECD and G7 initiatives. In many cases states simply fail in their task to use maximum available resources on account of limited administrative capacity, excessive bureaucracy,<sup>28</sup> or through their inability simply to collect taxes.

There are several indexes by which to measure economic inequality, which itself may explain structural problems with a state's economy, such as tax policies that effectively discriminate against the poor and low-income classes. An index/coefficient regularly employed by the UN Committee on Economic, Social and Cultural Rights (CESCR) is the Gini index, which measures economic inequality in a given population. The Gini index ranges from 0 (or 0 per cent) to 1 (or 100 per cent), with 0 representing perfect equality and 1 representing perfect inequality. In its assessment of the South African report, the country's Gini coefficient of 0.63 was found by the CESCR to be one of the worst globally. The CESCR explained that this score was partially due to South Africa's tax policies, which do not allow the mobilization of the resources required to reduce such inequalities. In addition, it found that value added tax, as well as other taxes on household items, had a serious impact on low-income households, for which there had not been no human rights impact assessments.<sup>29</sup> Section Four goes on to deal with the purported multilateral framework propagated by the OECD, but which ultimately only succeeded in a considerable degree of alienation and the culmination of unilateral goals and outcomes. Three distinct sub-sections examine the three pillars of this framework, namely: alternative corporate minimum tax; digital tax services; and formulary apportionment of MNC profits. The final section of the

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agreement whereby a permanent auditor was appointed to monitor the progress of relevant works, as well as a bimonthly work group to monitor implementation of the agreement, comprised of representatives from both camps.

<sup>27</sup> The German Federal Constitutional Court has held that the state's power of direct taxation – as opposed to indirect taxation – cannot be used to deprive people of the means for their 'existential minimum'. See Bundesverfassungsgericht [Federal Constitutional Court] Sep. 25, 1992, 82 Entscheidungen der amtlichen Sammlung [BVERFGE] 60, 85 (Ger.), Bundesverfassungsgericht [Federal Constitutional Court] Sep. 25, 1992, 87 [BVERFGE] 153,169 (Ger.).

<sup>28</sup> See Comm. on Econ., Soc. and Cultural Rts. [hereinafter CESCR] *Concluding Observations on the Combined Third to Fifth Periodic Reports of Romania*, ¶ 7, U.N. Doc. E/C.12/ROU/CO/3-5 (Dec. 9, 2014).

<sup>29</sup> CESCR, *Concluding Observations on the Initial Report of South Africa*, ¶ 21, U.N. Doc. E/C.12/ZAF/CO/1 (Nov. 29, 2018).

paper seeks to ascertain whether these initiatives are in fact self-serving and ultimately force developing states in Africa to pursue unilateral avenues that best benefit their people.

### III. THE 2020 OECD/G7 GLOBAL TAX INITIATIVE

In June 2020, under the leadership of the UK, the G7 agreed to push forward a multilateral agreement purportedly aimed at curtailing the capacity of large MNEs to achieve tax base erosion and profit shifting.<sup>30</sup> This was hailed as a seismic initiative, but it is not at all certain, just like several other past G7 initiatives, that it will culminate into a viable and globally accepted agreement. In any event, the 2020 G7 initiative is based on two pillars. Under the first pillar, MNEs will be expected to pay tax in the countries where they operate, as opposed to the countries where they are headquartered. This applies to MNEs with at least a 10 per cent profit margin, in which case 20 per cent of any profit above this 10 per cent profit margin will be taxed in the countries of operation. What is meant here by ‘operation’ is the accumulation of actual profits as these are reflected in the sale or distribution of an MNEs output. Surprisingly, the multifaceted complexities arising from “value creation” and the distributional conflicts created therefrom are given no attention whatsoever in this consideration.<sup>31</sup> The key beneficiaries of this first pillar tax are developed states with wealthy consumer markets. The countries where MNEs outsource their operations are outliers to this taxation initiative. Given that the introduction of taxation in the country of ‘operation’ will increase the cost of production, MNEs will now have a greater incentive to race to the bottom in the countries of production,<sup>32</sup> such as by decreasing labor cost, health and safety standards. In this vein, MNEs will no doubt seek to mitigate their increased tax bill by creative accounting through transfer pricing mechanisms.<sup>33</sup> In the absence of legislation and procedures to curtail transfer pricing in developing countries, MNEs are likely to spread profits and losses across their affiliates around the world in order to pay less taxes in the countries of production, the developing states. Even if developing states desired and possessed the mechanisms to deter and punish transfer mispricing, the race to attract foreign investment will halt any attempts to do so. As a result, the actions described in the first pillar

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<sup>30</sup> HM Treasury, *G7 Finance Ministers Agree Historic Global Tax Agreement*, GOV.UK, <https://www.gov.uk/government/news/g7-finance-ministers-agree-historic-global-tax-agreement>, (last updated June 5, 2021).

<sup>31</sup> See Johanna Hey, “*Taxation Where Value is Created*” and the OECD/G20 Base Erosion and Profit Shifting Initiative, 72 BULL. FOR INT’L TAX’N 203 (2018).

<sup>32</sup> See, e.g., CESCR, *General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the Context of Business Activities*, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017), where it was stressed that tax competition and bank secrecy, as well as an absence of global tax cooperation, drives developing states racing to the bottom and erodes fundamental human rights; see also Ilias Bantekas, *The Linkages Between Business and Human Rights and Their Underlying Root Causes* 43 HUM. RTS. Q. 117 (2021) (who argues that it is not the case that MNEs are inherently anti-human rights or willingly operate on the edges of the law, but rather that the international financial architecture is structured in a way that pushes developing countries to race to the bottom and which MNEs simply exploit).

<sup>33</sup> See Monica Iyer, *Transferring Away Human Rights: Using Human Rights to Address Corporate Transfer Mispricing*, 15 NW. J. HUM. RTS. 1 (2017) (who argues in favor of a human rights approach in the design of domestic and international tax policies). See also Allison Christians, *Fair Taxation as a Basic Human Right*, 9 INT’L REV. CONST. 211 (2009).

of the G7 initiative smacks of the type of multilateralism imposed by industrialized states out of self-interest with few, if any, tangible benefits for countries in the developing world.<sup>34</sup>

Under the second pillar, G7 states agreed to the principle of a levy of at least 15 per cent global minimum corporation tax on a country-by-country basis. There are several problems with this approach. Firstly, it does not in any way by itself curb harmful transfer pricing. Developing states may well levy 15 per cent corporate tax yet agree to sever or significantly decrease all other taxes that MNEs would otherwise be subject to. MNEs would then be seen in their mother/HQ state as having satisfied the 15 per cent corporate tax requirement, when in fact the overall tax they pay is lower. Secondly, in an ideal scenario, it is not unlikely that a corporate tax below 15 per cent is commingled with a range of levies or other obligations in order to create meaningful employment, contribute to the SDGs, or mitigate the effects of climate change. If this low corporate tax rate is viewed by industrialized states as tax avoidance – and accordingly the imposing state as a tax haven – none of the benevolent effects of the corporate tax decrease would materialize.

In this sense, it is abundantly clear that any efforts towards global tax multilateralism do not (and should not) begin (or end) with the self-interests of the industrialized North and its loss of tax revenues. Rather, any global tax reform, especially if engineered by the G7 should aim at strengthening global tax collection and curtailing profit shifting practices that prevent developing states from collecting due taxes.<sup>35</sup> Nothing in the 2020 G7 Initiative even hints at a tax governance that promotes the SDGs; instead, the wording emphasizes that need for greater tax collection for the benefit of the national economies of G7 states. Of course, there is at least one potentially useful outcome from the G7 initiative, if in fact it culminates into a treaty. Economies operating as mere postal boxes with no oversight or interest in the operations of foreign corporate entities, particularly those offering flags of convenience to shipping/freight companies, will be particularly impacted and rightly so. Companies operating under flags of convenience have not only evaded taxes globally, but moreover contribute nothing to the economies of host states and because of the absence of oversight mechanisms, they have been allowed to operate in gross violation of seaworthiness, labor and health and safety standards.<sup>36</sup>

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<sup>34</sup> See Reuven S. Avi-Yonah, *Globalization, Tax Competition and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1650 (2000) (who argues that “[i]n the absence of a world taxing authority that can redistribute tax revenues directly and given the paucity of foreign aid from developed to developing countries, [a progressive division of an international tax base between rich and poor] has the best chance of achieving meaningful distributive goals”).

<sup>35</sup> See Johanna Stark, *Tax Justice Beyond National Borders--International or Interpersonal?*, 41 OXFORD J. LEGAL STUD. 133 (2021) (who argues in favor of an international tax regime delivering distributive tax justice). See also Ivan Ozai, *Two Accounts of International Tax Justice*, 3 CANADIAN J.L. & JUR. 317, (2020) (who traces the distributive consequences of a possible global tax reform).

<sup>36</sup> See L.F.E. Goldie, *Environmental Catastrophes and Flags of Convenience: Does the Present Law Pose Special Liability Issues?*, 3 PACE Y.B. INT'L L. 63, (1991); Eric Powell, *Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience*, 19 ANN. SURV. INT'L & COMPAR. L. 263 (2013).

#### IV. THE EMERGENCE OF MULTILATERALISM THROUGH THE OECD AND ITS EXCLUSIONARY OUTCOMES

Although the human right dimension of base erosion was an insignificant factor in multilateral efforts to curtail such practice of tax base erosion and profit shifting, the significant loss of tax revenues of developed states was reason enough. It is thus unsurprising that a multilateral approach to address issues of base erosion and profit shifting had become desirable and was under discussion since the early 2010s. Under pressure by the G7 and G20 countries, the OECD in 2013 launched the Base Erosion and Profit Shifting (BEPS) initiative, to close gaps for companies that allegedly avoid taxation or reduce tax burden in their home country by engaging in tax inversions (moving operations) or by migrating intangibles to lower tax jurisdictions. 15 Action Items were issued by the OECD, which formed the BEPS Action Plans. They were to address tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax. In 2015, the BEPS package of 15 measures were delivered. It is important to note that this package of 15 measures was developed by 44 jurisdictions including all OECD and G20 members participating on an equal footing, as well as through widespread consultations with more than 80 other jurisdictions.<sup>37</sup> The OECD's desire was to introduce "soft law", which will be adopted by most countries both in their domestic and international tax dealings. To achieve this and to obtain legitimacy, in 2016 the OECD established the Inclusive Framework.<sup>38</sup> The Inclusive Framework came as a result of the call by G20 Finance Ministers to the OECD to build a framework by early 2016 with the involvement of interested non-G20 countries and jurisdictions, particularly developing economies, on an equal footing.<sup>39</sup> The mandate of this Inclusive Framework is to implement the BEPS package and finalize the remaining technical work to address BEPS challenges. For context, the delineation of the global tax issues, decision on priorities and solutions to these tax issues, were decided by 44 countries between 2012 and 2015.<sup>40</sup> In 2016, other countries, mostly developing countries, were invited to participate in the implementation of these global tax reforms, "on an equal footing". This act by the developed countries led to the metaphor, if you are not on the table, you are on the menu, among civil societies and campaigners. Nevertheless, African countries joined the Inclusive Framework and actively participated in

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<sup>37</sup>*Inclusive Framework on BEPS: Progress Report July 2016-June 2017* OECD Report (2017), <https://www.oecd.org/tax/BEPS/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf>. [hereinafter *Inclusive Framework*] BEPS was introduced in the EU as EU Council Directive EU/2016/1164 of 12 July 2016 (ATAD). For the purposes of this discussion, ATAD requires EU member states to adopt CFC rules (e.g., tax is based on residence if the effective tax rate of the source jurisdiction is below 50 per cent of the tax rate in the residence jurisdiction). This makes it much more difficult to shift profits artificially outside the EU. See Reuven S. Avi-Yonah & Orli K. Avi-Yonah, *Be Careful What You Wish For?: Reducing Inequality in the Twenty-First Century*, 116 MICH. L. REV. 1001 (2018).

<sup>38</sup> Sissie Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 2 ERASMUS L. REV. 76, (2017).

<sup>39</sup>*Inclusive Framework*, *supra* note 37.

<sup>40</sup> It is noteworthy that following the ratification of more than one-hundred bilateral tax agreements by the USA to curtail tax base erosion, which ultimately led to a Common Reporting Standard (CRS) for the automatic exchange of financial information, the OECD came up with a Multilateral Agreement on Administrative Cooperation in Tax Matters (MAATM). The aim of this was to concretize the CRS model and eliminate bank secrecy from the process. See Reuven Avi-Yonah & Gianluca Mazzoni, *BEPS, ATAP and the New Tax Dialogue: "A Transatlantic Competition?"*, 46 INTERTAX 885 (2018).

its deliberations. After all, you cannot complain of non-inclusion when you are not part of the decision-making process.

At the conclusion of the first BEPS Initiative, the OECD initiated BEPS 2.0, essentially blueprints on two pillars on finding solutions to the tax challenges arising from the digitalization of the economy. The 2013 BEPS Action Plan 1 focused on addressing the tax challenges of the digital economy and failure to reach a multilateral consensus on it. In addition to its heralded importance for all countries, the 2013 BEPS Action Plan 1 led to its elevation into BEPS 2.0. The Inclusive Framework is saddled with the responsibility of achieving multilateral consensus on this very important issue.

Pillar One of the blueprints sets out to develop a new right to tax highly digitalized companies but also consumer-facing companies who reach consumers in a jurisdiction through digital means.<sup>41</sup> Important here is the agreement on the nexus for establishing presence in a jurisdiction, given the limitations of permanent establishment nexus contained in tax treaties. Pillar Two focuses on ensuring that large internationally operating businesses pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate in.<sup>42</sup> These two pillars have pre-occupied the focus of the international tax community for the last five years, with countries and experts heavily investing in the process. For instance, Nigeria's active involvement saw the then head of the international tax department and now head of the tax policy department of the Federal Inland Revenue Service, become the Vice-Chairman of the Inclusive Framework. Thus, it is safe to claim that Nigeria, as many other African countries, sought a multilateral solution to the global tax issues and actively participated in the negotiation. However, Nigeria, in addition to Kenya, Sri Lanka and Pakistan, withheld its vote on the global solution, whose process it actively participated in.

The issues plaguing global corporate tax rules can be summarized thus: conflict of allocation of taxing rights between residence (mostly developed countries) and source states (mostly developing countries);<sup>43</sup> treatment of subsidiaries of MNEs as separate entities,<sup>44</sup> base erosion and profits shifting activities of MNEs through transfer mispricing and earnings stripping activities; and finally, tax competition through low or no tax rates.<sup>45</sup> Note that countries can address these issues through their domestic laws, however, as feared in the 1920s, it is the conviction that unilateral actions of countries will lead to double taxation of firms and adversely affect foreign investments, making it important to adopt a global

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<sup>41</sup> Org. for Econ. Coop. & Dev. [hereinafter OECD], *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (2020), <https://doi.org/10.1787/abb4c3d1-en>.

<sup>42</sup> *Id.*

<sup>43</sup> European Commission, *Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21<sup>st</sup> Century*, COM(2021) 251 final (2021), [https://taxation-customs.ec.europa.eu/system/files/2021-05/communication\\_on\\_business\\_taxation\\_for\\_the\\_21st\\_century.pdf](https://taxation-customs.ec.europa.eu/system/files/2021-05/communication_on_business_taxation_for_the_21st_century.pdf).

<sup>44</sup> Alexander Ezenagu, *Unitary Taxation of Multinationals: Implications for Sustainable Development: New Thinking on SDGs and International Law*, Policy Brief No. 4 (2019), [https://www.cigionline.org/static/documents/documents/SDG%20PB%20no.4\\_0.pdf](https://www.cigionline.org/static/documents/documents/SDG%20PB%20no.4_0.pdf).

<sup>45</sup> Aqib Aslam & Maria Coelho, *A Firm Lower Bound: Characteristics and Impact of Corporate Minimum Taxation*, INT'L MONETARY FUND 2021/161 (2021), <https://www.imf.org/en/Publications/WP/Issues/2021/06/08/A-Firm-Lower-Bound-Characteristics-and-Impact-of-Corporate-Minimum-Taxation-49886>.

consensus on addressing these tax challenges.<sup>46</sup> Hence, the BEPS process and the establishment of the Inclusive Framework. What is clear from the reactions of the African and other developing nations is that while the OECD may have achieved something historic by getting 136 jurisdictions to “agree” on a global approach to tax MNEs, the global solution has failed to meet its demands. One such demand is that the global minimum tax must be at least 20%<sup>47</sup> (25% for civil societies), however, the OECD has opted for a global minimum tax of 15%.<sup>48</sup> Note that, the African country of Mauritius, notorious for its use by firms for base erosion and profit shifting, has a corporate income tax of 15%, effectively, 3% after foreign tax credit, while Nigeria has a corporate income tax of 30%. The two-pillar solution excludes extractive industries and financial services from its scope, two important economic sectors to Nigeria in terms of employment and GDP contribution.<sup>49</sup> It is arguable that the Inclusive Framework achieves little or nothing for Nigeria, which may explain the country’s withdrawal of support for the “historic” global tax plan.

#### A. ALTERNATIVE CORPORATE MINIMUM TAX

What becomes of Nigeria and other African countries? First, it must be stated that tax is a sovereignty issue, and the sovereignty of national taxation should be protected.<sup>50</sup> This is beyond doubt part of customary international law, even if tax regulation in one state produces an impact on other states and its institutions, whether public or private. Where soft law fails to achieve fair and equitable treatment of all countries, countries will assert their sovereignty on tax matters,<sup>51</sup> which must be respected.<sup>52</sup> As Benjamin Franklin echoed, “we must, indeed, all hang together, or most assuredly we shall all hang separately.”<sup>53</sup> For Nigeria, this necessarily means the imposition of taxes on the profits of any company, which accrue in, are derived from, brought into, or received in Nigeria, as provided for in section 9 of the

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<sup>46</sup> Wole Obayomi & Victor Adegite, *INSIGHT: Taxation of Digital Economy in Nigeria—Significant Economic Presence*, BLOOMBERG TAX (Aug. 24, 2020, 3:00 AM), <https://news.bloombergtax.com/daily-tax-report-international/insight-taxation-of-digital-economy-in-nigeria-significant-economic-presence>.

<sup>47</sup> *130 Inclusive Framework Countries and Jurisdictions Join a New Two-Pillar Plan to Reform International Taxation Rules—What Does this Mean for Africa?* ATAF, <https://www.ataftax.org/130-inclusive-framework-countries-and-jurisdictions-join-a-new-two-pillar-plan-to-reform-international-taxation-rules-what-does-this-mean-for-africa> (last updated Jul. 1, 2021) [hereinafter *130*].

<sup>48</sup> Lamia Oualalou, *ICRICT Report: The Global Pandemic, Sustainable Economic Recovery, and International Taxation*, <https://www.icrict.com/press-release/2020/6/14/icrict-report-the-global-pandemic-sustainable-economic-recovery-and-international-taxation> (last updated June 15, 2020).

<sup>49</sup> *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm (last updated June 9, 2023).

<sup>50</sup> Julien Chaisse & Xueliang Ji, ‘Soft Law’ in *International Law-Making — How Soft International Taxation Law is Reshaping International Economic Governance*, 13 ASIAN J. WTO & INT’L HEALTH L. AND POL’Y 463 (2018).

<sup>51</sup> Will Moreland, *The Purpose of Multilateralism: A Framework for Democracies in a Geopolitically Competitive World*, BROOKINGS (2019), [https://www.brookings.edu/wp-content/uploads/2019/09/FP\\_20190923\\_purpose\\_of\\_multilateralism\\_moreland.pdf](https://www.brookings.edu/wp-content/uploads/2019/09/FP_20190923_purpose_of_multilateralism_moreland.pdf).

<sup>52</sup> *130*, *supra* note 47.

<sup>53</sup> Reuven S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 137 (2016).

Corporate Income Tax of Nigeria.<sup>54</sup> Options such as alternative corporate minimum tax (ACMT),<sup>55</sup> formulary apportionment of profits of MNEs<sup>56</sup> and digital services tax (DST)<sup>57</sup> should be adopted by the country in the exercise of its sovereign power to tax income and profits with significant economic presence within its territory.<sup>58</sup> These reform options are further discussed below.

Alternative corporate minimum tax (ACMT) is the imposition of a small percentage tax rate, for example, 1 percent, on the taxpayer's total revenue (turnover) before any deductions.<sup>59</sup> Where the alternative tax is higher than the taxpayer's regular tax liability (tax on the taxable profits of the taxpayer), the minimum tax is payable. The ACMT imposes a minimum tax rate on the turnover of companies, geared towards preventing base erosion and profit shifting, since no deductions are allowed before imposing the tax. For opponents of the ACMT, they argue that taxes on gross revenue subject investors to risk taxation even in the absence of economic profit. Therefore, the ACMT may be deemed to be economically inefficient for that purpose. Proponents of the ACMT argue that the ACMT is immune to avoidance of taxes through the overstatement of deductions since no deductions are allowed. They also argue that the ACMT is relatively easier to administer when compared to the existing tax system, which is fraught with the challenges of determining the arm's length and applying complex and difficult transfer pricing methodologies.

## B. DIGITAL SERVICES TAX

The digital services tax (DST) is similar to the imposition of withholding taxes on payments made by a taxpayer to a recipient.<sup>60</sup> The DST is paid on the gross transaction value of the digital service and the aggregate of DSTs paid on behalf of a taxpayer, for example, Netflix, will be deemed the final tax for that taxpayer, except where the foreign taxpayer has a permanent establishment in the taxing jurisdiction. Of importance is the definition of what constitutes digital services. For example, Kenya's Income Tax (Digital Service) Tax Regulations, 2020, defines digital services to include, "over-the-top services, downloadable digital content, provision of digital marketplace, sale of, licensing of, or any other form of monetizing data collected about users, generated from the user's activities on a digital

<sup>54</sup> See Companies Income Tax Act (1977), § 9 (Nigeria).

<sup>55</sup> Aslam & Coelho, *supra* note 45.

<sup>56</sup> *Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21<sup>st</sup> Century* COM (2021) 251 final (May 18, 2021).

<sup>57</sup> Christophe Waerzeggers, et al., *The Evolution of Tax Law Design within an Increasingly Destabilized International Tax Law Framework*, in *CORPORATE INCOME TAXES UNDER PRESSURE* 341-357 (Ruud De Mooij, et al., eds., 2021).

<sup>58</sup> See Finance Act (2019) 107:6 O.G., A1-24 (Nigeria).

<sup>59</sup> MICHAEL C. DURST, *TAXING MULTINATIONAL BUSINESS IN LOWER-INCOME COUNTRIES: ECONOMICS, POLITICS AND SOCIAL RESPONSIBILITY* (2019).

<sup>60</sup> Ana Cebreiro-Gómez et al., *Digital Services Tax: Country Practice and Technical Challenges*, INT'L BANK FOR RECONSTRUCTION AND DEV./THE WORLD BANK (2021), <https://documents1.worldbank.org/curated/en/099725001112228984/pdf/P169976002e89a07209ae40d48d6ebb7154.pdf>.



marketplace...”.<sup>61</sup> The Regulations further defines a digital platform to mean “any electronic application that allows digital service providers to be connected to users of the services, directly or indirectly, and includes a website and mobile application”.<sup>62</sup> Scholars have expressed the view that the introduction of a DST by a jurisdiction will see companies pass the additional burden to consumers in increased prices of the product.<sup>63</sup> This is commonly found in contracts where gross-up provisions are inserted to pass any burden imposed by the domestic law on the service recipient and not the provider. However, the same argument can be made for all types of taxes on companies since companies will always seek to maximize profits. Also, in a competitive market, increased prices of products by companies may result in boycott of the products for other products. Thus, companies have the incentive not to increase their prices, especially in a competitive market.<sup>64</sup>

### C. FORMULARY APPOINTMENT OF PROFITS

The formulary appointment of the profits of multinational group, in most cases, emanates from the treatment of the multinational group as a single firm (also known as unitary firm). This approach considers the multinational group as a single business, which for convenience is divided into purely formal separately incorporated subsidiaries.<sup>65</sup> After the global income of the multinational group is computed, the group income is apportioned between the various component parts of the group by a formula that reflects the economic contribution of each component part to the derivation of the global profit.<sup>66</sup> This approach of income allocation recognizes that the relationships between members of the multinational group are governed predominantly by control, and not legal contracts. It accepts the economic reality that multinational entities of a group share ownership, management and control, and this shared relationship should define their tax treatment as unitary firms contributing to a group profit.

To apply the formulary apportionment, establishing the unitary business and applying the formula are essential. Which parts of the business of the group are deemed unitary for the purpose of unitary taxation? Should all subsidiaries of the group be covered or are some to be excluded? What factors should be applied in profit apportionment and how should those be factors be weighed? It must be stated here that different businesses or industries will require different factors and weights. The factors and weight for the extractive industries differ from those for the digital economy.<sup>67</sup>

Opponents of the formulary apportionment of profits of group companies have argued that a move from the arm’s length principle would abandon the sound theoretical basis on

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<sup>61</sup> See The Income Tax (Digital Service Tax) Regulations (2020) KENYA GAZETTE SUPPLEMENT NO. 214 § 3, pursuant to the Finance Act 2020.

<sup>62</sup> *Id.* § 2.

<sup>63</sup> Wei Cui, *The Digital Services Tax: A Conceptual Defense*, 73 TAX L. REV. 69 (2019).

<sup>64</sup> Andrew Appleby, *Subnational Digital Services Taxation*, 81 MD. L. REV. 1 (2022).

<sup>65</sup> Kimberly A. Clausing, *The U.S. State Experience Under Formulary Apportionment: Are There Lessons for International Reform?*, 69 NAT’L TAX J. 353 (2016).

<sup>66</sup> Sol Picciotto, *Taxing Multinational Enterprises as Unitary Firms*, INT’L CTR. FOR TAX & DEV. 53 (2016), [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12773/ICTD\\_WP53.pdf](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12773/ICTD_WP53.pdf).

<sup>67</sup> Johannes Becker et al., *How Data Should (Not) Be Taxed*, (2018).

which the arm's length principle is founded. They have also argued that such a move, especially by individual countries or a small group of countries, will threaten the existing international consensus on taxation of MNEs, thereby substantially increasing the risk of double taxation. Also, a move to the formulary apportionment would require substantial international coordination, consensus on the pre-determined formula and composition of the group, which would be difficult to achieve. The use of pre-determined formula for all similar transactions or industries as against a case-by-case formula determination, is seen as arbitrary and not appreciative of the unique attributes of each transaction or each company within the same industry.<sup>68</sup> Proponents of formulary apportionment, emphasize that this approach guarantees that profit is taxed where the economic activities occur and eliminates the appeal of tax havens or low-tax jurisdictions, since substantial economic activities must occur in those jurisdictions for any profit to be allocated to them.<sup>69</sup> They also argue that the formulary apportionment greatly reduces profit shifting and base erosion by excluding intra-firm transactions and expenditure in the calculation of the group profit.<sup>70</sup>

#### V. MULTILATERALISM AT WHAT COST AND FOR WHOSE BENEFIT?

No reform option provides a one-size-fits-all solution or will be 100 percent fool-proof, however, tax regimes should be at the determination of the country, without fear of being black-listed or punished by the developed countries. It is therefore puzzling that the OECD in the October 2021 agreement has asked countries to remove all digital services taxes and other similar measures with respect to all companies, and to commit not to introduce such measures in the future. Note that Pillar I of the two-pillar solutions only applies to in-scope companies (about 100 global MNEs), leaving out the thousands of MNEs operating in developing countries. What rules apply to them? The existing arm's length principle, judged to be flawed, which led to the current BEPS process? In the absence of guidance or any acceptable guiding international law, countries should not be berated for introducing and implementing domestic measures. After all, nature abhors a vacuum.

Second, a new international tax soft law regime and a global tax sovereign should be created by Nigeria and other African countries to replace the OECD and its hold on the international tax regime. For decades, scholars and stakeholders have called for the establishment of a UN tax body, with obvious merits for developing countries. Recent updates to the UN Model Convention further justify this call. For instance, the recently agreed Article 12B of the UN Model Convention empowers source States to tax income paid by the resident of its State or a permanent establishment of a non-resident of its State to a third party of the other contracting State.<sup>71</sup> The new Article 12B allows source States to tax

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<sup>68</sup> Altshuler, Rosanne & Harry Grubert, *Formula Apportionment? Is it Better Than the Current System and are There Better Alternatives?* 63 NAT. TAX. J. 1145 (2009).

<sup>69</sup> See Michael Durst, *The Tax Policy Outlook for Developing Countries: Reflections on International Formulary Apportionment*, INT'L CTR. FOR TAX AND DEV. 32 (2015), [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/11181/ICTD\\_WP32.pdf](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/11181/ICTD_WP32.pdf).

<sup>70</sup> See KIMBERLY A. CLAUSING & REUVEN S. AVI-YONAH, *REFORMING CORPORATE TAXATION IN A GLOBAL ECONOMY: A PROPOSAL TO ADOPT FORMULARY APPORTIONMENT* (2008).

<sup>71</sup> See Andrés Báez Moreno, *Because not always B comes after A: Critical Reflections on the*

the gross income paid by resident of its State to the other State, while permitting the taxpayer of the other State to elect to pay taxes on its net profit for the financial year, where the taxpayer chooses and provides documents to that effect.<sup>72</sup> In any case, the source State has the right to tax the gross income of the taxpayer of the other contracting State. Article 12B does not incorporate a de minimis thresholds at present in the OECD BEPS Pillar I outcome, thus, giving states the right to tax any taxpayer, regardless of size. States may unilaterally decide to introduce de minimis threshold, for administrative efficiency.

While the call for a UN body may still be desirable, it is high time the African Union (AU) played an important role in tax matters. There are reasons for this. An AU tax body and regime will provide African countries with stronger bargaining power, akin to the roles of the US congress and the European Union parliament on tax matters. Decisions reached at the OECD and other global platforms are subject to approval at the legislative houses of these unions, offering further protection and influence. An AU tax body negotiating on behalf of all African countries will better represent the continent and influence decisions at the global level. The other reason is that, since the coming into effect of the African Continental Free Trade Area (AfCFTA) agreement, tax issues pose non-tariff barriers to the successful implementation of the free trade area, especially corporate income tax.<sup>73</sup> Hence, an AU tax regime on corporate income taxation of firms trading within the free trade area will avert tax avoidance, tax evasion and tax competition, which may act as barriers to the success of the AfCFTA.

Finally, corporate income tax is of great economic relevance to Nigeria, the largest contributor of non-oil tax to the country's revenue, and other African countries.<sup>74</sup> According to ATAF, large taxpayers, usually MNEs, account for 78% of total tax revenue collected by African countries, and corporate income tax is a significant part of the total tax revenue.<sup>75</sup> Thus, preserving the corporate income tax is of great relevance to Nigeria and other African countries. The failure of multilateralism in achieving a fair and equitable global tax solution leaves countries with no choice but to seek unilateral measures and new alliances. Such actions are justifiable, and Nigeria, just like Kenya, is right to have taken the first step in not supporting the global tax plan. It must now be bold in its next steps, by (1) protecting its fiscal sovereignty and exercising it without fear in accordance with laws of the state; and (2) by rallying other African countries under the auspices of the African Union to develop a tax regime that will work for the continent and ensure the successful implementation of the AfCFTA.

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new Article 12B of the UN Model Tax Convention on Automated Digital Services (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3923508](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923508).

<sup>72</sup> Okanga Okanga & Lyla Latif, *Effective Taxation in Africa: Confronting Systemic Vulnerability through Inclusive Global Tax Governance*, 2 AFR. J. of INT'L ECON. L. 100, 119 (2021).

<sup>73</sup> See Alexander Ezenagu, *Transfer Mispricing as a Non-Tariff Barrier to the African Continental Free Trade Agreement*, AFRONOMICS LAW (2019), <https://www.afronomicslaw.org/2019/01/24/transfer-mispricing-as-a-non-tariff-barrier-to-the-african-continental-free-trade-agreement>.

<sup>74</sup> See Tax/Statistics Report (2021) (Nigeria), <https://www.firs.gov.ng/tax-statistics-report/>.

<sup>75</sup> See African Tax Administration Forum, *African Tax Outlook 2019* (S. Afr.), [https://events.ataftax.org/index.php?page=documents&func=view&document\\_id=49&token=cf479f8927dec3b8fc4f3c027c42aa9d&thankyou](https://events.ataftax.org/index.php?page=documents&func=view&document_id=49&token=cf479f8927dec3b8fc4f3c027c42aa9d&thankyou).

## VI. CONCLUSION

Global tax initiatives have been manifold in the recent past, going far beyond the less complicated issue of double taxation. One would have expected that in the era of the SDGs and the challenges posed by climate change, multilateral tax initiatives, especially when intended to serve as potential global agreements, would focus on fair and equitable tax distribution, which in turn would help reshape the current international financial architecture. Neither the OECD nor the recent G7 initiatives support or lend hand to such an approach.<sup>76</sup> For one thing, the type of tax multilateralism envisaged and engineered by these entities is exclusive of the developing world. It is solely driven by the top to the bottom.<sup>77</sup> In fact, this type of multilateralism is of such a nature that does not require the active consent and participation of all states, even though its potential impact is global and severe. In the past it was rather simple to distinguish between contracting and non-contracting parties to a treaty regime, even if the treaty did produce some mild outcomes on third parties. The economic prowess of developed states (effectively controlling capital, currency, foreign investment, as well as political and military power) dictates that any agreement between them is necessarily 'forced' on third states and their populations. What might offset this state of affairs is a competing - regional or like-minded - tax regime that relies less on foreign capital and investment and whose participants are able to mitigate the effects of hard currency fluctuations as these impact imports and exports. This is a tall order, which does not seem likely, even if there are voices to this direction in Africa by countries such as Nigeria and Kenya. Although it is beyond the scope of this short paper, a potential alliance with China and Russia is a dimension whose impact has not been fully explored. It is hoped that any current or future global tax initiatives are not devoid of a human rights approach and are consistent with the UN Sustainable Development Goals. In the opinion of these authors such an approach is the only form of multilateralism that can achieve global inclusivity, and which can be labelled legitimate.

While the OECD and G7 leaders have every interest to pursue a global tax agenda that serves the backbones to their economies, namely the prerogative to tax MNCs at a level that does not allow host states to reap tangible tax benefits, it is unlikely that such a system can persist for much longer. Developing host states are weary of the international financial legal

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<sup>76</sup> *BCB Holdings Ltd. and Belize Bank Ltd. v. Att'y Gen. of Belize*, [2013] Caribbean Court of Justice [CCJ] 5 (AJ) is emblematic of this approach. There, a newly elected Belize government repudiated a tax concession granted to a group of companies by means of a settlement deed negotiated by its predecessor because it had not been approved by the Belize legislature, was confidential (hence non-transparent) and was manifestly contrary to the country's tax laws. The Caribbean Court of Justice argued that whether or not the concession violated public policy should be assessed by reference to 'the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize' as well as international public policy. The tax concession could only be considered illegal if it was found to breach 'fundamental principles of justice or the rule of law and represented an unacceptable violation of those principles.' It should be noted that BCB and the Bank of Belize bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded. *BCB Holdings Ltd. and Belize Bank Ltd. v. Government of Belize*, Fed. Appx. 17 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 619 (2017). The courts of developed states were happy to approach the validity of the award legalistically and not through the lens of tax justice or public policy.

<sup>77</sup> See Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation* 19 INT'L J. CONST. L. 798 (2021) (arguing that when capitalism was left to its own devices it bred injustice and inequality. The focus of the article is on Chinese capitalism and hence Alter takes the view that multilateralism led by liberal states is beneficial).

regime under which they have become highly indebted and there is some discussion in the horizon for alternative international finance regimes.<sup>78</sup> It is not a far leap for developing states to push towards modified unilateral or regional multilateral foreign investment normative frameworks that avoid a race to the bottom, which effectively allows MNCs to achieve maximum benefits in their search for host states. If alternative investment and finance frameworks are ultimately set up, even if rudimentary, taxation will become the next battleground. Control of investment, finance and international trade and commerce is the bedrock for the reform of the international tax regime.

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<sup>78</sup> See Ilias Bantekas, *Addressing Unsustainable Sovereign Debt through Parallel System(s) of Transnational Finance*, 37 CONN. J. INT'L L. 72 (2021).

GLOBALIZATION AND HUMAN RIGHTS

# Through Thin and Thick

From Human-Rights Principles to  
Politics Across the Americas and Beyond

ÁNGEL R. OQUENDO



OQUENDO

Through Thin and Thick

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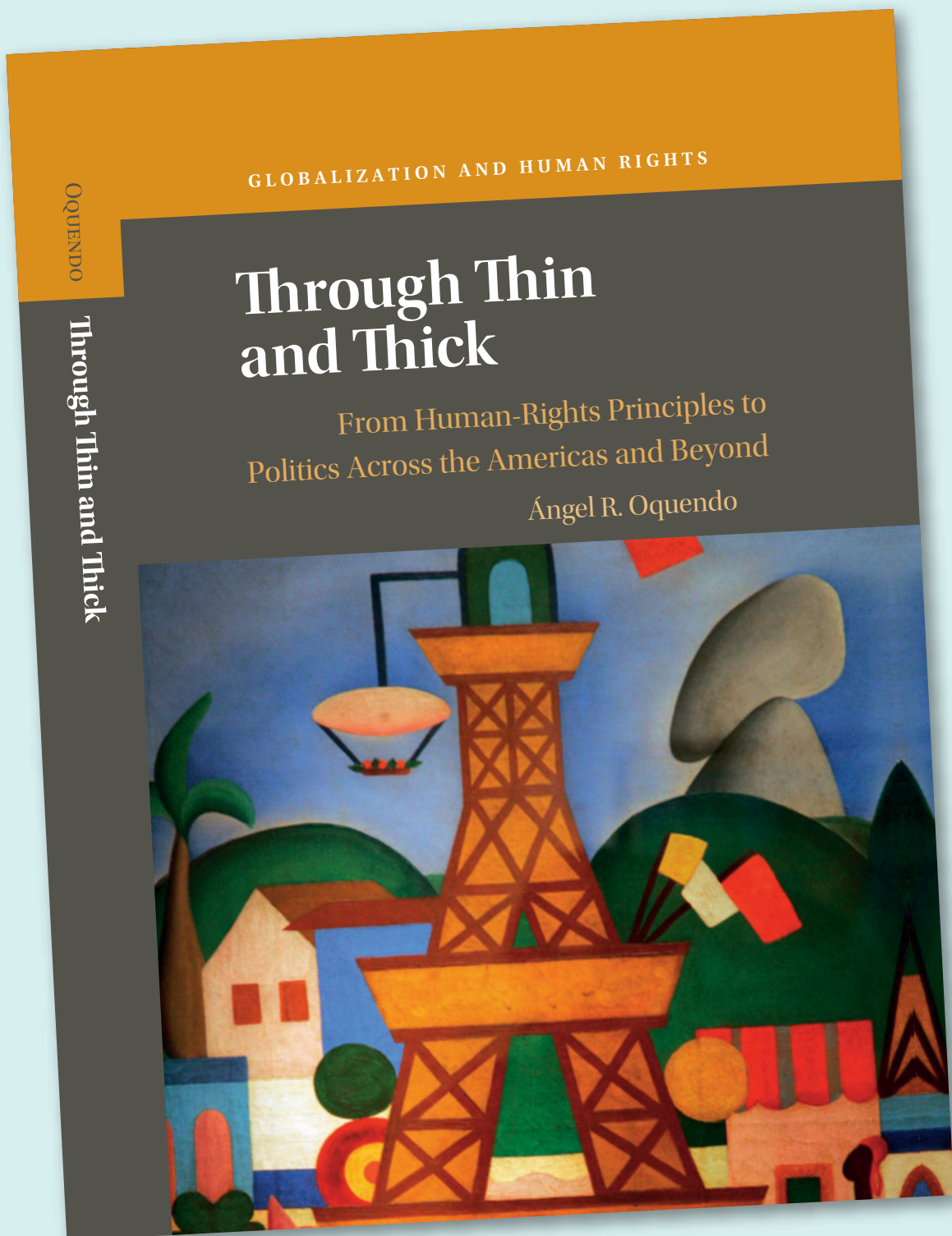
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**STRENGTH IN NUMBERS: GROUP RIGHTS, EXIT, SELF-DETERMINATION, AND  
RECOGNITION**

*Ángel R. Oquendo\**

## ABSTRACT

*Joint entitlements have bred controversy, recurrently rejection, within the Anglo-American philosophical, politically scientific universe in unison with its Continental European counterpart. They will occupy the present discussion, steadily structuring it. It will painstakingly parse the Northern Atlantic disputation around them, in correspondence with the conundrums—ranging from definitional to practical—chalked up to them, cautiously riding to their rescue.*

*Immersed in their thickness for an interfusion with policy, rights credited to a group, denominated as such, might pretend to legitimacy. On account of their judiciability, they might deserve their denomination. Straightaway, one could dovetail them with any other that likewise aids in the securement of a just citizenship, to familiarize them.*

*Pluralized to the gills, they might not disintegrate into their singularized correlates. When foisted upon them, this disintegration might deform them. Palpably, they might not strike one as superfluous constructs.*

*Through their multifariousness, divisibility, and overlap, the discussed collective holders might signal their richness, not their unviability. Advisedly, they should refrain from blocking a dissident, notably a female one, attempting to flee them. At bottom, the fluidity between them might reinforce societal pluralization, which might support their shelter in return.*

*Beyond this reinforcement, they might bolster the overarching society, transmuting it into participatory to the full. Characteristically, engagement in it passes through them. Further, they might individually, collectively redound to the profit of their clientele, centering, enriching it. Through them, it may determine itself.*

*Upon a respectable amount of geographical concentration, they may strive to secede. In the alternative, their self-determination journey may transport them barely to an autonomous, perchance virtually erected, integration. Significantly, they might accomplish recognition. This accomplishment might clear the road from civic to economic equality for them.*

*In this vein, they might effectively gainsay an overbearing national state. Their opposition might zero in on shoring up their culture as an intrinsically vibrant, extrinsically imperiled lifeline, not a fragile zoology. Thereby, they would be devoting themselves to democratized self-protection, forbearing any paternalistic condescension toward their clients.*

### TEXT

Joint entitlements have bred controversy, recurrently rejection, within the Anglo-American philosophical, politically scientific universe in unison with its Continental European counterpart. They will occupy the present discussion, steadily structuring it. It will painstakingly parse the Northern Atlantic disputation around them, in correspondence with the conundrums—ranging from definitional to practical—chalked up to them, cautiously riding to their rescue.

Within analytic philosophy, one might balk at communal guaranties from the onset. James Griffin instantiates this attitude toward them with the confession that their emergence “seems . . . regrettable” to him. In his judgment, they have cropped up in the midst of a “widespread modern” mobilization to have “the discourse of rights” perform “most of the important work in ethics” *contra naturam*.<sup>1</sup>

Correlatively, he cogitates that minorities can comfortably counterbalance losing, even entirely, their cultural perspective.<sup>2</sup> They can substitute it, in his appraisal, with any other sufficiently significant one, like the hegemonic specimen around them.<sup>3</sup> Concurrently, he admits this veracity: “Without doubt, . . . to deny [them] recognition, to regard” them “as” possessors “of little importance, inflicts” an immense injury upon them.<sup>4</sup>

Plainly, the cited author caricatures his adversaries. He imputes to them the desire to land a subsistence assurance for culture.<sup>5</sup> In his portrayal, they embolden their constituencies to consume this intangible asset passively.<sup>6</sup> Their recommendations, he complains, would

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<sup>1</sup> James Griffin, *Group Rights, in RIGHTS, CULTURE AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ* 161, 161 (Lukas H. Meyer, Stanley L. Paulson & Thomas W. Pogge eds. 2003).

<sup>2</sup> See *id.* at 173 (“The loss of cultural membership does not, in itself, reduce one’s ability to make meaningful choices.”).

<sup>3</sup> See *id.* at 173-74 (“All that one needs for meaningful choice is *some* culture, and if, as is often the case, a minority culture is in decline because it is being supplanted by a majority culture, one can, depending upon how much dislocation is involved in the process, still have *a* culture available to one.”); *id.* at 174 (“Also, it is easy to exaggerate the extent to which our deliberation about our options in life depends upon our *particular* culture.”).

<sup>4</sup> *Id.* at 175.

<sup>5</sup> See *id.* at 175 (“But the values [at stake] are not the survival of a culture, admirable or not . . . .”); *id.* at 175-76 (There seems to be no “reason to confer . . . upon all cultural groups a general right to the survival of their culture . . .” or “for society’s guaranteeing [the latter’s] survival.”); *id.* at 177 (“Nor is the fact that some cultures are at an unfair disadvantage a case for a general right to the survival of one’s culture.”).

<sup>6</sup> See *id.* at 174 (“There is something worryingly passive about the agent who figures in these arguments for the importance of cultures. According to these arguments, our culture gives us our options; we merely receive them as an inheritance. But this picture leaves out our active critical life.”).

fossilize it. They would immunize it against criticism along with change, sentimentalizing (after oversimplifying) the meaning of losing it.<sup>7</sup>

Maybe innocuously, he invites to a reformulation: One had “better—if for no other reason than [to sound] so much clearer—”persist in “speaking of *justice*” for “deprived” subgroups “rather than of” them as wielders of entitlements.<sup>8</sup> In his assessment, one should not construe the core claim through rights because it does not *match* his construction of them. In short, he austere pictures them, somewhat arbitrarily,<sup>9</sup> “as protections of our . . . standing” qua humans, our agency.<sup>10</sup>

The decried mismatch supposedly derives from the failure of the claimants to conform to this “element of austerity.”<sup>11</sup> In his opinion, they obsessively hanker after “the benefits of a robust sense” of concentric mutualized identification.<sup>12</sup> He would advise breaking the guaranties at stake down into a handful of classic personal liberties. Hence, self-determination, conceptualized as the preconditions for the participants in an “encompassing” ensemble to boast “an acceptable array of options in life” culminates in the autonomy “to pursue the ones they choose . . .”<sup>13</sup> It reduces to” a catalog of “first generation” entitlements.<sup>14</sup>

In actuality, *rights* attributed to a collective might merit their name, in spite of ranking generationally second (possibly third), because they welcome adjudicative vindication upon, in Herbert L. A. Hart’s vision, a credible “threat” “of force” to obtain what they command.<sup>15</sup> One might implement them through their root norm. They correlate with a delimited obligation that curbs the obligated subject’s arbitrariness, not necessarily her discretion. Due to their composition, these commitments might readily demarcate themselves from generically moral commandments. They might prevail over them.

In addition, one might distort these safeguards upon their individualization. As an illustration, collectively environmental entitlements might shield the lakes coupled with forests of a farming village. Ergo, they might differ from particularized ones, which might attach to the villager’s farms.

Patently, someone might envisage vindicating the rightful social access to the socialized environments by arithmetically dividing it into proportional segments for each farmer. Unavoidably, this segmentation might epitomize the distortion designated in the previous paragraph. It might, at worst, degrade into a misconception; at best, furnish a useful

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<sup>7</sup> See *id.* at 173 (“Cultures can, and must, be criticized.”); *id.* at 176 (“But cultures must be open to criticism and therefore to constant change, even to the point of a natural death.”). But cf. JOSEPH RAZ, *Multiculturalism: A Liberal Perspective* (Ch. 7), in *ETHICS IN THE PUBLIC DOMAIN* 155, 166-67 (1994) (“Liberal multiculturalism . . . is not a policy of conserving, fossilizing some cultures in their pristine state. . . . It recognizes that fossilized cultures cannot serve their members well in contemporary societies, with their generally fast rate of social and economic change.”). See also Griffin, *supra* note 1, at 173 (“And one must not oversimplify, or sentimentalize, what it means to people to abandon an old culture for a new one.”); *id.* at 174 (“Also, it is easy to exaggerate the extent to which our deliberation about our options in life depends upon our *particular* culture.”).

<sup>8</sup> Griffin, *supra* note 1, at 180.

<sup>9</sup> But cf. *id.* at 177 (“But I am not just arbitrarily choosing a definition of rights.”).

<sup>10</sup> *Id.* at 162.

<sup>11</sup> *Id.* at 169.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 171.

<sup>14</sup> *Id.*

<sup>15</sup> Herbert L. A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 178 (1955).

albeit artificial tool for individualized indemnification upon the impossibility of socially injunctive relief.

Without beating about the bush, David Miller champions the narrow view of rights under study. “My understanding of” them, he confesses, resembles “that recently proposed by . . . Griffin.”<sup>16</sup> For him too, they translate into artifacts “(a) grounded in features of . . . personhood . . . everywhere,” “(b) specified by their function in protecting . . . basic interests”: from “personal security” through “freedom of thought” to untrammelled “bodily movement.”<sup>17</sup> He might be admonishing any advocate of the presently propositioned posture when he writes that one “must resist the temptation to pack” entitlements “that stem from cultural conventions,” within societal backdrops, into the list.<sup>18</sup>

Synchronously, this political scientist concurs with the philosopher he conjures on the suspicion that countless contenders for insertion in the pack, like “free association,” lending themselves to unpacking into personal guaranties, would suffer from redundancy.<sup>19</sup> However, they might *not* show themselves redundant along this redescription. Supplying supplemental concretion for the exemplifications on the table, a geographically fragmented enclave might not freely associate redundantly just because its constituents could do so on their own with the fellow citizenry with which they coexist in the geographic fragment that they inhabit. It might determine itself on a similar nonredundant note. Extra concretely: although the denizens of Washington, District of Columbia, could vote separately in congressional elections via one of the surrounding states, their concerted crusade for suffrage as to the Congress might *not* sink into superfluity.

At a contiguous conjuncture, Miller objects that rights generally must yet (1) collective ones specifically cannot prove themselves exercisable “compatibly” with (2) others of their genre.<sup>20</sup> After facing up to the ineluctability of competition among the former, he affirms this intuition: “The aim” amounts to arriving at a suite of guaranties “that will only conflict in relatively rare circumstances (ideally not at all),” functioning “as fixed parameters” in a politically staged “debate.”<sup>21</sup> He elaborates on his affirmation: Had a promoter of these protections “always” to weight them “against one another,” she could produce “no” justification to segregate “them from the general run of political demands.”<sup>22</sup> He illustrates his objection through substantiated self-determination with copious conflications around it: “Consider . . . the problems that standardly arise” in disputes about it: which collectivities “qualify for it”; “where, territorially, . . . are [they] entitled to . . . it; “what . . . should [they] do about [their] internal minorities”; what answerabilities “to outsiders must [they] discharge[] before” exercising it, et cetera.<sup>23</sup>

<sup>16</sup> David Miller, *Group Rights, Human Rights and Citizenship*, 10 EUR. J. PHIL. 178, 181 (2002).

<sup>17</sup> *Id.* See also Jeremy Waldron, *The Dignity of Groups*, 2008 ACTA JURIDICA (Cape Town) 66, 84 (2008) (“Even though it is true that people worship in groups . . . , still we can accommodate all of that in a traditional individualist conception, just as we can accommodate the importance of political parties and collective self-determination within the framework of individual political rights. . . . In fact, social and economic rights can be given an individualistic grounding too.”).

<sup>18</sup> Miller, *supra* note 16, at 182.

<sup>19</sup> *Id.* at 183.

<sup>20</sup> *Id.* at 186.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

He accepts that one may aptly answer these queries.<sup>24</sup> Notwithstanding, he stresses, the answers would flow from sheer equilibration.

[T]o get to [them] right . . . we . . . need to look closely at situations in which . . . national [exigencies collide with] aspirations, [toward delivering to] each of the parties . . . part of what they would . . . like. What emerges from this process [one would describe] more accurately . . . as a “best solution” than . . . a right.<sup>25</sup>

Unfortunately for him, there is no qualitative intergenerational demarcation in this regard either. For instance, first generational guaranties, exemplified by that of unrestrained speech, convergently concern policies, which officialdom must “properly balance against objectives of other kinds.”<sup>26</sup>

In any event, the transindividual entitlements expostulated about by him might attain the grade of “civic” instead of “human.” He reasonably recommends this gradation, conditioning it: “The question . . . is whether [these] rights might be justified as ways of securing . . . equal citizenship . . . . Despite appearances, [this vindicable pledge] does . . . often require differential treatment for . . . citizens” within different categorizations.<sup>27</sup> Beyond his, this cogitation will aver below that the quest for equalization he summons up undergirds the plea for respectful acknowledgment, toward the studied guaranties en bloc.

On a farther front, he would indubitably group, not categorize, the contemplated collectives:

We [must] distinguish . . . a *category* of persons, understood to mean all those . . . who fit a particular description, such as being under twenty-one or having red hair, [from] a *group* proper, [qua a cluster of those] who by virtue of their shared characteristics think of themselves as [a distinctive collectivity].<sup>28</sup>

Resolutely, he concludes that they “should identify themselves” as affiliates amid the totality of them, “conscious” of their affiliation.<sup>29</sup> For him, “what turns” categorizable agglomerations into one of the ensembles under evaluation may well be “the experience of oppression,” like that of “discrimination.”<sup>30</sup>

Congruently, Claus Offe paints the examined entitlements as those “claimed by,” fitfully “conferred upon,” a “*structurally oppressed*,” outnumbered community.<sup>31</sup> He elucidates: “We grasp” the latter, through the “constitutive traits” behind its “resulting” commonality, as an organism that will “inevitably” linger on relegated numerically, perhaps existentially, even after its partakers “have exhausted to the utmost” the guaranties dispensed

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<sup>24</sup> *Id.* at 187.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 188.

<sup>28</sup> *Id.* at 178.

<sup>29</sup> *Id.* at 178-79.

<sup>30</sup> *Id.* at 179.

<sup>31</sup> Claus Offe, “Homogenität” im demokratischen Verfassungsstaat: Sind politische Gruppenrechte eine adäquate Antwort auf Identitätskonflikte?, 16 (Nr. 64) PERIPHERIE 26, 35 (1996) (“Gruppenrechte sind also Rechte, die von unterdrückten strukturellen Minderheiten in Anspruch genommen oder ihnen gewährt werden.”). See also *id.* at 34 (“Unter Gruppenrechten werden oft Minderheiten-Rechte verstanden.”).

to them.<sup>32</sup> “Compensation for the disadvantage” shouldered by them, he accentuates, “consists in bestowing” these liberties “to indemnify them for the perceived injustices from their exclusion.”<sup>33</sup>

As an aside, his paper deciphers the “trouble with” spotlighting minorities that, exposed to restructured oppressiveness, demand for themselves the brand of prerogative under the microscope into this one: “[T]hey can be subdivided into sundry subgroups” upon a “tactical” urge for this subdivision.<sup>34</sup> In all likelihood, he would counsel a classificatory improvement for them that centers on their demonstrable authenticity: videlicet, unmistakable “indications of a specific existential style” within them in consolidation with “a serious,” “lasting adherence [to them by] the majority of the ‘members’ tabulated by the [self-anointed] spokespersons.”<sup>35</sup> Nuancing a bit, Michael Walzer pinpoints that these “contemporary” multicultural reconfigurations replace—to supersede—“the politics of interest . . . by [one] of identity,” heading from “the material condition” as the “issue” to “the value of a culture, history,” *modus vivendi*.<sup>36</sup>

Staying in step, Iris Young herself flags the intricacy of these groups: The connection to them may wax “plural, ambiguous, . . . overlapping,” undefinable “by a single set” of common concerns alongside “attributes.”<sup>37</sup> Therefore, she laments, one may struggle “to say decisively that a . . . collection” of countrypersons “counts as a distinct people.”<sup>38</sup> She portrays popular “differentiation” as a “fluid” proposition, commenting: One may partake in this mix qua a “hybrid” devotee of “multiple” collectivities.<sup>39</sup>

Joseph Raz gazes at these convolutions from an angle of his own. For him: “Membership” reposes on (1) “belonging, not . . . achievement”; (2) “non-voluntary criteria:

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<sup>32</sup> *Id.*, at 34-35 (“Was wir unter ‘Minderheit’ verstehen, wenn es um Gruppenrechte geht, ist vielmehr eine ‘strukturelle’ Minderheit— eine Minderheit, die aufgrund ihrer konstitutiven Merkmale und daraus herrührenden gemeinsamen Interessen selbst dann unweigerlich eine Minderheit *bleiben* wird, wenn ihre Mitglieder ihre individuellen Rechte maximal ausgeschöpft haben.”).

<sup>33</sup> *Id.* at 36 (“Kompensationen für die Nachteile solcher strukturellen Minderheiten bestehen nun darin, daß ihnen Gruppenrechte zugestanden werden, so daß sie für die wahrgenommene Ungerechtigkeit ihres Ausschlusses als entschädigt gelten können.”).

<sup>34</sup> *Id.* at 37 (“Eine andere Schwierigkeit mit dem Kriterium der ‘unterdrückten Minderheit’ für Gruppen, die Rechte beanspruchen, liegt darin, daß jede Gruppe leicht in so gut wie endlos viele Teilgruppen untergliedert werden kann, wenn daran ein taktisches Interesse besteht.”).

<sup>35</sup> *Id.* at 38 (“Zweitens muß die Gruppe ‘authentisch’ sein. Das heißt, es muß klare Hinweise auf eine spezifische Lebensweise geben und ihre ernsthafte und dauerhafte Verbindlichkeit für die meisten von ihren Sprechern reklamierten ‘Mitglieder.’”).

<sup>36</sup> Michael Walzer, *Multiculturalism and the Politics of Interest* (Ch. 4), in INSIDER/OUTSIDER: AMERICAN JEWS AND MULTICULTURALISM 88, 88 (David Biale, Michael Galchinsky, Susannah Heschel, eds., 1998); cf. WILL KYMLICKA, MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY 81 (2005) (“Liberal multiculturalism has the same aspiration to link identities and interests. It not only recognizes particular minority identities, but seeks to transform the economic opportunities, political powers, and social status available to bearers of that identity.”).

<sup>37</sup> IRIS MARION YOUNG, *Two Concepts of Self-Determination* (Ch. 2), in GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE 39, 49 (2007).

<sup>38</sup> *Id.* at 49-50.

<sup>39</sup> Iris Marion Young, *Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel*, 5(2) ETHNICITIES 139, 140 (2005).

(3) non-exclusivity, since one may “belong to several” such constellations.<sup>40</sup> It may slim down to “mutual recognition”<sup>41</sup> upon “self-identification.”<sup>42</sup>

In this spirit, he fashions benchmarks, which ordinarily intertwine without entailing “each other,” for aspirant self-determiners.<sup>43</sup> These must present themselves as not a “small” knot of acquaintances but an “anonymous” aggregation, which scores the mentioned mutuality “by the possession” of generalized properties.<sup>44</sup> They must converge on a “character” within a “culture” that incorporates manifold, “varied,” weighty “aspects” of their existence, marking “a variety of [vital] forms” in consortium with “types of activity, occupation, pursuit, . . . relationship.”<sup>45</sup>

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Undoubtedly: “Any consistent defense” of the explicated entitlements intermixed with “exemptions,” predicated on “premises” of liberalism, must “ensure,” in the wording of Susan Moller Okin, “that at least one” guaranty—that “to exit” one’s ensemble “of origin—trumps” others, especially communitarian ones.<sup>46</sup> She recalls: In a host of enclaves “on whose behalf liberal theorists have argued” for peculiar privileges, a woman is “far less likely than” a man to benefit from the prospect of “exit.”<sup>47</sup> Upping the ante, one might coincidentally challenge those who theorize progressively, beyond liberally.

The critic herself expands her reasoning:

[In treating] girls [besides] women . . . unequally in various important ways within their cultural [milieu, one inescapably impacts] their . . . exercise [of] the right of exit that is of [central] importance to each theory. Moreover, [their] unequal capacity to exit leads to another [major] inequality[:] it affect[s] their potential to influence the directions taken by the [collective].<sup>48</sup>

Her critical essay details that the disparaged disparity frequently thrives thanks to the victims’ deficient access to quality education, their arranged constraining marriages, a socialization that undermines their self-esteem.<sup>49</sup> Judiciously, she denounces: Key “tensions

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<sup>40</sup> JOSEPH RAZ, *National Self-Determination* (Ch. 5), in *ETHICS IN THE PUBLIC DOMAIN* 110, 117 (1994).

<sup>41</sup> *Id.* at 115.

<sup>42</sup> *Id.* at 116.

<sup>43</sup> *Id.* at 117.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 114.

<sup>46</sup> Susan Moller Okin, *Mistresses of their Own Destiny: Group Rights, Gender and Realistic Rights of Exit*, 112(2) *ETHICS* 205, 205 (2002).

<sup>47</sup> *Id.* at 206.

<sup>48</sup> *Id.* at 207.

<sup>49</sup> See, e.g., *id.* at 216 (“In many of the world’s cultures, girls receive far less education than boys.”); *id.* at 217 (“It is not only the *lack* of education that can disproportionately affect girls’ future potential to exit their cultural groups of origin; what is imparted to them in the course of their education can also have far-ranging effects.”); *id.* at 218 (“Other cultural practices that can radically affect a woman’s capacity to exit her culture of origin are early or involuntarily arranged marriage and other practices that result in significant inequalities in marriage, including lesser rights to exit from a bad marriage.”); *id.* at 219 (“The overall socialization that girls undergo and the expectations placed on them in many cultures also tend to undermine their self-esteem—a



exist” pitting “the feminist” against the multiculturalist project, which respectively aim at (1) “achieving equality between the sexes” versus (2) “recognizing” subgroups—from religiously to culturally conceived ones—“by granting” them exceptional entitlements.<sup>50</sup>

A bête noire of this warning from within feminism,<sup>51</sup> Joseph Raz himself insists on comparable chances to depart, foregrounding them.<sup>52</sup> For him, they might constitute a cardinal “protection” for an insider “repressed” by the inside cultural praxis.<sup>53</sup> In his depiction, their availability might “compensate for . . . oppressive aspects” to “neutralize” them, countering “the worry that multiculturalism encourages repressive cultures.”<sup>54</sup> It might trace one of the “limits of tolerance.”<sup>55</sup>

Elsewhere, he alerts his audience about “pernicious” “*encompassing groups*,” excoriating them. They may crusade for the “exploitation” of their faithful, perseverating on “the denigration” paired with the “persecution” of their peers.<sup>56</sup> “If so,” he would view “the case for” their safekeeping alongside their “flourishing” as a “weakened” one at risk of foundering “altogether.”<sup>57</sup>

At this intersection, Claus Offe intones: The underprivileged constituents “must” problematically pay “with a corresponding loss of . . . liberty” for the “advantages . . . imparted” to their collectivity.<sup>58</sup> Furthermore, his intonation reverberates to home in on the danger of “empowering the ruling elites within . . . to enforce rules that may breach” their subordinates’ guaranties.<sup>59</sup> He educes that the leaders “can utilize” their delegated

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necessary quality for persons to plan their own lives and pursue such plans, including, if they wish, choosing a different mode of life from that into which they were born.”); *id.* at 220 (“In multicultural liberal states where group rights exist, sexist biases within the various cultures can seriously affect girls’ and young women’s access to education, choices about and status within marriage, and socialization for subordinate status.”).

<sup>50</sup> *Id.* at 207. Cf. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, BOSTON REV., Oct.-Nov. 1997, 25, 25 (1997) (“I shall argue instead that there is considerable likelihood of tension . . . between feminism and a multiculturalist commitment to group rights for minority cultures.”).

<sup>51</sup> See, e.g., Okin, *supra* note 46, at 212 (“The fact that women are successfully socialized into their various degrees of inferior status in virtually all of the world’s cultures means, Raz implies, that they are less oppressed.”).

<sup>52</sup> RAZ, *supra* note 7, at 166.

<sup>53</sup> *Id.* at 172.

<sup>54</sup> *Id.* at 169; *id.* at 172.

<sup>55</sup> *Id.* at 175. Cf. Jeremy Waldron, *Taking Group Rights Carefully*, in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 203, 205 (Grant Huscroft & Paul Rishworth, eds., 2002) (“Certainly from the mere fact that a group exists and has a good of its own, it does not follow that the aggregated interests of individuals (inside or outside the group) may or must be subordinated to the good of the group, in the way that making group rights ‘trumps’ would suggest.”).

<sup>56</sup> RAZ, *supra* note 40, at 118; *id.* at 119.

<sup>57</sup> *Id.* at 119; see also *id.* at 124 (“The problem is that the case for self-government is hedged by considerations of the interest of people other than members of the groups, and by the other interests of members of the groups, *i.e.*, other than their interests as members of the groups. These include their fundamental individual interests which ‘should’ be respected, e.g., by a group whose culture oppresses women or racial minorities.”).

<sup>58</sup> Offe, *supra* note 31, at 38 (“Es ist nämlich ein Problem von Gruppenrechten, daß die Vorteile nicht unzweideutig gewährt werden, sondern von (einigen) Gruppenmitgliedern durch entsprechende Verluste und Einbußen ihrer Freiheit bezahlt werden müssen.”); see also *id.* at 40 (“[S]o ist es, wie gezeigt, sehr wohl möglich, daß der Zuwachs an Minderheitenrechten mit der Minderung von Rechten und tatsächlichen Lebenschancen von individuellen Mitgliedern der Mitglieder einhergeht.”) (“As shown, an increment in minority rights might certainly entail a diminution in rights or actual vital opportunities for the individual members of the members.”).

<sup>59</sup> *Id.* at 39 (“Gemeint sind Gruppenrechte, welche die herrschenden Eliten innerhalb einer Gruppe ermächtigen, Regeln durchzusetzen, welche die individuellen Rechte von Mitgliedern verletzen können.”).

(imaginably arrogated) power “to violate” subjective freedom: *exempli gratia*, to “discriminate” against those they deem “less ‘worthy.’”<sup>60</sup> Not surprisingly, his conclusion resounds unequivocal: Personally allocated “entitlements, including that to found organizations, [mobilizing] them to procure sustenance through fair access to the media, fully suffice to attend to the wishes of these ‘ascriptive’” subgroups.<sup>61</sup>

In contrast, Jeremy Waldron distills caution, not repudiation, from the same difficulty. Initially, he identifies this troubling complication: “[T]o the extent that they implicate the interests of others”—from the cohort stationed outside to that posted inside “for whom” one harbors a “special concern” concatenated with accountability “(like children),” these meta-individual assertions “will pose . . . problems.”<sup>62</sup>

Subsequently, his commentary cautions: In the wake of their peremptoriness, “rights tend to close down compromise” in conjunction with “reconsideration.”<sup>63</sup> They exact extreme carefulness from us about “which” of them to validate.<sup>64</sup> We must “understand the . . . complexity of the issues” that their invocation purports “to settle.”<sup>65</sup> He summarizes the consequent predicament with this reflection: The “prejudice against” an “illiberal” collective “can still” occasion “great harm in human affairs.”<sup>66</sup>

Under an identical impulse, Michael Walzer proclaims: These ensembles “are obviously hostile” to the ideals of the “democratic” regime “whose toleration they are seeking. . . . Nonetheless, [they could wield] a strong argument in favor of tolerating [them,] even . . . providing some degree” of governmental assistance for their “cultural” propagation.<sup>67</sup> He abridges the argumentation into a tetrad of tenets:

[In essence,] first, [humans] need the support [on top of the] nurturance of [culturally configured communities] to live [a] decent [life]; second, [these entities] are highly complex . . . , created over . . . generations, with the effort

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<sup>60</sup> *Id.* at 42 (“Das gilt auch, weil Gruppenrechte typischerweise Gruppenvertreter mit Macht ausstatten, die diese Rechte dann benutzen können, um individuelle Rechte zu verletzen und jene zu diskriminieren, die sie als weniger ‘würdige’ Mitglieder der von ihnen vertretenen Gruppe betrachten.”).

<sup>61</sup> *Id.* at 44 (“Individuelle politische Rechte einschließlich des Rechtes, politische und religiöse Vereinigungen zu bilden und für die Unterstützung durch einen fairen Zugang zu den Medien zu mobilisieren, sind völlig ausreichend, um den Anliegen ‘askriptiver’ Gruppen Gehör zu verschaffen.”); *see id.* at 33 (“Nun [gehen wir] zu polyethnischen Rechten für Gruppen von Einwanderern und andere ‘askriptive’ Gruppen.”) (“Now [we can turn] to poly-ethnic rights for groups of immigrants and other ‘ascriptive’ groups.”); *id.* (“Sie beziehen sich auf Gruppen, die nicht nach Siedlungsgebieten abgegrenzt werden können. Polyethnische Rechte sind gruppenspezifische Rechtsansprüche und Programme zur Finanzierung, Anerkennung und Förderung ethnischer, religiöser, linguistischer und anderer Gruppen sowie ihres Beitrags zum Leben der politischen Gemeinschaft.”) (“They relate to groups that cannot be demarcated by settlement territory. Poly-ethnic rights are group-specific legal claims and programs for the finance, recognition, and promotion of ethnic, religious, linguistic, and other groups, along with their contribution to the life of the political community.”).

<sup>62</sup> Waldron, *supra* note 55, at 216; *see also id.* at 213 (“But in the case of a group, self-rule means that individuals in the group *will be ruled* by those who can claim to speak in the name of the group.”).

<sup>63</sup> *Id.* at 220.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Waldron, *supra* note 17, at 88. *See also id.* at 89 (“Even if we criticise a group for its violation of individual dignity, we may still think it important to have regard to its group dignity.”).

<sup>67</sup> Michael Walzer, *What Rights for Illiberal Communities?*, in *FORMS OF JUSTICE: CRITICAL PERSPECTIVES ON DAVID MILLER’S POLITICAL PHILOSOPHY* 123, 129 (Daniel A. Bell & Avner de-Shalit eds., 2003).

[atop the] devotion of many people; third, [although they] are unchosen . . . , [their constituency habitually pledges itself] to them; . . . fourth, [they] embody values that can't be rank ordered on a single scale . . .<sup>68</sup>

Surely, he would commend minorities that, irrespective of the animosity against them, have not succumbed to the hostility invoked, having bypassed it. Anyway, exhortations for them to watch out for it would probably follow.

To boot, his analysis enunciates the previously proffered admonition. It superimposes a pluralist patina:

[As a] crucial [matter,] [we must render] it . . . possible [for those born into these associations] to get out [of them]—. . . to find alternative ones [among them]. [T]his freedom sporadically requires . . . *somewhere* to [transit] to: it [necessitates] a genuine pluralism, a diversity of [them, each] with [associates] engaged, entangled, committed, hard at work.<sup>69</sup>

He extrapolates beyond this superimposition: "Mobility," as a "mark," typifies "a free society" composed of "men" in consort with "women: they move" through numerous of these outfits, "across ethnic, religious, ideological, . . . political frontiers; they experiment with commitment."<sup>70</sup>

Strikingly, he detects civic, democratizing empowerment in this associational configuration: "We learn to be citizens" in a plethora of contrasting collectivities: "neighborhoods, churches, unions," "professional" alliances, "parties," "movements," organizations "for mutual aid."<sup>71</sup> "Social democracy . . . must begin" within these multifarious organs of the third sector, leaning on them.<sup>72</sup> "It is [their] weakness," he forewarns, "not their strength, . . . that threatens our" cooperative existence.<sup>73</sup>

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Jürgen Habermas philosophizes that the worth of such an ensemble transcends that of its affiliates, withstanding any appropriation attempt by them. He spells out this insight: "Individual identity," which "interweaves" with its conjoint cousin, "can only stabilize in a cultural network that one may not misappropriate for oneself, any more than a mother tongue, as a private proprietorship."<sup>74</sup>

Jeremy Waldron would ally himself with this stance. For him,

a [popular] community [rejoices in] a human importance—in terms of culture, [reciprocal identification], destiny—that goes beyond what is severally or

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<sup>68</sup> *Id.* at 129.

<sup>69</sup> Michael Walzer, *Pluralism and Social Democracy*, DISSENT, Winter 1998, at 47-48. *See also id.* at 51 ("The pluralism that supports freedom is constituted by ethnic, cultural, religious, and political traditions and the groups of men and women that sustain them.").

<sup>70</sup> *Id.* at 48.

<sup>71</sup> *Id.* at 51.

<sup>72</sup> *Id.* at 52. *See also id.* at 53 ("Social democracy depends upon the vitality of associational life.").

<sup>73</sup> Michael Walzer, ON TOLERATION 105 (1997).

<sup>74</sup> JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE 258 (1996) ("Die Identität des Einzelnen ist mit kollektiven Identitäten verwoben und kann nur in einem kulturellen Netzwerk stabilisiert werden, das so wenig wie die Muttersprache selbst als ein privater Besitz angeeignet wird.").

cumulatively good for [those] that it comprises. [The significance of it for them] cannot be characterised except [communally]. It [may verge to a] composite [of them] yet [may carry capital weight] in itself.<sup>75</sup>

He documents this decisive detail: “Defenders” of the guaranties under review “are strongly opposed to any individualist reduction that would boil the group’s” postulations “down” to those of its participants.<sup>76</sup> At a certain distance, the skeptic Claus Offe deploys a documentation of his own to an equivalent effect: These safeguards do not come across “as . . . derivative[s] from” those that enable one “to form, join, engage in, identify with,” abandon “associations.”<sup>77</sup>

Eventually, Joseph Raz would himself coalesce with the allies alluded to. Within his valuation, the “tie” of “the individual” with her “collective” lies for sure “at the heart of the case for self-determination.”<sup>78</sup> Despite this surety, he protests, it should not collapse into a ready reductionism: For collectivized “interests” do not “reduce[]” to personalized ones.<sup>79</sup> One may “talk of” a subgroup “prospering” (sporadically “declining”), “of actions,” in lockstep with “policies,” advancing (intermittently harming) its well-being, “without having to cash this in” individualistically.<sup>80</sup> In his construal, the fingered link should not degenerate into a compulsory correlation either: These protracted partnerships “may flourish,” conjointly with their “culture,” without improving “the lot” of their plentiful partners let alone anybody else.<sup>81</sup>

Regardless, he would backstop the welfare of these collectivities, adjudging it focal for that of essentially each member within them: “The right to” self-determine emanates “from the value of membership” in them, as “a collective good.”<sup>82</sup> For him: “It rests on an appreciation” of the substantial import, for humans, of belonging to them, bonding with them, rooting for their “prosperity” with their “self-respect” in tow.<sup>83</sup>

At this juncture, he would advocate mainly but not exclusively independence. One could decode this common cause for him into “the option of fighting politically” for “a political framework exclusive” to, thinkably “dominated by,” the fighters’ camp.<sup>84</sup> He would underscore the non-uniqueness of his advocacy with this pronouncement: A pluralistic setup in which the divergent ensembles “compete” in the “arena” of politics “for” publicly distributable “resources” would wrong no one.<sup>85</sup>

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<sup>75</sup> Waldron, *supra* note 17, at 83.

<sup>76</sup> Waldron, *supra* note 55, at 214.

<sup>77</sup> Claus Offe, *Political Liberalism, Group Rights, and the Politics of Fear and Trust*, 53(3) STUDIES IN EAST EUROPEAN THOUGHT 167, 177 (2001).

<sup>78</sup> RAZ, *supra* note 40, at 115.

<sup>79</sup> *Id.* at 119; *see id.* at 120 (“Group interests are conceptually connected to the interests of their members but such connections are nonreductive and generally indirect.”).

<sup>80</sup> *Id.* at 119.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 126.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 122.

<sup>85</sup> *Id.*; *see* KYMLICKA, *supra* note 36, at 82-83 (“In many cases, political elites and government officials may have hoped and expected that token reforms would be sufficient. . . . However, whatever the original intention of government officials, non-dominant groups have used multicultural reforms as a springboard for negotiating significantly enhanced access to public resources, powers and offices.”).

Under territorialist presuppositions, Allen Buchanan would himself preliminarily check any initiative by these subgroups to secede. One must understand a “state in the context of . . . secession,” he observes, “as a territorially based primary political unit.”<sup>86</sup> Jeremy Waldron would second the observation. He believes that a community can most plausibly determine itself upon displaying viability qua a politically sustainable “entity, which means it must” abide in a discrete territorial tract.<sup>87</sup> For him, it will not count as a “viable” one if considerable “numbers” of its constituents cohabit “permanently dispersed amongst” and commingled with strangers to them.<sup>88</sup> Offe would jump in to round off a communing threesome. He submits this conviction: A candidate for a separatist breakaway must sit on “a fixed *territory* . . . populated by” a precise populace, ruled by an acknowledged “government,” “a *sovereignty*.”<sup>89</sup>

Cardinally, Iris Young warns that sheerly within a problematic “paradigm . . . that mirrors” the extant traditional “sovereign” must a “people dwell[]” within a fairly “large,” contiguous, bounded “territory,” self-ruling imperviously.<sup>90</sup> This “non-interference model,” she intimates, “makes a strong distinction” of the inside from the outside.<sup>91</sup> The self-determinative group” lastingly lodges itself in “a single territorial jurisdiction over which self-governing” schemes possess “sole authority.”<sup>92</sup>

Of course, she models alternately, suggesting that “self-determination” refers to the entitlement of a polity to its “own governance” regimens “through which” it decides on its ends, interpreting its “way of life”<sup>93</sup> into “nondomination,”<sup>94</sup> interrelationship,<sup>95</sup> mutualism,<sup>96</sup> deferential cooperativity,<sup>97</sup> unitary agenting.<sup>98</sup> “Because [it] stands in [an]

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<sup>86</sup> ALLEN E. BUCHANAN, *Self Determination and Secession*, in JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 331, 337 (2004).

<sup>87</sup> Waldron, *supra* note 55, at 212.

<sup>88</sup> *Id.*

<sup>89</sup> Offe, *supra* note 31, at 26 (“Zunächst einmal bedeutet ein ‘Staat’ bekanntlich das Zusammentreffen von drei Dingen: Erstens bezieht sich der Begriff des Staates (oder des ‘Landes’) auf ein fest gelegtes *Territorium*. . . . Zweitens setzt der Begriff des Staates voraus, daß das Territorium von einem *Volk* bewohnt wird. . . . Drittens schließt der Begriff des Staates eine anerkannte Regierung oder eine *souveräne* Autorität ein.”). *See also* Offe, *supra* note 77, at 170-71.

<sup>90</sup> Young, *supra* note 39, at 139.

<sup>91</sup> *Id.* at 144.

<sup>92</sup> *Id.*

<sup>93</sup> YOUNG, *supra* note 37, at 50.

<sup>94</sup> *Id.* (“Their claims for self-determination, I suggest, are better understood as a quest for an institutional context of nondomination.”); *id.* at 52-53 (“Applying a principle of self-determination as nondomination to existing states, then, as well as to peoples not currently organized as states, has profound implications for the freedom of the former. States ought not to have rights to interfere arbitrarily in the activities of those peoples in relation to whom they claim special jurisdictional relation.”); *id.* at 56-57 (“If we give priority to a principle of nondomination, however, then it should also apply to the relation between a group and its members.”).

<sup>95</sup> Young, *supra* note 39, at 140 (“Principles of non-domination imply relationships between self-determining units and the joint regulation of such relationships.”).

<sup>96</sup> *Id.* at 146 (“I propose a different model of self-determination, one that puts the objective of mutual respect and the avoidance of domination more at the center.”).

<sup>97</sup> *Id.* (“Self-determination means autonomy: the self-determining entity should be able to set its own ends and be able to act toward their realization, within the limits of respect for, and cooperation with, other agents with whom one interacts and with whom one stands in relation”).

<sup>98</sup> YOUNG, *supra* note 37, at 50 (“Insofar as a collective has a set of institutions through which that people make decisions and implement them, then the group sometimes expresses unity in the sense of agency.”); *cf. id.*

interdependent relation[] with others,” she postulates, it “cannot ignore” the contentions-cum-concerns that they might voice “when [its] actions potentially affect them,”<sup>99</sup> on pain of suspension of its relative imperviousness.<sup>100</sup>

One might posit an interdependence embedded in inextricable interconnections with—behind its charges toward—dwellers within, spasmodically those who reside without, it. It may not treat these at its pleasure, mistreating them in the main. On the contrary, they may pressure it to honor its responsibilities to them. Under this sensible pressure, it may act autonomously, battling heteronomy infused by domination over it. Ultimately, its domain might grow in extension diffusely, complicating a campaign for secessionist liberation.

Searching for alternates to separatism, Buchanan surveys the “diverse legitimate interests” furthered “by a correspondingly broad range of intra-state autonomy” assemblages.<sup>101</sup> With “innate minorities” in mind, Habermas relatedly ruminates about their:

assorted paths to the precarious goal of [their] “difference-sensitive” inclusion: [from] the federalist partition of power; [through] a functional transfer, [upon a] decentralization, of . . . competences; [to], above all, the concession of [their own culturally autonomous area], guaranties [tailored to them], equalization policies, [plus] other arrangements for [their] effective . . . protection.<sup>102</sup>

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(“Any collection of people that constitutes itself as a political community must worry about how to respond to conflict and dissent within the community, and whether the decisions and actions carried out in the name of a group can be said to *belong* to the group.”).

<sup>99</sup> *Id.* at 51; *see id.* (“In a densely interdependent world, peoples require political institutions that lay down procedures for coordinating action, resolving conflicts, and negotiating relationships.”); *id.* at 57 (“A relational concept of self-determination for peoples does not entail that members of the group can do anything they want to other members without interference from those outside.”).

<sup>100</sup> Young, *supra* note 39, at 146 (“The prima facie principle of non-interference in the internal jurisdiction of a self-determining unit may be suspended, then, in order that the common decisions of units be enacted to prevent domination by one of the units of another. Non-interference is also suspended, moreover, in order to prevent some members of a self-determining unit from dominating members internally.”).

<sup>101</sup> BUCHANAN, *supra* note 86, at 343 (citation omitted); *see also id.* at 373 (“Short of independent statehood there is a broad range of self-determination arrangements, with varying degrees and dimensions of autonomy within the state.”); *id.* (“[I]nternational law . . . can support a variety of intrastate autonomy arrangements, including those tailored to the needs of national minorities . . .”). This autonomism would culminate in a multinational democracy, to which the author assigns the elimination of “the more obvious sources of discontent among national minorities within states.” *Id.* at 392; *see also id.* (“Before scrapping the idea of multinational democracies as unworkable, much more should be done to eliminate the more obvious sources of discontent among national minorities within states. This means working harder to eradicate legal and extra-legal discrimination against minorities in education, employment, health care, and access to the benefits of the legal system. It also means reducing, as far as possible, the culturally exclusive aspects of state policy and public life (enabling the use of minority languages in legal proceedings and legislative processes, and the removal of culturally exclusive symbols from public spaces, etc.).”).

<sup>102</sup> HABERMAS, *supra* note 74, at 174 (“Das Problem ‘geborene’ Minderheiten . . . verschärft sich in multikulturellen Gesellschaften. [Es] bieten sich immerhin verschiedene Wege zum prekären Ziel einer ‘differenzempfindlichen’ Inklusion an: die föderalistische Gewaltenteilung, eine funktional spezifizierte Übertragung bzw. Dezentralisierung von staatlichen Kompetenzen, vor allem die Gewährung kultureller Autonomie, gruppenspezifische Rechten, Politiken der Gleichstellung und andere Arrangements für einen effektiven Minderheitenschutz.”). Buchanan bifurcates these paths into cultural and political, which comprise, respectively, the practice “of peoples” of “their own cultural or religious rituals” or “state support for teaching and preserving their own language,” on the one hand, and “self-government” or the procurement of “tax revenues,” on the other. Allen E. Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 54

At this crossroad, Joseph Raz might announce: "Nothing in the above presupposes that groups of the kind we are exploring" concentrate on the ground, with singularly "their" clientage as the "inhabitant[]" of their "region."<sup>103</sup>

Michael Walzer might himself sanction this openness comparably. To him, self-determining "implies the need for a piece of territory," otherwise, "at least a set of independent institutions."<sup>104</sup> With the disjunctively appended phrase, he might be discreetly waving through post-territorial possibilities from the outset.

After an opening stopover, Offe might situate himself in concurrence. By default, he would apply his territorialism to autonomism. For him: "Prerogatives to administer autonomously a terrain hold only in a multinational society."<sup>105</sup> Manifestly, he informs his readership, "they enjoy a limited scope."<sup>106</sup> For starters, their unambiguous applicability hinges on the "beneficiary (ethnic, linguistic, religious, . . .)" collectivity's constitution of "a regionally 'structural' majority" in "limitable" interior zones upon its settlement "there."<sup>107</sup> "The self-government mechanism," he assures, "does not work in diaspora" scenarios.<sup>108</sup>

Under his inspiration, a scattered subgroup might exceptionally "think of a . . . virtual," "nonterritorial federalism," under which its strewn affiliates could institute "an elected body for themselves"; alternatively, a combined "legislative assembly."<sup>109</sup> Through this unconventional route, it might regain its bearings, atop its feeling of belonging, to grapple with its organizational problems. Identically inspired, its directive agents might reckon: "Federalization" cannot represent in itself a practicable "prescription" amid deep division. They might deduce that it can facilitate "stability" solely in the absence of dire divisiveness.<sup>110</sup>

In parallel, Waldron notes that even inlanders living "interspersed . . . with" outlanders may assert "a right to" their cumulated cultural legacies.<sup>111</sup> Tentatively, he might depict these, which could conceivably counterweigh the drawbacks of diffusion, as "(something like) an enduring" display of societal "practices, subsisting" qua a mode of existence.<sup>112</sup> His apposite article adds: "Culture requires social space, institutional settings, for its enactment" in combination with its "reproduction."<sup>113</sup>

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(1995) ("Minority cultural rights include the rights of peoples . . . to practise their own cultural or religious rituals, as well as the right to state support for teaching and preserving their own language.") (Thus, "political rights . . . include . . . rights of self-government, including . . . rights to raise and disburse tax revenues.").

<sup>103</sup> RAZ, *supra* note 40, at 115.

<sup>104</sup> WALZER, *supra* note 73, at 85.

<sup>105</sup> Offe, *supra* note 31, at 33 ("Autonomierechte auf begrenzte Selbstverwaltung gibt es nur in multinationalen Gesellschaften.").

<sup>106</sup> *Id.* ("Aber ihre Möglichkeiten sind begrenzt").

<sup>107</sup> *Id.* ("Erstens sind sie nur dann eindeutig anwendbar, wenn die fraglichen ethnischen, linguistischen, religiösen usw. Gruppen in abgrenzbaren Sub-Territorien siedeln und dort regional 'strukturelle' Mehrheiten stellen.").

<sup>108</sup> *Id.* ("Der Mechanismus der Selbstregierung funktioniert nicht in Situationen der Diaspora . . .").

<sup>109</sup> Offe, *supra* note 77, at 180.

<sup>110</sup> *Id.* at 181.

<sup>111</sup> Waldron, *supra* note 55, at 215.

<sup>112</sup> *Id.* at 219.

<sup>113</sup> Walzer, *supra* note 36, at 93.

At the close of the day, the entitlements at issue might permit minorities to have themselves *recognized*, in the signification of this verb crafted by Georg Hegel,<sup>114</sup> introduced to philosophically analytical deliberation by Isaiah Berlin,<sup>115</sup> popularized in North America by Charles Taylor.<sup>116</sup> This popularizer expounds the concept:

The recognition . . . here [denotes] the acceptance of ourselves . . . in our identity. [One] may . . . “recognize[]” [us uniquely] in other senses—for example, as [equally standing] citizens, . . . right bearers, [compatriots] entitled to . . . service—[leaving us] still unrecognized in [our interior. What matters] to us in defining [ourselves] may [anchor] quite unacknowledged, . . . condemned in the public life . . . , though [one firmly guarantees] all our [civic prerogatives].<sup>117</sup>

He hypothesizes that this nonrecognition may “partly” shape our self.<sup>118</sup> Per this hypothesis, we can undergo “real damage” bordering on deformation whenever “the . . . society around” us reflects “back . . . a confining,” “demeaning,” “contemptible picture of” us.<sup>119</sup>

Michael Walzer showcases the dialectical dimension at base. In his estimation, these collectives “need a place in the world.”<sup>120</sup> They beg for a juridical persona, an institutionalized projection, wherewithal, considerate cohabitation with those “similarly

<sup>114</sup> See, e.g., GEORG W.F. HEGEL, PHÄNOMENOLOGIE DES GEISTES (1807), reprinted in 3 GEORG W.F. HEGEL, WERKE 1, 145 (Suhrkamp 1986) (“Das Selbstbewußtsein ist *an* und *für* sich, indem und dadurch, daß es für ein anderes *an* und *für* sich ist; d.h. es ist nur als ein Anerkanntes.”); see also Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM AND “THE POLITICS OF RECOGNITION” 25, 26 (1992) (“Hegel comes to mind right off, with his famous dialectic of the master and the slave.”); *id.* at 35-36 (“But the topic of recognition is given its most influential early treatment in Hegel.”); *id.* at 50 (“Hegel . . . takes it as fundamental that we can flourish only to the extent that we are recognized.”).

<sup>115</sup> See, e.g., Isaiah Berlin, FOUR ESSAYS ON LIBERTY 157-58 (1969) (“I may feel unfree in the sense of not being recognized as a self-governing individual human being; but I may feel it also as a member of an unrecognized or insufficiently respected group . . .”).

<sup>116</sup> See, e.g., Taylor, *supra* note 114, at 25 (“A NUMBER of strands in contemporary politics turn on the need, sometimes the demand, for *recognition*.”). See also Walzer, *supra* note 36, at 88 (“[The] most insistent demand [of groups in multicultural America] is for acknowledgment and respect. In contemporary multiculturalism the politics of interest is replaced or superseded by a politics of identity, where it is not the material condition of a group that is at issue but the value of a culture, history, or way of life.”); HABERMAS, *supra* note 74, at 239 (“Auf [die] Frage [der Anerkennung] gibt Charles Taylor eine differenzierte Antwort, die die Diskussion einen großen Schritt weiterführt.”); WILL KYMLICKA, *The Forms of Liberal Multiculturalism* (Ch. 3), in MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY 61, 66 (2005) (“The [multicultural] state accepts an obligation to accord recognition and accommodation to the history, language, and culture of non-dominant groups, as it does for the dominant group.”).

<sup>117</sup> CHARLES TAYLOR, RECONCILING THE SOLITUDES 190 (1993). See also *id.* at 48, 52, 58, 142-43, 162, 169, 188 & 190-96.

<sup>118</sup> Taylor, *supra* note 114, at 25.

<sup>119</sup> *Id.* at 25; see also *id.* at 26 (“Within these perspectives, misrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need.”).

<sup>120</sup> Walzer, *supra* note 36, at 90.



'placed,' roughly equal to themselves."<sup>121</sup> Their "necessary" "others . . . must," qua recognizers, "respect[]" them to the bone.<sup>122</sup> They "will want" reciprocity "in turn."<sup>123</sup>

Apparently, pressing for a guaranty to difference in these fights pushes the appeal for parity to its ultimate consequences. Strictly speaking, one could not treat somebody equally without accommodating her particularity. The minimal validation of her as an equal in worthiness (echoing dignity) would be lacking.

At this junction, the last quoted commentator would chorus: "The only satisfactory basis" for this system "of mutual respect" springs from "equality . . . of standing" together with "presence."<sup>124</sup> With a steady focus on unrecognition, Taylor would remark in synchrony:

When this [style] of denial [occurs] in the eyes of [the allegedly disrespected community,] the members [can hardly] feel that they are really [receiving] a . . . hearing. [A] prolonged refusal . . . can erode the common understanding of equal participation on which [an operative] liberal democracy crucially depends.<sup>125</sup>

Shifting back to the positive phase of the phenomenon, Jürgen Habermas would harmonize: The "democratic" substantiation of ineluctably equalizing entitlements "can also extend to safeguarding an egalitarian coexistence" for the "diverging ethnic" ensembles in the company of "their vital . . . formations."<sup>126</sup>

Under the prevalent pattern critically outlined by Will Kymlicka, the original nation-state did not endorse this egalitarianism. It envisioned itself "implicitly (. . . sometimes explicitly)" as an edifice kept under the ownership of "dominant national" collectivities, "which used [it] to privilege" their idiosyncratic self-perception, "language, history, culture, literature, myths, religion," transforming it into expressions of their own "nationhood."<sup>127</sup> Within these outlines of it: "Anyone who did not belong to [it] was subject to . . . [1]

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<sup>121</sup> *Id.* at 90-91.

<sup>122</sup> *Id.* at 91.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> TAYLOR, *supra* note 117, at 190.

<sup>126</sup> HABERMAS, *supra* note 74, at 257-58 ("Dann kann sich der demokratische Prozeß der Verwirklichung gleicher subjektiver Rechte auch auf die Gewährleistung der gleichberechtigten Koexistenz verschiedener ethnischer Gruppen und ihrer kulturellen Lebensformen erstrecken.").

<sup>127</sup> KYMLICKA, *supra* note 116, at 61; see WALZER, *supra* note 73, at 55 (1997) ("In nation-states, power rests with the majority nation, which uses the state . . . for its own purposes."); *id.* at 78 ("In nation-states, the stories and celebrations will . . . come out of, and teach the value of, the historical experience of the majority nation."); Will Kymlicka, *Neo-liberal Multiculturalism?* (Ch. 3), in *SOCIAL RESILIENCE IN THE NEOLIBERAL ERA* 99, 104 (Peter A. Hall, Michèle Lamont, eds. 2013) ("In the past, it was widely assumed that the only way to engage in [the] process of citizenization was to impose a single undifferentiated model of citizenship on all individuals."); *cf. id.* ("But multiculturalism starts from the assumption that [the] complex history [of citizenization] inevitably generates group-differentiated ethnopolitical claims—that is, claims for [multicultural policies], and not just for anti-discrimination."); *id.* at 115 ("[Resilience may take] the form of either blocking neoliberal reforms from taking place (the first form of resilience) or capturing and subverting neoliberal reforms when they do take place (the second form). . . . But there is a third form of resilience in which minority ethnic actors embrace the logic of global competitiveness, and integrate this with their earlier commitments to democratic citizenization."); *id.* at 118 ("This suggests that multiculturalism is most effective when it attends both to people's citizenship status and to their market status.").

assimilation,” in extremis “[2] exclusion.”<sup>128</sup> The former, like the latter, has transpired imperceptibly. After all: “Nation-building policies have become” such a “pervasive” facet of modernity “that most people scarcely . . . notice them.”<sup>129</sup>

Jürgen Habermas debates less diplomatically: “Normally,” these nationally governing instrumentalities

do not develop peacefully from isolated . . . ethnicities[, encroaching instead] upon adjacent localities, tribes, subcultures, linguistic [besides] religious collectives. Mostly, they rise at the expense of assimilated, [exploited], . . . marginalized subjugated populations. Almost always, ethnocentrically premised nationalization has coincided with bloody purification rituals, subjecting [newly overtaken outnumbered ensembles] to new repressions.<sup>130</sup>

Concomitantly, he diagnoses a currently ecumenical challenge: “The contests in which undervalued minorities culturally defend themselves against an insensitive majority stem not from the ethical neutrality of the legal order but rather from the inevitable impregnation with ethicality of any law-upholding community,” already in its democratically bottomed realization of foundational guaranties.<sup>131</sup> Accordingly, the leadership unleashes this contestation upon ethically effectuating these commitments. It does not spark if off by remaining neutral about the populace’s ethos.

A polity might unknowingly sideline its “unrecognizable” outcasts upon not completely comprehending the equity mandate upon it to afford them elbow room to power their divergence. Parallely, it might vouchsafe them an assortment of safeguards—for uninhibited discourse, unconstrained conscience, universal franchise, a fair trial—yet appreciate neither their unique prism nor the need to award them extraordinary licenses to foster their prismatic uniqueness. The helmspersons might conjecture that this appreciation would clash with the precept of fairness. They might prioritize impartiality, rejecting any affirmative consideration toward those sensed as interlopers.

Charles Taylor might favor this characterization of the conflict in Canada. He hints at a reinterpretation of Anglo-American liberalism to allow the chiefly impartial administration in Quebec to safeguard ethnically cultural manifestations in peril within its purview, carving

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<sup>128</sup> KYMLICKA, *supra* note 116, at 61-62. *See also* WALZER, *supra* note 73, at 55 (“But minority groups are unequal by virtue of their numbers and will be democratically overruled on most matters of public culture.”).

<sup>129</sup> KYMLICKA, *supra* note 116, at 64.

<sup>130</sup> HABERMAS, *supra* note 74, at 169-70 (“Aber in der Regel entwickeln sich Nationalstaaten nicht auf friedliche Weise aus einzelnen isoliert lebenden Ethnien, sondern greifen auf benachbarte Regionen, Stämmen, Subkulturen, Sprach- und Religionsgemeinschaften über. Neue Nationalstaaten entstehen meistens auf Kosten assimilierter, unterdrückter oder marginalisierter ‘Untervölker.’ Die unter ethnonationalen Vorzeichen stehende Nationalbildung war fast immer von blutigen Reinigungsritualen begleitet und hat stets neue Minoritäten neuen Repressionen unterworfen.”).

<sup>131</sup> *Id.* at 255 (“Auslöser [der Kulturkämpfe, in denen sich mißachtete Minoritäten gegen eine unempfindliche Mehrheitskultur zur Wehr setzen,] ist nicht die ethische Neutralität der staatlichen Rechtsordnung, sondern die unvermeidliche ethische Imprägnierung jeder Rechtsgemeinschaft und jedes demokratischen Prozesses der Verwirklichung von Grundrechten.”).

out exceptions for itself. Thus invested, it may *inter alia* legitimately prescribe teaching Franco-Canadian youngsters, next to their immigrant schoolmates, in French.<sup>132</sup>

From his standpoint, administrators may likewise mandate the utilization of this tongue within sizable firms and on “commercial signs,”<sup>133</sup> stimulating immigration from the Francophonie in concert. Ostensibly, they may *not* police personal conversations or refuse to gird an anglophone criminal defendant with an interpretation to contest the accusation against her. Their entire endeavor might orient itself with his dichotomy positioning “fundamental,” unassailably entrenched, inviolable “liberties” against important “privileges . . . that,” like their correspondent “immunities,” one “can . . . restrict[,]” even “revoke[,]” for robust “reasons of . . . policy.”<sup>134</sup>

Globally, he maintains as the underlying ambition that to have, past local “francophones” served in their idiom, their kind survive into “the next generation,” hopefully beyond it.<sup>135</sup> From his viewpoint, a liberalist polis “can” organize itself “around” definitions “of the good life, without” seeing this “as a depreciation” of anybody “who” does “not . . . share” them.<sup>136</sup> Pursuant “to this conception,” it can “single itself out as such,” aside from them, at large through its treatment of a minority that does not subscribe to them, “above all by the rights it accords” everybody.<sup>137</sup>

Presumably, these subgroups profit from no survival insurance. They cannot have themselves preserved qua an endangered fauna. Walzer opines that one “would have to curtail” the freedoms of individualism for such a preservation.<sup>138</sup> Pertinently, Will Kymlicka would label the membership’s unwillingness to conserve, toward promoting, its immaterial

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<sup>132</sup> See Taylor, *supra* note 114, at 52 (“One [law] regulates who can send their children to English-language schools (not francophones or immigrants) . . .”). See also *id.* at 55 (“Thus the schooling provisions of Law 101 forbid (roughly speaking) francophones and immigrants to send their children to English-language schools, but allow Canadian anglophones to do so.”); TAYLOR, *supra* note 117, at 165-66 (“Indeed, pursuing [the objective of preserving the French language] may even involve reducing their individual choice, as Bill 101 does in Quebec, where francophone parents must send their children to French-language schools.”).

<sup>133</sup> Taylor, *supra* note 114, at 52-53.

<sup>134</sup> *Id.* at 59.

<sup>135</sup> TAYLOR, *supra* note 117, at 165. See also *id.* at 176 (“Quebec has a strong sense of national identity . . . that is under threat. Because of this threat, the preservation and health of this language will always be one of the major national goals of French-speaking Canadians.”); Taylor, *supra* note 114, at 58 (“It is axiomatic for Quebec governments that the survival and flourishing of French culture in Quebec is a good . . . It is not just a matter of having the French language available for those who might choose it. . . . But it also involves making sure that there is a community of people here in the future that will want to avail itself of the opportunity to use the French language.”); WALZER, *supra* note 73, at 44 (“For the Québécois, what is most important is to live in French—to sustain the language that is now their chief distinguishing mark.”); *id.* at 46 (“The Québécois claim that without sufficient authority to enforce the everyday use of French, they will soon find themselves, given current rates of immigration and the pressure of English speakers in Canada as a whole, unable to sustain French as a public language.”).

<sup>136</sup> Taylor, *supra* note 114, at 59.

<sup>137</sup> *Id.*; see also *id.* (“A society with strong collective goals can be liberal, on this view, provided it is also capable of respecting diversity, especially when dealing with those who do not share its common goals; and provided it can offer adequate safeguards for fundamental rights.”); see also Offe, *supra* note 31, at 43 (“Vom Standpunkt der Mehrheit, von der gefordert wird, Gruppenrechte zu gewähren, hängt alles davon ab, wie hoch sie ‘Vielfalt’ bewertet.”) (“[For] the majority called upon to grant group rights, all depends on how much it values ‘diversity.’”).

<sup>138</sup> Michael Walzer, *Comment, in* Multiculturalism and “The Politics of Recognition” 99, 103 (1992).

inheritances (from customs to wisdoms), jointly with their disappearance for lack of subsidization, as an “unfortunate” albeit not “unfair” denouement.<sup>139</sup>

Habermas professes a perspicuous persuasion on point:

One may not transfer the ecological outlook of the conservation of species to cultures. The traditions of these [underneath] the existential forms articulated within them, typically reproduce themselves by *persuading* anyone who might embrace them, imprinting them on her personality structure. They must motivate her to appropriate them productively to cultivate them.<sup>140</sup>

His statement rings true at least recast into this conditional sentence: If the potential participants do not care about their culturally constructed heritage, disowning it substantially, it will irremediably perish in the teeth of the administrative apparatus’s countermeasures.<sup>141</sup>

Indeed, these official exertions might contextually discredit themselves as hopeless, antidemocratic interferences. On the flip side of the coin, they might justifiably help solve a collective-action quandary. Illustratively, innumerable Quebecker parents might overwhelmingly aspire to have their schoolchild instructed in the vernacular for fluency in it, with the proviso that its thriving flip from doubtful to feasible. Without this feasibility, they might fear this instruction could corner her in a blind alley.

At this stage, (particularly parental) voters might pick an executive that compelled them to enroll their progeny in schools with vernacularized instructional offerings. Through this authoritative compulsion, they might overcome their mistrust of their electoral comrades, their own *akrasia* (to wit, weakness of will), in tandem with the resultant attraction of schooling in the Canadian lingua franca. The constraint imposed from above would operate as a facilitator, not an enemy, of democracy. Taylor reasons analogously: “Where the nature of the good requires it be sought in common,” it may sensibly preoccupy the citizenry, galvanizing it.<sup>142</sup>

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Immersed in their thickness for an interfusion with policy, *rights* credited to a group, denominated as such, might pretend to legitimacy. On account of their judiciability, they might deserve their denomination. Straightaway, one could dovetail them with any other that likewise aids in the securement of a just citizenship, to familiarize them.

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<sup>139</sup> See Kymlicka, *supra* note 127, at 107.

<sup>140</sup> HABERMAS, *supra* note 74, at 259 (“Der ökologische Gesichtspunkt der Konservierung von Arten läßt sich nicht auf Kulturen übertragen. Kulturelle Überlieferungen und die in ihnen artikulierten Lebensformen reproduzieren sich normalerweise dadurch, daß sie diejenigen, die sie ergreifen und in ihren Persönlichkeitsstrukturen prägen, von sich *überzeugen*, d.h. zur produktiven Aneignung und Fortführung motivieren.”). See also Kymlicka, *supra* note 127, at 107 (“On [the liberal] view, giving political recognition or support to particular cultural practices or associations is unnecessary . . . because a valuable way of life will have not difficulty attracting adherents.”); WALZER, *supra* note 73, at 27 (“As internal controls weaken, minorities can hold their members only if their doctrines are persuasive, their culture attractive, their organizations serviceable, and their sense of membership liberal and latitudinarian.”).

<sup>141</sup> Cf. RAZ, *supra* note 7, at 174 (“Of course multiculturalism changes the prospects of survival for cultures it supports. . . . But it recognizes that deliberate public policies can serve a useful purpose only if they find response in the population they are meant to serve.”).

<sup>142</sup> Taylor, *supra* note 114, at 59.

Pluralized to the gills, they might not disintegrate into their singularized correlates. When foisted upon them, this disintegration might deform them. Palpably, they might *not* strike one as superfluous constructs.

Through their multifariousness, divisibility, and overlap, the discussed collective holders might signal their richness, not their unviability. Advisedly, they should refrain from blocking a dissident, notably a female one, attempting to flee them. At bottom, the fluidity between them might reinforce societal pluralization, which might support their shelter in return.

Beyond this reinforcement, they might bolster the overarching society, transmuting it into participatory to the full. Characteristically, engagement in it passes through them. Further, they might individually, collectively redound to the profit of their clientele, centering, enriching it. Through them, it may determine itself.

Upon a respectable amount of geographical concentration, they may strive to secede. In the alternative, their journey may transport them barely to an autonomous, perchance virtually erected, integration. Significantly, they might accomplish recognition. This accomplishment might clear the road from civic to economic equality for them.

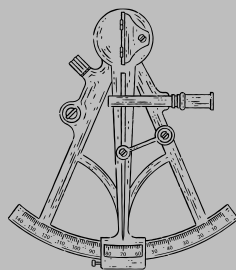
In this vein, they might effectively gainsay an overbearing national state. Their opposition to it might zero in on shoring up their culture as an intrinsically vibrant, extrinsically imperiled lifeline, not a fragile zoology. Thereby, they would be devoting themselves to democratized self-protection, forbearing any paternalistic condescension toward their clients.



COMMENTS, BOOK PRESENTATION: *THROUGH THIN AND THICK*

*Ángel R. Oquendo\**

*With comments by Carrie-Menkel Meadow and Daniel Markovits*



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INTERNATIONAL LAW

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## I

In earnest, I would like to thank everybody: from our speakers through our dear moderator to the audience. Invariably, our calendars seem the busiest on Friday afternoon. They burst with inexorable engagements.

If you had to rush through lunch, don't fret. This event will serve as a dessert after your meal. It'll soothe your stomach until the evening.

Minutes ago, we tweaked the schedule, flipping it. Before these tweaks, it had slated me to pronounce myself last. After them, I will have to start, extemporizing an overview from the lectern, unfortunately without the pointers (in consort with the extra time) that would have accrued to me during the other staged interventions.

Our discussants will be regaling us with these after mine. With any luck, they may have foreshadowed them in their generous blurbs. To cap off, you will be querying us from the microphone before me, stimulating us to a reassessment. Overall, this feedback will attract notice from me. It might afford me lifesaving redemption.

Apropos, I'm remembering a joke. It centers on a believer in God above everything. She resides in a small town. Out of the blue, the municipal authorities announce an impending hurricane.

In reply, she sits in a rocking chair on her porch, sipping from a lemonade. A neighbor swings by. He yells his lungs out at her: "Have you not heard the news?"

She answers back: "Yes, at full voice. Tut! Who cares? Having lived true to my faith, I will not worry. The Almighty will watch over me." In utter disbelief, he decamps.

After his decampment, the storm hits. Without delay, it metastasizes into a wicked windstorm. In replication, the municipality sends out trucks to evacuate its electorate. It orders them to leave no rock unturned.

They drive by, urging the character to join the townsfolk saved before her. She rejoins: "My salvation will descend from the Savior Himself. You can depart without me."

After the mean winds, the rain pours in vast quantities. It rises at maximum speed around her. In the aftermath, a boat navigates by. It halts before her.

The navigator bellows: "We'll be rescuing you, boss." His interlocutor retorts: "My rescue will fall from above. Farewell!" After restating his announcement in vain, he heads off.

The waterline soars nonstop. It reaches the height of her neck. At that moment, a helicopter flies over her. It drops a rope ladder exhorting her to climb up. She declines the exhortation. After her reiterated declinations, the chopper fades.

The rainwater surges further around her. With this surge, it eventually drowns her. Surprising nobody, she lands in heaven off the bat.

Upon her landing, the Lord receives a request from her for a meeting. With infinite patience, He obliges, to humor her. From the threshold of His headquarters, she hollers: "After those endless years of piety, you brewed a biblical tempest, forsaking me in full."

He replies: "What do you mean? I dispatched immediate assistance by land, water, air. Have you lost your mind? You ingrate!"

I may have encountered a similar situation. It may constrain me to listen with utmost care to your forthcoming offers of help. I ought neither to neglect them nor to scare them away. They might bring me my deliverance.

Upon this hope, my warm-up will exert itself to move you to a conversation with me. It will react against an anecdote about Spanish writer Francisco Umbral.

A television show had summoned him upon the appearance in print of his chronicle about the socialists' reign in his homeland from 1982 to 1992.<sup>1</sup> After a long chitchat among his fellow guests, he stood up shouting: "I've come to talk about my book!"<sup>2</sup>

In contraposition, I have not arrived before you to chat about mine.<sup>3</sup> Ideally, mine will just operate as a pretext for a casual consultation around our common intellectual fervors. It will linger behind the scenes. Before it, I will disclose a few promotional annotations solicited by the publisher, refashioning them to the hilt. They will follow this prefatory profession, suffer an interjection, spark off a reflection.

One might best expound my volume through my modus of composition. In essence, I was attempting to figure out the unfoldment of adjudication in this area. My attempt feeds off my incursions into internationalized litigation in local besides transnational forums. It deploys the tools of philosophy to decipher the dynamics inside. With meticulousity, I looked at the interaction of preceptive with politicized elements.

### SUMMARY

The publication launches from examples, concrete cases, globalized confrontations, to elucidate how to conceive the safeguards at stake. It portrays these as constructs embodying principles requiring particular actions together with the articulation of policies. For instance, free speech demands tolerating seemingly offensive expression plus promoting a robust give-and-take within the demos.

Then, the text scrutinizes specific guaranties, like those pertaining to asylum, citizenship, abortion, due process, self-determination, environment. It presents them as inducers of problems peculiar to them. Next, the discussion evaluates the evoked intrinsic tenets upon contingently clashing despite their overall commensurability: human rights against democracy at the forefront. Finally, it underscores the correspondent interconnections of negative, substantive, and national entitlements with another trio ranging from positive through procedural to international specimens.

From the onset, ruminations on these questions unfold: May judges contribute in lockstep with governments to actualizing these liberties? Do these bear upon solidarism, acquitting themselves as authentic liberators? May leaders opposed in ideology nonetheless collaborate on them?

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<sup>1</sup> FRANCISCO UMBRAL, *LA DÉCADA ROJA* (1993).

<sup>2</sup> Julio Llamazares, *Hablar de tu libro*, EL PAÍS, Nov. 27, 2020, 6:30 PM, <https://elpais.com/opinion/2020-11-27/hablar-de-tu-libro.html> ("¡Yo he venido a hablar de mi libro!").

<sup>3</sup> See ÁNGEL R. OQUENDO, *THROUGH THIN AND THICK: FROM HUMAN-RIGHTS PRINCIPLES TO POLITICS ACROSS THE AMERICAS AND BEYOND* (2022).

### INTERJECTIONAL INTERLUDE

In truth, the partial list could masquerade as a cryptic poem. It breaks down into these parts: “Conception,” “Concretion,” “Confliction,” “Connection.”<sup>4</sup> On afterthought, they might smack of those of a self-help manual.

#### ASPIRATIONS TO:

Reformulate the Relationship of Norms to Policymaking, Within the Commitments Under Scrutiny

Explicate the Respective Roles of the Judiciary, Legislature, Executive in Implementing These Judicable Undertakings

Reflect on the Bearing of These upon Social Justice

Ponder a Scenario Encapsulating Ideologically Adverse Nations in Collaboration on Them

#### HOOK

The work explains that these protections can boil down to a principled matter, calling for effectuation through administrative programs.

#### DESCRIPTION

It addresses anybody interested in these rights—qua professor, student, actor, analyst, concerned layperson—whether from a politically scientific, sociological, historical, journalistic, anthropological, humanitarian perspective. She will appreciate the path provided to think clearly about these justiciable promises.

#### FEATURES/BENEFITS

Explores legal along with philosophical topics touching upon the considered redeemable securements. Enables grappling with these twinned topical sets, envisaging their interrelationship.

Shows prohibitive, material, and domestic guaranties correspondingly interacting with an obverse threesome comprising from affirmative through adjective to supranational ones. Allows assuming a consolidative versus a compartmentalized approach to these attributions.

Demonstrates that political precepts, those behind democratized majoritarianism or the safekeeping against its excesses in particular, may conflict before a contingency. Assists in understanding how one may respond to these conflicts.

#### REFLECTIVE POSTLUDE

The quarrel within the Inter-American System during the 2010s kicked off the preliminary ponderations.<sup>5</sup> It triggered ongoing aftershocks. Within it, several systemic adherents—most conspicuously the Venezuelan, Ecuadorian, Bolivian, Nicaraguan bloc—fiercely attacked the main organs, namely, the Commission with the Court in tow. They chastised each for overstepping its bounds, questioning its legitimacy.

I probe into these transcontinental challenges, discarding the perception of outraged sovereign privileges combined with that of erroneous decision-making as their origin, construing them into an attractive yet partly problematic call for the politicization of the entitlements under inspection.<sup>6</sup> According to the undergirding appeal, internationally instated decision-makers should largely defer to a governmental defendant, especially one

<sup>4</sup>See *id.* at v-vi. (“Contents”).

<sup>5</sup>See *id.* at 8; *id.* at 9-84 (Part I) (“Conception”).

<sup>6</sup>See *id.* at 18-40 (Chapters 2-4).

with a broader project of emancipation.<sup>7</sup> From my proposed vantage, they should probably grant discretion on programmatic implementation, monitoring for disfunctions (from arbitrariness to abandonment), exactingly enforcing compulsory comportments alongside abstentions.

Afterward, the inquest assesses the assertion.<sup>8</sup> It refuses to associate the examined judiciable pledges exclusively with their corresponding normative component, recognizing their cardinal though not exhaustive politic phase.<sup>9</sup> After underlining the significance of principle in the company of policy, the contemplative investigation contends that officials deserve deference with respect to the latter but far less than the dissidents seek.<sup>10</sup> It spells out the contention by parsing the exercise of expressive in tandem with healthcare freedoms throughout a series of concretized controversies.<sup>11</sup>

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**THROUGH THIN AND THICK: COMMENTS – ARE HUMAN RIGHTS UNIVERSAL AND HOW DO WE ENFORCE THEM? THROUGH THICK AND THIN WITH AN INTELLECTUAL FRIEND AND SCHOLAR**

*Carrie Menkel-Meadow\**

**I. COMMENT**

Let me start by saying thank you for inviting me. Sorry I can't be there in person, but I am teaching in California. I want to start with a story. As you could tell from Ángel's presentation, Ángel is a master storyteller. And Ángel, correct me on the date, I believe it was 2004 or 2005 that Ángel and I met in Mexico City. I was on a mission, through the Hewlett Foundation, to evaluate, what I still think is one of the best law schools in the world, CIDE<sup>12</sup>, a public law school in Mexico City that had totally revamped legal education from the bottom up. It had a small student body and faculty that were drawn both from academia and theory, and also from practice, and students were chosen to represent different parts of Mexico. That law school had created a whole new curriculum and the faculty had produced totally new texts in all subjects, combining history, theory, doctrine, comparative law,

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<sup>7</sup> See *id.* at 33-40 (Chapter 4).

<sup>8</sup> See *id.* at 41-82 (Chapters 5-9).

<sup>9</sup> See *id.* at 41-53 (Chapters 5-6).

<sup>10</sup> See *id.* at 54-63 (Chapter 7).

<sup>11</sup> See *id.* at 64-82 (Chapters 8-9).

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\* Distinguished and Chancellor's Professor of Law (and Political Science), University of California Irvine and A.B. Chettle Jr. Professor of Law, Dispute Resolution and Civil Procedure Emerita, Georgetown University Law Center. These (edited) remarks were delivered (over WebX) at the book launch of Ángel R. Oquendo, *Through Thin and Thick: From Human Rights Principles to Politics Across the Americas and Beyond*, at the University of Connecticut Law School on October 28, 2022. I thank the law school for providing transcription of my remarks and the Law School and Ángel for inviting me to participate in this important event.

<sup>12</sup> CIDE is Centro de Investigacion y Docencia Economicas – Division de Estudios Juridicos, Licenciatura en Derecho (Law School), Mexico City, Mexico.

practice and social science methodology in virtually all of its courses.<sup>13</sup> Ángel was staying in the same hotel, along with, ironically, my husband's (who is a political scientist), dissertation advisor, Russell Hardin, probably known to many of you of political theory backgrounds<sup>14</sup>, and Steven Holmes, another political scientist<sup>15</sup>, both from the NYU faculty at that time. They were all in attendance at a conference on "confianza" (or "trust") as a concept of political theory. How and when do governments, legal institutions and international organization develop "trust" or "legitimacy" in their dealings with their citizens and other governmental actors?

At this theoretical conference being held at CIDE on trust in government and trust in the polity, I was very lucky to be able to not only do my work of evaluating the CIDE program, but to participate in the very important political theory conference, being able to practice my Spanish at very high levels of abstraction and academic jargon. But that's not the story I want to tell. This story, I hope, will get many of you who haven't read the book yet to read Ángel's new book because he is a master at telling big stories, important stories that lead in the two directions that I care about: both theoretical observations and also practical ones, derived from what actually happens to people on the ground, and also in legal proceedings. So, as we were returning from the conference, at one point, to the hotel, there was an unbelievable downpour. So appropriate Ángel, your story here about the hurricane, as I know your family in Puerto Rico has been suffering from all of this.

But there we were in Mexico City, not with a hurricane, but with an incredible downpour as bad as any hurricane I have lived through. And the van that was transporting us was stuck in water and gridlocked traffic for two or three hours going, not very many miles, from the university to our hotel. And in the course of those few hours Ángel began to tell stories and to recreate many famous speeches given by Fidel Castro in Spanish at almost the great length with which Fidel Castro gave speeches (lasting many hours). And I loved it, as did my political scientist husband, who was with us since he was serving as my co-investigator and translation assistant in the CIDE evaluation project. And our co-traveling political theory friends, Steven Holmes and Russell Harden understood not one word because they had specialized in other countries of the world and could not understand Fidel's (Ángel's) Spanish. And I tell you that story because Ángel so beautifully dramatized the way in which Fidel Castro held his own populace for hours and hours at a time telling stories, giving his speeches and exciting the populace to believe in and work with his principles. Fidel Castro, at least for a long while inspired "trust" in a political regime very different from ours---how

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<sup>13</sup> CIDE is a public university, but the law school received a large and innovative supportive grant from the Hewlett Foundation in Palo Alto, California, under the leadership of its President and former dean of Stanford Law School, Paul Brest. The inaugural dean was Ana Magaloni, a comparative constitutional scholar, who worked collaboratively with an interdisciplinary faculty with degrees and education from many different countries. I had been asked to conduct an evaluation of the school because of my experience in teaching in some South and Central American countries (including Argentina, Chile, Paraguay, Nicaragua and Costa Rica) and my work as a socio-legal, doctrinal and clinical teacher and scholar.

<sup>14</sup> See, e.g., RUSSEL HARDIN, *COLLECTIVE ACTION* (1<sup>st</sup> ed. 1982); RUSSEL HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* (1988); RUSSEL HARDIN, *TRUST AND TRUSTWORTHINESS* (2002).

<sup>15</sup> See e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

do we assess comparative (or universal) legitimacy of governments and human rights? Is “democracy” the only measure?<sup>16</sup>

I tell that story because, although probably not known to many of you, I’m not officially a scholar of Latin America, though I’ve written about it, I have spent a great deal of time working in Chile, Argentina, Paraguay, Brazil and Nicaragua, some places that have suffered with terrible dictatorships. And so, at the time that I first met Ángel, I was mastering the language (Spanish) so that I could focus in my work on transitional justice, which is another form of human rights. So, with that background to our story, Ángel then became a dear friend and scholarly fellow traveler as we talked about many of these issues in many different parts of the world. And I did become a Latin Americanist in my teaching and scholarly work, teaching international dispute resolution and working on comparative human rights and justice issues.<sup>17</sup>

I want to just make a few comments on this book, which for me, I have been lucky enough to read several times. I was one of the reviewers for Cambridge University Press urging publication of this book and upon publication I’ve had a chance to reread it (and burb it<sup>18</sup>). Ángel is brilliant at using concrete examples. And here, the provocation for the book, as he has indicated, was the Bolivarian leftist governments of Ecuador, Bolivia and Venezuela, which challenged the inter-American system of human rights. This could be interpreted, as Ángel’s book suggests, as critiques of particular decisions that were made by the Inter-American court that countered some of the efforts of allegedly popularly elected and very progressive leftist executives, who also did a lot of problematic things in the names of populism and leftist critique of the establishment (both legal and neo-liberal political understandings and practices). The responses by these “new” Presidents to the so-called “human rights system” have included the suspension of constitutions, the changing of constitutions to provide for greater executive power and longer terms, as well as increased imprisonment and other actions against regime opposition.

In my work in political science, I now supervise many dissertations that are looking at what we now call “adjectival constitutionalism<sup>19</sup>” -- executive constitutionalism, autocratic constitutionalism, presidential constitutionalism-- countries like the Bolivarian countries that still have constitutions but have used them to expand executive power. And as Ángel’s book explains, all of this is justified in the name of more progressivism of leaders of these countries that have been elected by a greater participation in electoral politics with leftist policies, as Ángel would suggest, that question both neoliberalism and anti-colonialism, and also the establishment of certain hegemons in the region (e.g., the United States).

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<sup>16</sup> See Carrie Menkel-Meadow, *Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile)*, 3(1) INT’L J. OF CONFLICT ENGAGEMENT AND RESOL. 3-32 (2015).

<sup>17</sup> My great mentor in this work was my friend Rhonda Copelon, now deceased, who was a human rights activist (and law professor at CUNY law school) before the Inter-American Court of Human Rights (and in many other places). We shared an important time together as Fulbright scholars in Chile (2007) in the post-Pinochet era as Chilean law schools were becoming leaders in human rights programs.

<sup>18</sup> “This brilliantly unconventional book demonstrates how a learned scholar combines deep political-philosophical conceptual analysis with thick descriptions of cases and facts on the ground to interrogate the promises and challenges for the Inter-American human rights system. A must-read for any student of human rights and justice in Latin America and beyond.”

<sup>19</sup> See Mark Tushnet, *Varieties of Constitutionalism Editorial*, 14(1) INT’L J. OF CONST’L L. 1-5 (2016).

Let me outline a couple of the major take homes for me from Ángel's wonderful book. I've urged him to teach a course based on it. I think Ángel's book would make an excellent course text because it goes from the specific, that is, what challenges did the Bolivarian countries see and make in their attempt to either withdraw from or critique the inter-American system? What are their concrete points of critique? As Ángel outlines in the book, when read through the lens of philosophy, political theory and legal theory, what do the specific challenges tell us about much bigger issues?

I want to make one other personal point. I am the child of Holocaust survivors, so I tried to become an expert in international law, globalization and human rights from a personal, as well as a professional experience. I have been a student of the European system of human rights for many years.

I teach the Nuremberg trials (for criminal accountability and the modern definitions of human rights and international crimes) and my grandparents and parents received a little bit of *wiedergutmachung* (amends, reparations) from the German government, very relevant now to our discussions about human and civil rights reparations. As Kendall Thomas asks here what does equality mean and what does the government owe the people that it has harmed? Who defines harm? What legal standards are there for liability? Are legal standards different from political or moral accountability? These are all very important issues. But Ángel's book asks, were these Bolivarian complaints about the inter-American system raising more theoretical, deeper questions? And I want to suggest, they are. So as Kendall has said here, I am a firm believer in "human rights are not enough". I am a founder of the Dispute Resolution Movement in American law, and I came to this movement because when I was a litigator of civil rights cases I found the courts were inadequate. Courts would issue decrees, would issue opinions, such as *Brown v. Education of Topeka* (1954), a whole bunch of important decisions and not much would change on the ground. So, one critique of the human rights "system" is that courts and legal proceedings are not "enough" and have done not much to ameliorate real inequality or even to curtail extreme human rights violations (e.g., police brutality, sexual assault and harassment. etc.).

I was also there as one of the founding members of critical legal studies a long time ago, so I have always been sympathetic to the critique of rights<sup>20</sup>. Rights are not enough. When I'm done, Ángel can respond and all of you can debate whether we at least need rights that serve as a floor, if not a ceiling, for legal expressions of human well-being. But the guarantee of rights in documents, be they national, constitutional or international have never been enough to guarantee what Ángel refers to in the book as social justice. So there is a good dialogic in the book about what is the relationship of rights to social justice, which is what I think all of us on this panel care about. That's number one. Social justice. Number two, the ADR person in me has argued that many rights may be conflicting with each other (consider in feminist rights—the conflicting norms of religious values and gender equality.)<sup>21</sup> And in Ángel's book, he does a terrific job of talking about those "conflictions." Actually, I want to

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<sup>20</sup> See e.g., Duncan Kennedy, *The Critique of Rights in Critical legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* (Wendy Brown and Janet Halley, eds., 2002).

<sup>21</sup> SUSAN MOLLER OKIN, *IS MULTI-CULTURALISM BAD FOR WOMEN?* (1<sup>st</sup> ed. 1999) (discussing such issues as veiling, seclusion, etc.)

say, Ángel, who is fluent in many languages, does a fabulous job of creating some wonderful neologisms in this book—like “conflictions.” So take a look at them.

Conflictions is a very important concept in my field of conflict resolution. So what do we do, and Ángel has some wonderful examples, when there are conflicts between rights? How do we resolve those? And so, for some examples, he looks at so called “rights” of abortion, “free” speech and health. What do we do when there is, “A right, an entitlement, a claim?” and there are other conflicting claims (either based on different cultural values or an inability to satisfy the claim (e.g., inadequate resources for health, housing or education (all of which are guaranteed “rights” in various human rights conventions (and some constitutions, as in South Africa). As Judith Jarvis Thomson has argued, what are we to do when we have a claim and that claim conflicts with somebody else’s claim<sup>22</sup>? So, at the very simple level at which mediation was founded in this country, in domestic relations, we have conflicting claims of right to parent a child in divorce. Both parents want to have control over the child. What do we do? Equal rights, equal claims, no parent is particularly bad, both parents are equally good. And my field of mediation came up with a concept of joint custody. Now, sometimes overused, but one “solution” to the conflicting rights issue in that context.

I read this book as a meditation on what do we do when rights conflict with each other at larger system-wide levels. And we do have rights that conflict with each other. Ángel suggests in the book one of my favorite examples. So let me just strike another personal note that is a feminist note. My human right, I often claim, especially in these times post-Dobbs,<sup>23</sup> is my religion which is feminism. And the political theorist, Susan Okin, queried this concern when the UN Declaration of Human Rights and the Inter-American Convention of Human Rights and the European Convention of Human Rights, all guarantee equality, some of which is based on gender equality.

Since many of us study culture and its complex relationship with law and rights, what happens when some cultures have a different conception of equality for women? And I would add we in the United States now are just as, “bad,” (post-Dobbs) in my religion as any other country that has subjugated women’s rights to religious concerns. Whether you see that as veiling or Sati (suttee) or any of the cultural practices that have treated women as anything less than full decision makers in the polity, now we have many definitions of what constitutes “human” rights for women. What do we do when we have international conventions and international texts that proclaim rights in a very broad-based way and they are not enacted in the same way, everywhere on the ground? That brings me to my second major point, that even without total agreement on what social justice is, we don’t even have a “universal” understanding of what “human rights” are. So, there are conflicts about content (as well as the critiques of the Bolivarian leaders that hegemonic power (north American) controls the Inter-American court processes). Whose human rights are actually protected by our human rights institutions and treaties? Consider the complexity of John Rawls’ effort to apply his universal “veil of ignorance” to the international polity and human rights.<sup>24</sup> Not a successful effort, in my view. More successful was Amartya Sen’s, *The Idea of Justice*, which is a more

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<sup>22</sup> JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

<sup>23</sup> *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>24</sup> JOHN RAWLS, *THE LAW OF PEOPLES* (1999).



contextualized effort to define human rights, while holding to some universal conceptions (the “capability principle”).<sup>25</sup>

The big question in this book, and as I've just suggested, using gender as an example, is which rights are universal? And one of the major claims of human rights and all the treaties and conventions and constitutional claims that we have are that most of the “basic” ones should be universal. But as we all know, any of us that teach international human rights, there has always been a disjunction, from the time they were drafted, between the International Covenant on Civil and Political Rights (1966, US adoption 1990), and the International Covenant on Social, Economic and Cultural Rights (1966), which the United States has not ratified. This became a big issue in the Cold War as the Soviet Union drew its allies to look at social and economic rights and the United States proclaimed political rights (and democratic values) demonstrating what many consider “negative” rights (restrictions on governments, rather than claims for positive entitlements to economic well-being) -- both sets of rights probably being more observed on paper than in reality. This “cold war” cleavage continues to exist as human rights, however defined, are “politicized” in their use by people of different ideologies and political commitments.

Ángel's book discusses these major and deep issues in human rights, whether they're litigated about (as illustrated in the cases he discusses) or discussed theoretically. What human rights are universal? There are many claims for cultural relativism here and the historical claim that human rights are universal comes from the European post-World War II “consensus,” and European history<sup>26</sup> which may not speak adequately to our current world. What human rights, as defined in those important human rights documents would we craft differently now? It's an exercise I do in class. How would you try to write conventions and treaties to reflect reparations for slavery, for colonialism? How do we name those things? How do we instantiate them in specific language? How do we create remedies?<sup>27</sup> Secondly, the long debate in human rights and constitutional rights that has framed much of my career, and to this I owe a lifelong conversation with my former colleague at Georgetown, Robin West, is the complexity of the distinctions between positive and negative rights. Are these conceptions of particular legal and political ideologies? Are they gendered? What do we owe to others—the liberal conception of leaving each individual alone to flourish on their own however they choose, with minimal interference from others or the state, or is there a collective duty to “take care” of others—isn't care for others a human right too and the “right” to be cared for?<sup>28</sup>

As the United States is happy to support political rights, freedom of speech on documents, if not in practice, we are less sanguine about promising social and economic rights, not only to our own citizens, but also in support of the rest of the world. And one feminist critique of human rights over the years has been just that, that people care more about having bread to eat, having economic wellbeing, and as Ángel's book, in its example, so beautifully points out, what does it mean to have a right to health, a right to jobs, a right

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<sup>25</sup> AMARTYA SEN, *THE IDEA OF JUSTICE* (Carrie Menkel-Meadow et al. eds., 2009); AMARTYA SEN AND LAW (Carrie Menkel-Meadow et al. eds., 1<sup>st</sup> ed. 2020).

<sup>26</sup> LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007).

<sup>27</sup> See Carrie Menkel-Meadow, *Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse and Injustice*, 64 U. TORONTO L. J. 620 (2014).

<sup>28</sup> See ROBIN WEST, *CARING FOR JUSTICE* (1997).

to education—the “social well-being” human rights? When I was growing up in the middle of the Cold War in a pretty progressive household, my father, would say, “Better red than dead.” As opposed to the mantra of the 1950s, “Better dead than red.” To which I used to add, “Better bread than either dead or red.”

Most people are concerned about their wellbeing, that is the ability to work, to feed their families, and to have some material comfort and guarantees of decent health care. And our human rights history, although paying lip service to that, hasn’t done very much about it. So those very important theoretical debates about universal human rights versus more specific ones continue. And I want any of the students in the audience to think about how you would consider what is more important to you. You’re growing up in an American law school, which is telling you the First Amendment and free speech is very important. But as Catharine MacKinnon argued so well many years ago in her book, *Only Words*<sup>29</sup>, isn’t a principle of constitutional and statutory construction that the thing that comes more recently modifies or amends that which comes before? So let me just repeat her argument, which I don’t think has received enough attention in recent years.

The Equal Protection Clause came after the First Amendment Clause. To what extent does the guarantee of equal protection of the laws, now extended as a suspect class to race and not so clearly in some aspects to gender “trump” or at least modify the First Amendment? To what extent does that guarantee of equality and equal protection modify the First Amendment? So that, for example, we could regulate hate speech because hate speech, for example, does encourage some people to act on principles of inequality. And as Catharine MacKinnon argued all those years ago, the extent to which some forms of speech, notably pornography, cause harm and yes, human rights violations (to be remedied as she argued, and ultimately lost, by a civil rights action<sup>30</sup>) demonstrates the very conflicts of rights discussed here. To what extent should our rights be looked at in terms of changing historical circumstances? And since it’s a big concept in human rights and legal and political theory, what rights should trump what rights? Is speech always “free”? Should it always be a primary “right” over others? European countries have defined this political right differently, allowing regulation of offensive hate speech.<sup>31</sup>

My final comment is to get you all to understand how deep this book is. Yes, triggered by the Bolivarian countries’ challenge to the institutions of the Inter-American court and with not as much, but a little criticism of the so-called “unity” of the European Human Rights Convention and system (even with its doctrine of “margin of appreciation” for national differences) we are asked to consider what is the content of human rights and what institutions are defining and enforcing them? To what extent, and this has been the critique of these international courts, is there a democracy deficit in the construction of claims and their enforcement? To what extent should the people, whoever they may be, have a right to reflect on, to vote on and to help create their human rights? I’m suggesting in my comments that if we really allowed the people to vote and consider, and as Jurgen Habermas would

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<sup>29</sup> CATHARINE MCKINNON, *ONLY WORDS* (1993).

<sup>30</sup> *Hudnut v. American Booksellers Asso.*, 475 U.S. 1001 (1986) (affirming *American Booksellers Asso. v. Hudnut*, 771 F. 2d 323 (7<sup>th</sup> Cir. 1985)).

<sup>31</sup> See e.g., JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012).

suggest, deliberate on these things, they might have a different hierarchy of rights. How would the “acted upon” choose what rights matter to them?<sup>32</sup>

They might not put those so-called political free speech rights above, in a sacrosanct way, the rights to bread, the rights to health, the rights to jobs. Ángel is discussing judicial decision making here. Our court system is a system that I think is necessary, but I've spent a lot of my 40 years as a law professor criticizing it. Why? Because it's brittle. Rights get adjudicated, somebody makes a claim and either that claim is recognized and the court tries to do something about it or the claim is “dismissed.” And by the way, Ángel does a very good job in the concrete cases he talks about of looking at the limitations of enforcement powers that these courts and institutions have even when claims are formally adjudicated and recognized. But more often those courts actually are not enough on the ground. Just look at our history with *Brown v. Board of Education*, and the absence of full racial justice in this country.

I was an elementary school student in the US north in 1954 and there was plenty of litigation about segregated schools and plenty of non-compliance. And anyone looking at it empirically would say the court decisions have not been terribly effective at the much bigger issue that Ángel tries to address in this book and that is the relationship of court action to social justice.<sup>33</sup>

So, what can you take away from my comments? Should we abandon the Inter-American system of human rights? No, of course not. But I think we do need to look at the critiques that were made by Correa, Morales and even Maduro, who are saying this system was set up by a northern sponsor and is “enforcing” its North American form of neoliberalism, though the United States does not “formally” participate in the Inter-American Court of Human Rights. (The US does support its activities and maintains an office at the OAS in Washington DC (where I have appeared to discuss the amiable settlement processes of human rights courts) because recognizing that this brittleness, that this you win, you lose in court decisions has done not very much on the ground). And so, the question is, do consensual efforts to negotiate, which is my field, and compromise actually have the potential in some cases to provide some more on the ground relief? For example, In the cases I was involved in, ordering more training of police. You could read the story here as a very depressing one, that at the current moment (looking at the war in Ukraine and elsewhere), our international institutions have not been terribly effective at creating a lot of social justice.

However, there are some counter stories too. I spent a lot of time teaching and working in Argentina, so I guess those of you from the Yale Latin American project will know a little bit about which I speak. Owen Fiss' work there with Carlos Nino, did produce a transition from dictatorship to democracy and human rights Truth Commissions.<sup>34</sup> If you haven't seen

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<sup>32</sup> See JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1998)

<sup>33</sup> CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1999); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (2<sup>nd</sup> ed. 2008).

<sup>34</sup> See Argentina Comision Nacional sobre la Desaparicion de personas. Nunca Más: Informe de la Comision Nacional sobre la Desaparicion de Personas. Eudeba, 1984 [Argentina National Commission on the Disappearance of Persons. Never Again: Report of the National Commission on the Disappearance of Persons. Eudeba (Editorial Universitaria de Buenos Aires)].

it yet, a new movie out, *Argentina 1985*, demonstrates one of the few very important successes of prosecutorial (national, not international) tribunals. When the Argentinian dictatorship was finally brought to trial in 1985, dramatized in that film, it was a moment for Argentinians, many of them, of the success of the kinds of institutions, a national court, that Ángel is also referring to.

So, it's a great story except for anyone following what's going on in Argentina right now, it's not a long story. That is, we view these developments in human rights litigation and see clearly that legal adjudication of rights is not enough. Politics often wins the day (see our own current political-legal crises). If, like Martin Luther King, you think that the arc of history is bending toward justice, and I like to believe that, I would say it's one that's not quite an arc. An arc looks more uniform, that's the universal human rights argument. I think it's more like a step ladder and we sometimes step up and have moments in which we are achieving more social justice, whether through litigation or through cultural change, which, in my view, is equally important to the law (see how the gay rights movement mobilized political as well as legal power). But I think at the moment, we're living at a time when we're taking a few steps down. And so, I will just end by saying to Ángel, if you want to respond to any of this, do you believe there are universal human rights, or are they more varied in the world, and should they be more culturally specific? And then what are the best methods for defining them and getting to more social justice? If not treaties, laws, texts and courts, then what?

And I'll just end by saying, my life as a scholar has been about process pluralism. Courts are necessary. They may be a floor, but they are not enough. And the challenge for all of us is to take the great words in our constitutions and our conventions and see, what are the best ways to actually instantiate them in action on the ground? And I mean not only governmental action, but civil society, which is what Jürgen Habermas is concerned with too.

Thank you, Ángel, for the opportunity to reread the book, and I urge all of you that haven't read it yet to read it, because you can read it, as you can hear, on levels of great, important political theory, as well of incredible stories and case studies of how these abstract principles are actually getting dealt with or not in the world.

Thank you.

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## THROUGH THIN AND THICK: COMMENTS

*Daniel Markovits\**

## I. COMMENT

Thanks, Ángel, for including me in this fantastic discussion. Kendall, Carrie, it's a great pleasure to be on a platform with you both. Thanks to UConn for letting me come. And thanks everybody for joining on a beautiful Friday afternoon. It's just nice to be here.

I thought what I would do is spend my time illuminating the sensibilities of the book, as I understand it, in three ways, and then conclude by observing something that connects these three sensibilities.

A good way to start is by identifying a series of oppositions that are familiar to every lawyer—that get taught in one way or another in the first term of law school—and identifying how the book stands with respect to these oppositions. What are the oppositions? The first is law versus politics, where law is understood as a technocratic elaboration of neutral principles, and politics as the setting of priorities. A second opposition is reason versus will, where reason is the set of principles that all minds share, and will is the choice of a particular mind. A third opposition is courts versus legislatures, where courts are peopled by lawyers performing their technical functions, and legislatures are peopled by citizens performing their political functions. Finally, a fourth opposition is the global order versus state sovereignty, where the global order is the set of rules that govern the behavior of all states, and sovereignty is the prerogative of an individual state to do as it wishes regardless of rules.

Now, the conventional way of thinking about human rights is to accept these oppositions and then take sides with respect to them. Human rights are associated with the first half of the oppositions. They're law, not politics. They're reason, not will. They're administered by courts, not legislatures. They're global and international, and they limit sovereignty.

Next, it's conventional to ask how we should think about human rights in light of the fact that they take sides in these oppositions.

On the one hand, there are champions of human rights who favor the first side of the oppositions—who think that law, and reason, and courts, and global regimes are all good things. Maybe, some human rights champions say, they're the best things. Maybe they're even sufficient to guarantee fundamental human interests for everyone. And for these reasons, some conventional champions of human rights—on the model, perhaps, of Human Rights Watch—place human rights at the center of how we should procure widespread and equal human flourishing in a conflicted planet.

On the other hand, there are detractors of human rights who think that the first half of each opposition unduly limits the prerogatives of the second half. That what it is to be sovereign is not to be constrained. That legislatures have a kind of innate, inherent authority that courts only trammel. That to have will is to be able to choose. And that law is just an ideological way of limiting politics. That's what certain leftist Latin Americans argue, and it's an argument that the book in a way begins with.

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Still, others adopt a third position with regard to how human rights relate to the familiar oppositions. This is the position: "Human rights aren't enough." Proponents of the third way say something like the following: "Well, the first side of the oppositions – law, reason, courts, global governance—names some great things, which are all closely associated with human rights. But while these things, and human rights, may be a necessary condition for human flourishing and equality, they aren't sufficient." This is what might be called the "Human Rights Plus" tradition.

Now, Ángel, I take your book to embrace none of these three conventional approaches. I take it that instead of choosing sides in the oppositions, or even embracing both sides, what you would like to do is apply each side of the oppositions to the other. That is to say, you want to put law within politics, to connect reason to will, to have courts think like legislatures, and to show the mutually constitutive relationship between the global order and sovereign states, so that each side of the opposition is transformed by its engagement with the other. You want to politicize human rights themselves. And that what's going on in the book is an elaboration of what it looks like for human rights to be themselves political, and for politics itself to take human rights as one of its ends.

The hope of the book is that when we do this, we'll avoid the ways in which politics can oppress law. We'll avoid the problems of Maduro in Venezuela. And, at the same time, we'll also avoid the way in which law can stunt politics. We'll also avoid the problems of the US's imposing its own neoliberal agenda on the inter-American system. In this way, the book implicitly works through each of the oppositions to show that by bringing the two sides into direct communication with each other, each can avoid the pitfalls that plague it when operating against the other. The hope is that this dialectic as a whole can overcome the shortcomings of each of its individual moments: that there's thesis, antithesis, and then synthesis; and that by following the dialectic method, we can be raised up to a better understanding.

Once again, this is a distinctive vision. It's not the same as the human rights maximalist view. It's not the same as the skeptic of human rights, nor is it even the same as the moderate middle that says human rights are good but not enough. It says the appeal of each side of the opposition is understandable, is intelligible, only in the shadow of an active and constant engagement with the other side. So that's what I take the first sensibility of the book to be.

The second thing I want to talk about with the book is to emphasize its focus on the inter-American system. There are lots of human rights regimes in the world. Probably the conventional way to think about human rights is to focus on the EU as the central system, as the most successful human rights regime in the world. Certainly, it's not to focus on the inter-American system. So why does Ángel think about the inter-American system as the core elaborative or explanatory case for the correct view of human rights, or the central site for analyzing the problems of human rights, or the place where the development of human rights can be best understood, most fully engaged with, and realized?

I'm speculating now, but the answers may lie in a peculiarity of the inter-American system that's different from most other human rights regimes. In most human rights regimes, the limiting features of human rights, the sides of the oppositions that human rights as conventionally understood stands with, comes second in time to the things that human rights limit.

That is especially true in Europe. Consider, for example, the opposition between human rights as universal reason and politics as local sovereign will. The European human rights tradition begins, perhaps, in the French Revolution with the Declaration of the Rights of Man. But this comes a millennium after sovereign nation states in Europe start forming. And so human rights come against the backdrop of already ensconced, established, secure, and theoretically well-understood states and sovereignties. And that puts human rights in an odd position, because from the get-go, they are constraining something that is thought to be complete in and of itself.

In the Americas, things are a little different. There are lots of gruesome and terrible legacies of settler colonialism, many of which are suppressed in conventional histories. For example, it's not widely known (and I'm embarrassed that until recently I hadn't known it) that when Cortez arrived in Mexico, there were 30 million people living there, but 60 years later there were just two million people left living in Mexico. This simple statistic gives a sense of the devastation that that form of colonialism wrought on a continent. But one thing colonialism did is it wiped out sovereignty. It wiped out sovereignty through brutality. And this has as a consequence that, in the inter-American system, there's a sense in which sovereignty and human rights arose co-extensively. Neither was prior or uncontested vis-à-vis the other.

And so, if one's interested in understanding each as a form of dialectical engagement with the other, the Americas are a promising place to look. Because of the destruction of the colonial enterprise, something arose that doesn't exist elsewhere in the world, and certainly not in Europe, where there wasn't the same measure of destruction of sovereignty. So possibly one reason why the inter-American system is so interesting, and I wonder what Ángel will think about this, is because it has this peculiar feature that the nested oppositions at the center of Ángel's thought had each side arise in the shadow of the other, rather than having one be clearly prior in time, in theorization, and in conceptual power. In this way, the second sensibility that I have in mind—the book's insistent focus on the Inter-American system—is closely connect to the first.

Finally, let me raise a third observation about Ángel's book and its sensibilities. The book is self-consciously non-discursive. I think I've called it elsewhere a hermeneutic explosion of a book. It proceeds impressionistically through stories. It jumps around from place to place, case to case. It refuses to announce its own central claims. It leaves the reader to fight through the examples it uses. It demands that readers struggle to draw associations in much the same way, I take it, in which Ángel's mind drew them, as he was thinking through the writing of the book. And so the third question is, why does the book do that?

I imagine the answer is connected to my first two observations. The central opposition in an ordinary argument is between author and reader, between creation and reception. And there's a way in which the author produces something, and the job of the reader is simply to take up, to assume, what the author has produced.

But this book can't be read in that way. This book has to be read performatively, not discursively. It has to be read by somebody who goes through the same struggles that its author went through in the writing of it, and I imagine that's not accidental for the topic. Because once again, there's a dialectic between writer and reader, and the success for each comes from the synthesis of the two. This dialectic of writing and readings proceeds in much the same way as the dialect of human rights, in the first sensibility I talked about, lifts up the

familiar oppositions that dominate conventional legal thought; and it proceeds in much the same way in which the inter-American system becomes so important on account of embracing the co-creative element of the national and the transnational. This is, then, a book that you write as you read it, and I take it that's important to Ángel, and that it's important to Ángel because he regards it as important to his subject.

Let me conclude by revisiting the title of the book. The title of the book is *Through Thin and Thick*. I think the most important word in the title is actually "through." It's not Thin as Against Thick, or Between Thin and Thick. There is an opposition there, thin versus thick. But the critical thing is the "through" part that builds a connector, and lets each side of the opposition bleed into the other in just the manner in which each side of the first oppositions has to bleed into the other, in just the manner in which the inter-American system allows the national and the transnational to bleed into the other, and in just the manner in which the style of writing in this book allows the author and the reader to bleed each into the other.

So, I think if the book has a single central lesson—a lesson that can apply directly to our current moment—it is that the only way forward is through.

Thanks very much.

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## II

I'm recollecting a collegiate presentation by socialist President Felipe González from Spain. Girded by one of his handlers with a printed oration, he commenced by reading it, with a glaring feeling of discomfort. This commencement occupied him for a little while. Ultimately, it exasperated him.

He handed over the folder, with the words: "Okay, I must liven up." After this resolution, his oratory flourished.

Consonantly, the comments bestowed upon us have seduced me to an enlivenment. They have woken me up. Before them, I was straining to unpack this entire tome: a difficult task after its completion.

At this intersection, a fresh footpath has opened up for me. It is inciting me to seize it. I welcome you to the trip.

Ostensibly, a passage to heavenly survival has unlocked for me. It is beckoning me to tread it, loosening up in my reactions. For the purpose of dialoguing beyond us on the stage, I'll obey the beckon with succinctness.

Those of you on the floor should jump on the bandwagon after me. After the jump, the palaver should resume during the reception. Hopefully, it will evolve into the beginning of a beautiful friendship.

Thankful, I'll begin with the drops of wisdom sprinkled with generosity by Kendall. They suit me in their entirety. Doubtless, the bench proves inadequate, beyond not sufficient, by itself. It avails those outside the courthouse little.

Forever, Carrie has been cautioning us about this inadequacy. We used to study procedure by perseverating on happenings inside the courtroom. An expert on arbitration, she crept up on us exclaiming: "Trust me. Multifarious channels to 'justiciability' exist. They spread from litigious to extrajudicial."



Her exclamation has oriented me from the get-go. Incidentally, it could enlighten the gamut of our disciplines. Irrespective, several of my chapters do focus on caselaw. Through these convergences, they betray my familiarity with it qua a lawyer during my escapades from the ivory tower.

Additionally, I fire off my argumentation with the referenced altercation over the appropriate place for judicial intermediaries in this domain, sizing them up. Altercating with animosity, the insurrectionary faction protested, staring them down: "They should butt out for us to occupy the field." It insisted on the predominance of, foremost, the executive arm, over them.

Against this insistence, I deplored their disempowerment. At this argumentative crossroad, they were screaming for my attention, cycling from effectuating the safeguards before them against the administration, occasionally the parliament, qua violator to buckling under it as a legitimate policymaker, perchance a genuine emancipator. During the enforcement, the cycle was empowering the mobilized populations. Meanwhile, it was incrementing its impact.

One cannot overemphasize this empowerment. In reality, the showcased dispositions exemplify it. They often unrolled as transindividual suits. The claimants, from lone rangers through groups to non-governmental organizations, bespeak the veracity of the wise proposal before us. During their push, they agitated before various branches of governance, internationalist institutions, populaces across the globe.

These presidors over the agitation matter in toto. They would resist a ranking of them on the basis of their weight. In actuality, an affirmation of their involvement invites a critique against them. It induces to an appreciation of their insufficiency in isolation.

Before them, we may agree on the proffered proposition. This agreement aside, my initial, partially structured expostulation concludes with a recognition of the unavoidability of competition among them. It presses them to learn to coexist with competitiveness. They should not expect to predominate.

After extolling the age of rights, Kendall may have been pushing us to skepticism about these. For him, they may not represent a silver bullet. With judiciousness, he may have been implicating their idiosyncratic want of sufficiency on the ground, forewarning us about it. We attended to it in musing about them during our drive from New Haven.

With a touch of irony, I wholeheartedly sign off on this implication about them, upon devoting myself to them. During this devotion, my bookish contribution highlights their criticalness. It flags their advancement of integrative equity.

Notwithstanding, I accentuate that they do not further the latter unequivocally. To me, they "appear to advance but not to guarantee it and might extraordinarily thwart it."<sup>35</sup> To pursue it, one might have to sidestep them to home in on politically, economically, societally delineated activism.

Daniel's meditations elsewhere about equality might lie on the horizon before us. They could aid me in developing these thoughts in the future. In the meantime, we could return to the supreme adjudicatory decision from April on Puerto Rico, intercalating it here. It arbitrated on the validity of excluding islanders from federal redistributive payments for the elderly.

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<sup>35</sup> See *id.* at 59-60.

A majority bordering on unanimity validated the exclusion. For the most, it omitted egalitarian preoccupations, disregarding them from start to finish. Against this disregard, they pop up with force in the solitary dissent by Sonia Sotomayor.

She dredged up the concept of cruelty. Without elaboration, I would characterize the crux as cruel indifference toward the weak, beyond unequal treatment of them. In my opinion, one cannot reconcile extreme inequality with minimal decency, let alone significant parity.

Against a backdrop of ideologization, this irreconcilability might engender different responses: from denial onto apathy through disapproval to outrage. It might have fueled the adumbrated ideological brawls. Like Willajeanne, these might lead us to wonder about the feasibility of teamwork around ideologized entitlements. Unlike her, they might convert us into skeptics about the prospect. I hazard a step toward an answer during my journey on paper from legality toward elementary equalization.

Without doubt, we should meditate on the road ahead. Dissimilar conceptualizations of inclusiveness have emerged across the Earth: from Europe through Latin America to the United States. They may unleash unlike implementations. Unable to plunge into the minutiae at this instant, I'll venture a bare statement. Diversifying European countries are facing ordeals akin to those of their north transatlantic allies. They may be repeating the same mistakes, wreaking comparable iniquities.

Carrie mentioned the leftist movement down south. To my ears, she assayed it soundly. Inspired by the historic champion of regional unification Simon Bolívar, it purported to emancipate the polities under its command. Adopting its self-deprecating denomination, she referred to it as the "Bolivarian Axis."

It ushered in an exciting, turbulent last duo of decades. She might concur with me on a fascination with the coalition's present transmutation into a large, variegated constellation of freestanding regimes on the left. We shouldn't lose track of this apparition.

Sticking to her guns, she accounts the freedoms under perusal, cogitating them as an insufficient boon. In fact, they may insufficiently equalize existential circumstances within the polis behind them. Therefore, one would have to warm up to her cogitation on them. Once in a blue moon, poverty might indeed increase through them. It could evidence this increase, she might concede, through their comparative unenforceability, maybe unavailability, for a poor person.

Without minding this concession, she asks about a universalist reading of them. For me, they have graduated to universal in the banal sense that our worldwide community has espoused them. In the shadow of this espousal, disagreement on their detail persists. It may never disappear during their lifetime atop ours.

Prefiguring the unlikelihood of this disappearance, the fierce fight over them may have intensified across the board. It may have gained in intensity upon their heightened import after their universalization. With pertinence, our symposium has alluded to the nastiness about them in Europe. During the allusion, it might have been presuming the inevitability of this nasty development upon them.

Anyway, their universality may barely extend past the point fixed by me earlier. A judicious commentator might scruple with me at universalizing them into the metaphysical

realm. Clinging to this scruple, she might predicate them “on” many a “broadly shared,” “crucial notion[], like reasonableness, justification,” “acceptability.”<sup>36</sup>

Her predication of them might up the ante. It might wrap up on this note: “Hence, one might defend” them “with [a] forceful, “widely appealing argument[].”<sup>37</sup> She might reinforce them during this defense with a quotation from Tim Scanlon: Their empirical judgmental fundament “presuppose[s],” a “background . . . sufficiently widespread” to count as universalizable in practice.<sup>38</sup>

Their foundation in their acceptance during our modernity might suffice for her. It might render them applicable everywhere today. Against this ample applicability in the present, she might balk at applying them in the past, tempted by Bernard William’s “relativism of distance.”<sup>39</sup> For her, they might rejoice in relevance solely within her era.

The democratic deficit around them piques my curiosity a great deal. Among us in this hall, my friend Steve Utz inquired about their relation to democracy at a workshop on campus during the dawn of the semester. Sub silentio, he may have been rooting for their contextualization.

Like wine grapes, they may stem from a single seed to grow differently in consideration of the type of soil underneath them. Against stateside experience, the European besides the Latin American region had to transition in the twentieth century from dictatorship through them to democratization. This transition may have enhanced the autochthonous steadfastness to them.

After this transitional period of unreserved enthusiasm about them, they may have flickered from an enhancement to a curtailment of their prestige. In Germany, the supersession of a dictatorial, genocidal adventure might have augmented the allegiance to some of them, like that to “bodily inviolacy.”<sup>40</sup> It might have reduced that to others among them, such as that to reproductive choice.<sup>41</sup>

Kitty-corner across the ocean, they prolonged this trajectory, with a twist. The southwestern half-sphere epitomizes the pivot toward them with its dramatic entrance into their ambit. It constitutionalized a wild array of them, intoxicated with them, possibly in anticipation of a hangover from them.

This constitutionalization may have revolutionized by unchaining them. It may have influenced Daniel’s deliberations. These intrigued me. They transported me to a remark by a famous filmmaker. I would guess Federico Fellini.

During an interview, a clever critic was opining on a film of his, approving of it. She identified numerous fascinating facets in it, teasing them out of it. With candidness, he

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<sup>36</sup> *Id.* at 56-57.

<sup>37</sup> *Id.* at 57.

<sup>38</sup> Thomas M. Scanlon, *Human Rights as a Neutral Concern*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 113, 116 (2003).

<sup>39</sup> Bernard Williams, *Human Rights: The Challenge of Relativism* 14, SACKLER DISTINGUISHED LECTURE: UNIV. CONN. (Apr. 23, 1997) (on file with author).

<sup>40</sup> Grundgesetz [GG] [Basic Law], art. 2(2) (Ger.) (“Jeder hat das Recht auf Leben und körperliche Unversehrtheit.”).

<sup>41</sup> Bundesverfassungsgericht [Federal Constitutional Court], May 28, 1993, 88 BVerfGE (ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [Decisions of the Federal Constitutional Court]) 203 (Ger.) (on file with author).

admitted to her: “You have persuaded me that they find themselves within it. However, I for sure did not put them there.”

I myself would not reject the sensibilities singled out by you with parallel perspicuity, inventorying them. Having improved on my pursuit, they merit my faithfulness. In the inspirational tale behind this sentence, Argentine author Jorge Luis Borges regarded (1) a particular translation as an improvement on (2) the original. Upon this regard, he branded the latter “unfaithful” to the former.<sup>42</sup>

Also, I liked your oppositions. Admittedly, taking sides discomforts me, before (not at) a loss. An additional admission for you: your mentions of dialectics pleased me. They reminded me of a deleted footnote, preventing me from repressing it.

It drew on dialectician Georg Hegel’s “immanent” “substance[s]”<sup>43</sup> to illuminate the footnoted arguments. With hesitation, I expunged it during my revisions. It struck me as a potentially pompous, confusing appendage.

During an observational expedition, an observer may confront apparent contradictions. She may have to choose between the apparently contradictory poles. Against the compulsion on her about these, an alternative might occur to her. After this occurrence, she might embrace them both. This embrace might equate to a reconciliation of them. It might permit her to progress avoiding self-inflicted deprivations.

Exempli gratia: adjudicators may joust with constancy against installed politicians. Episodically, they might cooperate with these to transcend the joust. This cooperation could cost them an abundance of energy. Coincidentally, it might galvanize them for the righteous inclusion of disempowered plaintiffs before them.

The commentaries chimed in on this cooperativeness. During their interpolation, they threw me back to an observation by our confrère Jon Bauer, among us within these four walls at the outset, absent now. During our internal colloquium, he admonished me for my conceptualized “waywardness,” challenging me on it. To his nose, it reeked of “capriciousness,” affording officialdom an enormous amount of leeway. Understandably, he was translating the noun into “rationality control.”

Conversing along the highway this morning, I warned against decontextualizing the standard on the table. Per my warning, a civic suitor should contextually counter an arbitrary accused, categorizing it as “wayward” in the context of the liberties at bar, not in the abstract. She may criticize it for diverse failures—from its irrationality through its unreasonableness to its lack of loyalty—by means of the underpinning precepts. Against her criticisms, it may demand elbow room, not a *carte blanche*.

In this spirit, a nonarbitrary authoritative campaign around health guaranties must involve more than rational deportments before acquired-immunodeficiency-syndrome (AIDS) patients. It might cry for fixation on prevention by virtue of the incurability of the disease. In Venezuela, the top tribunal plied these pathways at the turn of the millennium. It ruled against the official vacillation in this battle on account of cost.

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<sup>42</sup> JORGE LUIS BORGES, *Sobre el “Vathek” de William Beckford*, OTRAS INQUISICIONES, VOLUMEN 2, PROSA COMPLETA 250, 253 (1980) (“El original es infiel a la traducción . . .”).

<sup>43</sup> GEORG W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS (1821), *reprinted in* 7 G.W.F. HEGEL, WERKE 25 (Suhrkamp Verlag 1970).

Our respondents discoursed about the contextual importance of institutionalization. My colleague Jill Anderson broached the subject during our in-house session. She alerted me to the urgency of the outlined cooperationist exertions.

The secondly sensible insight envisioned by you relates to the concentration on the actualization apparatus for “Inter-America” instead of its counterpart in Europe. From this prism, it shifts to a paradigm in which (1) the investigated protections precede (2) sovereignty. The former supervene after the colonial destructions of the latter, outlasting it. They flower unhindered by it, unintimidated by its subsequent rebirth.

Indigenous custom, whose shelter the crown commanded to no avail during the conquest, may have preserved them in a premodern form after secession. Throughout the secessionist war until after independence, it may have coalesced with civilian jurisprudence, which continued generating them, to safeguard them.

An aftereffect upon them may be materializing before us nowadays. It may be displaying its face whenever a European Union member tackles societal misery through their bureaucratization into the safety net, an Anglo-American compeer via their aggregation, an Iberian-American cousin upon their collectivization.<sup>44</sup> The incorporation of Britain might complicate the analysis. Inescapably, it will have to wait until deeper, future research.

The takes on mutualized prosecution in the New World may clarify the deliberated placement of “the cart before the horse,” translatable for me into a “tortilla flip.” On the whole, they do not foreground the autonomous, sovereignly constructed ministry for publicly dedicated advocacy.<sup>45</sup> Relying on the equitable class-complaint upgraded through the pertinent formal rule, the United States encourages injured individuals to stand in for similarly situated peers.<sup>46</sup> It distinguishes itself from its southern sisters entitling citizens to speak for neighborhoods, cities, counties, provinces, nationalities, planets, universes.<sup>47</sup>

The arrangement to assure constitutional supremacy through abstract review illustrates this idea. On the old continent, it may engage specialized triers.<sup>48</sup> High-profile complainants—from the commander in chief onto the legislative leadership through a parliamentary minority to the attorney general—may possess standing.<sup>49</sup> They may contest the constitutionality of laws right before or after enactment.<sup>50</sup>

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<sup>44</sup> See OQUENDO, *supra* note 3, at 298-318 (Chapters 29-30).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* See also *id.* at 174-76.

<sup>48</sup> See Const. (Fr.), art. 61. See also GG, art. 93(1)(2) (Ger.).

<sup>49</sup> See Const. (Fr.), art. 61. See also GG, art. 93(1)(2) (Ger.).

<sup>50</sup> See Const. (Fr.), art. 61. See also GG, art. 93(1)(2) (Ger.).

Brazil in combination with Mexico adheres to the model from northeast across the Atlantic.<sup>51</sup> Against the grain of these jurisdictions, the bulk of Spanish America is blazing its own trails. It is authorizing the citizenry (without a personal link) to sue.<sup>52</sup>

At the margins of this blaze, no one can federally undertake such a contestation northward of the Río Grande.<sup>53</sup> One may have to petition the enactors to remedy the violation, perhaps by mailing them the petition. Before them, this option may boast a nil chance of success. In its praxis, it may degrade into that of voting them out of office.

In the south, the rights revolution is springing opportunities in consolidation with perils. It is recasting age-old conundrums, reigniting them. We can revisit that of the rivalry of (1) the central democratic tenet with (2) the litigable plights at play.

The former contrasts with the latter in the preceptive parameter under it. Beyond this contrast, it may not constitute one of them. They can hardly accommodate it, qua a comprehensive good belonging to the public, within their ranks. In general, it can integrate them only upon its possession by a holder, to wit, a tangible collectivity.

Within this contrastive crisscross, the “sovereign” as a notional artifact perplexes me. Although unsatisfactory in spades, it may defy endeavors to overcome it. This defiance apart, a “self-determiner” may suitably substitute. It may offer the performative possibilities without the deficiencies—from absoluteness through exclusivity to masculinity—of its predecessor.

Iris Young would propel the constructive newcomer toward these latitudes, securing it at them.<sup>54</sup> She would headline its inclusivity, its relativity, in conjunction with its preservation of duties to insiders, outsiders, individualities, communal ensembles, nonhuman existences. In fairness, I am myself adding these nonhumans to its obligers, coupled with my construal of it as a player in a non-zero-sum game.

This standpoint intertwines multiple perspectival levels: the local, the provincial, the federal, the supernational. It matches power with accountability at the totality of them. They limit one another throughout their intertwinement.

The Western Hemisphere might undergo these changes with relative ease, enduring them without considerable commotion. Before them, it might outdo an erstwhile colonizer. They might facilitate the solidification of the unprecedented, existent entitlements-regimen. During this facilitation, solidarity might profit from them into the bargain. It might enlarge toward the victims of sovereign prepotency: from inlanders to outlanders.

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<sup>51</sup> See OQUENDO, *supra* note 3, at 309 (In Mexico, “the ‘Procurator General’ or ‘33%’ of one of the parliamentary organs may contradict the constitutionality of a state’s or the federation’s enactments ‘within’ about a month of their ‘publication.’”) (quoting CONST. art. 105(II) (Mex.)). See also *id.* at 316 (In Brazil, “the Public Ministry, chief executives or lawmaking leaderships of the central or immediate subcentral government; or ‘political parties,’ ‘unions,’ or the ‘Bar Association’ may likewise ‘originally’ assert the unconstitutionality of statutes before the forum of final instance.”) (quoting CONST. arts. 102(I)(a), 103 (Braz.)).

<sup>52</sup> See *id.* at 307 (“The almost universally exercisable unconstitutionality-complaint provides a special case in point. Apparently unprecedented north of the border and having outdistanced its forebears on the European Continent, it alternatively empowers [anyone] to actualize the polity’s commitment to legislators’ or administrators’ adherence to constitutionalized constraints. She may have unconstitutional norms invalidated as such before their application.”).

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 23, 184-85, 191.

Thirdly, I would endorse your interpretations stretching, in their focus, from anti-discursivity through impressionism to performativity, appropriating them for myself. They may capture something nestled between these covers, spotlighting it for us. In honesty, it does not derive from my conscious efforts.

I may have subconsciously insinuated it throughout my synoptic pages. These crop up within the Introduction to reappear in the Conclusion. They enunciate the impossibility of an apposite expertise, pleading for a democratization of the dialogue.

Qua a democrat of this ilk, I cannot shove a particular, expertized discourse through my readership. My panoramic impression hulks behind this self-imposed constraint. Toggling from lawyerly to philosophized in its quality, it communes with those of anthropologists, historians, sociologists, laymen, laywomen. With unpretentiousness, I am bidding the assortment of these to a chat.

May they, with you before me among them, accept my bid. Deliberately without authoritativeness, I'm backstopping a position, not a whim, before the amplified "you."

You should pay me back in kind. In reciprocity, we can converge on our passion for the topic. I wish to embark anew upon a pluralistic confabulation, not finalize a lonely peroration.

### III

To: Julián A. Quiñones Reyes

From the bottom of my heart, I value this awakening. You're dwelling on a critical dissonance, punctuating it for us. Fortunately, it might not degenerate into an inconsistency.

I would not trivialize it into a "tension" under my reconstruction of the term.<sup>55</sup> Indubitably, the sovereign's competences may collide with a global guaranty on occasions. Through the collision, they may catapult us back to the problematized oppositional category.

Insightful, you have reconducted us to them for reconsideration. For reference, a subdivision of mine surfaces them in an equivalently conflictive crossway.<sup>56</sup> It harks back to disputations dating back to the Enlightenment to capitalize on them.

Contemporary philosopher Jürgen Habermas dissects them for us. He crusades to harmonize the duet of camps in combat. Under the inspiration of Jean-Jacques Rousseau, the first of them tunnels in on "popular sovereignty." Under the sway of Immanuel Kant, the second prioritizes the perused prosecutable pledges.

During his dissection, our contemporary within the trinity resolves to escape the polarity between these ideations. He reconstructs them under a unitary "autonomy," subordinating them to it. They respectively incarnate its public and private dimensions.

I adopt a distinctive strategy, ideating it without circumlocutions. It might differ from yours. This weekend, we could contemplate the beauty of a colloquy within the triad of them.

In expectation of this contemplation, I would burrow myself into the first, sovereignly popularized, publicized dimensional variant, recharging against it. It may have entrenched itself with its rigidities. In counterpoint, these egg us on against it.

In a conciliatory lapse, I might not dismiss reinterpreting it. Upon its reinterpretation, it would keep its name, modifying its content. Against its exclusiveness laced with masculine

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<sup>55</sup> See *id.* at 205, 216, 218-19, 239.

<sup>56</sup> See *id.* at 201-44 (Part III).

absolutism, we could have it divide up the attributable authorizations, remodeling them into answerabilities.

Without qualms, I would rather have it superseded. We should not cower before it, resigning ourselves to its entrenchments. Relentless, it has concatenated intercontinental evolutions with devolutions.

In light of these concatenations, we could eradicate it. After this eradication, it would evanesce in nexus with our worries about its latent defects. Its ghosts would not haunt us anymore.

Per my insinuations, it has articulated infrastructures, from localized to supernationally supersized, around itself. Before all these, I would term our parleys about it “institutional,” not “conceptual,” complexifying them. Upon this complexification, we should not underrate them.

Against a strong temptation, I’ll desist from expanding. Sorry for the brevity. Writing off my sorriosity, the Spaniard Baltasar Gracián from the Baroque would back my desistance.

He redacts: “When brief, what is good turns twice so.”<sup>57</sup> My complementary redaction would resound like a conversion of his: “When brief, what is bad becomes half so.” With gratitude, I’ll alight from the train at this station.

#### IV

To: Steven Utz

The hardest queries may poke their head out behind a mask of simplicity. They may deceive the responder into underestimating them. Yours sound simple through the concision of their formulation. For me, they recall the renowned debate about dilemmas, repurposing it.

The previously quoted Williams, whom you met in the flesh, transforms it to the core. He injects the underlying emotions into it. Upon this injection of his, I’m trying to transfer it from morality to politics.

Bold as brass, he gainsays the tradition, neutralizing it. Before him, it foreclosed deontological conflicts, disclaiming them as unacceptable incoherences. In particular, he rebukes William Ross’s misinterpretation of them into ostensible clashes discardable after the dismissal of one of the vying “prima facie” prescriptions.<sup>58</sup>

A straightforward setting guides him through the rebukes. It pictorializes them. Within it, a woman promises to lunch with a workmate. By coincidence, she witnesses a terrible accident en route to meet him.

To her eyes, the responsibility to succor the wounded trumps. In consequence, she misses her appointment with him. This omission, she comforts herself, should not subject her to his reproof. Au contraire, it could attest her virtuousness before him.

Alas, her debt to him might not vanish ex post facto. Albeit for an impeccable reason, she might have failed him. Her promise might attach to her throughout.

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<sup>57</sup> José María Mella. *La revolución de los ricos*, FARO DE VIGO, Jan. 3, 2013. (“Lo bueno, si breve, dos veces bueno.”).

<sup>58</sup> See OQUENDO, *supra* note 3, at 222 (quoting Bernard Williams citing William David (W.D.) Ross).



Upon this attachment, she should strive to patch up with him. Her breach places her on the spot. She might have to contact him, apologize, reschedule, grab the tab during a renewed rendezvous, et cetera.<sup>59</sup>

The story around her has itself bred scholarly polemics. For controverters comprehending from Mary Mothersill to Terrance C. McConnell,<sup>60</sup> it amounts to a resolvable, ergo not dilemmatic, difficulty for her. Peter Railton would refrain from misreading it into a drama for her. As a compromise, he would acknowledge her “regret” for “the inconvenience she knowingly . . . caused.”<sup>61</sup>

Beyond swapping her for a collective protagonist, I picture an analogous setup dramatically amped up to surmount the polemical misgivings. Like she, the collective might regret its neglect of the upended precept, not its endorsement of the prevailing alternative one. It might have to make amends to those disappointed by it.

Plainly, you were analyzing the vindicable plights surveyed. Still, these may correlate with a dutiful mandate, fixating on it. They may conflict through it.

Tentatively, one might simply state that a quandary looms large whenever a couple of valid norms points in opposite directions.<sup>62</sup> In an exemplification of this bind, democratically demarcated integrity might necessitate respecting majority determinations that burden an enclave; elemental egalitarianism, contrariwise, ignoring them. Curiously, this normative antagonism might not provoke a deadlock. Again, it might waive through a reasonable choice between the competing commandments.

Nevertheless, one might want to reconsider these conflictions, unbolting the door to them. After all, they might arise unavoidably, sometimes in the teeth of the exemplarity, amid the precaution, of the affected subgroup. Undoubtedly, the obligee might know well enough by which of the contending guidelines it should abide. Regardless, it might proceed accordingly without extinguishing the claims of the overridden one.

As an upshot, a residue might remain. Despite comporting itself with propriety, the contingent might experience a bitter aftertaste. In addition, it might owe satisfaction to those it has deserted.

Significantly, this whole posture need not contravene basic deontic logic. Even upon the incompatibility of the execution of *A* with that of *B*, an agent might hold separate obligations toward each one of them. Critically, she might not thereby end up beholden to both, much less to carry out either of them *alongside* to not doing so.

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<sup>59</sup> Peter Railton notes that “obligation, and especially ‘living up to’ our obligations or respecting those to whom they are owed, are complex and partly symbolic matters, with many routes to reconciliation and the mitigation of moral residue.” Peter Railton, *The Diversity of Moral Dilemma*, in *MORAL DILEMMAS AND MORAL THEORY* 140, 159 (Homer E. Mason ed., 1996).

<sup>60</sup> See Mothersill, *supra* note 12, at 66 (In the face of “a judgment in which all right-thinking people concur, I don’t see why it should be called a dilemma.”); Terrance C. McConnell, *Moral Residue and Dilemmas*, in *MORAL DILEMMAS AND MORAL THEORY* 36, 42 (Homer E. Mason ed., 1996) (No “moral dilemma” crops up whenever “there is a uniquely correct resolution to the conflict.”).

<sup>61</sup> Railton, *supra* note 3, 155.

<sup>62</sup> Thomas Nagel regards these dilemmas as the most extreme kind of practical conflict. “The strongest cases of conflict are genuine dilemmas,” he writes, “where there is decisive support for two or more incompatible courses of action or inaction.” THOMAS NAGEL, *MORTAL QUESTIONS* 179 (1989).

Of course, a prescriptive bond of this genre might entail a generalized commitment to create conditions for its fulfillment without encompassing one to eschew every incongruous obligatory act. Likewise, separately pledging oneself to this pair of incompatibles might not violate the practical requirement that “ought” must imply “can.” The two independent charges might not illogically aggregate to a joint one to honor them in spite of their resistance to conflation.

My three cents worth, with a hefty tip. I may have overstayed my welcome. Profuse apologies.