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Origins of the Sino-American Trade War: A Case Study of Three Shakespearean Proverbs on Expectations

EDITORIAL NOTE

This Obiter Dictum was subject to a single-blind peer review, in which the anonymity of the reviewer was guaranteed.

There is much to say about the trade war between America and China. So much to say that it is an honour to have authored *Trade War: Causes, Conduct, and Consequences of Sino-American Confrontation*, a 710-page analysis, published contemporaneously with this *Obiter Dictum*.[1] The thesis of that book is straightforward: America and China are locked in a trade war to which there is no obvious end in sight. The causes of which lie in their different values; the conduct of which extends far beyond commerce; and the consequences of which are dangerous. The thesis of this essay complements the thesis of that book and, in a sense, lines up chronologically before it. Here, the question addressed is what are the origins of the Trade War? Succinctly put, the answer – the complementary thesis – is *disappointed expectations*. In other words, the origins of the Trade War date back nearly 75 years to the expectations surrounding China's effort to enter (or re-enter – given its ancient history) the world trade system. Those expectations were inflated, even unrealistic. They remain unfulfilled. Hence, unsurprisingly, in retrospect, disappointed expectations led to an outright, across-the-board commercial conflict between the Eagle and the Dragon. Three of Shakespeare's proverbs (quoted below) aptly summarise this *expectations* narrative.

The starting point for this expectations narrative is 30 October 1947. That was the birthdate of the modern multilateral trade system through the signing of the General Agreement on Tariffs and Trade (GATT).[2]

[1] *See* BHALA, CAUSES, CONDUCT AND CONSEQUENCES OF SINO-AMERICAN CONFRONTATION (2023), https://cap-press.com/books/isbn/9781531027438/Trade-War.

[2] *See* 1 Raj Bhala, Modern GATT Law: A Treatise on the Law and Political Economy of the General Agreement on Tariffs and Trade and Other World Trade Organization Agreements, ch. 1 (Thomson Sweet & Maxwell eds., 2nd edition, 2013), www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=5273.

GATT, which entered into force on 1 January 1948, was both the institutional architecture and constitutional treaty for world trade until 1 January 1995 when the World Trade Organization (WTO) was born. China, along with the United States, as well as India and Pakistan, was one of the 23 original GATT contracting parties. But which "China" was that signatory?

It was the "China" governed by the Nationalists under the *Kuomintang* (*KMT*) under Generalissimo Chiang Kai-Shek (1887-1975).[3] The KMT lost the 1927-1949 Chinese Civil War and fled to the then island of Formosa – now known as Taiwan.[4] On 1 October 1949, the Chinese Communist Party (CCP), led by Chairman Mao Zedong (1893-1976), hoisted the Red Flag over Tiananmen Square.[5] A year later, in October 1950, a mysterious telex was sent from Taiwan to the GATT Secretariat – the headquarters of GATT – in Geneva. The telex said "China" was withdrawing from GATT.[6]

Mao's government, in control of Mainland China, but not Taiwan, did not pay much attention to the withdrawal that purported to cover both the Mainland and Taiwan. The CCP had little interest in being part of what would quickly evolve into a post-Second World War, Cold War, capitalist trading system. Moreover, as famed Mao biographer Ross Terrill (1938-) writes of the Chairman:

> [. . .] Ambivalence marked his [Mao's] view of America. [. . .]
> The root of Mao's ambivalence lay in the mixed feelings he had had toward the West as a young man. The U.S. was both capitalist and non-Chinese. It was hard for Mao to bring himself to rely on such a force. The U.S. was advanced, yes, but maybe also sated by its wealth and comforts, maybe doomed by Marx's "laws" to fall even quicker than it had risen.[7]

The *KMT* worried that if its "China" remained in GATT, then – per GATT Article I:1 – industries on the Mainland would receive the most favoured nation (MFN) treatment from all other contracting parties.[8] At the time, Taiwan was relatively less industrialised.

[3] *See* John King Fairbank, The United States and China, Chapters 9-11 (Harvard University Press ed., 4th edition, 1983) [Hereinafter, Fairbank].

[4] *See* e.g., Barbara W. Tuchman, Stilwell and the American Experience in China, 1911-1945 (The Macmillan Company ed., 1971), for a classic account of how the American war effort on behalf of the Nationalists was wasted; Edgar Snow, Red Star Over China (Victor Gollancz ed., 1st revised and enlarged edition, 1968), for a classic, first-hand account of the Chinese Civil War by the first Westerner to meet and interview Chinese Communist officials.

[5] Fairbank, *supra* note 3, ch. 13-14.

[6] *See* 1 Raj Bhala, International Trade Law: A Comprehensive Textbook, ch. 19, 423 n.2 (5th edition, 2019), https://cap-press.com/books/isbn/9781531014711/International-Trade-Law-A-Comprehensive-Textbook-Four-Volume-Set-Fifth-Edition, [Hereinafter, Bhala, Trade Textbook].

[7] Ross Terrill, Mao: A Biography 396 (Stanford University Press ed., revised and expanded edition, 1999).

[8] On the MFN rule, *see* 1 Bhala, *supra* note 6, ch. 28.

Hence, the *KMT* essentially sought what might be called infant industry protection and import substitution by keeping "China" out of GATT.[9]

Accordingly, China, as in Mainland China, was out, and so was Taiwan. This would remain true until 11 December 2001,[10] when China joined the WTO, as did Taiwan one month later on 11 January 2002.[11] History, of course, is replete with ironies. In retrospect, Taiwan would have benefitted from the non-discrimination and market access rules of GATT as it raced far ahead of the Mainland to industrialise in the decades immediately following the War. It became an export powerhouse – one of the East Asian Four Tigers (along with Hong Kong, Korea, and Singapore).[12] Mainland Chinese trade policy was, after 1950 until the late 1970s, autarky, *i.e.,* no trade.[13] To be sure, the Mainland did engage in imports and exports, but not with the U.S. or most other countries in the Western Alliance, nor with India (with which it fought a border war in 1962).[14] Rather, the Mainland sought to be self-reliant, and its interest in trade, if any, was confined to other Socialist or Communist Countries, like North Korea after the 1950-53 Korean War, and the former Soviet Union until the Sino-Soviet split in 1961. Amidst is self-imposed isolation and inward-looking economic policies, China from 1966 to 1976 underwent a Cultural Revolution. Its hideous consequences – including for human rights – taught some senior CCP leaders that they needed to reconsider their relationship with the world trading system. Even Chairman Mao, who died in 1976, agreed to the February 1972 *Shanghai Communiqué* with U.S. President Richard Nixon (1913-1994) and his Secretary of State, Henry Kissinger (1923-).

The tide against international trade turned for China Deng Xiaoping (1904-1997) – China's pragmatic top leader from December 1978 to November 1989. Famous for catchy progressive phrases like, "It doesn't matter if a cat is black or white, so long as it catches mice"; "Reform is China's second revolution"; and "To get rich is glorious",[15] he catalysed a serious of market-oriented changes to the Mainland's sclerotically

[9] On modern Taiwanese economic history, *see* Peter C. Chow, Taiwan in the Global Economy: From an Agrarian Economy to an Exporter of High-Tech Products (Praeger Publishing ed., 2002).

[10] *See* World Trade Organization, *China and the WTO*, https://www.wto.org/english/thewto_e/countries_e/china_e.htm.

[11] *See* World Trade Organization, *Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) and the WTO*, https://www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm.

[12] *See* The World Bank, The East Asian Miracle: Economic Growth and Public Policy (Oxford University Press ed., 1993).

[13] For this and other points about the modern political economy of China, *see* Fairbank, *supra* note 3, ch. 15-17; *see* also Dwight H. Perkins, China's Modern Economy in Historical Perspective (Stanford University Press ed., 1st ed., 1975).

[14] On the Sino-Indian War, *see* Bruce Riedel, JFK's Forgotten Crisis: Tibet, The CIA, and the Sino-Indian War (Brookings Institution Press ed., 2015); Jasjit Singh ed., China's India War, 1962: Looking Back to See the Future (KW Publishers Pvt Ltd ed., 2013).

[15] *Deng Xiaoping Quotes*, BRAINYQUOTE, https://www.brainyquote.com/authors/deng-xiaoping-quotes.

underperforming economy. Most notably among them, the creation of Special Economic Zones (SEZs), in which limited private enterprise, was permitted.

By 1986, China applied to join, or re-join, GATT, as a contracting party.[16] That was an inauspicious year, in that the GATT contracting parties – by then numbering around 100 – had launched the biggest round of multilateral trade talks ever: the Uruguay Round. The Uruguay Round, between 1986 and 1994, produced roughly 20 trade treaties spanning about 1,000 pages, including the *Agreement Establishing the WTO*.[17] Throughout the Uruguay Round, negotiators in the U.S., EU, and most other contracting parties knew China was on the verge of becoming a manufacturing powerhouse – the world's factory. That anticipated new status would be a blessing to their producer-exporters, which would set up factories in China and ship goods with the benefit of MFN treatment from the importing WTO Members. That status also was a curse, specifically on domestic producers in other WTO Members. They might – and, indeed, did (to one degree or another – depending on their market position, management, and ability to adjust to technological change) – suffer from competition on like or directly competitive merchandise made in China by low-cost labour that was neither represented by independent trade unions nor protected by rigorous environment regulations to guard against toxins of all sorts.

So, the plot, as it were, was to finish the Uruguay Round texts first while negotiating with China to join the "Club" but not invite China into the Club until the texts were set. China then would have to accept the rules the existing Club members wrote. That plot unfolded. The Uruguay Round negotiations were concluded on 15 December 1993, were signed in Marrakesh on 15 August 1994, and entered into force on 1 January 1995 (save for the *Agreement on Trade Related Aspects of Intellectual Property Rights* (*TRIPs*), which took effect on 1 January 1996). China's application to accede to the WTO was not finalised until nearly 13 years after it was first launched, in November 1999, when China and the U.S. reached a key agreement on China's commercial terms of entry.[18]

Those terms of entry, finalised by the Administration of President Bill Clinton (1993-2001) and Chinese Premier Zhu Rongji (1928-, Premier, 1998-2003), were breath-taking.[19] What made them so impressive was their breadth and depth: they spoke

[16] *See* Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 American University International Law Review 1469-1538 (2000) [Hereinafter, Bhala, *Enter the Dragon*].
[17] *See* 1 Bhala, *supra* note 6, ch. 20 § I-II.
[18] *See* U.S.-China Bilateral WTO Agreement, Nov. 15, 1999, https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html.
[19] Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1469-1538 (2000).

to the CCP's intention to open its economy to foreign goods and services and Foreign Direct Investment (FDI); protect intellectual property rights (IPRs); and subject itself to the WTO dispute settlement system. As in just one example, China committed to slash its auto tariffs from 100 per cent to 25 per cent (by 1 July 2006), and permit non-bank, foreign, auto financers to lend to Chinese customers so they could afford to buy foreign cars.[20] Premier Zhu said the Chinese people could (to paraphrase the Chinese expression) "eat bitterness" and suffer competition from overseas. Their culture of hard work and entrepreneurship would help them succeed in the new, post-Cold War trading system China was joining. Integration into this system would help further alleviate poverty in China, and create job opportunities in export industries for millions of Chinese citizens. Besides, China could not afford to stay out of this system if it was to re-emerge on the world stage as a great power.

To be sure, China never committed to becoming a western-style, multi-candidate, multi-party democracy with an American-style Bill of Rights. The CCP never pledged that it would let the *KMT* contest elections against itself on the Mainland; invite the 14th Dalai Lama back to Tibet (whence he had fled to India in March 1959 amidst the Tibet Uprising); nor that it would launch a transparent inquiry into the 4 June 1989 Tiananmen Square massacre. Nor did the CCP need to do so. There never were any political or civil rights criteria necessary to join GATT as a contracting party, and nor were there any to join the WTO. After all, the Kingdom of Saudi Arabia – an absolute monarchy – acceded to the WTO in 2005.[21]

But, amidst the euphoria of the post-Cold War Washington consensus in favour of free, open trade, it was widely – and reasonably – expected that China's economic liberalisation, and its commercial law reforms, necessitated by WTO Membership, would extend to some degree into the political realm. What William Shakespeare (1564-1616) wrote in Act III, Scene 2 of *Troilus and Cressida* (1602), the words of Troilus, could have been the words of the WTO Members, and even of some constituencies on the Mainland:

> I am giddy, expectation whirls me round.
> The imaginary relish is so sweet
> That it enchants my sense.[22]

[20] *See* 1 Bhala, *supra* note 6, ch. 20 § I-II.

[21] *See* Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 The International Lawyer 741-812 (2004).

[22] SHAKESPEARE, TROILUS AND CRESSIDA, act. 3, sc. 2, https://www.folger.edu/explore/shakespeares-works/troilus-and-cressida/read/3/2/.

Many, if not most, Members were "giddy" with the "expectation" that China would move, albeit at its own pace, toward freer, capitalist-style markets. They were "enchanted" by the "imaginary relish" of Milton Freedman (1912-2006) in his classic *Capitalism and Freedom* (1962).

That is, as the 1976 Nobel Economics laureate indicates in chapter 1 ("The Relation between Political Freedom and Economic Freedom") of his book:

> It is widely believed that politics and economics are separate and largely unconnected; that individual freedom is a political problem and material welfare an economic problem; and that any kind of political arrangements can be combined with any kind of economic arrangements. The thesis of this chapter is that such a view is a delusion, that there is an intimate connection between economics and politics, that only certain combinations of political and economic arrangements are possible, and that, in particular, *a society which is socialist cannot also be democratic, in the sense of guaranteeing individual freedom*.
>
> Economic arrangements play a dual role in the promotion of a free society. On the one hand, freedom in economic arrangements is itself a component of freedom broadly understood, so economic freedom is an end in itself. In the second place, *economic freedom is also an indispensable means toward the achievement of political freedom*.[23]

So, WTO Members thought (or, at least, hoped) economic liberalism required by China's WTO accession commitments (a transition from an almost entirely state-controlled economy) would lead to expanded political liberalism (some individual democratic-like liberties). Even though the express texts of GATT-WTO treaties do not link the two, in theory, and ultimately in practice, economic and political freedoms are intertwined: in Shakespeare's phraseology, they "whirl around" together.[24] Surely, political domination by a CCP autocracy ultimately would be incompatible with China's desire to match the U.S. economically because openness to trade and investment ultimately somehow leads to tolerance in governance.

[23] Milton Friedman, Capitalism and Freedom 7-8 (The University of Chicago Press ed., 1962).

[24] Arguably, the way in which certain provisions of these treaties are applied, such as the use of GATT Article XX(a), XX(e), and XXI, concerning (respectively) exceptions for public morality, prison labour, and national security, aim to advance democratic principles. *See* 2 Bhala, *supra* note 6, ch. 40-42 (public morality), 2 Bhala, *supra* note 7, ch. 17, 19 (national security), 3 Bhala, *supra* note 6, ch. 22-23 (labor issues).

Surely not. That expectation was dashed – worse yet, in both the economic and political sense. The apt phrase attributed to Shakespeare comes from Act III, Scene 1 of *Hamlet* (1599-1601). The protagonist says in his famous "To be or not to be" a soliloquy:

> [. . .] and by a sleep to say we end
> The heartache and the thousand natural shocks
> That flesh is heir to.[25]

Perhaps from Hamlet's statement is the proverb Shakespeare is said to have coined, namely, "expectation is the root of all heartache." [26]

China's post-accession behaviour in the WTO entailed a "thousand shocks", which caused a "heartache" "rooted" in disappointed expectations. As China's participation in the WTO continued in the early 2000s, America and many other WTO Members felt China failed to play by WTO rules. For example, China did not grant foreign banks the licences to do business (including retail deposit-taking and local currency lending) across the Mainland (not only on its Eastern Seaboard in the Beijing-Shanghai-Guangzhou corridor, but inland as well), which China supposedly promised it would.[27] As another example demonstrates, China discriminated in favour of its own credit card and payment system providers against MasterCard and Visa.[28]

But were the expectations of the Americans disappointed because of the CCP? Or, perhaps, did they crash upon lessons not learned from the most basic of first-year law school courses: Legal Writing? It became clear the U.S. and its WTO Member-Allies arguably had not nailed down China's commitments in its WTO *Accession Protocol* the way they thought they had. In particular, on key points, they accepted promises from the CCP that it would push through future legal reform, after joining the Club, rather than insisting on implementation of conforming legislation before gaining Membership.

By no means did pre-Trump American Administrations accept the inevitability of a "heartache." To the contrary, successive U.S. Presidents before President Donald J. Trump (1946-, President, 2017-2021) laboured mightily for a cure. Specifically, during the Administrations of Presidents George W. Bush (1946-, President, 2001-2009) and Barack H. Obama (1961-, President, 2009-2017), before the Trade War, the U.S. strategy pursued a two-track strategy with China:

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[25] SHAKESPEARE, HAMLET, act. 3, sc.1, https://publictheater.org/contentassets/696d609cf4fe4451a9de5eb46867aa67/scripts/bns_week8_hamlet.pdf.

[26] *See Expectation Is The Root Of All Heartache*, SHAKESPEARE GEEK, https://www.shakespearegeek.com/2010/08/expectation-is-the-root-of-all-heartache.html/.

[27] *See* 1 Bhala, *supra* note 6, ch. 20 § I-II.

[28] *See* World Trade Organization, DS 413: *China – Certain Measures Affecting Electronic Payment Services*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm.

(1) Dialogue –

The U.S. (in partnership with Allies) held regular discussions with China to discuss their concerns about China's implementation of the specific commitments it made in its 2001 *Protocol of Accession*, and in general to GATT-WTO rules.[29] Their talks also embraced WTO-related issues not explicitly covered by the *Protocol* or WTO treaties, most notably, currency manipulation.

(2) Litigation –

The U.S. (along with other WTO Members, including Australia, Canada, EU, and South Africa) brought dozens, indeed, hundreds, of trade remedy cases against China: with respect to unfair trade; anti-dumping (AD) and countervailing duty (CVD) contentions; and with respect to fair trade, safeguard actions.. The cases were lodged at the WTO level and in domestic adjudicatory systems. For instance, they involved allegations that China dumped steel products in Western markets, and shipping illegally subsidised aluminium merchandise to those markets (AD and CVD cases, respectively). Chinese car tires surged into the U.S. (triggering an Obama-era safeguard case).

Alas, the dual strategy of litigation and dialogue failed. In retrospect, that America (and its Allies) would be disappointed in their expectations of success is unsurprising. That is for three reasons.

First, dialogue-litigation was an episodic strategy, but the problems posed by how the CCP governed China's trade relations with the world were systemic. A trade case on steel or discussions on banking licences could not cover the broad, deep problem that the CCP – especially under the new, starting in November 2012 of President Xi Jinping (1953-) – was not as interested in market-based reforms as it had been in the 1980s and 1990s. President Xi certainly appreciated that he could not mercilessly privatise state-owned enterprises (SOEs) and state-owned commercial banks (SOCBs), and subject them to competition from American, European, and Japanese entities. Or, radically devalue the Chinese *yuan* to address concerns from overseas regarding currency manipulation. Such measures – however much they were expected of China under the letter or spirit of its WTO accession commitments – would be a recipe for social unrest that could undermine the grip on power of the CCP. Millions of workers might be laid off, and vent their frustrations in

[29] Protocol of accession of the Public Republic of China to WTO, Nov. 23, 2001, https://worldtradelaw.net/document.php?id=misc/ChinaAccessionProtocol.pdf&mode=download.

violent protests against a Communist Party that had breached its social contract with the Chinese people ever since 1 October 1949: a trade of economic prosperity in exchange for political constraints.

Second, this new CCP leadership, itself, was more nationalistic, and insistent on the great renewal of China. It saw concessions to foreigners today through the lens of the humiliating concessions of the 1842 *Treaty of Nanking* (ending the first, 1839-1842, Opium War).[30] China was not to be carved up again by what it called "unequal treaties", imposed by neo-colonialist hegemons in the WTO, the way it had been by gunboat colonialists of the imperial period. Indeed, in the present Trade War, the seemingly endless rounds of American measures and tit-for-tat Chinese countermeasures evinces the dragon's determination to fight back against the eagle.

Third, China had big ambitions: power overseas and unity at home. Externally, the CCP wanted reunification with Taiwan, even by force if necessary. It wanted to assert sovereignty across the Nine Dash Line of the South China Sea. Internally, the CCP expected Tibetan Buddhists in Tibet and Uyghur Muslims in Xinjiang to behave under the Party – or dare it be said, male-dominated Han – leadership.

In America, the dashing of expectations that Bush-Clinton-Bush-Obama dialogue-litigation would cajole China to change its offensive trade acts, policies, and practices coincided with an economic phenomenon that had grave political consequences: the loss of approximately two million manufacturing jobs in the U.S., particularly, in States rich with Electoral College votes.[31]

Enter Presidential candidate Donald J. Trump. Though the facts were that most of the job losses and income erosion was due to changes in technology across the 20-year period, 2001-2016, when China entered the WTO, the narrative of blaming China caught fire across the American electorate. Forget dialogue and litigation. It was time for an "America First" trade policy, toward China and, indeed, the world.

With the March 2018 publication by the United States Trade Representative (USTR) of a well-documented report under Section 301 of the *Trade Act of 1974*, accordingly amended,[32] the Trade War was launched. Stiff tariffs on Chinese-origin merchandise ensued. Further justification for the successive waves of Section 301 tariffs came from two follow up reports – one in November 2018 by the USTR under Section 301, and one in June 2018 from the White House on Chinese economic aggression. The CCP's reaction quickly exacerbated the conflict: to each American measure came a Chinese

[30] *See* John King Fairbank, Trade and Diplomacy on the China Coast: The opening of the Treaty Ports, 1842-1854 (Harvard University Press ed., 1953).
[31] *See* 1 Bhala, , *supra* note 6, ch. 11 § V.
[32] *See* 19 U.S.C. § 2411 *et seq*.

countermeasure. The cycles of tit-for-tat retaliation continue. Ominously, the theatres of battle have expanded from tariffs to non-tariff barriers (NTBs), to human rights (most notably over Hong Kong), and to sabre-rattling over Taiwan.

Shakespeare again furnishes the perfect proverb to capture the *status quo*, and the *status futurus*, that is, where America, China, and the world now are, and where they appear headed. In Act II, Scene 1 of *All's Well that Ends Well* (1601-1605), Helena observes:

> Oft expectation fails, and most oft there Where most it promises; and
> oft it hits where hope is coldest, and despair most fits.[33]

China's long odyssey back into the world trading system "promised" the "most," and "expectations failed." "Hope" now is "cold." "Despair" seems to "fit." Or, perhaps, the Americans and Chinese can figure out a way to "end well" their Trade War for the benefit of "all".

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[33] SHAKESPEARE, ALL'S WELL THAT ENDS WELL, act 2, sc. 1, http://www.literaturepage.com/read/shakespeare-alls-well-that-ends-well-22.html.

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The Court of Justice of the E.U.: a Contextualist Court

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ABSTRACT

The Court of Justice of the European Union (E.U.) is sometimes labelled "a teleological court". In this paper I will show why it is a misleading label. Then I will propose a more appropriate label for it – "a contextualist court" – and describe what such a label reveals about the interpretation of E.U. law by the Court of Justice. In particular, I will show that the contextual/systemic arguments are the most defining feature of the Court's legal reasoning and that those arguments are essential for the Court's use of other categories of interpretive arguments: textual/linguistic, purposive/teleological, and historical/intentional. I will also discuss what are the values promoted by such an approach to the interpretation of E.U. law. In the end, I will demonstrate, using a recent case study, that the Court's interpretive approach leads to integrationist outcomes less often than is usually thought. This challenges accounts built on the alleged integrationist bias of the Court of Justice, which is often used interchangeably with the label "teleological".

KEYWORDS

Interpretation of E.U. Law; Court of Justice; Legal Reasoning; Teleology; Contextualism

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INTRODUCTION

The Court of Justice of the E.U. receives incredible attention from legal scholars. It always has. They dissect its case law in every possible area of E.U. law. They analyse its legal reasoning. They discuss its institutional setup. They sketch its relationship with other institutional actors, especially the E.U. legislature and national courts. They question or defend its legitimacy and authority. They look deeper into its judgments to find a particular ideology, biases, or policy preferences. They describe, explain, criticise and justify what the Court *is* or *does*, as well as urge, advocate, require, and propose what the Court *should be doing*.

E.U. legal scholars also label. They take certain features or characteristics of the Court's setup, case law, reasoning, etc., and come up with labels that best capture them. These labels are then used descriptively to give as accurate and detailed an account of judicial practice in the E.U. as possible, as well as, normatively, defending or criticising such practice.[1]

One such label is "teleological". It is meant to describe the typical approach of the Court of Justice to the interpretation of E.U. law. Namely, in its legal reasoning the Court is supposedly giving great(er) weight to the teleological arguments – including objectives, purposes, and effectiveness of E.U. law – often at the expense of the textual argument or the intention of the E.U. legislator.[2] Its interpretive philosophy can thus be characterised as purposivism,[3] which is usually associated with judicial activism and a lack of judicial restraint and deference to the legislator.[4] The omnipresence of the Court's teleology and purposivism are sometimes taken axiomatically - such that the focus shifts to the purported justifications of such interpretations.[5]

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[1] *Cf.* Paul Craig, *Pringle and the Nature of Legal Reasoning*, 21 Maastricht J. Eur. & Comp. L. 205, 209 (2014) (U.K.).

[2] *Cf.* Gunnar Beck, *The Structural Impact of General International Law on EU Law. The Court of Justice of the EU and the Vienna Convention on the Law of Treaties*, 35 Y. B. Eur. L. 484 (2016) (U.K.) [hereinafter Beck, *The Structural Impact*]; *see also* Gunnar Beck, *The Legal Reasoning of the Court of Justice and the Euro Crisis – the Flexibility of the Cumulative Approach and the Pringle Case*, 20 Maastricht J. Eur. & Comp. L. 635 (2013) (U.K.); Timothy Millett, *Rules of Interpretation of EEC Legislation*, 10 Statute L. Rev. 163 (1989) (U.K.).

[3] *Cf.* Giulio Itzcovich, The Interpretation of Community Law by the European Court of Justice, 10 German L. J. 537, 557–59 (2009) (Ger.); *see also* Mitchel de S.-O.-L'E. Lasser, Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy 229 (Oxford University Press, 2009) (U.K.) (who rather terms it "meta-purposive" or "meta-teleological"); Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 Fordham Int'l L. J. 656 (1996). For sector-specific studies, see generally Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*, 5 German L. J. 283 (2004) (Ger.); Kenneth M. Lord, *Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice*, 29 Cornell Int'l L. J. 571 (1996); David Mazzarella, *The Integration of Aviation Law in the E.C.: Teleological Jurisprudence and the European Court of Justice*, 20 Transp. L. J. 353 (1992).

[4] *Cf.* Hjalte Rasmussen, On Law and Policy in The European Court of Justice: A Comparative Study in Judicial Policymaking (Brill Nijhoff ed., 1986) (Neth.); *see also* Trevor C. Hartley, *The European Court, Judicial Objectivity, and the Constitution of the European Union*, 112 Law Q. Rev. 95 (1996) (U.K.).

[5] *Cf.* Stephen Brittain, *Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal*, 55 Irish Jurist 134 (2016) (Ir.).

Some authors have rejected this label as inadequate, selective, and superficial.[6] I will briefly revisit their objections and explain why we should break off with the label "teleological" for good. At the same time, I will propose a more accurate label for the Court of Justice – a "contextualist" court. I will argue that, as a descriptive matter, the contextual/systemic arguments are the most defining feature of the Court's legal reasoning and its judicial philosophy. I will also show that the Court's use of other general categories of interpretive arguments – textual/linguistic, purposive/teleological, and historical/intentional[7] – is marked by their *contextualisation*. Following that, as a normative matter, I will ask what value or good is promoted by such an approach to legal reasoning. Lastly, I will reflect on the relationship between a "contextualist" reasoning and outcomes of adjudication. The main concern is that contextualism, just like teleology, will in most cases lead to integrationist outcomes that reflect E.U. interests. Based on a sample of recent cases of the Court of Justice, I will illustrate why that is not necessarily so. The final section concludes with looking into the factors that call for a contextualist court in the current state of the E.U. legal system.

1. GREAT CASES MAKE BAD LAW

The label "teleological" given to the Court of Justice has two major limitations. First, it is based on a limited number of cases.[8] And second, those cases are what we usually call "landmark" cases. They make up for only a tiny fraction of all cases the Court of Justice deals with – a dozen a year at most, compared to almost a thousand a year which the Court is currently deciding.[9] They feature exceptional controversies that raise salient legal and political issues of a constitutional nature, which cannot merely be solved by

[6] *See* Albertina Albors Llorens, *The European Court of Justice, More than a Teleological Court*, 2 Cambridge Y. B. Eur. Legal Stud. 373 (1999–2000) (U.K.); *see also* David Edward, *Judicial Activism – Myth or Reality?*, *in* Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie Stuart 29 (Angus I. L. Campbell & Meropi Voyatzi eds., 1996).

[7] For discussion of these main interpretive arguments that appear in judicial reasoning in many contemporary jurisdictions and legal traditions, and in general of the interpretation of law as argumentative practice, see generally Neil MacCormick, *Argumentation and Interpretation in Law*, 9 Argumentation 467 (1995) (Neth.); *see also* Neil MacCormick & Robert Summers, Interpreting Statutes: A Comparative Study, Routledge (Neil MacCormick & Robert Summers eds., 1991) (U.K.).

[8] One of the major critical works readily admits this limitation when it notes that it takes into account "only a tiny proportion" of the Court's case law – less than 0.3% of judgments in a thirty years period; *see* Sir Patrick Neill, The European Court of Justice: A Case Study in Judicial Activism (European Policy Forum ed., 1995) (Neth.).

[9] In 2021, the Court received 838 new cases, completed 772 cases, and had 1113 cases pending. 2019 was the peak year, before the Covid-19 pandemic hit. In that year the Court received 966 new cases, completed 865 cases, and had 1102 cases pending; *see* Court of Justice of the E.U., *Ann. Rep. 2021 – Judicial activity* (Mar. 2022).

only looking into the text of legal provisions and their relevant context. On the contrary, in those cases the Court is often presented with a range of arguments that point to rivalling yet equally plausible conclusions. So, once the immediate rules run out, the Court has to use what Advocate General Michal Bobek termed "constitutional interpretive tiebreakers".[10] These are, for instance, certain moral or political values and principles like dignity, equality, liberty, peace, solidarity, cultural diversity, free movement, market liberalisation, etc. They are characteristic of a liberal democracy being a political order and liberal constitutionalism as a legal order in general. More importantly, they are recognised as such in the E.U. constitutional order, be it in Article 2 of the Treaty on European Union (T.E.U.) or other provisions of the founding Treaties. Hence, they represent the intentionally made "fundamental constitutional choice" of the E.U. Treaty-makers.[11] By extension, they inform the legal reasoning of the Court of Justice in the interpretation of E.U. law and not only in these landmark cases - albeit that in them this becomes the most apparent. Of course, although we may all subscribe to nominally the same values and principles, reasonable disagreements about their conceptions, their meaning, and their requirements in particular circumstances still exist.[12] The controversies in these landmark cases usually concern disagreements about moral and political issues. So, whichever side the Court takes – and one side it must always take – there will surely be those who will loudly protest the outcome. For that reason, landmark cases typically receive the greatest scholarly and public attention.

[10] Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., Opinion of Advocate General Bobek, ECLI:EU:C:2020:375, ¶¶ 104–117 (May 14, 2020).

[11] *See* Siniša Rodin, *Liberal Constitutionalism, Rule of Law and Revolution by Other Means*, Il Diritto dell'Unione Europea 203, 226–27, 230–31 (2021) (It.).

[12] *Cf.* Martijn van den Brink, *Justice, Legitimacy and the Authority of Legislation within the European Union*, 82 Mod. L. Rev. 293, 300 (2019) (U.K.).

In an often-quoted passage from his dissenting opinion, U.S. Supreme Court Justice Oliver Wendell Holmes famously reminded us that "[g]reat cases, like hard cases, make bad law".[13] The same holds true in the E.U. context: a fixation on "great" cases can give false impressions and expectations about the actual practices of the Court of Justice and lead to a distorted picture of its legal reasoning.[14] For the same reason, labels assigned on the basis of great cases are bad. The one about "teleological" courts is too simplistic and selective. It was never verified by a larger and comprehensive case law analysis that describes the reasoning of the Court in a meaningfully selected sample of cases that cover certain areas of law or periods of time.[15] At the same time, it leaves out a vast majority of the Court's judgments. In them, the Court routinely deals with ordinary cases that involve somewhat simpler questions of interpretation of E.U. (often secondary) law. These questions are about politically or morally non-salient controversies; and therefore, receive scant attention.

One may push back against this and say that what actually matters is what the Court of Justice does in hard, exceptional cases. They set the tone for the Court's practice

[13] Northern Securities Co. v. United States, 193 U. S. 197, 400 (1904) (Holmes, J., dissenting).

[14] What is acknowledged by many authors, including those that are the most critical of the Court's alleged purposivism: see, e.g., Giulio Itzcovich, *The European Court of Justice*, *in* Comparative Constitutional Reasoning 277, 294 (András Jakab, Arthur Dyevre & Giulio Itzcovich eds., 2017):

> [T]he fact that literal arguments are almost absent [. . .] [from the Court's leading cases that are notable for] their impact on the legal culture of the Member States, their contribution to the completion of the common market, and their influence on the development of European law [. . .] cannot be regarded as indicative of a general feature of the Court's legal reasoning;

Beck, *The Structural Impact*, *supra* note 2, at 496:

> [I]n most run-of-the-mill cases, which concern the application of more or less clear, detailed, and technical provisions [. . .] the Court generally pays close regard to the wording of the applicable provisions, and it is exceptional for the Court to reach a conclusion based on teleological criteria, which are opposed to a literal reading. However, the Court's pro-Union default position becomes crucial and often the decisive factor in cases involving major issues of principle, such as constitutional issues or the division of competences between the [E.U.] and Member States;

Gerard Conway, *The Quality of Decision-Making at the Court of Justice of the European Union*, *in* How to Measure the Quality of Judicial Reasoning 225, 231 (Mátyás Bencze & Gar Yein Ng eds., 2018):

> [T]he [European Court of Justice] has a marked tendency to meta-teleological interpretation [. . .] purposive interpretation at a very high level of generality related to the [E.U.] legal system overall, rather than to particular legislative provisions or pieces of legislation. This sets it apart from national and other international courts and gives it great scope for creativity, albeit that it only really does this in a minority of cases.

[15] On the contrary, it was challenged in certain studies; see, e.g., Albors Llorens, *supra* note 6, at 398, who notes that:

> [W]hichever view one takes of the Court's work, it is too facile to generalise on the basis of a few decisions randomly selected from more than forty [now seventy] years of case law. A more rigorous approach, based on a systematic analysis of the Court's case law in different areas, would do it more justice. The comparatively few judgments where it has reached a seemingly dramatic result must not obscure the careful and painstaking interpretative task carried out by the Court in the majority of its decisions.

overall and are thus the most important for the E.U. legal system and community. Hence, they deserve all the attention, and it is most important to know how the Court will go about deciding those cases. But in reality, the reason why a certain case is considered important is often unclear. They rarely lead to major twists and turns in the jurisprudence of the Court, nor fierce reactions from national courts and governments, or dramatic changes in everyday life of ordinary citizens. Sometimes it is legal scholars who overstate the importance of certain judgments - for better or worse.

Alternatively, cases that are considered routine and simple may often be equally important. They may affect the legal position of many individuals or impose significant financial burdens on those that end up on the losing side. They are very important, at least, for many legal practitioners and national judges who will have to apply E.U. law to solve real-life disputes. So, what the Court of Justice does in these cases is not less important from what happens in cases that stir great controversy. The fact that the former cases exceed the latter by far in numbers makes them only more important. Our knowledge about the Court's reasoning in those cases is much more useful for everyone outside academia - especially if we measure the usefulness of that knowledge by how successful it is in predicting the outcomes of judicial rulings.[16] It can also provide a more solid basis for describing and characterising the Court's legal reasoning, including labelling its approach to the interpretation of E.U. law.

[16] Echoing Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897): "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law".

To overcome the obstacles of selectiveness and representation, my observations in this paper build upon a study of a recent set of cases, which does not (only or mostly) consist of landmark cases. It is composed of 102 preliminary references received by the Court of Justice between mid-2018 and 2020,[17] which contain 135 questions of interpretation of E.U. law posed by national courts. These questions are about the interpretation of different substantive areas of E.U. law, from customs and taxes; to consumer protection and the free movement of workers; to environment and asylum; as well as different sources of E.U. law: both primary and secondary. Questions were referred by courts from twenty-one Member States of different jurisdiction and rank: from ordinary, administrative, financial, and constitutional courts to first instance, appellate, and apex courts.[18]

Moreover, among these references, there is a small number of those that could perhaps be characterised as hard cases, if we assume that those cases are reserved for the Grand Chamber - of which there are seven in total (containing ten questions of interpretation).[19] There are also only a few cases that the Court decided with a reasoned order, which can be considered as "easy" cases and there are three in total (containing four questions).[20] Other cases fall on the spectrum between these two ends where fifty-one cases (containing sixty-one questions) dealt with three-judge chambers and without the opinion of the Advocate General (except in one case);[21] eight cases (containing eleven questions) dealt with five-judge chambers without the opinion of the Advocate General; and thirty-three cases (containing forty-nine questions) dealt with five-judge chambers with the opinion of the Advocate General.

[17] Which is around one-seventh of all preliminary references (720 in total) received by the Court during this period.

[18] This set of cases was compiled of preliminary references in which national courts proposed answers to the questions of interpretation of E.U. law sent to the Court of Justice. In an earlier study, I have compared those references to the responses of the Court of Justice; see Davor Petrić, Interpreting E.U. Law: Legal Reasoning of National Courts in the Preliminary Ruling Procedure (2022) (Ph.D. dissertation, University of Zagreb), in which I aimed to assess the interpretive practice of national courts. Since the analyzed cases covered a significant number of diverse legal questions, which were not restricted to specific area(s) or source(s) of law, national background or type(s) of the referring courts, they provided a solid sample for describing general features of the legal reasoning of the Court of Justice.

[19] *Cf.* Rules of Procedure of the Court of Justice of the E.U., art. 60(1), 2012 O.J. (L 265) 1. ("Assignment of cases to formations of the Court"): "The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber [. . .]".

[20] *Cf. Id.* at art. 99. ("Reply by reasoned order"):

> Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

[21] *Cf.* 3. Protocol on the Statute of the Court of Justice of the E.U, art. 20(5), 2004 O.J. (C 310) 210 : "Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General".

Such a diverse sample of cases – most importantly, in terms of their perceived legal difficulty and subject areas – arguably comes closer to representing the bulk of the everyday interpretive practice of the Court of Justice. Therefore, it enables a more accurate description of the Court's general approach to the interpretation of E.U. law.

2. THE INTERPRETIVE APPROACH OF A CONTEXTUALIST COURT

Against this background, in this Section I take up the most important categories of interpretive arguments the Court of Justice uses when interpreting E.U. law. Those are textual/linguistic, contextual/systemic, purposive/teleological, and historical/intentional arguments. For each of these arguments, I will show what are the main characteristics of their use and what place *context* and *contextualisation* have in that process.

2.1. TEXTUAL OR LINGUISTIC ARGUMENTS

Legal provisions are typically expressed in writing. Written text is, therefore, the starting point of legal interpretation. The same holds true in E.U. law.[22] Indeed, the Court of Justice often cites textual or linguistic features of E.U. legal provisions as a first step in their interpretation.[23] The Court refers to these features in different ways. Some examples are the "[strict/actual] wording",[24] "expression",[25] "usual meaning [in everyday language]",[26] "everyday meaning",[27] "terms",[28] etc. The Court, however, rarely adds anything to these brief references. Rather, it merely asserts that the meaning or scope of a legal provision is "clear" or "apparent" based on its text; or that from its wording or terms or ordinary use a specific meaning or scope inevitably "follows". The

[22] *Cf.* Case C-482/09, Budějovický Budvar, Opinion of Advocate General Trstenjak, 2011 E.C.R. I-08701: "According to traditional principles of construction, the starting-point of any interpretation, and also its boundary, is always the wording of a provision".

[23] In my study, it did so in more than half of situations (57.1%) or in 76 of 135 questions of interpretation.

[24] Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶ 39 (July 16, 2020); Case C-292/89, Antonissen, ¶ 9, 1991 E.C.R. I-00745.

[25] Case C-112/19, Marvin M., ECLI:EU:C:2020:864, ¶ 37 (Oct. 28, 2020); Case C-363/19, Konsumentombudsmannen v. Mezina, ECLI:EU:C:2020:693, ¶¶ 46–47 (Sept. 10, 2020).

[26] Case C-264/19, Constantin Film Verleih, ECLI:EU:C:2020:542, ¶¶ 29–30 (July 9, 2020). Occasionally, the Court makes a distinction between "the usual meaning" of a term or sentence "in scientific language and in everyday language"; *see* Case C-346/08, Comm'n v. United Kingdom, 2010 E.C.R. I-03491, ¶ 37.

[27] Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶ 51 (Nov. 25, 2021).

[28] Case C-513/20, Termas Sulfurosas de Alcafache, ECLI:EU:C:2022:18, ¶ 29 (Feb. 13, 2022).

only exception is that the Court may support this assertion with a remark that other parties in the proceedings share the same understanding.[29]

For their part, (some) Advocates General are usually more elaborate with these assertions. When they make them, they may cite dictionaries,[30] technical manuals and scientific writings,[31] legal scholarship and legal vocabulary, etc.[32] These legally non-binding materials support the conclusion that the meaning of provisions follows from their text or ordinary use. They may indirectly appear in the Court's judgments. For instance, when judgments refer to specific points in the opinions ("as the Advocate General observed/stated/noted in her Opinion, [. . .]") or "soft law" instruments published by E.U. institutions, which the Court recognises as admissible aids to interpretation.[33]

In some situations, the Court of Justice may implicitly rely on the linguistic rules on grammar and syntax. For example, it may point to the form or function of the words or their position in a sentence. Typical examples are the use of the word "shall" which implies obligation;[34] or the word "only" which implies exhaustiveness;[35] or the conjunction "or" which implies alternatives;[36] or the indefinite article "a" which implies a general scope or status.[37]

However, these linguistic subtleties and inferences are not what lead the Court of Justice to conclude that the meaning of a provision is clear and unambiguous. What leads it there more often is *contextualisation* of the text. As Neil MacCormick noted, "[n]o linguistic communication is fully comprehensible save in a whole presupposed context of utterance".[38] To illustrate how this works, consider the following example.

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[29] *See* Case C-167/95, Linthorst, 1997 E.C.R. I-04383, ¶ 13:

> The term "valuations", as it is understood in common parlance, signifies – as the German Government and the Commission have pertinently observed – examination of the physical condition or investigation of the authenticity of a good with a view to estimating its value or quantifying work to be carried out or the extent of damage sustained.

[30] *See* Case C-264/19, Constantin Film Verleih, Opinion of Advocate General Øe, ECLI:EU:C:2020:261, ¶ 30 (Apr. 2, 2020); Case C-535/19, A. v. Latvian Ministry of Health, Opinion of Advocate General Øe, ECLI:EU:C:2021:114, ¶ 88 (Feb. 11, 2021).

[31] *See* Case C-88/19, T. M. and Others, Opinion of Advocate General Kokott, ECLI:EU:C:2020:93, ¶¶ 34, 39 (Feb. 13, 2020).

[32] *See* Case C-532/18, G. N. v. Z. U., Opinion of Advocate General Øe, ECLI:EU:C:2019:788, ¶ 45 (Sept. 26, 2019).

[33] *Cf.* Case C-189/19, Spenner v. Germany, ECLI:EU:C:2020:381, ¶¶ 48-49 (May 14, 2020).

[34] *See* Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304, ¶ 39 (Apr. 23, 2020); Case C-112/19, Marvin M., ECLI:EU:C:2020:864, ¶ 37 (Oct. 28, 2020).

[35] *See* Case C-564/18, L. H., ECLI:EU:C:2020:218, ¶¶ 29–30 (Mar. 19, 2020); *see also* Case C-321/19, B. Y. and C. Z., ECLI:EU:C:2020:866, ¶¶ 31–32 (Oct. 28, 2020).

[36] *See* Case C-540/19, W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶ 29 (Sept. 17, 2020).

[37] *See* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11, ¶ 63 (Jan. 14, 2021).

[38] MacCormick, *supra* note 7, at 475.

In *Presidenza del Consiglio dei Ministri v. B. V.*, the Court was asked to interpret Article 12(2) of Directive 2004/80/EC relating to compensation to crime victims. That provision mandates Member States to "ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims". The Court noted that from its "wording" it follows that "that provision sets out, in general terms, the obligation for Member States to provide for the existence of a scheme on compensation to "victims of violent intentional crimes committed in their respective territories" and not only to victims that are in a cross-border situation".[39] But that conclusion follows only after juxtaposing the wording of Article 12(2) to the wording of other provisions of the same Directive, which expressly refer to the existence of cross-border elements as a precondition of their application.[40] So, the meaning that the Court brings to the "wording" of this provision is not usual or everyday meaning that it could be ascribed to the text in question. Rather, it is a contextualised meaning that becomes apparent only in a relevant context, i.e., in an immediate setting of a provision in question or a wider setting of the legislative act.

In many other situations encountered in my study,[41] the Court of Justice was using the textual/linguistic arguments in the same way. It pointed to textual or linguistic features of E.U. legal texts not in isolation but rather in their immediate or wider surrounding.

Of course, there may be certain words, phrases or sentences whose meaning may be ascertained only by observation of the natural language in which they are expressed, without inquiring about their context. It may be argued that every text does have the "core" meaning – after all: "[a] cigarette is not an elephant".[42] In many situations in everyday life, we can understand the meaning of legal texts without much effort or background information. But these are not situations that generate controversy or end

[39] Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶ 39 (July 16, 2020).

[40] *See* Council Directive 2004/80/EC of 29 April 2004 relating to Compensation to Crime Victims, 2004 O.J. (L 261) 15, 1.

[41] *See generally*, Case C-502/18, C. S. and Others, ECLI:EU:C:2019:604, ¶ 20 (July 11, 2019); *see also* Case C-524/18, Willmar Schwabe, ECLI:EU:C:2020:60, ¶ 52 (Jan. 30, 2020); *see* Case C-578/18, Energiavirasto, ECLI:EU:C:2020:35, ¶¶ 38–40 (Feb. 23, 2020); *see* Case C-610/18, AFMB and Others, ECLI:EU:C:2020:565, ¶¶ 52-53 (July 16, 2020); *see* Case C-722/18, KROL v. Porr, ECLI:EU:C:2019:1028, ¶¶ 30–32 (Nov. 28, 2019); *see* Case C-791/18, Stichting Schoonzicht, ECLI:EU:C:2020:731, ¶¶ 30–31 (Sept. 17, 2020); *see* Case C-796/18, Informatikgesellschaft für Software-Entwicklung, ECLI:EU:C:2020:395, ¶¶ 29–30 (May 28, 2020); *see* Case C-299/19, Techbau, ECLI:EU:C:2020:937, ¶¶ 39–46 (Nov. 18, 2020); *see* Case C-365/19, F. D., ECLI:EU:C:2021:189, ¶¶ 28–30 (Mar. 10, 2021); *see* Case C-530/19, N. M. v. O. N., ECLI:EU:C:2020:635, ¶¶ 24–25 (Sept. 3, 2020); *see* Case C-619/19, Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶¶ 37–40 (Jan. 20, 2021); Case C-189/19, Spenner v. Germany, ECLI:EU:C:2020:381, ¶¶ 37-40, 45 (May 14, 2020); Landkreis Harburg, ECLI:EU:C:2020:732 ¶¶ 29-31.

[42] Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 Cardozo L. Rev. 767, 767 (1992).

up being litigated before courts. Those that do usually concern the "penumbral" meaning of the text, which cannot be ascertained only by following the rules of ordinary language.[43] These situations represent the tip of the iceberg of all legal questions requiring judicial resolution.[44]

Cases that are brought before the Court of Justice are of the same kind. Therefore, in the interpretation of E.U. law, it is indeed "context and not text that provides answers to legal questions".[45] For that reason, most situations in which the Court refers to the textual/linguistic arguments are characterised by the contextualisation of linguistic expressions, in the way just described. What provides relevant context are typically other provisions found within the same legal act. These provisions, together with provisions of different but related legal acts or of higher sources of law, are part of what is usually considered as making the content of the following category of interpretive arguments.

2.2. CONTEXTUAL OR SYSTEMIC ARGUMENTS

These arguments are used to ensure that the meaning of a legal provision "fits" into its context horizontally and vertically. As the Court famously noted in *CILFIT*, "every provision of [E.U.] law must be placed in its context and interpreted in the light of the provisions of [Union] law as a whole".[46] What makes the relevant context is expressed through different types of contextual/systemic arguments - the most important being contextual harmonisation, precedent, analogy, and general principles. These will be discussed in the following lines.

In the case law of the Court of Justice, contextual harmonisation and precedent are by far the most frequently used arguments.[47] It can rightfully be said that it is impossible to find a judgement of the Court that does not cite at least one of these two arguments.

The first of them is contextual harmonisation. It is important since no legal provision is enacted in isolation from other provisions. Rather, every provision is a part of a certain section or chapter of some legislative act, which is, together with related legislative acts, part of a certain area of law, which is, in turn, a part of the entire legal

[43] *See* Riccardo Guastini, *Legal Interpretation. The Realistic View*, *in* Encyclopedia of the Philosophy of Law and Social Philosophy (Mortimer Sellers & Stephan Kirste eds., 2020).
[44] *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. Chi. L. Rev. 1215, 1226–31 (2009).
[45] Siniša Rodin, *In the Classroom and the Courtroom*, 20 Maastricht J. Eur. & Comp. L. 475, 477 (2013) (U.K.).
[46] Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 03415, ¶ 20.
[47] In my study, the Court used the argument from contextual harmonization in 83.4% questions of interpretation or 111 in total, and the argument from precedent in 84.2% of questions of interpretation or 112 in total. As for the other two contextual/systemic arguments, general principles were cited in 29.3% of questions of interpretation or 39 in total, and analogy in 28.6% of questions of interpretation or 38 in total.

system. This, then, finds its place next to other legal systems in the transnational legal arena, and so on. In line with this, the Court of Justice uses the argument from contextual harmonisation to interpret provisions of E.U. law consistently with other relevant provisions, on different levels and in different dimensions. Most notably:

- to determine the meaning of a term consistently with the meaning of other terms found in the same provision (also known as *ejusdem generis* [of the same kind] argument);[48]

- to determine the meaning of a provision consistently with the meaning of provisions immediately surrounding it,[49] or with provisions with which it forms a specific Unit or Chapter of a source of law,[50] or with provisions from Annexes to that source of law;[51]

- to determine the meaning of a provision consistently with the title of a Section or Chapter of the legal act in which it is found;[52]

- to determine the meaning of a provision consistently with analogous provisions from other legal acts,[53] and other areas of law,[54] or with provisions from different legislative acts regulating the same area of law (also known as *in pari materia* argument);[55]

[48] *See* Case C-272/19, V. Q. v. Land Hessen, ECLI:EU:C:2020:535, ¶¶ 69–71 (July 9, 2020); *see also* Case C-73/16, Peter Puškár v. Finančné ECLI:EU:C:2017:725, ¶¶ 39–40 (Sept. 27, 2017); *see* Case C-101/01, Bodil Lindqvist, 2003 E.C.R. I-12971, ¶¶ 44–45.

[49] *See* Case C-546/19, B. Z. v. Westerwaldkreis, ECLI:EU:C:2021:432, ¶¶ 43–46 (June 3, 2021); *see also* Case C-543/19, Jebsen & Jessen v. Hauptzollamt Hamburg, ECLI:EU:C:2020:830, ¶¶ 56–57 (July 1, 2019); *see* Case C-686/2019, SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582 ¶¶ 38–42 (July 6, 2020); *see* Case C-616/19, M. S. and Others v. Minister for Justice and Equality, ECLI:EU:C:2020:1010, ¶¶ 32–36 (Dec. 10, 2020); Case C-791/18, Stichting Schoonzicht, ECLI:EU:C:2020:731, ¶ 26 (Sept. 17, 2020); Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953 ¶¶ 43-48 (Nov. 25, 2021).

[50] *See* Case C-786/18, ratiopharm GmbH v. Novartis Consumer Health GmbH, ECLI:EU:C:2020:459, ¶ 34 (Oct. 31, 2018); Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304, ¶¶ 25-35 (Apr. 23, 2020).

[51] *See* Case C-881/19, Tesco Stores ČR a.s. v. Ministerstvo zemědělství, ECLI:EU:C:2022:15, ¶¶ 34–39 (Jan. 13, 2022).

[52] *See* Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶ 40 (July 16, 2020); Case C-500/18, AU v Reliantco Investments, ECLI:EU:C:2020:264, ¶ 60 (Apr. 2, 2020).

[53] *See* Case C-706/18, X. v. Belgische Staat, ECLI:EU:C:2019:993, ¶¶ 34–37 (Nov. 20, 2019).

[54] *See* Case C-306/06, 01051 Telecom GmbH v. Deutsche Telekom A.G., 2008 E.C.R. I-01923, ¶ 27 (Apr. 3, 2008); see also Case C-360/00, Commission v. Italian Republic, 2003 E.C.R. I-05767, ¶ 38 (Jun. 12, 2003) (concerning payments in commercial transactions and payments to the E.U. budget).

[55] *See* Case C-815/18, Federatie Nederlandse Vakbeweging v. Van den Bosch Transporten BV, ECLI:EU:C:2020:976, ¶ 35 (Dec. 1, 2020); *see* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶¶ 40–42 (Dec. 17, 2020); *see* Case C-619/19, Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶¶ 55-56 (Jan. 20, 2021); *see* Case C-264/19, Constantin Film Verleih, ECLI:EU:C:2020:542, ¶ 33 (July 9, 2020); *see also* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11 ¶ 66.

- to determine the meaning of a provision consistently with provisions of hierarchically higher sources of law:[56] secondary law consistently with primary law,[57] which includes: the Charter,[58] and general principles,[59] as well as with international law;[60] or implementing legislation consistently with primary legislative act;[61]

- to determine the meaning of a provision in light of a generic requirement of completeness and coherence of the E.U. legal system.[62]

Second important argument in this category is precedent. Its appearance in the jurisprudence of the Court of Justice has been discussed many times.[63] As we saw, the Court makes references to its earlier case law in almost every judgement. Case law thus makes an important element of the context in which legal provisions are placed. In its jurisprudence, the Court of Justice constantly interprets provisions from different

[56] See Joined Cases C-392/16, C-77/17 and C-78/17, M. and Others v. Commissaire général aux réfugiés et aux apatrides, ECLI:EU:C:2019:403, ¶ 77 (May 14, 2019):

> [I]n accordance with a general principle of interpretation, an [E.U.] measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter [. . .] Thus, if the wording of secondary [E.U.] law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with that law.

[57] *See* Case C-199/19, R.L. sp. z o.o. v., ECLI:EU:C:2020:548, ¶ 30 (July 19, 2020).

[58] *See* Case C-949/19, M.A. v. Konsul Rzeczypospolitej Polskiej w N., ECLI:EU:C:2021:186, ¶ 44 (Mar. 10, 2021).

[59] *See* Case C-356/19, Delfly sp. z o.o. v. Smartwings Poland sp. z o. o., formerly Travel Service Polska sp. z o.o, ECLI:EU:C:2020:633, ¶ 29 (Sept. 3, 2020); Case C-826/19, W.Z. v. Austrian Airlines AG, ECLI:EU:C:2021:318, ¶ 41 (Apr. 22, 2021).

[60] *See* Case C-515/19, Eutelsat SA v. Autorité de régulation des communications électroniques et des postes (ARCEP) e Inmarsat Ventures SE, ECLI:EU:C:2021:273, ¶ 63 (Apr. 15, 2021); *see also* Case C-790/19, Parchetul v. L.G. and M.H., E.C.R., ¶¶ 55–58 (Sept. 2, 2021); *see* Case C-795/19, X.X. v. Tartu Vangla, ECLI:EU:C:2021:606, ¶ 49 (July 15, 2021). Note also that the limit to consistent interpretation of E.U. law with international law is reached if the outcome of interpretation would prejudice the fundamental principles of the E.U. constitutional order or undermine its autonomy: see Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA), Opinion 1/17 of the Court, ECLI:EU:C:2019:341, ¶ 107 (Apr. 30, 2019); *see also* Joined Cases C-302/05 and C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-06351, ¶¶ 284–285.

[61] *See* Case C-815/19, Natumi GmbH v. Land Nordrhein-Westfalen, ECLI:EU:C:2021:336, ¶ 52 (Apr. 29, 2021); Case C-361/06, Feinchemie Schwebda GmbH and Bayer CropScience AG v. College voor de toelating van bestrijdingsmiddelen, 2008 E.C.R. I - 3865, ¶ 49.

[62] *See* Case C-482/08, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, 2010 E.C.R. I-10413, ¶ 48. For classic expressions of this requirement, see Case 294/83, Parti écologiste "Les Verts" v. European Parliament, 1986 E.C.R. 01339, ¶ 23; Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 04199, ¶ 16.

[63] *See generally* Itzcovich, *supra* note 14, at 296–97; Gunnar Beck, the Legal Reasoning of the Court of Justice of The EU 290–91 (Bloomsbury Publishing, 2013) (U.K.); see also Mitchel de S.-O.-l'E. Lasser, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court* 51 (N.Y.U. L. Sch., Jean Monnet Working Paper No. 1/03, 2003), who noted that "the Court's "case-law", identified explicitly as such, constitutes probably the single most important focal point in [the Court's] argumentation".

sources of E.U. law. These earlier interpretations then become relevant for later interpretations of the same, similar, or related provisions. Some of the reasons for holding earlier judicial interpretations as authoritative and relevant – and not only in E.U. law – include stability and predictability of the legal system; institutional knowledge and wisdom accumulated during periods of development; and consolidation of precedents; and the value of equality which requires treating the same or similar cases in a same or similar manner.

Precedent is closely related to other types of contextual/systemic arguments mentioned earlier like analogy and general principles. Regarding analogy, when the Court encounters situations that have the same or similar factual or legal background as situations that have already been resolved in an earlier judgement, it can extend its holding from an earlier case and apply it by analogy to a later case.[64]

As for general principles of E.U. law, which are unwritten sources of law, they are developed in the case law. Hence, they can always be traced back to the original judgement that established them. In these rulings, the Court of Justice drew general principles from some of the existing, written sources of law in order to fill in the gaps left by the Treaties. In this exercise, wider legal context becomes essential. When establishing the general principles, the Court of Justice refers to the Treaties and their "general/whole" "system/scheme",[65] constitutional traditions common to the Member States,[66] comparative law in general,[67] and international law.[68] Of course, this doctrinal exercise cannot be reduced to arithmetic, but requires evaluative choices.[69] In other words, the Court does not seek "a lowest common denominator" among these written sources of law, but rather a principle that would "fit" best within the scheme of the Treaties, ultimate objectives and fundamental values of E.U. integration.[70] This is where

[64] *See* Case C-535/18, I. L. and Others, ECLI:EU:C:2020:391, ¶¶ 94–98 (May 28, 2020); *see also* Joined Cases C-762/18 and C-37/19, Q. H., C. V. v. Iccrea Banca, ECLI:EU:C:2020:504 ¶¶ 65–70; *see* Case C-29/19, Z. P. v. Bundesagentur für Arbeit, ECLI:EU:C:2020:36, ¶ 40 (Jan. 23, 2020); Case C-87/19, TV Play Baltic v. v Lietuvos radijo ir televizijos komisija, ECLI:EU:C:2019:1063, ¶¶ 22, 28–29 (Dec. 11, 2019). *see* Case C-329/19, Condominio di Milano v. Eurothermo SpA, ECLI:EU:C:2020:263, ¶ 37 (Apr. 2, 2020); *see* Case C-673/19, M. and Others, ECLI:EU:C:2021:127, ¶¶ 36, 44 (Feb. 24, 2021); Council Directive 2004/80/EC, *supra* note 40, art. 1 ¶¶ 38–40; Case C-363/19, Konsumentombudsmannen v. Mezina, ECLI:EU:C:2020:693, ¶¶ 60–61 (Sept. 10, 2020); Case C-949/19, M.A. v. Konsul Rzeczypospolitej Polskiej w N., ECLI:EU:C:2021:186, ¶ 46 (Mar. 10, 2021).

[65] Case 22/70, Commission v. Council (ERTA), ECLI:EU:C:1971:32, ¶¶ 12, 15 (Mar. 31, 1971).

[66] *See* Case 11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114, ¶ 4 (Dec. 17, 1970).

[67] *See generally* Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur/Factortame,1996 I-01029, ¶¶ 27–30.

[68] *See* Case 4/73, Nold, 1974 00491, ¶ 13; Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, 1979 E.C.R. 03727, ¶ 15.

[69] *See* Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 Common Mkt. L. Rev. 1629, 1635-54 (2010).

[70] *See* Case 13/61, Kledingverkoopbedrijf v. Bosch GmbH, 1962 E.C.R. 00045, ¶¶ 283–284; Constantinos N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 Pace Int'l L. Rev. 267, 273-275 (1994).

general principles overlap with the category of purposive/teleological arguments,[71] which is discussed below.

But, it should be noted that cases in which the Court of Justice establishes general principles are very exceptional. They have mostly been laid out in early case law, during the formative period of the E.U.'s legal order. In most situations afterwards, general principles were used as arguments in the interpretation of different provisions of E.U. law.[72] Or, absent specific provisions, they are applied to situations that share relevant factual or legal properties, which is where general principles interact with analogy. Furthermore, at certain points many unwritten principles developed in the case law were codified, be it in a human rights catalogue or secondary law instruments. For instance, the general principle of equal treatment is expressed in several provisions in Title III ("Equality") of the E.U. Charter of Fundamental Rights and directives regulating, e.g., access to employment and working conditions. From there, the Court of Justice can invoke that principle by reference to respective provisions of the Charter or directives in question. This is where the argument from general principles becomes intertwined with the argument from contextual harmonisation.

In the majority of situations in which they nowadays appear in the Court's case law, general principles are indeed used alongside other arguments from this category: contextual harmonisation, precedent, and analogy. For instance, the principle of equal treatment is paired with provisions of primary or secondary law which give a more concrete expression to it;[73] or recalled from the case law in which it was previously applied;[74] or applied by analogy to legally or factually similar situations.[75] As can be seen, the principle of equal treatment or non-discrimination – together with the principle of fiscal neutrality as its iteration in the area of tax law – seems to be the most versatile and frequently used across different areas of law.

These combinations of interpretive arguments reveal another important feature of the legal reasoning of the Court of Justice. It concerns the use of the argument from precedent. Typically, the Court provides a literal "copy–paste" quotation of its earlier

[71] *Cf.* Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 Eur. J. Legal Stud. 137, 141 (2007): "Comparative law becomes, in this way, one more instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation".

[72] *Cf.* Case C-759/18, O. F. v. P. G., ECLI:EU:C:2019:816, ¶¶ 32, 34 (Oct. 3, 2019) (interpretation in conformity with the principles of legal certainty and mutual trust); Case C-45/19, Compañía de Tranvías de La Coruña, ECLI:EU:C:2020:224, ¶ 21 (Mar. 19, 2020) (interpretation in conformity with the principle of legal certainty); Case C-854/19, Vodafone GmbH v. Bundesrepublik Deutschland, ECLI:EU:C:2021:675, ¶ 24 (Sept. 2, 2021). (interpretation in conformity with the principle of equal treatment).

[73] *Cf.* Case C-830/18, P. F. and Others, ECLI:EU:C:2020:275, ¶ 69 (Apr. 2, 2020); Council Directive 2004/80/EC, *supra* note 40, art. 1.

[74] *Cf.* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶¶ 43–51 (Dec. 17, 2020).

[75] *Cf.* Case C-707/19, K. S. v. A. B., ECLI:EU:C:2021:405, ¶¶ 31–32 (May 20, 2021).

rulings, without additional discussion or explanations. At times, one has to go back to these referenced judgements to see how exactly (if at all) they are relevant for the situation at hand. In these judgements, the Court may be pointing to two things. One is a previously determined rule or outcome, as in: "The Court held in *A. v. B.* that the meaning of Article *X* of Directive *Y* is *Z*." The other is specific interpretive arguments that were employed in the earlier judgement, as in "The Court held in *A. v. B.* that the purpose of Article *X* of Directive *Y* is *Z*." By the latter form of the argument from precedent, we can see that this argument in the Court's reasoning becomes "transcategorical".[76] In other words, although the Court is formally citing precedent, it is actually referring to some other argument, like contextual harmonisation, textual argument, purpose, or the intention of the legislator.[77]

To sum up: so far, we have seen how the Court of Justice cites the contextual/systemic arguments the most, in particular contextual harmonisation and precedent to justify its rulings; how contextual harmonisation is used for putting textual and linguistic features of E.U. legal provisions in a proper context; how precedent serves as a "bridge" to other types and categories of interpretive arguments; and how these arguments in general are essential for avoiding legal antinomies, i. e., ensuring that different provisions do not conflict with each other, which manifests in two dimensions. One, horizontally, for the E.U. legal system to be coherent, internally consistent and gapless. And vertically, to preserve validity and constitutionality of provisions in sources of law that are lower in rank.

In what follows, we will see how the contextual/systemic arguments interact with the remaining two general categories of interpretive arguments.

2.3. PURPOSIVE OR TELEOLOGICAL ARGUMENTS

These arguments are used to ensure that the meaning of a legal provision corresponds to the purpose, end, or goal ("*telos*") of that provision or of the legal act in which that provision is situated. The idea of interpreting law in conformity with its purpose is not new. It goes back to Roman law, where it was expressed in the maxim: "*[S]cire leges non*

[76] For an explanation of this term, MacCormick, *supra* note 7, at 472.

[77] For examples of the argument from precedent leading to the argument from contextual harmonisation, *see* Case C-488/18, Golfclub Schloss Igling, ECLI:EU:C:2020:1013, ¶¶ 34–38 (Dec. 10, 2020); *see also* Case C-373/19, Dubrovin & Tröger – Aquatics, ECLI:EU:C:2021:873, ¶ 20 (Oct. 21, 2021); *see* Joined Cases C-503/19 and C-592/19, U. Q. and S. I., ECLI:EU:C:2020:629, ¶¶ 41–42 (Sept. 3, 2020).

hoc est verba earum tenere, sed vim ac potestatem" [knowing the laws does not mean knowing their words, but their intent and purpose].[78] The same is well established in the E.U. law.[79]

There are different ways of framing these arguments. The interpreters can thus rely on the purpose of a specific legal provision; the purpose of a legal act or entire legal system, including values that are recognized in them; or the consequences that are assumed to follow for an identified purpose from adopting a certain interpretation. These different types of the purposive arguments are discussed below.

The relevant purposes, values, and consequences referred to can be expressly found in the text of some legal sources. Or they can be imputed by the interpreters, as implicit in those sources. In the former case, purposes, values, and consequences are drawn by the interpreters from written sources. So, in a wider sense they can be understood as a part of the context that is relevant for the interpretation of specific provisions, alongside other related provisions, legal acts, judicial decisions, and legal principles. This overlap between contextual and purposive arguments is often acknowledged in E.U. law.[80] Hence, in the entire system of the Treaties or the legislative acts the Court can find relevant purposes of their provisions.[81]

2.3.1. PURPOSES

When using the argument from purpose, the Court of Justice, almost as a rule, refers to actual purposes written down in different sources of E.U. law rather than imputing the purposes to those sources. These purposes – also referred to as "goals", "aims", or "objectives" of the E.U. or of specific policy areas – concern different areas of political and social life: from the internal market and consumer protection to economic growth and price stability, to environmental protection and protection of health, and to free movement of persons and elimination of inequalities. These can be found in the operative part of the Treaties or legislative acts,[82] in which case they are legally binding;

[78] András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L. J. 1215, 1241 (2013) (Ger.).

[79] *See* Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 03415, ¶ 20.

[80] What Bengoetxea terms "teleo-systemic criteria" of interpretation; *see, e.g.*, Joxerramon Bengoetxea, The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence 250–51 (Cambridge University Press, 1993).

[81] *Cf.* Koen Lenaerts & José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 3, 32 (2014).

[82] For a classic example, see Case 43/75, Defrenne, 1976 E.C.R. 00455, ¶¶ 8–12, in which the Court interpreted what is nowadays art. 157 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.], a provision that codifies the principle of equal pay for equal work for men and women. The Court famously noted that this provision "pursues a double aim [. . .] which is at once economic and social": on the one hand, fair competition, and on the other, elimination of inequalities between men and women and prohibition of discrimination based on sex, which are expressed in the operative part of the Treaties.

or in the Preambles to the Treaties or legislative acts in which case they are not legally binding although they are authoritative.[83]

Many Treaty provisions have indeed been drafted in goal-oriented terms. That is why the Treaties have sometimes been referred to as "*traité-cadre*" or "framework treaties".[84] The Preamble to the Treaties also contains a number of overarching purposes of E.U. integration, such as the creation of "ever closer Union among the peoples of Europe".[85] Similarly, recitals of the Preambles to the acts of secondary law typically contain numerous statements of purpose. This is a peculiarity of E.U. law, unlike in other legal systems, where the E.U. legislator and Treaty-makers specifically reflect on the ratio and purpose of adopting certain regulatory arrangements, which makes it easier for the interpreters to identify those purposes. And given that Member States regularly agree on these purposes – unanimously in the case of the Treaties' amendments, unanimously or by qualified majority when adopting secondary law (alongside the Parliament) – it is inevitable that the Court will frequently take recourse to them when interpreting E.U. law.

E.U. law may at times pursue several, equally important yet not fully compatible, purposes. In certain situations, those purposes could pull the interpreters into different directions.[86] To solve the problem, it is not sufficient to point to one of those purposes and insist on it. The reason is obvious: "[t]he game of "choose the recital you like" leads wherever one wishes it to: it is just necessary to pick the fitting recital".[87] Rather, judges need to weigh and balance the contradictory purposes. The Court of Justice does so by lifting its reasoning to a higher level: it uses values as "constitutional interpretive tiebreakers" that are in the background of those purposes and takes them through the proportionality test.

[83] *Cf.* Joined Cases C-402/07 and C-432/07, Sturgeon and Others, 2009 E.C.R. I-10923, ¶ 42 : "[T]he operative part of an act is indissociably linked to the statement of reasons for it [provided in the Preamble], so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption"; Case C-162/97, Nilsson and Others, 1998 E.C.R. I-07477, ¶ 54: "[T]he [P]reamble to a [Union] act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question". Although some cases seem to indicate that recitals have legal status greater than "a mere interpretative guidance"; *see* Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., Opinion of Advocate General Bobek, ECLI:EU:C:2020:375, ¶ 120 (May 14, 2020).

[84] Itzcovich, *supra* note 3, at 558.

[85] As declared by the Court of Justice, "the objective of all the [E.U.] [T]reaties is to contribute together to making concrete progress towards European unity"; and "to contribute [. . .] to the implementation of the process of integration that is the raison d'être of the [E.U.] itself"; *see* Opinion 1/91, Draft agreement on the European Economic Area, 1991 E.C.R. I-06079, ¶ 17; Opinion 2/13, Draft agreement on the accession of the EU to the European Convention on Human Rights, ECLI:EU:C:2014:2454, ¶ 172 (Dec. 18, 2014).

[86] *Cf.* Presidenza del Consiglio dei Ministri, ECLI:EU:C:2020:375 ¶¶ 46-51 (Opinion of Advocate General Bobek); Case C-16/18, Dobersberger, Opinion of Advocate General Szpunar, ECLI:EU:C:2019:638, ¶¶ 23–24 (July 29, 2019); Case C-442/16, Gusa, Opinion of Advocate General Wathelet, ECLI:EU:C:2017:607, ¶ 52 (July 26, 2017); Case C-140/12, Brey, ECLI:EU:C:2013:565, ¶ 71 (Sept. 19, 2019).

[87] Presidenza del Consiglio dei Ministri, ECLI:EU:C:2020:375 ¶ 101 (Opinion of Advocate General Bobek).

But this happens very exceptionally. In most situations, the Court straightforwardly identifies a single relevant purpose of a provision that informs its interpretation. It did so in about two out of every three questions included in my study.[88] The argument from purpose is thus explicitly invoked more often than textual arguments, but not as often as contextual harmonisation and precedent. Moreover, the purpose is usually found in the text of the legislative act, be it in an operative part or the Preamble.[89] At times, the Court will refer to its earlier judgement in which the purpose of a provision was identified,[90] which as discussed above reveals the "transcategorical" nature of the argument from precedent. There were rarely any references to the broader purposes of E.U. law found in the sources of primary law or the system of the Treaties, like purposes of specific areas of law as defined in the Treaties,[91] or meta-purposes like the classic "ever closer union".[92] This may be explained by the fact that nowadays most of the cases before the Court of Justice arguably concern the interpretation of E.U. secondary law, or are framed as

[88] That is, in 66.1% of questions of interpretation or eighty-eight in total.

[89] *Cf.* Case C-527/18, Gesamtverband Autoteile-Handel eV v. KIA Motors Corporation, ECLI:EU:C:2019:762 ¶ 35 (Sept. 19, 2019); Case C-671/18, CJIB, ECLI:EU:C:2019:1054 ¶ 29 (Dec. 5 2019); Case C-20/19, kunsthaus muerz v. Zürich Versicherungs AG, ECLI:EU:C:2020:273 ¶ 34 (Apr. 2, 2020); Case C-88/19, Asociaţia "Alianţa pentru combaterea abuzurilor" v. T. M. and Others, ECLI:EU:C:2020:458 ¶¶ 21, 46 (June 11 2020); Case C-191/19, O. I. v. Air Nostrum Líneas Aéreas del Mediterráneo SA, ECLI:EU:C:2020:339 ¶ 32 (Apr. 30, 2020); Case C-267/19 and C-323/19, PARKING d.o.o. and Interplastics s.r.o. v SAWAL d.o.o. and Letifico d.o.o., ECLI:EU:C:2020:351 ¶ 48 (May 7, 2020); Case C-330/19, Staatssecretaris van Financiën v. Exter, ECLI:EU:C:2020:809 ¶¶ 25, 27 (Oct. 8, 2020); Case C-477/19, I. E. v. Magistrat der Stadt Wien, ECLI:EU:C:2020:517 ¶ 18 (Jan. 2, 2020); Case C-636/19, Y. v. Centraal Administratie Kantoor, ECLI:EU:C:2021:885 ¶ 51 (Oct. 28, 2021); Case C-524/18, Willmar Schwabe, ECLI:EU:C:2020:60, ¶¶ 35, 55 (Jan. 30, 2020); Case C-722/1 KROL v. Porr, ECLI:EU:C:2019:1028, ¶ 35 (Nov. 28, 2019); Techbau,ECLI:EU:C:2020:937, ¶¶ 53–54 (Nov. 18, 2020); Case C-329/19, Condominio di Milano v. Eurothermo SpA, ECLI:EU:C:2020:263, ¶ 23 (Apr. 2, 2020); Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶¶ 30, 44, 46 (Jan. 20, 2021); SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582 ¶¶ 27, 48–50 (July 6, 2020) ; Spenner v. Germany, ECLI:EU:C:2020:381, ¶ 63 (May 14, 2020); Jebsen & Jessen v. Hauptzollamt Hamburg, ECLI:EU:C:2020:830, ¶¶ 58, 76 (July 1, 2019); L. G. Case C-790/19, Parchetul v. L.G. and M.H., E.C.R., ¶ 68 (Sept. 2, 2021); K. S. and Others, ECLI:EU:C:2021:11 ¶¶ 69–70; Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶¶ 42–43, 54, 56–57 (Nov. 25, 2021); Case C-881/19, Tesco Stores ČR a.s. v. Ministerstvo zemědělství, ECLI:EU:C:2022:15, ¶¶ 34, 43–46 (Jan. 13, 2022).

[90] *Cf.* Case C-583/18, Verbraucherzentrale Berlin eV v. DB Vertrieb GmbH, ECLI:EU:C:2020:199 ¶ 31 (Mar. 13, 2020); Case C-48/19, X. v. Finanzamt Z., ECLI:EU:C:2020:169 ¶ 24 (Mar. 12, 2020); Case C-97/19, Pfeifer & Langen GmbH & Co. KG v. Hauptzollamt Köln, ECLI:EU:C:2020:574 ¶¶ 32, 44 (July 16, 2020); Case C-331/19, Staatssecretaris van Financiën v. X., ECLI:EU:C:2020:786 ¶¶ 33–34, 38 (Oct. 1, 2020); Case C-509/19, BMW Bayerische Motorenwerke AG v. Hauptzollamt München, ECLI:EU:C:2020:694 ¶ 13 (Sept. 10, 2020); Case C-799/19, N. I. and Others v. Sociálna poisťovňa, ECLI:EU:C:2020:960 ¶ 64 (Nov.25, 2020); Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶ 45 (Dec. 17, 2020); L. H., Case C-564/18, L. H., ECLI:EU:C:2020:218, ¶¶ 30, 76 (Mar. 19, 2020); Case C-488/18, Golfclub Schloss Igling, ECLI:EU:C:2020:1013, ¶ 46 (Dec. 10, 2020); Case C-707/19, K. S. v. A. B., ECLI:EU:C:2021:405, ¶ 27 (May 20, 2021); Case C-373/19, Dubrovin & Tröger – Aquatics, ECLI:EU:C:2021:873, ¶ 21 (Oct. 21, 2021); W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶¶ 33, 37 (Sept. 17, 2020).

[91] Sole exception is C-629/19, Sappi Austria Produktions-GmbH & Co KG and Wasserverband "Region Gratkorn-Gratwein" v. Landeshauptmann von Steiermark, ECLI:EU:C:2020:824 ¶ 43 (Oct. 14, 2020).

[92] Only two Opinions reflected on this kind of purposes; *see* C-616/19, M. S. and Others v. Minister for Justice and Equality, Opinion of A. G. Øe, ECLI:EU:C:2020:648 ¶ 71 (Sep. 3, 2020); *see* Case C-243/19, A. v. Veselības ministrija, Opinion of A. G. Øe, ECLI:EU:C:2020:325 (Apr. 30, 2020).

such.[93] They do not raise questions of interpretation of E.U. primary law or questions of (non-)conformity of secondary law with primary law.

As can be seen, the Court of Justice in most situations refers to the purposes of E.U. law in the same way as when using the contextual arguments: either by pointing to the specific purposes expressed in the operative part or in Preamble of a written source of E.U. law, which makes a wider context of a provision that is being interpreted,[94] which basically corresponds to how the argument from contextual harmonisation is used; or by invoking its case law in which the relevant purpose has already been confirmed, which corresponds to the argument from precedent. In both ways, the purposive arguments resemble the contextual arguments.

How about other iterations of the purposive arguments which are grounded in values and consequences associated with established purposes?

2.3.2. VALUES

Judicial interpretations of law are expected to conform with values that are of fundamental importance to a legal system. These values capture moral norms or political and policy ideas, and may include e.g., liberty, equality, equity, dignity, justice, fairness, tolerance, solidarity, democracy, federalism, etc. They are not necessarily found in or derived from a formal source of law, like constitutions or treaties, but may fall in the domains of politics and morality. Moreover, these values may be expressed in various purposes or consequences that are assumed to follow from specific interpretations. Consider the following: "The purpose of this provision is to achieve *equality* between men and women", or "[s]ince the proposed interpretation of this provision would lead to a restriction of the *liberty* of individuals, it cannot be accepted".

When interpreting E.U. law, the Court of Justice very rarely invokes these values (moral, political, social, economic, etc.) as self-standing reason justifying its decision, even in its landmark rulings. Rather, it usually traces them back to some legal source and presents them in the form of a distinctly legal argument.[95] For instance, the Court can link values of human dignity or equality to respective provisions of the Charter.[96] Other values can be accommodated in general principles of law: for instance, in *Defrenne* the

[93] *Cf.* Bruno de Witte, *The Freedom to Provide Services: The Controversial Freedom?*, *in* THE INTERNAL MARKET 2.0 137, 144-45 (Sacha Garben & Inge Govaere eds., 2021) (concerning free movement of services).

[94] *Cf.* Vienna Convention on the Law of Treaties art. 31, May 23, 1969 ("General rule of interpretation"): "The context for the purpose of the interpretation of a treaty shall comprise [. . .] the text, including its [P]reamble and [A]nnexes [. . .]".

[95] *See* Itzcovich, *supra* note 14, at 302–03.

[96] *See* Charter of Fundamental Rights of the European Union, Art. 1-5 and Art. 20-23, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter CFR].

Court seemed willing to accept economic interests as a reason to limit the temporal effects of its decision, but nevertheless the argument it put forward was the principle of legal certainty.[97] In these situations, values appear in the form of the contextual arguments. And although parties before the Court at times explicitly refer to values as an independent argument, the Court would dismiss it by saying that it is not "called upon to broach" non-legal value questions, but instead "must restrict itself to a legal interpretation".[98]

It is therefore unsurprising that, in my study,[99] I found only one situation in which the Court of Justice was referring to a certain value on its own.[100] In *K. S. and Others*, the Court was asked whether asylum seekers have the right to access the labour market under the Reception Conditions Directive 2013/33/EU, where a transfer decision has been taken in their regard under the Dublin III Regulation (Regulation (EU) No. 604/2013). Answering in the positive, the Court mentioned, among many other things, the value of work that contributes to a life of dignity, and avoidance of financial costs that Member States would have to bear for paying social benefits to individuals who without a job cannot sustain themselves and their families.[101]

In most situations that it handles, therefore, the Court of Justice is not faced with questions of interpretation that require moral or political values to be answered. On the contrary, in these cases the Court justifies its answers with the support of other available arguments which are grounded in written sources of law. And where certain values are indirectly referred to, they come through other types of arguments like contextual harmonisation or general principles.

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[97] *See* Case 43/75, Defrenne, 1976 E.C.R. 00455, ¶¶ 69–70, 74.

[98] Case C-34/10, Oliver Brüstle v. Greenpeace eV., 2011 E.C.R. I-09821, ¶ 30 and Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and Others, ECLI:EU:C:1991:378 ¶¶ 19–20 (Oct. 4, 1991).

[99] Which is 0.75% of all analysed questions of interpretation.

[100] See Opinions of Advocates General referred to independent values somewhat more. *See also* Joined Cases C-322/19 and C-385/19, K. S. and Others, Opinion of Advocate General de la Tour, ECLI:EU:C:2020:642 ¶¶ 85–87 (Sept. 3, 2020) (referring to the value of work for preservation of one's dignity; increased vulnerability, precariousness, isolation, and social exclusion of non-working asylum seekers; and social and financial burdens for supporting non-working asylum seekers that host Member States bear); Case C-581/18, R. B. v. TÜV Rheinland LGA Products GmbH and Allianz IARD SA, Opinion of Advocate General Bobek, ECLI:EU:C:2020:77 ¶ 107 (Feb. 6, 2020) (referring to the value of "equal dignity"); Case C-481/19, D. B. v. Consob, Opinion of Advocate General Pikamäe, ECLI:EU:C:2020:861 ¶ 99 (referring to autonomy, freedom of determination and formation of one's will without coercion, and human dignity); Case C-580/19, R. J. v. Stadt Offenbach am Main, Opinion of Advocate General Pitruzzella, ECLI:EU:C:2020:797 ¶ 44 (Oct. 6, 2020) (referring to the need to protect the worker as a weaker party in the employment relationship); *see* Joined Cases C-762/18 and C-37/19, Q. H., C. V. v. Iccrea Banca, Opinion of Advocate General Hogan, ECLI:EU:C:2020:49 ¶ 48 (referring to the notion of justice in the relationship between worker and their employer); Case C-535/19, A. v. Latvian Ministry of Health, Opinion of Advocate General Øe, ECLI:EU:C:2021:114, ¶¶ 151, 153 (Feb. 11, 2021) (referring to the value of solidarity).

[101] *See* K. S. and Others, ECLI:EU:C:2020:642, ¶¶ 69–73 (Opinion of Advocate General de la Tour).

2.3.3. CONSEQUENCES

Another one of the purposive arguments is the argument of consequences. When invoking it, the Court of Justice is considering consequences that are likely to affect some purpose or value in case a certain interpretation is adopted.[102] The Court is often expressing this argument in negative terms, i.e., referring to the undesirable consequences that ought to be avoided in the interpretation of E.U. law. Furthermore, these consequences may be of two kinds: socio-economic consequences, typically related to the functioning of the internal market, and legal consequences.

The example of the former may be found in the free movement cases. When interpreting relevant Treaty provisions on free movement of workers, establishment, or services, and deciding that they are applicable to relationships between private parties, the Court emphasised that the abolition of obstacles to free movement between Member States – the purpose of those provisions – *would be compromised* if actors governed by private law are allowed to keep certain barriers in place.[103]

These kinds of consequences appear regularly in the Court's judgments: in my study, they occurred in nearly every third question the Court was answering.[104] Specific consequences are usually invoked side by side with related purposes,[105] which are, as we

[102] Cf. Defrenne, E.C.R. 00455 ¶ 71, where the Court acknowledged that "the practical consequences of any judicial decision must be carefully taken into account", before adding that "it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result [. . .]".

[103] *See* Case 36/74, B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, ECLI:EU:C:1974:140 ¶¶ 17–18 (Dec. 12, 1974); *see also* Case C-281/98, Roman Angonese v. Cassa di Risparmio di Bolzano SpA, 2000 E.C.R. I-04139, ¶ 32; *see* Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti., 2007 E.C.R. I-10779 ¶ 57.

[104] That is, in 30.3% of questions of interpretation or forty-one in total.

[105] *Cf.* Case C-828/18, Trendsetteuse SARL v. DCA SARL, ECLI:EU:C:2020:438 ¶¶ 37–38 (June 4, 2020); Case C-96/19, V. O. v. Bezirkshauptmannschaft Tulln, ECLI:EU:C:2020:353 ¶ 38 (May 7, 2020); Case C-290/19, R. N. v. Home Credit Slovakia a.s., ECLI:EU:C:2019:1130 ¶ 31 (Dec. 19, 2019); Case C-742/19, B. K. v. Republika Slovenija, ECLI:EU:C:2021:597 ¶¶ 43, 79 (July 15, 2021); Case C-879/19, FORMAT Urządzenia i Montaże Przemysłowe v. Zakład Ubezpieczeń Społecznych I Oddział w Warszawie, ECLI:EU:C:2021:409 ¶¶ 29–32 (May 20, 2021); Case C-868/19, M-GmbH v. Finanzamt für Körperschaften Berlin, ECLI:EU:C:2021:285, ¶¶ 44, 51 (Apr. 15, 2021); Case C-895/19, A. v. Dyrektor Krajowej Informacji Skarbowej, ECLI:EU:C:2021:216, ¶ 46 (Mar. 18, 2021). Case C-610/18, AFMB and Others, ECLI:EU:C:2020:565, ¶¶ 66–69 (July 16, 2020); Case C-45/19, Compañía de Tranvías de La Coruña, ECLI:EU:C:2020:224, ¶¶ 20–22, 26 (Mar. 19, 2020); Case C-299/19, Techbau, ECLI:EU:C:2020:937, ¶¶ 54–55 (Nov. 18, 2020); W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶¶ 34–38 (Sept. 17, 2020); Case C-199/19, R.L. sp. z o.o. v., ECLI:EU:C:2020:548 ¶¶ 35–36 (July 19, 2020); Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶¶ 58–59 (Nov. 25, 2021); Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304, ¶ 46 (Apr. 23, 2020); Case C-112/19, Marvin M., ECLI:EU:C:2020:864, ¶ 41 (Oct. 28, 2020); Case C-29/19, Z. P. v. Bundesagentur für Arbeit, ECLI:EU:C:2020:36, ¶¶ 37, 42 (Jan. 23, 2020); Case C-502/18, C. S. and Others, ECLI:EU:C:2019:604, ¶ 30 (July 11, 2019); Case C-786/18, ratiopharm GmbH v. Novartis Consumer Health GmbH, ECLI:EU:C:2020:459, ¶ 44 (Oct. 31, 2018); Case C-330/19, Staatssecretaris van Financiën v. Exter, ECLI:EU:C:2020:809, ¶ 29 (Oct. 8, 2020); Case C-616/19, M. S. and Others v. Minister for Justice and Equality, ECLI:EU:C:2020:1010, ¶ 52 (Dec. 10, 2020).

saw, found in the entire context of E.U. legal acts. In that sense, references to consequences are not less "legal" and more "political", if the latter would mean that relevant consequences are found in a non-legal realm.[106] Rather, they are related to what the law already expressly proclaimed are its goals and objectives.

2.3.4. EFFECTIVENESS

As for the legal consequences, they may concern either effectiveness or redundancy of provisions that are interpreted. The assumption is that the purpose of a legal provision can only be achieved if that provision produces all its intended useful effects and is not rendered meaningless or superfluous. This version of the purposive argument is, therefore, used to justify interpretations that ensure the effectiveness of a provision and to discard interpretations that would diminish its effectiveness or lead to its redundancy.

These two notions – effectiveness and redundancy – are of the same kind, with the only difference being that they vary in degree. A redundant provision would be fully stripped of its effectiveness. Yet a provision of limited or decreased effectiveness would not necessarily be redundant. The same appears to be the understanding of the Court of Justice.[107] Its approach seems to be: to interpret E.U. law in order not to make any provision redundant, and to make every provision as effective as possible. The latter indicates that the effectiveness is conceived in maximalist terms to ensure the greatest possible effects of a provision in question.[108] However, the same could be conceived in a minimalist sense, i. e., to ensure *some* useful effects of a provision; hence, not to make it completely useless or redundant, but to allow certain limitations to its effects for the sake of other arguments or interests.[109]

Another rationale behind this argument is that a rational (E.U.) legislator intends the provisions it enacts to be as effective as possible and does not enact provisions that are ineffective.[110] In that sense, it can overlap with the argument of the legislator's intention discussed below. It often also overlaps with contextual arguments.

[106] Contrary to what was argued by Conway, *supra* note 14, §13.12 "Conclusions": "Consequentialist is clearly less dependent upon legal sources and the discipline of legal method, it is less predictable and may be dependent upon an extra-legal evidential base, including complex socio-economic data. Consequentialism is more political and less "legal"".

[107] *See* Case C-173/03, Traghetti del Mediterraneo SpA v. Repubblica italiana, 2006 E.C.R. I-05177 ¶¶ 36, 40.

[108] A classic example of effectiveness as seeking to ensure not some effect but maximum effect of E.U. law is Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, ECLI:EU:C:1963:1, 13 (Feb. 5, 1963).

[109] An example of using effectiveness in a non-maximalist sense would be the case law on horizontal direct effect of directives; *see* Tamara Ćapeta, *Ideology and Legal Reasoning at the European Court of Justice*, *in* The Transformation or Reconstitution of Europe 89, 111–13 (Tamara Perišin & Siniša Rodin eds., 2018).

[110] *Cf.* Lenaerts & Gutiérrez-Fons, *supra* note 81, at 17.

For instance, a provision is made redundant if its interpretation is identical to another provision's interpretation. Similarly, meaning given to one provision can impact the effectiveness of another provision. Therefore, when using this argument, the Court of Justice does not always constrain itself to looking at a single provision of E.U. law but operates in a wider system of primary and secondary law.

Effectiveness of E.U. law (*effet utile*) featured in many important judgments of the Court of Justice. A settled case law of the Court is that "where a provision of E.U. law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness".[111] The Court was invoking this argument not only to ensure the effectiveness of a single provision of E.U. law,[112] but also the effectiveness: of provisions of E.U. law as a whole;[113] of a class of E.U. legal acts;[114] of procedures established by the Treaties;[115] of the Treaty itself;[116] and of general principles of E.U. law established by the Court.[117]

Unsurprisingly, then, effectiveness is often considered as being the key argument in the repertoire of a teleological Court, which appears frequently and carries significant weight. As Michal Bobek wrote in his early work:

> In its [Union] guise, the problem with the use of purposive reasoning is not so much the unpredictability of the value choice of the judge; on the contrary, it is the fact that recourse to teleological reasoning by the Court of Justice almost always leads us on a journey to a well-known destination called "effet utile". The problem with the case law of the Court of Justice [. . .] might well be the fact that purposive reasoning is often reduced to one and only one purpose: the full effectiveness of [E.U.] law, which is turned into the crucial principle not allowing for any balancing or opposition.[118]

[111] Case C-576/20, C. C. v. Pensionsversicherungsanstalt, ECLI:EU:C:2022:525 ¶ 54 (July 7, 2022).
[112] *See* Case 43/75, Defrenne, 1976 E.C.R. 00455, ¶ 33.
[113] *See* Joined Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v. Italian Republic, 1991 E.C.R. I-05357 ¶ 33.
[114] *See* Case 9/70, Franz Grad v. Finanzamt Traunstein, ECLI:EU:C:1970:78 ¶ 5 (Oct. 6, 1970) (concerning direct effect of decisions); Case 41/74, Yvonne van Duyn v. Home Offic., 1974 E.C.R. 01337 ¶ 12 (concerning direct effect of directives).
[115] *See* Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 00629 ¶ 20 (concerning the preliminary ruling procedure under art. 267 T.F.E.U.).
[116] *Id.* ¶ 18.
[117] *See* Case C-173/03, Traghetti del Mediterraneo SpA v. Repubblica italiana, 2006 E.C.R. I-05177 ¶ 40 (concerning the principle of state liability for damages due to violations of E.U. law committed by national courts as confirmed in Case C-224/01, Gerhard Köbler v. Republik Österreich, 2003 E.C.R. I-10239).
[118] *See* Michal Bobek, *On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say"?*, 10 Cambridge Y. B. Eur. Legal Stud. 1, 21 (2008) (U.K.).

In reality, however, this happens rarely. In my study, the argument of effectiveness/redundancy appeared in around one in every six cases.[119] It was cited alongside specific purposes and not isolated from them.[120] The reason why the issue of effectiveness is raised in a relatively small number of cases may be that the Court of Justice is able to interpret provisions of E.U. law with support of other arguments, especially contextual arguments, in a way that does not impact their effectiveness. Moreover, in certain cases the argument of effectiveness gave way to other arguments and considerations. This shows the effectiveness of E.U. law as not just being a one-way street. Consider the following example.

Constantin Film Verleih concerned the interpretation of the term "addresses" from Article 8(2)(a) of the Intellectual Property Rights Directive 2004/48/EC, which enlisted information that must be provided in cases of infringement of intellectual property rights. One of the questions was whether that term covers "email addresses" and "I.P. addresses" of users through which files that infringe intellectual property rights were uploaded. The referring court, the German *Bundesgerichtshof* [Federal Court of Justice], proposed an answer in the affirmative. It offered several purposive arguments in support of that answer: that email and I.P. addresses, in the same way as postal addresses, *facilitate* identification of copyright infringers, and are thus necessary for safeguarding the right to intellectual property under Article 17(2) of the Charter; the *purpose* of the Directive, according to its Recital 3, is "protective" – it concerns *effective* enforcement of intellectual property rights in the E.U. internal market; *broad* interpretation of the term "addresses" would contribute to the *effectiveness* of the regime for protection of intellectual property rights under the Directive given that many platform operators do not collect or verify personal names and postal addresses of its users; the term "addresses" should be given "*dynamic*" interpretation, to take account of the technological developments, since the *objectives* of the Directive could not be ensured "as long as the traditional understanding of the terms" in question would be maintained.[121]

[119] That is, in 16.3% of questions of interpretation or twenty-two in total. *See* Case C-540/19, W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶¶ 34–35 (Sept. 17, 2020); *see also* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶¶ 50, 53 (Dec. 17, 2020); Case C-828/18, Trendsetteuse SARL v. DCA SARL, ECLI:EU:C:2020:438, ¶ 37 (June 4, 2020); *see* État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶¶ 54, 58 (Nov. 25, 2021); *see* Case C-706/18, X. v. Belgische Staat, ECLI:EU:C:2019:993, ¶¶ 26, 37 (Nov. 20, 2019); *see* Case C-215/19, Veronsaajien oikeudenvalvontayksikkö, ECLI:EU:C:2020:518 ¶ 39 (concerning effectiveness as a limit to the requirement of narrow interpretation of exemptions to general rule).

[120] *Cf.* Case C-580/19, R. J. v. Stadt Offenbach am Main, ECLI:EU:C:2021:183 ¶ 32 (Mar. 9, 2021); Case C-686/2019, SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582, ¶ 51 (July 6, 2020); C-629/19, Sappi Austria Produktions-GmbH & Co KG and Wasserverband "Region Gratkorn-Gratwein" v. Landeshauptmann von Steiermark, ECLI:EU:C:2020:824, ¶ 45 (Oct. 14, 2020); Case C-535/18, I. L. and Others, ECLI:EU:C:2020:391, ¶ 100 (May 28, 2020).

[121] *See* Case C-264/19, Constantin Film Verleih, order for reference, ECLI:EU:C:2020:542, ¶¶ 12-15 (July 9, 2020).

The Court of Justice nonetheless disagreed. The Court did implicitly acknowledge the referring court's argument – that adopting its proposed answer would "ensure the effective exercise of the fundamental right to property, which includes the intellectual property right [. . .] by enabling the holder of an intellectual property right to identify the person who is infringing that right and take the necessary steps in order to protect it".[122] However, the Court offered a number of arguments supporting the opposite outcome, i.e., that Article 8(2)(a) should not be interpreted as covering emails and I.P. addresses. Most importantly, the Court looked into "the usual meaning of the term "address" in everyday language"[123] and how the same term is used in a wider "scheme" of E.U. secondary law,[124] as well as having analysed the *travaux préparatoires*.[125] From all of this, it became apparent that the E.U. legislators attempted to strike a balance between the competing rights and interests: the protection of intellectual property rights on the one hand and the freedom of expression or the protection of private life and personal data safeguarded by Articles 7 and 8 of the Charter on the other. Furthermore, the Court added that in the Directive "the E.U. legislature chose to provide for minimum harmonisation concerning the enforcement of intellectual property rights in general".[126] So, concerning the provision in question, "that harmonisation is limited [. . .] to narrowly defined information".[127] To support that claim, the Court pointed to Article 8(3)(a) of the Directive, in which the E.U. legislator expressly provided an option to the Member State "to grant holders of intellectual property rights the right to receive fuller information".[128] So, under Article 8(2)(a) there would be no obligation to provide the right holders with information about emails and I.P. addresses of infringers of intellectual property rights. Nonetheless, from the context of the Directive it was apparent that the Member States were left to choose whether to provide for this additional information.

In *Constantin Film Verleih*, we can see that the Court of Justice was willing to accept that, in circumstances such as those in the main action, the provision of the E.U. law in question would not produce the maximum effect that it could possibly have. Rather, from the context of that provision and the Directive in general, the Court concluded that the legislator's intention was to achieve minimum harmonisation with the Intellectual Property Rights Directive and thus establish a narrower scope of Article

[122] Case C-264/19, Constantin Film Verleih, Judgment, ECLI:EU:C:2020:542, ¶¶ 12-15 (July 9, 2020).
[123] *Id.* ¶ 30.
[124] *Id.* ¶¶ 32–33.
[125] *Id.* ¶ 31.
[126] *Id.* ¶ 36.
[127] *Id.*
[128] *Id.* ¶ 39.

8(2)(a). In essence, the Court was deferring to the E.U. legislator instead of taking *effet utile* as a knockout argument that wins in every interpretive dilemma.[129] From this it also transpires how the Court uses contextual arguments to substantiate the argument from the intention of the legislator, which will be discussed in the following Section.

In my case study, there were several other examples that showed the same trend.[130] The referring courts tend to adopt purposive and consequential reasoning at the expense of textualism. Based on that approach, they propose "dynamic" interpretations of E.U. law in the light of technological and social development; hence, appearing "activist". Meanwhile, the Court of Justice tends to adopt a balanced reasoning based on the observations of context and systemic coherence, demonstrating thereby judicial restraint and deference to the E.U. legislator. That is hardly an approach of a *teleological* Court. It also raises a question about the influence of the referring courts: whether they at times push the Court of Justice into adopting ambitious interpretations of E.U. law.[131] Furthermore, this takes the whole interpretive burden off the Court's shoulders and indicates that the interpretation of E.U. law is a collaborative exercise in which multiple actors interact; introduce different arguments; and push for different solutions.[132]

2.4. HISTORICAL OR INTENTIONAL ARGUMENTS

Historical or intentional arguments support the interpretation of a legal provision that corresponds with the intention of the legislator which enacted that provision. Since the courts are bound by *the authority of the legislator, democratic will expressed by it when passing laws,* and *the separation of powers*, it is unsurprising that they will often refer to the intention of the legislator when interpreting the law. These arguments are also called "historical",

[129] Advocate General Henrik Saugmandsgaard Øe explicitly referred to the principle of separation of powers which promotes the value of legislative primacy; *see* Case C-264/19, Constantin Film Verleih, Opinion of Advocate General Øe, ECLI:EU:C:2020:261, ¶¶ 43, 58–59 (Apr. 2, 2020).

[130] *Cf.* Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union DHU Arzneimittel GmbH & Co. KG v. Bundesrepublik Deutschland, ECLI:EU:C:2020:304 (Apr. 23, 2020) REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany) order for reference (Nov. 6, 2018) and the Court's reply in Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304 (Apr. 23, 2020); Case C-535/19, A. v. Latvian Ministry of Health, Augstākā tiesa (Senāts) ECLI:EU:C:2021:595 (July 15, 2021) REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākā tiesa (Senāts) (Supreme Court, Latvia) order for reference (July 9, 2019) and the Court's reply in Case C-535/19, A. v. Latvian Ministry of Health, ECLI:EU:C:2021:595; and cases discussed *infra* Section 2.4.

[131] *Cf.* Maduro, *supra* note 71, at 148; and Edward, *supra* note 6, at 44, 54.

[132] *Cf.* Antoine Vauchez, *Close-Ups to Long Shot: In Search of the "Political Role"of the Court of Justice of the European Union, in* New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context 45 (Claire Kilpatrick & Joanne Scott eds., 2020) (U.K.).

since they look at what the legislator wanted to achieve when enacting that legislation in a particular moment in history; as well as "psychological", since they impute the specific intent – basically a state of mind – to the legislator as a collective entity.[133] The use of these arguments is regularly acknowledged in E.U. law too.[134] In my study, they appeared in around one in every three questions the Court of Justice was answering.[135]

Like in other legal systems, the argument from the intention of the legislator is "transcategorical". It is typically expressed through one of the previously discussed types of interpretive arguments, which means that it also depends on proper contextualization. In the case law of the Court of Justice, several different ways of conceptualising the intention can be distinguished.

First, the intention can be found in the wording of a provision.[136] The wording or text of enacted provisions is obviously legally binding and authoritative.[137] If that wording or text is clear and unambiguous, it is taken as the evidence of what the E.U. legislator intended with that provision.[138] The assumption would be that the E.U. legislators used or intended to use the words and the text in their ordinary meaning when enacting that provision. In this respect, the argument from intention moves back to textual arguments as discussed above.

Second, the intention can be established by observing the relevant context of a provision. For instance, by observing the provisions in their immediate or wider

[133] *Cf.* Fabrizio Macagno & Douglas Walton, *Arguments of Statutory Interpretation and Argumentation Schemes*, 2 Int'l J. Legal. Discourse 47, 51 (2017) (Ger.)

[134] *Cf.* Case C-583/11, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, ECLI:EU:C:2013:625 ¶ 50 (Oct. 3, 2013): "The origins of a provision of European Union law may also provide information relevant to its interpretation"; Fennelly, *supra* note 3, at 657: "The object of all interpretation lies in the true intention of the lawmakers, whether they be framers of a constitution or a treaty, legislators, or drafters of secondary legislation".

[135] That is, in 29.6% of questions of interpretation or forty in total.

[136] *See* Case C-671/18, CJIB, ECLI:EU:C:2019:1054, ¶ 35 (Dec. 5 2019); Case C-828/18, Trendsetteuse SARL v. DCA SARL, ECLI:EU:C:2020:438, ¶ 24 (June 4, 2020); *see* Case C-530/19, N. M. v. O. N., ECLI:EU:C:2020:635, ¶ 24 (Sept. 3, 2020); *see* Case C-686/2019, SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582, ¶ 31 (July 6, 2020); *see* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶ 39 (Dec. 17, 2020); C-629/19, Sappi Austria Produktions-GmbH Co KG and Wasserverband "Region Gratkorn-Gratwein" v. Landeshauptmann von Steiermark, ECLI:EU:C:2020:824, ¶¶ 33–34 (Oct. 14, 2020); *see also* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11, ¶ 63 (Jan. 14, 2021); Case C-547/14, Philip Morris Brands SARL e.a. v. Secretary of State for Health, ECLI:EU:C:2016:325 ¶ 63 (May 4, 2016).

[137] *See* Case C-815/18, Federatie Nederlandse Vakbeweging v. Van den Bosch Transporten BV and Others, Opinion of Advocate General Bobek, ECLI:EU:C:2020:319 ¶ 62 (Apr. 30, 2020): "[. . .] Hopes, ideas, or wishes are not legally binding. The adopted text is".

[138] *See* Case C-482/09, Budějovický Budvar, Opinion of Advocate General Trstenjak, 2011 E.C.R. I-08701, ¶ 69: "[A] semantic examination of the various terms used gives a sufficiently clear indication of what the legislature actually intended"; *see also* Case 28/76, Milac GmbH Groß-und Außenhandel v. Hauptzollamt Freiburg, Opinion of Advocate General Warner, ECLI:EU:C:1976:144, (Oct. 28, 1976): "[A]t the end of the day, I think that the solution of the problem must lie in seeking to ascertain, from the wording of the relevant legislation of the Council what, objectively, the intention of its authors was [...]".

context;[139] or comparing the differences in the wording between the surrounding provisions or chapters;[140] or making inferences from the "silence" of the wording i.e., from what is not explicitly mentioned in the text of a provision or its context;[141] or using what is expressly provided as exceptions to a general rule to infer what cannot be implied as an additional exception to that rule (the so called *expressio unius* argument, which is a variation of the *a contrario* argument),[142] etc. Here, the E.U. legislators are assumed to act and legislate rationally, e.g. to enact internally coherent and valid legislation, which does not overlap with provisions in its horizontal context nor infringe provisions in its vertical context. In this respect, the argument from intention falls back to contextual arguments - discussed above.

Third, the intention can be established by looking into the statement of reasons made by the E.U. legislator in the Recitals of the Preamble to a legal act.[143] Preambles are not legally binding and cannot derogate from the clear and unambiguous wording of operative provisions.[144] Nevertheless, they can be taken as authoritative when they disclose the intent of the E.U. legislator in a clear and convincing manner.[145] At times, the statements of intent in the Preambles are indistinguishable from the statements of

[139] *See* Case C-715/18, Segler-Vereinigung Cuxhaven, ECLI:EU:C:2019:1138 ¶ 32; *see also* Case C-796/18, Informatikgesellschaft für Software-Entwicklung, ECLI:EU:C:2020:395, ¶¶ 34, 66–70 (May 28, 2020); *see* Case C-868/19, M-GmbH v. Finanzamt für Körperschaften Berlin, ECLI:EU:C:2021:285, ¶¶ 34–35 (Apr. 15, 2021); Case C-373/19, Dubrovin & Tröger – Aquatics, ECLI:EU:C:2021:873, ¶¶ 26–27 (Oct. 21, 2021); *see* Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 ¶ 60 (Dec. 11, 2018).

[140] *See* Case C-616/19, M. S. and Others v. Minister for Justice and Equality, ECLI:EU:C:2020:1010, ¶ 35 (Dec. 10, 2020); Case C-477/19, I. E. v. Magistrat der Stadt Wien, ECLI:EU:C:2020:517, ¶ 27 (Jan. 2, 2020); Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶¶ 40–42 (July 16, 2020); Case C-370/12, Thomas Pringle v. Government of Ireland and Others, ECLI:EU:C:2012:756 ¶¶ 130–132 (Nov. 27, 2012); *see also* Joined Cases C-439/05 P and C-454/05 P, Land Oberösterreich and Republic of Austria v. Commission of the European Communities, 2007 E.C.R. I-07141, ¶¶ 37–41.

[141] *See* Case C-219/19, Parsec Fondazione v. ANAC, ECLI:EU:C:2020:470, ¶ 27 (Jun. 11, 2020); Case C-365/19, F. D., ECLI:EU:C:2021:189, ¶¶ 38–39 (Mar. 10, 2021); *see also* Joined Cases C-297/88 and C-197/89, Massam Dzodzi v. Belgian State, ECLI:EU:C:1990:360, ¶ 36 (Oct. 18, 1990).

[142] *See* Case C-815/18, Federatie Nederlandse Vakbeweging v. Van den Bosch Transporten BV, ECLI:EU:C:2020:976, ¶¶ 32–33 (Dec. 1, 2020); Federatie Nederlandse Vakbeweging, ECLI:EU:C:2020:319, ¶ 56 (Opinion of Advocate General Bobek): "[I]f something is be to excluded from the scope of an otherwise generally worded act, it can and should be stated clearly".

[143] *See* Case C-774/19, Personal Exchange International, ECLI:EU:C:2020:1015, ¶ 35 (Dec. 10, 2020); *see also* Case C-941/19, Samohýl group v. Generální ředitelství cel., ECLI:EU:C:2021:192, ¶ 42 (Mar. 10, 2021); Case C-786/18, Ratiopharm GmbH v. Novartis Consumer Health GmbH, ECLI:EU:C:2020:459, ¶ 49 (Oct. 31, 2018); Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶¶ 46, 51; Case C-707/19, K. S. v. A. B., ECLI:EU:C:2021:405, ¶ 27 (May 20, 2021); Case C-790/19, Parchetul v. L.G. and M.H., E.C.R., ¶ 60 (Sept. 2, 2021). For a classic example, see Case 29/69, Stauder v. City of Ulm, ECLI:EU:C:1969:57, ¶ 5 (Nov. 12, 1969): "The last recital of the preamble to this decision shows that the Commission intended to adopt the proposed amendment".

[144] See *supra* text accompanying notes 82–83; *see also* Tadas Klimas & Jūratė Vaičiukaitė, *The Law of Recitals in European Community Legislation*, 15 ILSA J. Int'l & Compar. L. 61 (2008).

[145] For a remark that the Court of Justice occasionally treats Preambles as something more than "a mere interpretative guidance" see Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., Opinion of Advocate General Bobek, ECLI:EU:C:2020:375, ¶ 120 (May 14, 2020).

purpose.[146] This is understandable, since the two are intertwined: after all, "the legislature's intent is to write a law that [fulfils] the legislative purpose".[147] So, the claim would be that when enacting legislation the E.U. legislators intended to achieve specific purposes, to reach some desirable outcomes or avoid undesirable (absurd, unjust) outcomes, etc. In this respect, the argument from intention falls back to purposive arguments - discussed above.

Fourth, the intention can be established by investigating materials that are, unlike operative provisions and Preambles, outside the legislative act that is being interpreted. These are different documents related to the drafting history of the legislation, also known as the *travaux préparatoires*. The requirement of their use in the interpretation of E.U. law is that they are made publicly available. This was the reason why, until recently, the Court of Justice has been using the *travaux* only for the interpretation of secondary law.[148] Nowadays, the Court uses them when interpreting the Treaties,[149] and the Charter,[150] as well as secondary law.[151] Still, being external to the legislative act, the *travaux* are not legally binding. But they can be used as an ancillary argument to support the finding of the intent of the E.U. legislator based on other arguments. In that sense, they are especially persuasive as the indicator of the legislators' intent when they confirm the clear and unambiguous wording of the operative parts of the legislative act.[152] So, the *travaux* are most useful when providing context and clarification to the wording or objectives expressed in the text of the legislation.

The argument from intention seems to have the greatest weight when it is linked to either textual or contextual arguments. In several examples from my study, the Court

[146] Cf. C-29/69. Stauder v. Stadt Ulm, ECLI:EU:C:1969:57, ¶ 3, where the Court referred to "the real intention of [the] author and the aim he seeks to achieve". *See also* Case C-331/19, Staatssecretaris van Financiën v. X., ECLI:EU:C:2020:786, ¶ 33 (Oct. 1, 2020); *see* Case C-267/19 and C-323/19, PARKING d.o.o. and Interplastics s.r.o. v. SAWAL d.o.o. and Letifico d.o.o., ECLI:EU:C:2020:351 ¶ 48 (May. 7, 2020); *see* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11, ¶ 88 (Jan. 14, 2021).

[147] *See* Lawrence M. Solan, The Language of Statutes: Laws and Their Interpretation 142 (2010).

[148] For a discussion, *see* Samuli Miettinen & Merita Kettunen, *Travaux to the EU Treaties: Preparatory Work as a Source of EU Law*, 17 Cambridge Y. B. Eur. Legal Stud. 145 (2015); Case C-583/11 P, Inuit, Opinion of Advocate General Kokott, ECLI:EU:C:2013:21, ¶ 32 (Jan. 17, 2013).

[149] Case C-370/12, Thomas Pringle v. Government of Ireland and Others, ECLI:EU:C:2012:756, ¶ 135 (Nov. 27, 2012).

[150] *See* Case C-279/09, DEB v. Germany, ECLI:EU:C:2010:811, ¶¶ 32–39 (Dec. 22, 2010), (using Explanations relating to the Charter of Fundamental Rights, published by the Convention that drafted the Charter); *see also* TEU art. 6(1) and CFR art. 52(7). For further discussion, see Lenaerts & Gutiérrez-Fons, *supra* note 81, at 52–59.

[151] *See* Case C-264/19, Constantin Film Verleih, ECLI:EU:C:2020:542, ¶ 31 (July 9, 2020); Case C-321/19, B. Y. and C. Z., ECLI:EU:C:2020:866, ¶ 28 (Oct. 28, 2020); Case C-299/19, Techbau, ECLI:EU:C:2020:937, ¶ 56 (Nov. 18, 2020); Case C-796/18, Informatikgesellschaft für Software-Entwicklung, ECLI:EU:C:2020:395, ¶ 33 (May 28, 2020); Case C-619/19, Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶ 44 (Jan. 20, 2021).

[152] *See* Case C-306/06, 01051 Telecom GmbH v. Deutsche Telekom A.G., 2008E.C.R. I-01923, ¶¶ 23–25 (Apr. 3, 2008); Case C-488/18, Golfclub Schloss Igling, ECLI:EU:C:2020:1013, ¶ 39 (Dec. 10, 2020).

employed it to outweigh the purposive arguments. The following one is particularly indicative.

Criminal proceedings against F. O. concerned the interpretation of two Regulations on road transport.[153] The dispute arose from a roadside check in France, which showed that a bus driver of the German transport company had driven through Germany without inserting his card in the vehicle's tachograph. The question was whether one Regulation allows French authorities to sanction that driver or his transport company for infringement of the other Regulation committed on the German territory but detected on French territory. The referring court, the French *Cour de cassation* [Court of cassation], seemed to have thought that it did. The reasons were that, first, such a broad interpretation would be in line with the *purposes* of these Regulations, which include improvement of the working conditions of employees in the road transport sector and, in general, improvement of road safety; and second, it would ensure the *effective enforcement* of the two Regulations.[154]

The Court of Justice nevertheless disagreed. It pointed out that the unambiguous wording of the provision in question,[155] and its immediate context,[156] confirmed beyond doubt that the E.U. legislator envisaged the system under which national authorities cannot issue criminal sanctions based on one Regulation for the infringements of the other Regulation.[157] Even if such an interpretation may lead to undesirable consequences for the drivers' working conditions and road safety, the Court added that it was up to the E.U. legislators to make appropriate amendments to the text of the Regulations.[158]

In this example, we can again see the Court of Justice adopting a reasoning based on the consideration of the text and relevant context. From there, it infers the E.U. legislator's intent and defers to it; hence, prioritising the legislative primacy over purported purpose and effectiveness of E.U. legislation - contrary to what the referring court, intervening government, and the Commission had suggested.[159] The intention of the E.U. legislator, when convincingly established, clearly becomes imposed as a limit on

[153] See Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonization of certain social legislation relating to road transport, 2006 O. J. (L 102) 1, and Council Regulation (EEC) No. 3821/85 of 20 December 1985 on recording equipment in road transport, 1985 0. J. (L 370) 8.

[154] Case C-906/19, Criminal proceedings against F. O., Judgment, ECLI:EU:C:2021:715, ¶¶ 31–33 (Sep. 9, 2021).

[155] *Id.* at ¶ 41.

[156] *Id.* at ¶¶ 42-44.

[157] Case C-906/19, Criminal proceedings against F. O., ECLIEU:C:2021:178, ¶¶ 45–57, especially ¶¶ 54, 57 (Mar. 4, 2021) (separate opinion by Bobek, M.).

[158] Case C-906/19, Criminal proceedings against F. O., Judgment, at ¶ 45.

[159] Case C-906/19, Criminal proceedings against F. O., separate opinion by Bobek, M., at ¶¶ 47-48.

the Court's purposivism. Again, hardly something one would expect from a *teleological* Court.

3. THE VALUE OF HAVING A CONTEXTUALIST COURT

The examples discussed in the previous Sections illustrate that in a significant number of cases, the Court of Justice favours systemic coherence over the effectiveness of individual provisions of E.U. law, or their particular purposes, or avoiding bad consequences that follow from certain interpretations. In those situations, the Court favours *general*, *structural* or *macro* over *particular* or *micro* values and interests. As Mitchel Lasser rightly noted, "[t]he [Court of Justice's] interpretive technique is therefore oriented primarily towards developing a proper legal order, namely, one that would be sufficiently certain, uniform and effective".[160] The question that can be raised at this point is what good is promoted by such an interpretive approach?

First of all, the Court's contextualist approach to the interpretation of E.U. law, which places a premium on the coherence of the E.U. legal system, can be linked to the idea of the E.U. legislator being a rational actor. That the E.U. legislator intends to create a coherent and consistent legal system, to adopt a sensible legislation that does not conflict or overlap with already enacted legislation or higher sources of law, and not to depart from the previous case law of the Court unless expressly provided so, etc., is indeed a "benign"[161] assumption that guides the interpretation of E.U. law.[162] It can even be argued that such a legislative behaviour is mandated by the E.U. Treaties. Article 7 of the T.F.E.U. can thus be read as one of the expressions of that mandate: it prescribes that "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account [. . .]".

Moreover, the contextualist approach means that the interpretive arguments the Court uses will always be grounded in formal sources of law "posited" by the E.U. legislator. So, a "contextualist" court could, at the same time, be understood as a

[160] Lasser, *supra* note 63, at 54. *Cf.* Edward, *supra* note 6, at 66–67: "In any system based on case-law the judge must proceed from one case to another seeking, as points come up for decision, to make the legal system consistent, coherent, workable and effective".

[161] Cf. Green v. Bock Laundry Machine Co., 490 U. S. 504, 528 (1989) (Scalia, J., concurring), who argued that the meaning of a legal provision ought to be determined by considering which meaning is, among other things, "most compatible with the surrounding body of law into which the provision must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind".

[162] *Cf.* Lenaerts & Gutiérrez-Fons, *supra* note 81, at 17: "[T]he authors of the Treaties are assumed to have established a legal order that is consistent and complete".

"positivist" court. By linking the arguments in its reasoning to legal sources posited by the E.U. legislator, the Court defers to the choices made by the democratically legitimated legislator. It understands itself to be "a faithful agent"[163] of the E.U. legislator who is tasked with "making sense rather than nonsense"[164] out of the body of law enacted and developed by the historical and contemporary legislature. Such an approach to the interpretation of E.U. law promotes the values of democracy and separation of powers (in the E.U. context, known as institutional balance).

The contextualist approach is also essential for one of the key functions of the Court of Justice – making E.U. law intelligible – alongside other important functions such as reviewing acts of the E.U. legislator and protecting individual rights. By ensuring the intelligibility of E.U. law, the Court enables private and public actors to adjust their behaviour to directives that stem from sources of E.U. law, while enabling E.U. law to fulfil its normative function of guiding the behaviour of its subjects. This is what arguably all courts strive to achieve in practice and most of the contemporary legal systems work reasonably well most of the time.[165] The value thereby promoted is legal certainty, which is less of a concern in the teleological interpretation that typically gives way to momentary, short-term interests which cannot always be predicted beforehand.

Making law intelligible might be even more important in a complex institutional system such as the E.U. For the E.U. legal system to function optimally, the Court of Justice needs the cooperation of other actors, supranational and national: from the Council, the Parliament, the Commission, and the E.U. agencies and offices, to Member State legislatures, national courts, and executives. National actors are especially important since they are mainly responsible for the everyday application of E.U. law. If E.U. law that they ought to give effect to is made consistent and coherent by the Court of Justice, they will likely have little to no difficulties in enforcing it. E.U. law will then produce equal effects in all Member States and will apply to all E.U. citizens in the same manner, thereby ensuring their equal treatment. So, making sense of the body of E.U. law eventually ensures its efficiency and uniformity, which are important structural values, and ultimately the equality of Member States and their citizens, another

[163] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J. L. & Pub. Pol'y 61, 63 (1994).

[164] See Justice Scalia's majority opinion in West Virginia University Hospitals v. Casey, 499 U. S. 83, 100–01 (1991): Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law [...] because it is our role to make sense, rather than nonsense, out of the *corpus juris.*

[165] *See* D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification, in* Interpreting Statutes 511, 535 (Neil MacCormick & Robert Summers eds., 1991).

fundamental value of the E.U. legal system. In such a decentralised institutional environment, contextualism seems to be the most appropriate interpretive approach.

It should also be added that the Court's interpretive approach that aims at ensuring coherence, completeness, and consistency of E.U. law corresponds to the ideal of a constitutional court as envisaged by Hans Kelsen. For Kelsen, a constitutional court is responsible for ordering the legal system so as to achieve unity of law, which would be free of any contradiction.[166] That system is necessarily hierarchical and monist, since no one can be above the constitutional court that is tasked with making the system coherent and whole.[167] That the Court of Justice indeed understands itself to be such a Kelsenian court transpires from the clash with the German Federal Constitutional Court following the ruling in *Weiss*.[168] In a number of reactions – institutional,[169] judicial,[170] and extra judicial[171] – it was strongly asserted that there can be only one final authority in the interpretation of E.U. law, thus rejecting the notion of interpretive pluralism in the E.U. legal system,[172] which would in theory be just the opposite from the ideal of coherence and consistency of law.

4. "CONTEXTUALIST" OR "TELEOLOGICAL" - DOES IT MATTER IF BOTH REACH THE SAME OUTCOME?

An important objection against the label "contextualist" and a description of the legal reasoning of the Court of Justice proposed so far, as well as the values it promotes, could be to question whether it matters at all? In other words, do different interpretive approaches

[166] *See* Stanley L. Paulson, *Formalism, "Free Law", and the "Cognition" Quandary: Hans Kelsen's Approaches to Legal Interpretation*, 27 U. Queensland L. J. 7, 29 (2008).

[167] *See* Daniel Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance* 28–32, 39–43 (Univ. Mich. L. Sch. Pub. L. Working Paper Series, Working Paper No. 229, 2011).

[168] *See* Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018); *see also* Bundesverfassungsgericht [BVerfG] (Federal Constitutional Court), May. 15, 2020, 2 BvR 859/15, Judgment of the Second Senate regarding Public Sector Purchase Program, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915 (Ger.).

[169] See Court of Justice of the EU, Press Release No. 58/20 following the judgment of the German Constitutional Court of 5 May 2020 (May 8, 2020).

[170] *See* Case C-824/18, A. B., C. D., E. F., G. H., I. J. v. Polish National Council of the Judiciary, Opinion of Advocate General Tanchev, ECLI:EU:C:2020:1053 ¶¶ 80–84 (Dec. 17, 2020).

[171] *See* Koen Lenaerts, *No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties*, Verfassungsblog (Oct. 8, 2020), https://verfassungsblog.de/no-member-state-is-more-equal-than-others/ (Ger.).

[172] *See* Gareth Davies, *Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation*, 24 Eur. L. J. 358 (2018) (U.K.).

lead to different interpretive outcomes, if we assume that the outcomes of adjudication are what in the end matters the most?

Those who insist on the label "teleological" and accuse the Court of Justice of judicial activism may not actually be concerned with the reasoning of the Court that is offered to justify particular outcomes, but with those outcomes themselves. So, the problem would be that the Court's teleological interpretive approach has a built-in "communautaire tendency" that inevitably results in "pro-integration" outcomes.[173] In other words, whenever a doubt about the outcome of interpretation exists – i.e., about the resolution of a case – the Court will always opt for the "federal" or "centralising" solution that favours the Union, enhances European integration, and promotes its interests.[174] Many studies, both critical and sympathetic, hence, argued that the Court of Justice consistently and in all strands of the case law arrives at these integrationist outcomes,[175] irrespective of the reasoning it adopts that purportedly lead there.

For many advocates of the Court of Justice, this cannot be seen as surprising. Teleological interpretation is driven by the goals of E.U. law and those goals are distinctly integrationist and "pro-E.U.". As David Edward wrote, if anything like "integrationist agenda" or "communautaire tendency" exists, it is in the Treaties. The Member States have set it, and the Court cannot ignore it when interpreting E.U. law.[176] The following remark with a similar tenor is often quoted:

> The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted to it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an "ever closer union among the peoples of Europe".[177]

But this "genetic code" may not only be in the objectives and purposes of E.U. law. It may permeate the entire E.U. legal system - down to every single provision in every source of law. That is why some insiders to the Court like Advocate General Miguel Poiares Maduro spoke about "meta-teleology", about the "constitutional telos" of the legal context in

[173] *Cf.* Beck, *supra* note 63, at 318–31.

[174] *See* Hartley, *supra* note 4, at 95; Rasmussen, *supra* note 4, at 3; *see also* Derrick Wyatt, Does the European Court of Justice Need a New Judicial Approach For the 21st Century?, Lecture at the Bingham Centre (Nov. 2, 2015).

[175] *Cf.* Anna Bredimas, Methods of Interpretation and Community Law 179 (1978); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 Am. J. Int'l L. 1, 24–27 (1981) Trevor C. Hartley, The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community 78 (4th ed., 1998).

[176] *See* David Edward, *The European Court of Justice - Friend or Foe?*, Eur. Atlantic J. 60, 67-68 (1996) (U.K.).

[177] Giuseppe Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice,* 57 Mod. L. Rev. 175, 186 (1994) (U.K.).

which provisions of E.U. law exist,[178] where the systemic/contextual and purposive/teleological interpretation become one. So, not only *télos* (end) but also *óntos* (essence) of E.U. law is integrationist.[179] For that reason, a contextualist court will act just like a teleological court would. If the Court of Justice is contextualist, and the context is implicitly but surely integrationist, the Court will in the end come to the integrationist outcomes. If the result is the same, the labels given to the interpreter are irrelevant.

However, there are several issues with making it all about the integrationist outcomes. Namely, what makes an outcome an integrationist one is rather elusive. "Integration as a term does not mean anything in itself",[180] Advocate General Tamara Ćapeta wrote. It is hard not to agree with this remark. European integration has so many diverse objectives, some of which may be contradictory in certain circumstances. When the Court of Justice gives preference to one objective at the expense of another, has the outcome thus reached integrationist or not? So, looking at the E.U. 's values, interests, and policies at the macro level, we cannot know what exactly would qualify them as integrationist. Is it right or left, socially liberal or conservative, economically interventionist or *laissez-faire*? Does integration imply preference for market and competition or social justice and equity? In the Court's case law, one can find outcomes that further all these causes. And they would all qualify as integrationist.[181] But if all of these different causes are integrationist, then that term loses a lot of its explanatory power. For integration to be more useful conceptually in this context, it would require a master plan. However, there is no such thing, there never was, and cannot be in such a diverse and dynamic political community like the E.U. As Robert Schuman said in his address when launching the idea of the European Coal and Steel Community, "Europe will not be made all at once, or according to a master plan".

Some authors did, however, offer a more specific and analytically useful measure of integration. For instance, Trevor Hartley considered an outcome integrationist if it promoted European integration in the way that it strengthened the Union and its federal elements, increased the scope and effectiveness of E.U. law, or enlarged powers of the E.U. institutions.[182] However, when put to test, these criteria likewise fail for the following reasons.

[178] *See* Maduro, *supra* note 71, at 140. *See also* Lasser, *supra* note 3, at 203–38; and for a similar concept of *économie générale* that informs the Court's interpretation of E.U. law, see Siniša Rodin, *Interpretation in the Court of Justice of the European Union: Originalism, Purposivism and L'Économie Générale*, 34 Am. Univ. Int'l L. Rev. 601 (2019).

[179] *See* Siniša Rodin, *A Metacritique of the Court of Justice of the European Union*, 2 Il Diritto dell'Unione Europea Law of the European Union 193 (2016) (It.).

[180] Ćapeta, *supra* note 109, at 105.

[181] *Id.* at 104–07.

[182] *See* Hartley, *supra* note 175, at 78.

Not every case before the Court of Justice raises these issues. Perhaps some or most of the landmark cases do in one way or another. But these represent only a smaller portion of cases dealt with by the Court of Justice. They are not representative of what the Court does in most of the situations.[183] In the same way that great cases make bad law and provide bad labels for judicial reasoning, they give a bad impression of judicial preferences for integrationist outcomes.

The same thing can be noticed in the case study I performed for the purposes of this paper. In 135 questions of interpretation of E.U. law, I analysed, and I counted how many outcomes reached by the Court of Justice could be classified as integrationist, non-integrationist, and neutral. Echoing Hartley's suggestion, I looked into whether the outcome: (i) broadens or restricts the scope of E.U. law; (ii) widens or narrows the exception from application of a general rule of E.U. law; (iii) leads to a more or less effective and efficient enforcement of E.U. law; (iv) precludes or allows application of national law that restricts application of an E.U. rule and consequently narrows or widens discretion of national authorities; (v) was supported or opposed by the Commission in the proceedings before the Court.

The outcomes for which none of these criteria could be established were considered as neutral. They concern, for instance, certain technical questions which seemingly do not involve political or value considerations, or have no impact on structural features of the E.U. legal order. Examples would be classification of a copper rod or a medicinal product under one or the other customs' heading of the combined nomenclature of the E.U. common customs tariff;[184] or allowing or prohibiting a package leaflet of homoeopathic medicinal products to contain information about dosage schedules; etc.[185] It is difficult to consider these outcomes as being integrationist or not absent certain indications based on the aforementioned (or other similar) criteria. In any event, in 135 questions of interpretation of E.U. law covered in my study, the Court of Justice had 54 neutral outcomes - which is 40% of the total number.

As for the other two types of outcomes, the situation is as follows: the Court of Justice reached 64 integrationist outcomes, which is 47.4% of the total number, and 17 non-integrationist outcomes, which is 12.6% of the total number. So, in less than half of all cases the Court's integrationist bias surfaces. But in one in every eight cases, the Court reaches outcomes that cannot be considered as promoting the E.U. integration, no

[183] *Cf.* Conway, *supra* note 14, § 13.12 "Conclusions", where he notes that "the Court's role remains a matter of controversy in those important cases where the Court pursues a pro-integration policy instead of a more conventional hermeneutic discipline".

[184] *See* Case C-340/19, Valsts ieņēmumu dienests v. Hydro Energo, ECLI:EU:C:2020:488, (Jun. 18, 2020); *see also* Case C-941/19, Samohýl group v. Generální ředitelství cel, ECLI:EU:C:2021:192 ¶ 42 (Mar. 10, 2021).

[185] *See* Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304 (Apr. 23, 2020).

matter how contradictory that may sound. Moreover, two in every five cases will not even raise these concerns. So, the full picture is less black-and-white and much more nuanced than authors who criticise the Court of Justice's alleged integrationist bias are willing to admit.[186] Which should not come as a surprise, given how unlikely it would be to have a full agreement over anything between twenty-seven judges sitting in the Luxembourg benches.[187]

From this, we can see that the Court of Justice, in the many situations in which it interprets E.U. law, does not reach integrationist outcomes. By extension, the entire E.U. legal context cannot be fully integrationist. Rather, a significant number of cases will deal with integration-neutral issues in which a contextualist court has to make sense of a complex web of technical legislative solutions. What is more, in some parts of the E.U. legal context Member States may have envisaged a limited scope of E.U. law or firm exceptions from application of E.U. law; or have granted wide discretion to national authorities; or left the matter completely to be dealt with at the national level. In those situations, a contextualist court that seeks to make the E.U. legal system intelligible, coherent, and consistent will take into account those decentralising pieces of the puzzle instead of blindly and forcefully trying to fit centralising solutions in that frame.

CONCLUSION

The Court of Justice is a contextualist court. In my view,[188] that is the most appropriate label for its approach to the interpretation of E.U. law, and the fairest characterisation of its legal reasoning. It may sound like an apology, but it is difficult not to come to that conclusion after reading a bigger sample of the Court's judgments. My claim is easily verifiable. Anyone can take a look at a randomly or carefully selected sample of cases, related or not to a specific area of E.U. law or legislative act, in a limited period of time, and read a hundred or more judgments of the Court of Justice - not only those that draw some controversy but also those rather uninteresting ones to which scholars rarely pay

[186] Cf. Rodin, *supra* note 179, § III "Ontological metacritique: how the CJEU should be deciding cases?", where he noted that "[w]hile it is true that the Court has generated solid jurisprudence that can be characteri[s]ed as Europeanizing, there are also abundant examples of [the Court promoting] de-centrali[s]ing values".

[187] *Cf.* Michael Malecki, *Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers*, 19 J. Eur. Pub. Pol'y 59 (2012) (U.K.) (showing that the Court's judges do not have uniform preferences when it comes to pursuing pro-integration agenda, but rather they fall on a spectrum between "Europhilia" and "Euroscepticism").

[188] Here I should reiterate that my observations were based on a study of the Court's recent case law, that is a sample of judgments delivered between 2019 and 2021, so these conclusions should be read with that caveat in mind. For the explanation of the design of my research, see *supra* Section 1.

attention. When reading, they should take note of the following: the nature of legal questions – whether they have an integrationist "flavour"; how the Court uses specific interpretive arguments; what are the most frequently used arguments; and what kind of outcomes the Court usually reaches. After they are done with reading and taking notes, I am convinced that the pattern they will identify with all those points will reveal "the careful and painstaking interpretative task carried out by the Court in the majority of its decisions",[189] and not some carefree activist approach unrestricted with the letter of E.U. law that pursues a grand plan of delivering a European superstate or something along those lines.

The label "contextualist", moreover, could make the most sense in the current state of development of the E.U. legal order. You may even think that it is logical that the Court will have such an approach to the interpretation of E.U. law some seventy years after the creation of the first European communities, compared to what it championed in the formative years of the E.U. or during periods of political turmoil, which could perhaps be labelled "teleological". So, first, the E.U. legal system was built from scratch by a teleological court. On that basis, it grew and consolidated. And now, it is being systematised and perfected by a contextualist court.

There are several factors that may have contributed to such an evolution of the interpretive approach of the Court of Justice. The first is the number of cases it handles. From a few dozen a year in the first decades to almost a thousand a year in recent years. Perhaps over time the Court will keep delivering a similar absolute number of bold, purposive rulings. Before they stood out and could be thought of as being representative of the Court's legal reasoning. But lately those become drowned in hundreds of rulings in which the Court routinely solves the issue by a careful consideration of the text and relevant context.

The second factor concerns the personnel. From seven judges sitting at the early court to twenty-seven being there at the moment. A greater number of judges overall means more diversity in opinion, which makes it more difficult to have everyone in favour of ambitious reasoning and far-reaching outcomes. Moreover, the original seven were initially handling all cases together and could indeed adopt a distinct judicial philosophy and follow it consistently. Since they had to make the system operative and secure its institutional authority along the way, they could have been more eager to rely on purposivism. Now, cases are being handled mostly in chambers of three and five judges. This may serve as a steadying factor that pushes everyone to come up with a solution that will be the most acceptable to the rest of the judges. And since more cases

[189] Albors Llorens, *supra* note 6, at 398.

handled by different formations of the Court will produce more material to work with, it becomes important to consolidate the case law and make it coherent and consistent.

The third factor concerns the nature of the cases the Court is dealing with. Initially, the Court was mostly asked to interpret Treaty provisions which are broadly drafted and goal-driven. They are often concerned with issues related to free movement, which were essential for the establishment and functioning of the internal market. And in certain periods, the Union legislator was in a deadlock and could not enact legislation that would make those provisions operative. Furthermore, there was less case law in which the subsequent rulings had to be situated. At the same time, the Court was less known and politically exposed, "blessed with benign neglect by the powers that be and the mass media",[190] so some ambitious rulings could fly under the radar. And some of them dealt with rather mundane facts such as import of chemicals, unpaid electricity bills, or subsidies for slaughtering cows. Such an environment, indeed, may be more conducive to purposivism. But today, that environment has markedly changed. The internal market is more or less completed and solidly in place. The Court is dealing not so much with the Treaty provisions but rather with the intricate, extensive, technical, and ever-growing body of the E.U. secondary law,[191] which shows that the legislative output is there. That law regulates sensitive matters like social security or human rights, which are politically more problematic for Member States since they may encroach on the areas of their reserved competence. And the Court's rulings and legal reasoning are scrutinised more closely than ever, not only by scholars but also by the media, interest groups, politicians, and national judiciaries. Such an environment calls for a contextualist court, and the Court of Justice seems to be responding.

[190] Stein, *supra* note 175, at 1.

[191] *Cf.* Michal Bobek, *What Are Grand Chambers For?*, 23 Cambridge Y. B. Eur. Legal Stud. 1 (2021) (U.K.):

> [I]in contrast to the cases which came, for example, in the 1980s or even in the 1990s, the main role of the Court today is perhaps not so much focused on proactively opening up new areas of law, often based on broadly stated constitutional or primary law principles or Treaty provisions. The cases put before the Court today require ever more navigating through a rather complex web of detailed secondary law instruments, seeking to establish at least some sort of internal order and consistency.

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Contract Law and Public Justification

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ABSTRACT

In *Justice in Transactions* and elsewhere, Peter Benson presents his theory of contract law, "contract as a transfer of ownership", as being capable of providing a public basis of justification for court decisions on contracts. In this article, I argue that Benson's theory of public justification of judicial decisions is a sort of consensus theory according to which public justification requires reasons shared by the justificatory constituency or members of the public. In Benson's case, certain reasons are taken as shared because they are constitutive of the practice of contract law. One of the main theses of the article is that, for Benson's theory of public justification to hold, the public justification must be composed only of those citizens for whom the practice of contract law as a whole is legitimate. The exclusion of other citizens (that is, those who regard contract law as illegitimate), however, does no greater damage to Benson's theory. In addition, I also argue that considerations about the public justification of judicial decisions do little to defend the thesis that contract as a transfer of ownership is the best interpretive theory of contract law.

KEYWORDS

Contracts; Public Justification; Public Reason; Benson; Interpretation

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INTRODUCTION

Peter Benson presents his theory of contract law,[1] — the theory of contract as a transfer of ownership, as a theory that provides a public basis of justification for contract law.[2] Benson points out the difference between the public justification of a certain area of law, such as contract law, and other kinds of public justification[3] — the public justification of the institutional system as a whole, or of what John Rawls designates as the "basic structure of society".[4] Nonetheless, the claim to justify contract law publicly means that, like other theories of this genre, Benson's theory concerns itself with justification for members of a certain public — the justificatory constituency or members of the public. Like other theories of this genre, Benson's theory is concerned with what is justified to members of a certain public, the members of the public.

Although there is nothing new in saying that coercion by the state must be justified publicly,[5] Benson is the only author I am aware of who applies public justification to contract law, and to private law in general.[6] It is also peculiar, therefore, that Benson claims that his theory is preferable to rival other theories — not because it offers a better interpretation of contract law; or because it is superior in terms of fairness; or any other substantial value; but because, unlike other theories, it offers a basis of justification for contract law.

This article has a dual objective. First, it aims to scrutinise Benson's theses on the public justification of contract law. In discussing public justification, Benson makes few references to the vast literature on the subject. I would like to demonstrate that certain refinements found in the post-Rawls literature help to illuminate Benson's claims about

[1] *See generally* Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 Osgoode Hall L. J. 273 (1995) [hereinafter Benson, *The Idea*]; Peter Benson, *The Unity of Contract Law*, *in* The Theory of Contract Law 118 (Peter Benson ed., 2001) (U.K.); Peter Benson, *Contract as a Transfer of Ownership*, 48 Wm. & Mary L. Rev. 1673 (2007) (Ger.); Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, 1 Issues in Legal Scholarship (2001); Peter Benson, *The Idea of Consideration*, 61 Univ. Toronto L. J. 241 (2011); Peter Benson, *Justice in Transactions*: A theory of Contract Law (2019) [hereinafter Benson, Justice in Transactions]; Peter Benson, *Outline of a Public Justification of Contract Law*, *in* Research Handbook on Private Law Theory 75 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) [hereinafter Benson, *Outline*].

[2] *See* Benson, Justice in Transactions, *supra* note 1, at 11: "[M]y aim . . . is to provide a public basis of justification for contract law . . .".

[3] *See id.* at 13: "[W]e must not simply assume that the public justification developed for one subject, such as political relations, is also immediately or directly applicable to some other, such as contract law . . .".

[4] Rawls defines the basic structure of society as "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation". *See* John Rawls, *A Theory of Justice: Revised Edition* 6 (1999).

[5] *See* John Rawls, The law of Peoples: With "The Idea of Public Reason Revisited" 133 (1999) (discourses of judges in their decisions, especially of the Supreme Court, as part of the public political forum to which the idea of public reason applies).

[6] But for a recent account on the justification of legal rules also focused, like Benson's, on the idea of acceptability, see Stephen A. Smith, *Intermediate and Comprehensive Justification of Legal Rules*, *in* Justifying Private Rights 63 (Simone Degeling et al eds., 2021) (U.K.).

the public justification of contract law. More precisely, I will argue that Benson's theory is best interpreted as an exemplar of consensus theory. According to consensus theories of public justification, something is publicly justified if it is justified for reasons that members of the public share. I will also argue that, in Benson's case, the members of the public are citizens for whom contract law as a whole is legitimate.

Second, the article proposes a critique of Benson. I will argue against Benson's claims that considerations regarding public justification say little about the best interpretation of contract law. Only once the theory of contract as a transfer of ownership is a successful interpretive theory of contract law, will it provide a public basis of justification, but this is true of other theories as well.

Although Benson's theory of contract law is extensively commented on, less attention has been paid to the issue of public justification.[7] In particular, I am not aware of any works that have tried to scrutinise Benson's theses in light of the literature on public justification in general.[8] In this article, I propose to fill this gap.

The remainder of the article is organised as follows. Part 1 presents Benson's theory of contract law as a theory that serves as a public basis of justification. Part 2 draws on the literature on public justification to answer the following question: what kind of theory of public justification is Benson's theory anyway? My answer is that Benson's theory is best understood as a consensus theory in which the justificatory constituency is restricted to those people who accept contract law as legitimate. Part 3 contains my critique of Benson. In it, I make the case that almost any successful interpretive theory of contract law provides a public basis of justification. Furthermore, apart from the requirement of publicity (i.e., that a theory should offer criteria whose application by courts is easy to verify), there seems to be nothing about public justification that would lead us to prefer the theory of contract as a transfer of ownership against other theories. Thus, Benson's theory of contract law can offer a public basis of justification, but only because it is a successful interpretive theory, not the other way around.

[7] For some exceptions, see Aditi Bagchi, *Would Reasonable People Endorse a "Content-Neutral" Law of Contract?*, 17 Eur. Rev. Cont. L. 245, 248-51 (2021) (Ger.) (Benson's public justification fails because it employs too strong a conception of reasonableness); *see also* Martijn W. Hesselink, *Justice in Transactions: A Public Basis for Justifying Contract Law?*, 17 Eur. Rev. Cont. L. 231 (2021) (Ger.) (Benson's theory of public justification either imposes liberal values external to contract law, or it is incompatible with the priority that Rawls accords to the principles for the basic structure of society); *see* Felipe Jiménez, *Contracts, Markets and Justice,* 71 Univ. Toronto L. J. 144 (2021) (Benson's approach succeeds as a normative reconstruction of contract law practice, but the project of a public justification requires more distance from that practice).

[8] A first attempt of mine in this direction includes references to the author's work.

1. PUBLIC JUSTIFICATION IN CONTRACT LAW

According to Benson:

> [A] public basis of justification is appropriate, and needed when it is morally essential that individuals (and societies) find a shared normative basis, and point of view from which to explain and to justify among themselves the terms governing their interactions with each other. While a shared basis of justification may not be needed to validate one's individual moral, religious, or philosophical outlooks, it is necessary to legitimate the exercise of coercive power by citizens over each other when all count as free, and equal. This would be particularly so — as is the case with contract law — where interpersonal obligations are determined and coercively enforced even though the parties need not have deliberately intended to be so bound.[9]

In this Part, I will present how Benson accomplishes the task described in the passage above. My emphasis will be on how he thinks that a theory of contract law can provide a public basis of justification "where interpersonal obligations are determined, and coercively enforced". On the other hand, I will avoid, as much as possible, dealing with features of Benson's theory that do not eminently concern the *desideratum* of a public justification for contract law.[10]

Benson's theory — contract as a transfer of ownership — is an interpretive theory of contract law. Not every interpretive theory, however, claims Benson, is able to offer a public basis of justification. In order, also, to support publicly justified coercion by the state, an interpretive theory needs to make use of publicly available ideas, such as the ideas found in the doctrines applied by the courts in their decisions.[11] What an interpretive theory, as a public basis of justification, aspires towards is to bring to light principles or values implicit in these doctrines. It is also a question of demonstrating, as

[9] Benson, Justice in Transactions, *supra* note 1, at 12.

[10] Although Benson's emphasis is on the common law, he hints that his theses could also apply to civil law countries. This seems to hold particularly with regard to claims about public justification. While the theory of contract as transfer of ownership is an interpretive theory of a particular system of contract law (which may therefore not have the same success as other systems), Benson's remarks on public justification are more abstract, concerning the coercive practice of contract law in general (rather than a particular system of contract law). *See id.* at 29: "[E]ven though it is worked out for the common law in a judicial setting, the path taken by the proposed public justification may be relevant in developing a similar theoretical approach for other modern systems of contract law—most obviously, those belonging to the civilian tradition". Thanks to an anonymous reviewer for urging me to clarify this point.

[11] *Id.* at 14 (a public justification of contract draws its ideas "from legal doctrines publicly available to all . . .").

far as possible, that the different doctrines of contract law mutually support each other forming an "intelligible whole".[12]

For Benson, the theory of contract as a transfer of ownership meets these goals. In contrast to other theories — i.e., autonomy-based theories and economic theories — the theory of contract as a transfer of ownership avoids applying a criterion (such as autonomy or efficiency) that is external to contract law. In contrast, Benson's theory starts from a basic characteristic of contract law, namely, that "[a]ll systems of modern contract law present and justify their governing principles, standards, and rules as aiming, primarily, to do justice between the parties".[13] The theory of contract as a transfer of ownership manages to offer a public basis of justification because it appeals to an idea of justice between the parties, or transactional justice that is present in the main doctrines of contract law.

Other ideas that Benson's theory also considers as latent in contract doctrines (or present in the "public legal culture") serve to clarify what he understands as transactional justice. One of them is that of a certain conception of the person – designated by Benson as a juridical conception. According to this conception, contractors are treated as agents with the capacity "to assert their sheer independence from their needs, preferences, purposes, and even their circumstances".[14] The justice that contract law has in view is, therefore, a justice between agents characterised by their capacity for self-determination, and not by their needs, preferences, or circumstances. Therefore, it is a conception of justice that differs from other conceptions — in particular, conceptions of distributive justice - in which these same needs, preferences, or circumstances play a prominent role.[15]

[12] *Id.* (a public basis of justification "sees if and how the different contract doctrines and principles—as well as the ideas and values that they implicitly embody—are mutually supportive and fit together in one unified and intelligible whole"). *See also* Benson, *Outline*, *supra* note 1, at 76.

[13] Benson, Justice in Transactions, *supra* note 1, at 14.

[14] *Id.* at 369. Another moral capacity imputed to the parties is the capacity for reasonableness, or "an ability to recognize and accept the normative significance and implications of our independence, not only for ourselves but for others as well". *Id.* at 371.

[15] *See id.* at 27 (as a conception of justice is indifferent to needs and interests, transactional justice "must be conceived as wholly nondistributive in character").

Finally, another basic idea of contract law (and of private law as a whole), according to Benson, is the principle of liability for misfeasance only. According to this principle, private rights emanate from the capacity for independence (they are rights that are, therefore, indifferent to everything that does not concern the capacity for self-determination, such as needs and circumstances). And liability in private law is a liability limited to the violation of those rights.[16] Consequently, the mere disregard for the interests of others — as far as it does not constitute the infringement of a right, like refusing to contract with someone under a pressing need — is not a wrong. On the contrary, it is a mere case of nonfeasance and consequently, it does not engender liability. One of Benson's main aims is to demonstrate that contract law — in particular, the law of contract remedies — conforms to the principle of liability for misfeasance only.[17]

It is instructive how Benson differentiates his theory of contract as a transfer of ownership from other interpretive theories of contract law that fail, according to him, to provide a public basis of justification. The problem with other theories — such as welfarist or distributive justice theories — is that they assign a certain end to contract law. Teleological considerations are, however, incompatible with the "legal point of view", that is, with the fact that contract law is itself indifferent to the extent to which the interests of the parties are realised through the contract. Doctrines such as those of offer and acceptance, frustration and mistake are illustrative that, for contract law, it does not matter what the contracting parties actually wanted (or their particular conceptions of good), but only what they manifested.[18]

By postulating a certain good to be achieved through contracts, teleological theories contradict the limit of liability — liability only for misfeasance — that characterises private law:

[16] *See* Peter Benson, *Misfeasance as an Organizing Normative Idea in Private Law*, 60 Univ. Toronto L. J. 731, 733 (2010) (Can.): "[M]isfeasance restricts the fundamental imperative in private law to a prohibition against conduct, whether act or omission, that injures or interferes with a definite but limited kind of protected interest; namely, another's ownership right". More precisely, on the rights whose violation (misfeasance) results in liability, see *id.* at 737: "[T]he only legally recognized interests which the plaintiff can possibly assert vis-à-vis the defendant are her rights of bodily integrity and property".

[17] The seed of doubt was planted by Fuller and Perdue's famous article, Lon L. Fuller & William F. Perdue Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 Yale L. J. 52 (1936), 46 Yale L. J. 373 (1937). According to Fuller and Perdue, only policy reasons could explain the preference of the common law for the expectation damages remedy, which would grant the contracting party victim of contractual breach "something he never had". Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), *supra* note 17, at 53. By supporting the thesis that the contract transfers rights at the time of its formation (and regardless of the performance of the parties' obligations), Benson intends to demonstrate that Fuller and Perdue are wrong and that the remedy of expectations damages can indeed be understood as a compensation for the violation of a right. *See* Benson, Justice in Transactions, *supra* note 1, at 319-65.

[18] Benson, *The Idea*, *supra* note 1, at 307-08.

> Viewed from the standpoint of public justification, the reliance theory of Goetz, and Scott, the distributive approach of Kronman, and Posner's wealth-maximization share the same basic difficulty [. . .]. Each fails to recognize the limited idea of legal responsibility embodied in the common law distinction between misfeasance, and nonfeasance, a distinction that is presupposed throughout contract law [. . .]. Individuals are not obliged to preserve, or assist others, to meet their needs, or wishes, or to further their good. In contrast, each of the above welfare-based theories attributes to contract law the goal of bringing about the efficient, fair, or maximum satisfaction of transacting parties' needs. At bottom, then, each theory must postulate a qualified right to have one's needs recognized, and met. This makes them unsuitable as *public* justifications of contract.[19]

Another problem that afflicts some theories is that they offer criteria whose application requires a large amount of information or expertise that courts lack. Also for this reason, certain theories — Benson cites the examples of Kronman's theory, with his principle of Paretarianism,[20] and theories of the economic analysis of law — do not lend themselves to the public justification of contracts. To serve as a public basis of justification, therefore, a theory must not only be based on ideas present in the public legal culture — such as the ideas found in the main doctrines of contract law — but also offer criteria that courts can easily apply, and are therefore publicly available.[21]

2. WHAT KIND OF PUBLIC JUSTIFICATION?

Although Benson stresses the uniqueness of his theory of public justification,[22] this cannot entirely preclude comparison with other theories. In this section, I shall resort to the

[19] *Id.* at 309-10.

[20] *See* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 486 (1980) (enunciating the principle of Paretarianism, according to which contracts must be enforceable although one of the parties has taken advantage of the other, provided that the enforceability of these contracts is, in the long term, beneficial to the disadvantaged party).

[21] Benson, *The Idea*, *supra* note 1, at 310: "[I]nformation and procedures are required that are either unavailable, or too complex, or too uncertain for the theories to be applied successfully, and equitably in the institutional context of adjudication. Hence, they are unsuited to provide a public basis of justification". *See also* Benson, Justice in Transactions, *supra* note 1, at 13-14; Benson, *Outline*, *supra* note 1, at 78.

[22] *See* Benson, Justice in Transactions, *supra* note 1, at 13: "[A] public justification for contract has to be specifically worked out anew for contract law, taking into account not only its distinctive norms, and values as reflected in its main doctrines, and principles but also its specific role as but one part of a complete system of justice".

literature on public justification in general in order to ask what kind of public justification is envisioned by Benson.

A first clarification concerns the fact that justification, public or otherwise, can refer either to the legitimacy of the law of contracts, or any other, or to its authority (or both).[23] In asking ourselves about the legitimacy of contract law, what we want to know is whether that part of the law — or, more precisely, the coercion that is exercised under it — is morally permissible. This is a different question from the question of authority, which asks whether we have a duty to obey court decisions on contracts. These two questions — of legitimacy and authority — can be answered in different ways. We might, for example, claim that a certain judicial decision is not morally authoritative, i.e., not legitimate, but that we nevertheless have a duty to obey it, i.e., the decision is authoritative.

Now, it seems clear that Benson's theory is a theory about the legitimacy, not the authority, of contract law. Not only does Benson occasionally use terms like "legitimate",[24] but he never once suggests that a public basis of justification is a condition for state decisions to be obeyed. Contract law that is not publicly justified is, according to Benson, objectionable, which does not mean that we are authorised to disregard it.

Another issue is whether Benson's theory of public justification is a consensus or convergence theory.[25] Consensus theories are theories according to which public justification requires reasons that are shared by the members of the public. Convergence theories, by contrast, drop this requirement, usually contenting themselves with a law being justified to all members of the public, albeit for reasons that are not shared. Well, then, there is no doubt that Benson's theory is an example of consensus theory — although it is not simple to assess why the reasons Benson refers to are reasons common to members of the public. In any case, it is clear that, in appealing to ideas present — explicitly or implicitly — in contract law doctrines, what Benson has in view is public

[23] On the difference between legitimacy, and authority, *see* David M. Estlund, Democratic Authority: A Philosophical Framework 41 (Princeton University Press ed., 2008).

[24] *See e.g.*, Benson, Justice in Transactions, *supra* note 1, at 1-2: "For contractual obligation is always coercively enforceable obligation, and this, if it is to be legitimate, ought to be justified as a matter of justice and shown to be consistent with the freedom, and equality of the parties".

[25] On the difference between consensus, and convergence theories, *see* Fred D'Agostino, Free Public Reason: Making It Up As We Go 30 (1996). (U.K.):

> If both *A* and *B* share a reason *R* that makes a regime reasonable for them, then the justification of that regime is grounded in their *consensus* with respect to *R*. If *A* has a reason *RA* that makes the regime reasonable for him, *and B* has a reason *RB* that makes the regime reasonable for her, then the justification of that regime is based on *convergence* on it from separate points of view.

See also Kevin Vallier, *Convergence and Consensus in Public Reason*, 25 Pub. Aff. Q. 261, 262 (2011).

justification for reasons that members of the public (in some sense) share, and not for a mere convergence of reasons.

A final preliminary clarification concerns whether the requirement that Benson's theory applies to contract law is an exclusionary requirement, a restraint requirement, or both. In the first case (exclusion), Benson's theory would be satisfied that contract law is justified by public reasons. In the second (restraint), what the theory would prohibit is the supply of non-public reasons.[26] The two requirements must not be confused. Considering a non-public reason *RNP* — for example, a consequentialist reason — it is sufficient, for an exclusionary claim, that contract law can be justified only on public grounds—and therefore, independently of *RNP*. For a restraint requirement, by contrast, it is incompatible with the public justification that *RNP* be offered as a reason for deciding — even if the decision in question can be justified without resorting to *RNP*. In other words, whereas an exclusion requirement is concerned with the reasons that justify the exercise of coercion, what a restraint requirement has in view are the reasons offered for justification purposes — by certain authorities, or by members of the public.[27]

It seems safe to me to assert (although not as safe as in the previous cases) that public justification in Benson is based on a principle of exclusion, not restraint. I believe that Benson is, at best, only secondarily interested in judicial rhetoric, and that his thesis is therefore that the theory of contract as a transfer of ownership offers a public basis of justification. He does so by demonstrating that contract law can be justified with reasons arising solely from contract doctrines and the ideas latent in these doctrines. Judicial decisions offering reasons that are foreign to contract law, as is the case for Benson, for reasons of efficiency or distributive justice, could be a problem only because such decisions could misinform the public about the reasons why they are legitimate. Provided, however, that contract law, regardless of the rhetoric employed, is justified by public reasons, its legitimacy could be attested.[28]

Having made these clarifications, I would like to move on to the question that seems, to me, crucial for the characterisation of Benson's theory of public justification:

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[26] On the difference between exclusion and restraint, see Kevin Vallier, Liberal Politics and Public Faith 50 (2014).

[27] A famous example of restraint requirement is Rawls's duty of civility. *See* Rawls, *supra* note 5, at 55-56:

> [J]udges, legislators, chief executives, and other government officials, as well as candidates for public office, [must] act from and follow the idea of public reason and explain to other citizens their reasons for supporting fundamental political questions in terms of the political conception of justice that they regard as the most reasonable.

[28] In any case, there seems to me no doubt that Benson's theory contains at least an exclusion requirement. If, therefore, my above interpretation is wrong, this would only plague Benson with an additional problem, namely, that of explaining why, in addition to the exclusion of non-public reasons, public justification also imposes that public authorities exercise restraint as to the reasons that offer for their decisions.

in what sense are we to understand that the reasons of the theory of contract as a transfer of ownership are public? Especially, in contrast with the reasons of rival theories, such as the economic analysis of law or autonomy-based theories. We have seen that, like other consensus theories, Benson's theory subjects public justification to reasons that are commonly endorsed by the members of the public. In what sense, however, can the reasons of Benson's interpretive theory of contract law be deemed as reasons that are shared by the members of the public?

To claim that the reasons for the theory of contract as a transfer of ownership are public reasons because they are found in the major doctrines of contract law, and are therefore part of public legal culture (Benson's standard answer) only complicates the puzzle. It, essentially, invites us to ask why it is sufficient, in order for them to be public, that reasons can be deduced from existing law. Other consensus theories are treated as public reasons that members of the public accept. It is also common in consensus theories that the members of the public is idealised,[29] and not made up of the totality of citizens — for example, by excluding unreasonable citizens. Returning to Benson, what we are led to ask then is whether the reasons of the theory of contract as a transfer of ownership are, in some sense, reasons accepted by the members of the public, as well as whether, for the characterisation of this public, idealisations and exclusions are employed, and why.

Benson's answer to the first part of the question is, as it seems to me, the following: the reasons of the theory of contract as a transfer of ownership theory are shared by members of the public because everyone can or at least could intuit that these reasons stem from the main contract doctrines and ideas — such as that of liability for misfeasance only. This answer, however, comes up against cases like Eugene's (a fictional character I introduce here just for the purposes of argument). Eugene is an avid reader of Benson and is convinced that the theory of contract as a transfer of ownership is the best interpretation of contract law. He agrees, therefore, with Benson that considerations of transactional justice are the only ones capable of conferring intelligibility on contract law as a whole. Eugene, however, does not think that contract law in its current form is morally acceptable. For him, transactional justice is a false justice because it abstracts from the needs and circumstances (in particular, the disparity of forces) of the contracting parties.[30] How could we claim, then, that the reasons of the theory of contract as a transfer of ownership are Eugene's reasons?

[29] *See e.g.* Paul Billingham & Anthony Taylor, *A Framework for Analyzing Public Reason Theories*, 21 Eur. J. Pol. Theory 671, 673 (2022) (U.K.): "A key dimension along which public reason views vary . . . is in how they specify the constituency of reasonable citizens to whom acceptability, or justifiability, is required [. . .]. On every public reason view, this justificatory constituency is an idealized constituency".

[30] Benson argues for the moral acceptability of contract law in the second part of *Justice in Transactions*. We can say, in short, that Eugene is persuaded by the arguments of the first Part of this book (the interpretive theory), but not by those of the second one.

Two answers can be considered. The first consists in appealing to the *sui generis* character of the public justification of contracts in order to simply state that, contrary to other consensus theories, Benson's theory is satisfied by reasons for state decisions being part of the public legal culture — regardless, therefore, that these reasons are accepted by members of the public. This answer, however, is not very promising because it calls into question the plausibility of Benson's theory. Why should we insist that these reasons be public if they have nothing to do with the endorsement of those reasons by people subject to coercion? It does not seem easy to reconcile a common ground between theories of public justification, like respect for citizens,[31] with a theory that bases justification on reasons that are actually rejected by some members of the public.[32]

[31] For examples of theory in which public justification draws upon a principle of respect for citizens, *see* Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599 (1999); See also Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, PHIL. & PUB. AFF. 3 (2011) (U.K.).

[32] It is true that convergence theories do precisely this, but with the advantage that, in these theories, a law is legitimate only if it is justified for all members of the public—even though the reasons why a certain member of the public, *MPA*, has a law as justified may not be endorsed by another member of the public, *MPB*.

The second answer, which seems to me to be preferable, involves another of the questions referred to above: the question concerning the members of the public. Benson could stipulate that his theory of public justification is a theory about how to justify, publicly, the court decisions to people for whom the law of contract is legitimate,[33] thus excluding people like Eugene from the members of the public. The reasons for the theory of contract as a transfer of ownership would be reasons shared by the justificatory constituency (people like Eugene excluded) is because they are the reasons that flow from legal material (laws, precedents, etc.) that members of the public endorse or would endorse.[34] This second answer avoids the inconvenience of the first one — that regarding treating those reasons as public that are actually rejected by some members of the public — albeit, of course, at the expense of excluding from that public the people for whom contract law is not legitimate.[35]

One objection is that, so understood, Benson's theory of public justification would be circular, for it would be a theory about the legitimacy of contract law to citizens who already regard contract law as legitimate. Note, however, that there is a difference between the legitimacy of the practice of contract law and the legitimacy of some particular instance of coercion taking place within that practice. These are different things, for it is perfectly possible to consider a single exercise of coercion to be illegitimate without, at the same time, condemning the coercive practice as a whole.[36]

Another objection is that the move to exclude people like Eugene from public justification is regrettable because it is in relation to such people that the question of the

[33] I use "legitimate" above in the sense of "morally permissible". To consider contract law as legitimate (and to be part of the members of the public), it is therefore sufficient for citizens to consider the state morally authorised to institute contract law such as the current one, even though, for some of these citizens, contract law is not completely fair.

[34] In addition to excluding from members of the public people for whom contract law is not legitimate, the above interpretation involves the following idealisation: members of the public meet the necessary epistemic conditions to intuit the ideas that are present (explicitly or implicitly) in the main contract doctrines and that give unity to that part of the law. So, if Benson is correct in his interpretation of contract law, the reasons of the theory of contract as a transfer of ownership will be reasons accepted by this idealised audience.

[35] It is interesting to note that the reasons why members of the public regard contract law as legitimate do not have to be the same. In the Part (Part 2) of *Justice in Transactions* concerned with the legitimacy (Benson speaks of "stability") of contract law, Benson weaves arguments addressed to a varied audience: welfarists, moralists concerned with the binding force of promises, and advocates of distributive justice. *See* Benson, Justice in Transactions, *supra* note 1, at 397-413 (on the compatibility between contract law and promissory morality); 413-48 (on the compatibility between contract law and the market as a "system of needs"); 448-76 (on the compatibility between contract law and distributive justice). As Benson does not claim that the reasons given in this part of the book are public, it can be assumed that he is content with his readers agreeing that contract law is justified, albeit for different reasons.

[36] It is important to stress that Benson does not explicitly differentiate between the legitimacy of the practice of contract law and the legitimacy of a particular decision occurring within that practice. The article's thesis is not that the interpretation that makes use of this difference has a textual basis, but that it would be necessary for Benson's theory to circumvent the difficulty raised by the Eugene case. Thanks to an anonymous reviewer for urging me to clarify this point.

justification of contract law might seem most pressing. I agree that, as I am reconstructing it, Benson's theory of public justification is less ambitious than it could be. I see no other way, however, of reconciling the claim to offer a public basis of justification for contract law with the assertion that this same public basis can only come from a theory that is based on the ideas that are already incorporated (albeit implicitly) in the main doctrines of contract law. This is because the reasons provided by these ideas can only be shared by the members of the public if that public accepts the practice of contract law in general as legitimate. One way out would be to claim that some idealised version of the members of the public, indeed, accepts contract law as legitimate — which would imply treating people like Eugene as unreasonable or suffering from some cognitive deficit. Benson, however, does not advance this thesis.

According to the interpretation I am advocating, Benson's theory of public justification addresses an audience for whom contract law as a whole is legitimate. The question the theory sets out to answer is how individual decisions (e.g., judicial decisions) on contracts can be justified to the public. And the answer is that such decisions will be legitimate if they are justified by reasons that members of the public share. Finally, the reasons for the theory of contract as a transfer of ownership are shared reasons because they come from the main doctrines of contract law and from ideas implicit in those doctrines. I.e., reasons arising from legal material that members of the public see as legitimate by their own reasoning.

Let me explain. Suppose that, for whatever reason, Richard holds the practice of contract law to be justified — it might be, for example, that Richard accepts the principle of wealth maximisation and believes that contract law satisfies that principle. At first glance, the fact that contract law is legitimate might not seem to imply that the theory of contract as a transfer of ownership is accepted by Richard. Let us consider, however, that Benson is right in proclaiming that the theory of contract as a transfer of ownership is the theory that accounts for the ideas underlying the main doctrines of contract law. If this thesis of Benson is correct, then the ideas of the theory of contract as a transfer of ownership are constitutive of the practice that Richard regards as legitimate. But Richard cannot endorse the practice of contract law without endorsing the constitutive ideas of that practice. Thus, the reasons for the theory of contract as a transfer of ownership are Richard's reasons — they are, if not reasons that Richard currently endorses, reasons he would endorse after correctly interpreting contract law.

Let us go back to Eugene. One charge levelled against theories of public justification, that exclude certain people from members of the public, is that this exclusion is impossible to reconcile with the ground of public justification (be it liberty,

equality, or respect for citizens).[37] How does one defend a theory that proposes to justify coercion publicly and at the same time disregards the opinions of part of the citizens?

I believe, however, that in Benson's case, the manoeuvre of limiting the public justification would be defensible. In view of the fact that Benson's theory of public justification is a theory concerned with justifying coercion, the exclusion of citizens for whom contract law as a whole is not legitimate would be understandable. After all, what point would there be in trying to justify some particular instance of practice to people for whom the practice in question is (as a whole) corrupt? If, indeed, there are citizens for whom contract law is not justified, this is a problem for the justification of contract law but a problem we can temporarily set aside when dealing with the exercise of coercion by courts or other public authorities. It is not, in any case, a problem with which Benson's theory of public justification (as reconstructed above) sets out to deal.

I think, in summary, that the ambition of Benson's theory should be understood in the following way. Given that people who accept contract law as legitimate differ on the considerations on which specific issues should be decided,[38] what is it that is necessary in order, notwithstanding the divergence, for coercion to be justified for this restricted audience? The exclusion of people like Eugene from the public in question is not disrespectful and does not affront the equality and freedom of the citizens in question. This is for the simple reason that Benson's theory of public justification is not intended to pass a verdict on the legitimacy of contract law in general.

3. JUST ANOTHER INTERPRETIVE THEORY OF CONTRACT LAW?

In Part 2, I argued for how best to understand Benson's project on the public justification of contract law. We can now turn to the critique of this project. Is Benson's theory of public justification successful? The answer, it seems to me, is yes. I do not believe, however, that this is a significant achievement — in particular. I do not believe that, in presenting his theory of contract as a transfer of ownership as a public basis of justification, Benson has any advantage over rival interpretive theories. Let me explain.

[37] See, e.g., David Enoch, *Against Public Reason, in* 1 Oxford Studies in Political Philosophy 112, 122-23 (David Sobel et al. eds., 2015), exclusion of unreasonable citizens runs counter to the aim of reconciling authority with liberty and equality; Chad Van Schoelandt, *Justification, Coercion, and the Place of Public Reason,* 172 Phil. Stud., 1031, 1037-41 (2015), exclusion of citizens not committed to liberal values sets aside the interpersonal justification sought by theories of public reason in favour of impersonal justification.

[38] Or would accept, under certain ideal epistemic conditions. *See supra* note 34.

As seen in Part 1, there is, in fact, a sense in which the theory of contract as a transfer of ownership serves as a basis for contract law. Since the justificatory constituency is restricted to those people for whom the practice of contract law, in general, is legitimate, the reasons for transactional justice that the theory of contract as a transfer of ownership brings to light can, in fact, be taken as public reasons. I.e., reasons accepted by the members of the public. Because it excludes certain people — such as Eugene — from the public justification, it is not assured that Benson's theory can justify contract law to these people. This, however, is more than would be expected from a theory that deals with the legitimacy, not the practice, of contract law as a whole but only in particular instances of coercion taking place within that practice. It is no small feat that such a theory succeeds in demonstrating how these decisions can be publicly justified among people (for example, consequentialists and defenders of the morality of promises) who, although they regard contract law as legitimate, disagree profoundly about its value.

Yet, the success of the theory of contract as a transfer of ownership as a public basis of justice is tied to its success as an interpretive theory. This is because the kind of public justification that Benson has in view is that of a justification based on any theory that offers a successful interpretation of contract law. This is what we might understand as an interpretation that brings to light fundamental ideas found explicitly or implicitly in the main contract doctrines which are such that they present those doctrines as a unity or (to use Benson's expression) "intelligible whole". Any interpretive theory — and not just the theory of contract as a transfer of ownership — that fulfils this *desideratum* can claim the status of a public basis of justification.

Benson is perfectly entitled, of course, to claim that rival theories fail, and only the theory of contract as a transfer of ownership is a successful interpretive theory in the above sense. He does something like this when criticising other theories for neglecting the difference between misfeasance and nonfeasance, and the principle of liability for misfeasance only.[39] What we have here, however, is nothing more than an interpretive battle and one in which the alleged status of the public basis of justification does nothing to help the theory of contract as a transfer of ownership. On the contrary, it is only if the theory of contract as a transfer of ownership comes out as the best interpretive theory that it will be entitled to vindicate the status of a public basis of justification.

[39] Benson, *The Idea*, supra note 1, at 309-10. That the principle of liability for misfeasance only is a fundamental principle of private law is something with which, of course, not all interpreters agree. *See, e.g.*, Hanoch Dagan, *Two Visions of Contract*, Mich. L. Rev., May 2021, at 1247, 1260. (supporting the interpretation according to which the basic principle of contract law is that of self-determination, which implies "modest affirmative interpersonal obligations" between contracting parties).

Can Benson claim that his theory of public justification, at least, defines the criteria under which different interpretive theories are to be compared? In other words, if they are not enough to proclaim the theory of contract as a transfer of ownership as the correct interpretive theory, can Benson's remarks about the public justification of judicial decisions, at least, guide us in the search for the best interpretation of contract law? Possibly so, but I am not very optimistic about it. Consider, to begin with, two well-known arguments about the interpretation of private law. The first is that an interpretive theory is preferable, *ceteris paribus*, if it matches the rhetoric of judges, lawyers, and other practitioners — sometimes referred to as the "internal point of view".[40] Another argument is that we cannot lose sight of private law having a bilateral structure. Interpretive theories fail, according to this argument, if they cannot account for that structure.[41]

[40] The argument of the internal point of view could also apply to other areas of law, but it is more common, it seems to me, among private law interpreters. *See, e.g.*, Ernest J. Weinrib, The Idea of Private Law 16 (2d ed., 2012) (U.K.) (criticising functionalist theories for attention to the outcomes of court cases at the expense of "specific juristic reasoning, doctrinal structure, and institutional process from which these results emerge"); *See also* Stephen A. Smith, Contract Theory 29 (2004) (arguing that interpretive theories must explain the law "internally", that is, in ways that recognize that the explanations offered by judges for their decisions are, if not correct, at least of the right kind); *See* John C.P. Goldberg & Benjamin C. Zipursky, *Seeing* John C.P. Goldberg& Benjamin C. Zipursky, *Seeing Tort Law From the Internal Point of View: Holmes and Hart on Legal Duties*,75 Fordham L. Rev. 1563, 1575 (2006) (advocating in favor of a duty-accepting conception of tort law based on "how ordinary citizens, lawyers, and officials talk and act in certain spheres").

[41] *See, e.g.*, Jules L. Coleman, *The Structure of Tort Law*, 97 Yale L. J. 1233, 1241 (1988) (criticizing the economic analysis of law for being unable to explain a structural feature of tort law, namely that "[t]ort suits bring victim-plaintiffs together with injurer-defendants, and only within this structured context do questions regarding who should bear a particular accident's costs arise"); *See also Weinrib*, *supra* note 41, at x (incompatibility of the economic analysis of law with the "bilateral structure of the plaintiff-defendant relationship").

The question here is not how powerful these arguments are but whether Benson's theory of public justification helps us to know how powerful they are. Does the fact that we are interested in public justification give us any reason to privilege interpretive theories conforming to the internal point of view or to the bilateral structure of contract law? I do not see why we should. After all, other interpretive theories can also be based on ideas found (implicitly, at least) in the main doctrines of contract law. Suppose that the economic analysis of law is an example of a theory such as the latter (that is, a theory indifferent both to the internal point of view and the bilateral structure of private law). If, nevertheless, economic theory succeeds in demonstrating that efficiency is an idea underlying contract law as a whole, what reason would we have for denying this theory the status of a public basis of justification?[42]

What matters here, it should be noted, is not whether the economic analysis of law is right in treating efficiency as a latent idea in contract law. Nor is it that of knowing whether an interpretive theory can be successful despite diverging from the rhetoric of judges and lawyers, and treating the bilateral structure of litigation as a mere artifice for achieving ends external to the contractual relationship. The question is whether, in this case, such a theory could serve as a basis for public justification in Benson's terms. And the answer is yes. If efficiency reasons are constitutive reasons for the practice of contract law (that is, if efficiency explains why contract law is the way it is), then these reasons are reasons endorsed by citizens who regard contract law as legitimate. Or at least, they are reasons that these citizens would endorse if they engage in the interpretation of contract law.

And what about sceptical interpretive theories according to which, far from constituting a unity, contract law is a hodgepodge of doctrines drawing upon diverse and potentially conflicting ideas?[43] Is Benson right in saying that these theories are not fit to serve as a public basis of justification?

In this regard, it is convenient to differentiate the two theses. The first is that interpretive theories which reveal the object of interpretation as a coherent whole, all other things equal, are better (*qua* interpretive theories) than other theories. I will call

[42] Benson denies that the economic analysis provides a public basis for justification, but the reason seems to be simply that the economic interpretation of contract law is wrong. Like promissory theories, says Benson, economic theories "seek to account for contract law on the basis of norms, values, and criteria that are not only disconnected from but also at odds with the fundamental normative ideas implicit in its doctrines and principles". *See* Benson, Justice in Transactions, *supra* note 1, at 3. Advocates of promissory and economic theories, of course, disagree.

[43] See for a recent example, Thilo Kuntz, *Against Essentialism in Private Law Theory: Private Law as an Artifact Kind, in* Methodology in Private Law Theory (Thilo Kuntz & Paul Miller eds., forthcoming 2023) (manuscript at 2) (htttps://ssrn.com/abstract=4339372) (U.K.): "Private law accommodates and rests on a mixed set of norms and values with weights and relevance changing over time, rendering any partisan account ineffective".

this thesis of coherence. The second thesis is that only interpretive theories that reveal the object of interpretation as a coherent whole (if the object in question is the legal system) are able to serve as a public basis of justification (hereafter, I will refer to this second thesis as the thesis of public justification).

The coherence thesis seems plausible to me, but only because it contains the *ceteris paribus* clause. It would be more difficult to endorse a different and stronger version of this thesis according to which coherentist interpretive theories are better than other theories. At first sight, there are other interpretive goals (among them, the ability to explain the interpreted object) in the light of which a non-coherentist theory may occasionally perform better.

The question is whether the public justification thesis, if correct, would imply anything about the relationship between interpretation and the practice of coercion. Let us consider that Benson is wrong and that some non-coherent interpretive theory of contract law (let's call it *T*) is the best interpretive theory of contract law. One might think that if the best interpretation of contract law is the one that *T* offers, it is this interpretation, and not another, which should base the exercise of coercion. According to the public justification thesis, however, *T* is unable to provide a public basis for justification. Is it the case, then, of setting *T* aside in favour of an inferior interpretation of contract law, such as the interpretation of the contract as a transfer of ownership?

The answer, I believe, is yes, but provided the public justification thesis is correct. One problem, then, is that Benson says nothing in defence of the latter thesis. After all, why is unity of contract law necessary for public justification (and why is the unity in the question of contract law rather than law as a whole)? Let us suppose, again, against Benson, that the best interpretation of contract law reveals a commitment by this area of law to the distinct and potentially antagonistic ideals of independence (in the sense of Benson's juridical conception of the person) and autonomy. According to this interpretation, while, as Benson wants, certain parts of contract law are well explained by the idea of independence (these are the parts of contract law where the legal conception of person and the principle of liability for misfeasance only are vindicated), others, in contrast, aim at human flourishing in accordance with a theory of the good such as autonomy or self-determination. Well then, if this is the best interpretation of contract law, why would state coercion based on the idea of autonomy not be publicly justified? If autonomy is, as we are assuming, a constitutive idea of the practice of contract law, it seems that the same argument about the public justification of judicial decisions favouring coherentist theories would have to be extended to the present case.

A final point concerns the alleged incompatibility between public justification and interpretive theories — as is the case, according to Benson, of the economic analysis of law — which are difficult for courts to apply. Benson seems to consider that public justification requires not only that the reasons for coercion be shared but also that these reasons be easily verifiable by the public. And, this will not occur if the resolution of concrete cases has to be based on intricate rules or rely on too much information.[44]

The proposition that the reasons for decisions by public authorities should be, in addition to being shared, publicly recognisable — meaning that those decisions be based on rules whose application is easy to verify — is plausible. If this proposition is correct, then we must reject interpretations of contract law that cannot be translated into easily applicable criteria — *at least as a basis for concrete decisions*. The caveat is important because an interpretive theory that does not meet the requirement in question is not necessarily a bad interpretive theory — it might just not be the theory on which we would like judges and other public authorities to base their decisions. Furthermore, considerations about the publicity of reasons are unlikely to be decisive in favour of the theory of contract as a transfer of ownership. While more sophisticated versions of economic analysis may, indeed, prove inadequate for public justification, this will not necessarily be the case for all other consequentialist theories.

CONCLUSION

This article has been concerned with Benson's theory of the public justification of contract law. One of my main theses is that Benson's theory should be understood as a kind of consensus theory of public justification. As such, it is a theory that considers public reasons as the reasons constituting contract law according to the best interpretation of that area of law. But for these reasons to be, in fact, reasons accepted by members of the public, it is necessary to exclude from the public justification those citizens for whom contract law as a whole is not legitimate. Unlike other theories of public justification, where the exclusion of certain citizens from the public justification may seem suspect, I have argued that in Benson's case, this exclusion is defensible. Benson's intent is to demonstrate how particular instances of coercion can be justified by people who, while they accept the practice of contract law in general, disagree profoundly about the value of that practice.

[44] *See* Benson, *The Idea*, supra note 1, at 310; *See also* Benson, Justice in Transactions, *supra* note 1, at 13-14; *See* Benson, *Outline*, *supra* note 1, at 78.

The other main thesis advocated in the article is that Benson's account of public justification does little to favour Benson's theory of contract law — the theory of contract as a transfer of ownership — over other theories. The proposition that the theory of contract as a transfer of ownership provides a public basis of justification may be true, but only insofar as the theory in question is a successful interpretive theory of contract law. Certain arguments that could be used in favour of contract as a transfer of ownership as an interpretive theory — such as that it is a theory consistent with the judicial rhetoric or "internal point of view", and the bilateral structure of private law — simply seem to be beside the point. This is because nothing Benson says about public justification suggests that other theories - which find no echo in judicial rhetoric or treat the bilateral structure of litigation as a mere expedient — may not serve as a public basis of justification. Still, in this regard, the claim that only a coherentist theory of contract law, like Benson's, offers a public basis of justification seems unfounded. Thus, the only argument concerning public justification that could favour the theory of contract as a transfer of ownership over other theories — in particular, against theories containing criteria whose application by the courts is difficult to verify — is that of publicity. This is not, however, a decisive argument since the theory of contract as a transfer of ownership is surely not the only interpretive theory of contract law that can be easily applied by judges and other public authorities.

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The Problem with the Global Notion of "Environmental Sustainability"

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ABSTRACT

This article reflects on the international notion of environmental "sustainability" from the normative perspective. As a norm, it has been commonly analogised to "justice" — meaning the failure to uphold such would constitute a "wrong". At its face value, this positive understanding should be welcomed as it signals and promotes the importance of sustainability. However, this article takes the role of the Devil's advocate and argues that this analogy does more harm than good. It has over-glorified the notion of environmental sustainability because injustice is — at least in theory — an absolute wrong in all circumstances, but unsustainability is not. On the one hand, the public is being increasingly instilled with the normative idea that unsustainability is wrong. On the other hand, unsustainable acts are not necessarily outlawed and may even be endorsed. This undermines the rule of law and its perception because the law, in effect, is selectively allowing and sanctioning different acts involving the exact same wrong. This goes against the rule-of-law requirement of consistency. If the world truly cares about sustainability, it should be accorded the same paramount status as "justice", so that it will be upheld to the greatest possible extent. If this is not possible, there is still a pressing need to state the standing of the norm, accurately, to avoid creating an expectation gap and causing further harm to the rule of law.

KEYWORDS

UN Sustainable Development Goals (SDG); Renewable Energy Transition; Carbon Emissions; Climate Change; Green Economy

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INTRODUCTION

"Environmental sustainability", as a universally applicable norm,[1] has been frequently analogised to the basic norm of "justice" and other fundamental notions like "equality".[2] This implies that the failure to uphold it would constitute a "wrong" from the normative perspective. This positive, trendsetting understanding should be welcomed as it signals and promotes the importance of sustainability.[3]

However, this article takes a Devil's advocate role and argues that this analogy does more harm than good. It over-glorifies "sustainability" because injustice is — at least in theory — an absolute wrong in all circumstances, but unsustainability is not. Rather, sustainability is just one of the three balancing considerations alongside economic and social determinants.

On the one hand, the public is being increasingly instilled with the normative idea that unsustainability is unethical and wrong. On the other hand, unsustainable acts are not necessarily outlawed, and they may even be endorsed. Furthermore, the current integrated approach — which is adopted in law and policy frameworks and treats sustainability as a mere factor — underplays the importance of sustainability. These conflicting narratives undermine the rule of law (and its perception) because the law is selectively allowing and sanctioning different acts involving exactly the same wrong. If the world truly cares about sustainability just as it cares about "justice", then sustainability should be accorded the same paramount status. Otherwise, they should not be analogised. This will avoid disappointment and causing harm to the rule of law when inactions, contradictions, and even regressions are happening under the governance of the norm.

This topic has strong practical relevance in a divided world. For example, Texas has recently introduced an "anti-woke fossil-fuel law" which protects fossil fuel companies.[4] The law prevents the Government from contracting with businesses that

[1] *See, e.g.,* Robert Goodland & Herman Daly, *Environmental Sustainability: Universal and Non-Negotiable*, 6 Ecological Applications 1002 (1996).; *see also* European Commission Press Release IP/16/3883, Sustainable Development: EU sets out its priorities (Nov. 22, 2016). ("the Sustainable Development Goals are universally applicable to all countries"); Graham Long, *The Idea of Universality in the Sustainable Development Goals*, 29 Ethics & Int'l Affairs 203, 209 (2015) (who explains that "universal application is to say that the goals must identify issues that affect all").

[2] *See infra* note 28.

[3] Technically, the term "sustainability" does not only refer to environmental sustainability. It could equally mean the sustainability of economic or social development. This article refers to the environmental aspect whenever the term "sustainability" is used.

[4] *See* Ross Kerber, *Analysis: Texas 'anti-woke' fossil fuel law to be tested by BlackRock funds*, Reuters (Oct. 7, 2022), https://www.reuters.com/markets/europe/texas-agency-may-keep-blackrock-funds-test-new-fossil-fuel-law-2022-10-07/; *see also* Danielle Moran, *Texas Adds HSBC to Energy-Boycotters Blacklist in ESG Crackdown*, Bloomberg (Mar. 20, 2023), https://www.bloomberg.com/news/articles/2023-03-20/hsbc-deemed-energy-boycotter-by-texas-in-latest-esg-crackdown#xj4y7vzkg.

refrain from investing in fossil fuels — i.e., a legislation that is anti-environmental, social, and corporate governance [anti-E.S.G.].[5] Similarly, Louisiana vowed to pull investments from Blackrock as the latter's "blatantly anti-fossil fuel policies would destroy Louisiana's [energy] economy".[6] The same trend extends to many other states such as Florida.[7] In other words, some states have chosen to prioritise economic interests over environmental protection in their balancing exercise. Contrary to how the mainstream literature has boasted about the sustainability norm, this is one of the failures of its normativity (with more examples to be discussed in Section 3).

But at the other end of the spectrum, some countries, mostly in Europe, have taken the opposite turn to economic protectionism and abolished environmentally-outmoded practices. For instance, France has radically banned short-haul domestic flights that can be covered by train in order to cut carbon emissions.[8]

The neutral view (that does not prefer nor stand against environmental sustainability) would suggest that there is neither a right nor a wrong answer in the balancing exercise. Both "regressions" and "progressions" are controversial developments in the subjective eyes of either camp.

But ultimately, our society needs to re-assess the deserved status of the norm — which is the goal of this article — to be accurate and clear about its *actual* standing and apply it properly and consistently.

[5] *See* Jordan Wolman, *Boycotting comes with a cost*, Politico (Jan. 12, 2023), https://www.politico.com/newsletters/the-long-game/2023/01/12/boycotting-comes-with-a-cost-00077692; *See also* Tex. S.B. 13, 87th Leg. (2021); Spencer Grubbs, *Fighting a Fossil Fuels Boycott*, Fiscal Notes (May, 2023), https://comptroller.texas.gov/economy/fiscal-notes/2023/may/fossil-fuels/.

[6] Silla Brush, *BlackRock Faces More ESG Fallout as Louisiana Pulls $794 Million*, Bloomberg (Oct. 6, 2022), https://www.bloomberg.com/news/articles/2022-10-05/blackrock-faces-more-esg-fallout-as-louisiana-pulls-794-million#xj4y7vzkg.

[7] *See* Blanca Begert, *Kentucky becomes the newest battleground in Republicans' fight against green investing*, Grist (Jan. 5, 2023), https://grist.org/climate-energy/kentucky-becomes-the-newest-battleground-in-republicans-fight-against-green-investing/.

[8] *See* Saskya Vandoorne, *France bans short-haul flights where trains are available*, CNN (May 23, 2023), https://edition.cnn.com/travel/article/france-bans-short-domestic-flights-climate/index.html.

1. SUSTAINABILITY AS A UNIVERSAL NORM

Sustainability is considered a "norm" in terms of its contemporary socio-legal standing.[9] It refers to "meeting the needs of the present without compromising the ability of future generations to meet their own needs".[10] Its key requirement is the *integrated* development approach which takes into account environmental, economic and social considerations all at the same time.[11]

[9] Normativity means how citizens ought to behave. *See, e.g.,* Stephen A. Smith, *The Normativity of Private Law*, 31 Oxford J. L. St. 215, 215 (2011) (U.K.); Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 Fordham L. Rev. 1171, 1174 (2006) ("A norm can thus only exist if it is practiced, accepted, believed in, endorsed, prescribed, recognized"). *See also* John C. Dernbach & Federico Cheever, *Sustainable Development and Its Discontents*, 4 Transnat'l Envtl. L. 247, 251 (2015) (U.K.) ("Sustainable development is a normative conceptual framework; it is not a legal framework. Yet, just as other normative ideas such as freedom, equality, and justice have been written into law, so sustainable development is being written into law".); Klaus Bosselmann, *Sustainability and the Courts: A Journey Yet to Begin?*, 3 J. Ct. Innovation 337, 338 (2010) [Bosselmann, *Sustainability and the Courts*] (Bosselmann first identified the primitive view that sustainability may not yet be a norm because it is not sufficiently definitive. But he also acknowledged the caveats to this view as its "normative character can be in little doubt considering that . . . this imperative has been widely accepted across many cultures"); *id.* at 345 ("sustainability is the most fundamental of all environmental principles"); Klaus Bosselmann, *The rule of law in the Anthropocene, in* The Search for Environmental Justice 44, 53-54 (Paul Martin et. al. eds., 2015).

> A *grundnorm* can be defined as a basic norm to bind governmental power in the same sense as the rule of law is generally perceived as a basic norm to bind governmental power . . . Surely, ecological sustainability has *grundnorm* qualities that any legal norm, including the rule of law, ought to respect.

[10] Rep. of the World Commission on Environment and Development, Our Common Future, U.N. Doc. A/42/427 (1987).

[11] *See* Dernbach & Cheever, *supra* note 9, at 253, 259 ("foundational action principle of sustainable development is integrated decision making"); *see also* Natasha Affolder, The Legal Concept of Sustainability, Addresses before the Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage, *in* Univ. Calgary, March 2012, at 3 (sustainability "requires the balancing of three equally important "pillars" — economic, environmental and social"), 7 ("principle of integrated decision making") (Can.); Eelis Paukku, *Sustainability as a basic principle for legislation: a case study of drafting laws in Finland*, 15 Visions For Sustainability 80, 81-82 (2021) (It.) (noting that as "the three dimensions of sustainability"); Klaus Bosselmann, *Strong and weak sustainable development: Making differences in the design of law*, S. Afr. J. Env't. L. Pol'y., July 2006 at 39, 40 (S. Afr.) ("A further commonly accepted aspect is that [sustainable development] "requires integrating environmental, social and economic objectives. Regardless of the political debate about how such integration could be achieved, there seems no dispute over the goal of harmonizing and integrating them".); Virginie Barral & Pierre-Marie Dupuy, *Principle 4: Sustainable Development through Integration*, *in* The Rio Declaration on Environment and Development: A Commentary 157 (Jorge E. Viñuales ed., 2015); Rio Declaration on Environment and Development 1992, Principle 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it"); Consolidated Version of the Treaty on the Functioning of the European Union art. 11, May 9, 2008, 2008 O.J. (C 115) 47 [TFEU]. ("Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development").

Apart from the United States [U.S.] and Canada,[12] many other jurisdictions have also incorporated this notion as a legal norm as part of their domestic laws, such as the European Union [hereinafter E.U.],[13] Finland,[14] and New Zealand.[15] For example, the New Zealand Resource Management Act 1991 requires sustainable management in the use of "land, air and water".[16] Some of these domestic legal norms are also making a transnational impact, as compliance is required from foreign entities wishing to do business.[17]

[12] In the U.S., see, e.g., Green Governments Illinois Act, 20 Ill. Comp. Stat. 3954, § 20 (2020) (requiring the local government to "integrate environmental sustainability"); Illinois Sustainable Agriculture Act, 505 Ill. Comp. Stat. 135 (2020); Cal. Health & Safety Code § 25209.10 (2021) (explicitly recognizing that "long-term economic and environmental sustainability of agriculture is critical"); Hawaii State Planning Act, Haw. Rev. Stat. § 226-108 (2013) (Hawaii State Planning Act) (encouraging "balanced economic, social, community, and environmental priorities"); 12-3 Miss. Code R. § 20-400.11; Md. Code Ann., Land Use § 1-201 (2020). For Canada, *see* Affolder, *supra* note 11, at 1 ("Over [eighty-five] Canadian statutes now recognize the legal concepts of sustainability and sustainable development").

[13] *See* Sander R.W. van Hees, *Sustainable Development in the E.U.: Redefining and Operationalizing the Concept*, 10(2) Utrecht L. Rev. 60 (2014) (Neth.)

> The Charter of Fundamental Rights [C.F.R.] (which is binding on the [E.U.]) states that the [E.U.] should promote sustainable development. According to Article 37 [C.F.R.] sustainable development should also be taken into account in policy-making: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

[14] Paukku, *supra* note 11.

[15] *See* Hon S. D. Upton, *Purpose and Principle in the Resource Management Act*, 3 Waikato L. Rev. 17 (1995) (N.Z.).

[16] *Id.*

[17] *See* Anu Lähteenmäki-Uutela et. al., *Legal rights of private property owners vs. sustainability transitions?*, J. Cleaner Production 1, 6-7 (2021) (Neth.) ("players such as the [E.U.] or the [U.S.] can extend their sustainability or human rights policy beyond national borders by governing through trade". For example, The Timber Regulation (EU) No. 995/2010 "extends sustainability criteria to supply chains starting outside the E.U. Timber produced by illegal loggings is not allowed to enter the E.U. market").

Sustainability is not just a norm applicable to the public sector. To corporations, it is an emerging global business standard that forms part of corporate social responsibility and is used for measuring E.S.G. compliance.[18] In 2023, the European Parliament passed the Corporate Sustainability Due Diligence Directive which requires companies operating in the E.U. to conduct environmental due diligence of their subsidiaries and other entities in their value chain.[19]

Besides, it is not just a national policy and legal norm. It is also an international policy norm adopted by the United Nations [U.N.] and U.N. Member States. The Sustainable Development Goals [S.D.G.s] are the much-discussed objectives which are taken up by heads of state and governments.[20] Contrary to the S.D.G.'s predecessor Millennium Development Goals [M.D.G.s] which are applicable only to developing countries, the S.D.G.s apply also to developed countries.[21] This change makes the sustainability notion universal.[22]

[18] *See* Becky L. Jacobs & Brad Finney, *Defining Sustainable Business - Beyond Greenwashing*, 37 VA ENV'T L. J. 89, 95 (2019) (Governments help push sustainability by offering "tax incentives, trading credits, and other economic benefits to companies"); *See* Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L. J. 1217, 1253 (2022).

[19] *See* Huw Jones, *EU parliament backs company checks on suppliers for human rights abuses*, Reuters (Jun. 1, 2023), https://www.reuters.com/sustainability/eu-parliament-backs-company-checks-suppliers-human-rights-abuses-2023-06-01/.

[20] G.A. Res. 70/1 (Sept. 25, 2015). A number of S.D.G.s concern environmental sustainability, including Goals 7.2 and 12.c on renewable energy; Goals 9.4 and 17.7 on environmentally sound technologies; Goals 11.6 and 12.4 on air and waste pollution; and Goal 13 on climate.

[21] Long, *supra* note 1, at 210; G.A. Res. 2015, *supra* note 20 ("While the [M.D.G.s] applied only to so-called "developing countries', the [S.D.G.s] are a truly universal framework and will be applicable to all countries. All countries have progress to make in the path towards sustainable development").

[22] G.A. Res. 2015, *supra* note 20.

Furthermore, it is a legal norm of international standing which "has widely penetrated treaty law".[23] It engages a number of international environmental law principles including "the principle of integration; the principle of intergenerational equity; the precautionary principle; the polluter pays principle; the principle of ecological integrity; and the principle of participation".[24] The emerging view is that sustainability already constitutes a customary international law of "general normative reach".[25]

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[23] *See* Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 Eur. J. Int'l L. 377, 384 (2012) (U.K.); *id.* at 388 ("References to sustainable development can indeed be found in 112 multilateral treaties, roughly [thirty] of which are aimed at universal participation".); Maximilian Eduard Oehl, Sustainable Commodity Use: Its Governance, Legal Framework, and Future Regulatory Instruments 178 (Springer ed., 2022).

> [P]rinciple 4 of the non-binding 1992 Rio Declaration first put the concept of [sustainable development] into the operational language of what resembles a legal norm by stating that [i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

see Louis J. Kotzé & Sam Adelman, *Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope*, 34 Law & Critique 227 (2023) (Neth.) ("International environmental law has played a pivotal role in turning sustainable development into a normatively, politically, economically, and socially powerful concept"). It is also closely related to international human rights law: *see* Chuan-Feng Wu, *Challenges to Protecting the Right to Health under the Climate Change Regime*, Health & Hum. Rts. J. 121, 126 (2021) ("courts have held that anthropogenic activities affecting climate may threaten a population's standard of health and compromise its inviolable right to health") ("if litigants can establish that the state's failure to mitigate or adapt adequately to climate change resulted in damage to health or life, they then may claim a violation of the right to health" in some jurisdictions). See also *supra* note 18 in relation to the recent right to a sustainable environment.

[24] Affolder, *supra* note 11, at 5; Barral, *supra* note 23, at 380 ("Sustainable Development = (Intergenerational Equity + Intragenerational Equity) × Integration"); Dernbach & Cheever, *supra* note 9, at 253

> A handful of principles support the integrated decision-making process. Parties should not use the absence of scientific certainty as a reason for postponing cost-effective measures to prevent environmental degradation (the precautionary approach). Generally, parties should be responsible for the damage they cause (the polluter-pays principle). The public needs to be informed and involved in the process of making decisions (public participation).

[25] Barral, *supra* note 23, at 385 ("In order to ascertain whether sustainable development benefits from a general normative reach, it must find reflection in customary international law"). Barral's work helpfully explains the "fierce" debate on whether the notion of sustainability has become customary international law:

> [S]ome see enough evidence of *opinio juris* and state practice to prove the existence of a customary rule, be it a very abstract and general one that requires case by case concretization, others avoid this difficult question by emphasizing that the relevance of sustainable development is to be found elsewhere than in its legal nature, and notably in the influence it exerts on international law as a new branch of that discipline: at 385.

Barral concludes that "sustainable development, as an objective, already constitutes a principle of customary law, even if this principle is a very general one, with a high degree of abstraction and which requires case by case substantiation.": at 388. Barral considers that "sustainability" is an "obligation of means", i.e., in the sense that international law obliges states "to strive or do their best to achieve it": at 390-91. *See also* Gabcˇíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J., 88 (Sept. 25) (separate opinion by Weeramantry, C.)

> Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.

Skeptics suggest that it has not yet become a concrete norm in light of the absence of an international mechanism for enforcement (like many other major environmental instruments such as the Paris Agreement).[26] In reply, it can be argued that sustainability is a constantly growing norm as "[n]o one is naive enough to believe that free markets alone will bring the necessary transformation".[27] The world is taking more and more action to enhance its standing and normativity.

[26] *See, e.g.,* Kalterina Shulla & Walter Leal Filho, Achieving th UN Agenda 2030: Overall actions for the successful implementation of the Sustainable Development Goals before and after the 2030 deadline (Dec. 22, 2022), https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702576/EXPO_IDA(2022)702576_EN.pdf. ("[T]he [S.D.G.s] are not legally enforceable, [but] in precise terms they form a normative conceptual framework"). In relation to the Paris Agreement (2015), see Richard Sťahel, *Sustainable Development in the Shadow of Climate Change*, 19 CIVITAS: REVISTA DE CIÊNCIAS SOCIAIS 337, 345 (2019) (Braz.) (noting that -the "weakness" of the Paris Agreement 2015 "is that the goals to reduce greenhouse gas emissions set by individual states are voluntarily and there is no mechanism to enforce these obligations".); William R. Moomaw et. al., *Sustainable Development Diplomacy: Diagnostics for the Negotiation and Implementation of Sustainable Development*, 8 GLOB. POL'Y 73, 79 (2017) (U.K.) (suggesting that, with no means of enforcement for the Paris Agreement, peer pressure becomes the only substitute for accountability).

[27] P.S. Elder, *Sustainability*, 36 MCGILL L. J. 831, 845 (1991) (Can.); Paukku, *supra* note 11, at 81 ("Regulation is often seen as necessary in order to bring about change in different actors' actions so as they become more sustainable".); John C. Dernbach & Joel A. Mintz, *Environmental Laws and Sustainability: An Introduction*, 3 SUSTAINABILITY 531, 532 (2011) (Switz.) ("law provides essential tools and institutions for governing sustainably"); Benjamin J. Richardson & Stepan Wood, *Environmental Law for Sustainability, in* ENVIRONMENTAL LAW FOR SUSTAINABILITY 1, 2 (Benjamin J. Richardson & Stepan Wood eds., 2006) (U.K.)

> Law—understood in the conventional sense of official state law—has come to be widely accepted as a central vehicle for environmental protection, because of its ability to create authoritative standards and decision-making procedures for land use planning, pollution control and nature conservation, among many other elements of modern environmental governance.

Lähteenmäki-Uutela et. al., *supra* note 17, at 2 ("Through setting new targets, environmental law is a significant factor in speeding up the adoption of greener technologies in society").

2. UNSUSTAINABILITY AS INJUSTICE AND A WRONG

Notably, the "legal concept" of sustainability has been analogised to that of "justice", and University of British Columbia Professor Natasha Affolder contends that it is "unjust" to be unsustainable — in the sense of compromising the future generations' ability to meet their own needs.[28] This involves intra- and inter-generational equity and justice, and becomes an ethical matter.[29] The comparison implies that we have a "right" to the pursuit of sustainability (which is further reinforced in light of recent U.N. recognition of the right to the sustainable environment),[30] just as we have the right to justice and equality.[31]

[28] Affolder, *supra* note 11, at 2 ("Thinking about sustainability in a similar way to how we think about justice is not misguided. Living at the expense of future generations and the natural environment is unsustainable and unjust".); Bosselmann, *Sustainability and the Courts*, *supra* note 9, at 345 ("There are important parallels between the idea of sustainability and the idea of justice . . . [in the sense that] justice . . . is fundamental to civilized nations, similar to the principles of freedom, equality – and sustainability").

[29] Bosselman, *supra* note 11, at 40

> It is a widely accepted view that intragenerational and intergenerational equity form part of the wider idea of justice. There is no just world without fair distribution of existing resources among people living today and no future without regard for the needs of people living tomorrow. The concept of [sustainable development] expands the idea of distributive justice in "space" and "time".

See also Upton, *supra* note 15 (noting that sustainability is a governing principle with "far more ethical weight and direction than a simple statement of purpose").

[30] The "right to a clean, healthy and sustainable environment as a human right" is provided in G.A. Res. A/76/L.75 (July 26, 2022) and Human Rights Council Res. A/HRC/RES/48/13 (Oct. 8, 2021). *See also* Eric C. Ip, *From the Right to a Healthy Planet to the Planetary Right to Health*, 7 The Lancet Planetary Health E104, E104 (2023) (U.K.)

> The right to a healthy environment cannot be found in the texts of important environmental treaties, such as the [U.N.] Framework Convention on Climate Change and the Paris Agreement. Nevertheless, this right has been enshrined in the constitutions of over 100 nations, located mostly in Africa, Europe, and Latin America, and in regional treaties ratified by at least 130 countries. Such widespread recognition constitutes evidence that this right is becoming part of customary international law.

[31] In relation to the right to justice, see, e.g., R.I. Const. art. I, § 5. ("Right to justice . . . Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws".); Peter Spiller, *The Judicial Legacy of Salmond J in New Zealand*, 38 Victoria Univ. Wellington L. Rev. 797 (2006) (N.Z.) (noting the former judge of the Supreme Court of New Zealand John Salmond's remark that the "primary purpose" of administration of justice is "to maintain right, to uphold justice, to protect rights, to redress wrongs".); John L. Kane Jr., *Public Perceptions of Justice: Judicial Independence and Accountability*, 17 J. Nat'l Ass'n Admin. L. Judiciary 203, 208 (1997). ("There is an illusion that judges have no justice function . . . But the people who appear before us have the *right to expect justice*. This view that we have no justice function is clearly wrong. It overlooks the fundamental purpose animating our very existence — to accomplish justice within a framework of objective legal rules".) (emphasis added). Regarding the right to equality, see, e.g., Colm O'Cinneide, *The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?*, 1 U.C.L. Hum. Rts Rev. 80 (2008) (U.K.).

Sustainability's comparability with "justice" is a notable view that is being advocated (e.g., by the leading sustainability law expert Prof. John Dernbach).[32] The New Zealand Ministry for the Environment remarked that "[s]ustainability is a general concept and should be applied in law in much the same way as other general concepts such as liberty, equality and justice".[33]

Yet, their comparability is questionable. "Justice" is, at least in theory, the paramount consideration in law and policy even when there are competing and substantial interests involved.[34] By contrast, sustainability does not have an equivalent standing. It is just one of the three balancing considerations under the integrated approach alongside economic and social determinants.[35] In other words, achieving sustainability is not a must — not even in theory.

There are two possible explanations as to why the dubious comparison is made in the first place. First, the comparison aims to emphasise the perceived urgency of environmental transitions. The perceived harm caused by unsustainable acts gives rise to the call for "justice" (and the call for a "right" to safeguard against the harm).

In other words, the comparison is just a description of the (subjectively perceived) importance, but not of the actual normativity in law and policy. If this is the case, this should be clarified. As exemplified by the statement made by the New Zealand Ministry

[32] *See, e.g.,* Lähteenmäki-Uutela et. al., *supra* note 17, at 2

> The sustainability transition itself is about providing environmental and social justice, including the rights of current and future generations to benefit from the ecosystem services . . . law must uphold what is just. This task for law applies also to transition management, where system-level change is necessary and driven for the sake of the public good.

Dernbach & Cheever, *supra* note 9, at 258 ("unsustainable development is also unjust development and unjust development is generally unsustainable"). *See also* Stephen Dovers, *Clarifying the Imperative of Integration Research for Sustainable Environmental Management*, 1 J. Rsch. Prac., 2005, at 1, 7 (Can.) (Sustainability, the agenda that created the integration imperative, is a higher-order social goal akin to democracy, justice, or equity".). Dover's statement was widely cited with approval in, e.g., Kim Bouwer et al., *'Climate Change isn't Optional': Climate Change in the Core Law Curriculum,* 43 Legal Stud. 240 (2022) (U.K.); Nicole Graham, *This is Not a Thing: Land, Sustainability and Legal Education*, 26 J. Env't L. 395, 415 (2014) (U.K.).

[33] Resource Management Law Reform Core Group, *Sustainability, Intrinsic Values and the Needs of Future Generations* (Wellington, Ministry for the Environment, Working Paper No. 24, Jul. 1989). This view was quoted with approval by many. *See e.g.* Upton, *supra* note 15; Affolder, *supra* note 11, at 2.

[34] *See, e.g.,* White v. Sebring, 133 Misc. 784, 787 (N.Y. Super. Ct. 1929) ("The desire to do justice is the prime consideration of the courts"); Temple v. Aujla, 681 So. 2d 1198, 1200 (Fla. Dist. Ct. App. 1996) ("Courts must do justice, especially when the legislature fails to do justice".); Sorey v. Sorey, 718 A.2d 568 (Me. 1998) ("it is axiomatic that a court must do justice"); Allstar Electronics, Inc. v. Honeywell Int'l, Inc., No. 8:10-CV-1516-T-30TGW (M.D. Fla. Oct. 13, 2011) ("the court's interest in the administration of justice is paramount"). *See also* the U.K. trite holding in *R v Sussex Justices, ex parte McCarthy,* [1924] 1 KB 256 (U.K.) ("Not only must Justice be done; it must also be seen to be done"); The Supreme Court of the Philippines's judgement in *Rico V. Domingo v. Ramon Gil Macapagal*, G.R. No. 242577, (Feb. 26, 2020) (Phil.) ("The interest of justice is always paramount and genuine efforts must be exerted to attain it"). The oaths to be taken by judges before taking up the position usually include pronouncements on upholding justice. *See, e.g.,* 28 U.S.C. § 453 - Oaths of justices and judges ("solemnly swear (or affirm) that I will administer justice").

[35] See *supra* note 11 on the integrated approach.

for the Environment,[36] it would not be easy for the public and professionals to discern whether a comparison refers to the former or the latter.[37] Misunderstandings could lead to an expectation gap between what the law states and what the relevant stakeholders must do pursuant to the norm. If one is led to think of sustainability as an established norm like justice, there will be issues like whether the government has properly adhered to the norm. The perceived failures and inactions of the law undermine the rule of law (to be explained in the next Section).

In relation to the second explanation for the comparison, it is possible that it has the benign intention of artificially inflating the standing and importance of the sustainability norm. This provides a louder claim for environmental movements and petitions. In other words, this "fake it till make it" approach is adopted exactly because environmental sustainability is *known* to be of secondary importance in reality.

Just like the first explanation, causing misunderstanding about the actual standing of the norm creates the same expectation gap. It therefore does not matter which explanation is more plausible. But the second one has far worse implications than the first explanation because it constitutes deception (despite its good intentions to promote environmental sustainability) *to the detriment of the rule of law*.

[36] *See supra* note 33.

[37] On the one hand, the statement unequivocally aligns environmental sustainability with justice and emphasizes its general applicability. On the other hand, it seems the government has not treated it as paramount in reality. For example, the New Zealand Government subsidizes fossil fuels and has made the decision in 2023 to extend it. *See* Anneke Smith, *Government's fuel subsidy extension "extremely dumb economic policy"*, Radio New Zealand (Feb. 2, 2023), https://www.rnz.co.nz/news/political/483481/government-s-fuel-subsidy-extension-extremely-dumb-economic-policy; Thomas Coughlan, *Revealed: The climate cost of Chris Hipkins' U-turns and fossil fuel subsidies*, New Zealand Herald (Mar. 15, 2023), https://www.nzherald.co.nz/nz/politics/revealed-the-climate-cost-of-chris-hipkins-u-turns-and-fossil-fuel-subsidies/SFYEZXGL2VALFDB3SKRYFL5U4Q/ (N.Z.).

3. UNDERMINING THE RULE OF LAW

In light of its acclaimed normative standing, it naturally means that unsustainability — which is claimed to be "unjust" — is a "wrong".[38] This is becoming the general understanding as unsustainable acts have often been equated with unethical behaviour.[39] Accordingly, the rule of law requires the norm to be applied consistently to guide our behaviour.[40]

[38] *See, e.g.,* G.A. Res. A/76/L.75 (July 28, 2022)

> (Recognizing also that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights).

See also John Stanton-Ife, *The Limits of Law*, in The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2022), https://plato.stanford.edu/archives/spr2022/entries/law-limits/ ("immorality or wrongdoing is generally taken by legal moralists to be a *prima facie* or *pro tanto* ground for the imposition of legal coercion").

[39] *See, e.g.,* Mastura Ab Wahab, *Is an Unsustainability Environmentally Unethical? Ethics Orientation, Environmental Sustainability Engagement and Performance,* 294 J. Cleaner Production 1 (2021) (U.K.); Fabio Zagonari, *Environmental Sustainability Is not Worth Pursuing Unless It Is Achieved for Ethical Reasons*, Palgrave Commc'n Dec. 2020, at 1, 2 (U.K.) ("The literature has also recently begun to emphasize the role of ethics in achieving global environmental sustainability").

[40] Marc O. DeGirolami, *Faith in the Rule of Law*, 82 St. John's L. Rev. 573, 592 (2008) ("there is a connection between the rule of law and a kind of stepchild of classical reason-a commitment to principled consistency, for example. Consistency is itself one of the virtues of formal legality".); *id.* at 578 ("consistency is an important component of justice"); Karen Steyn, *Consistency - A Principle of Public Law?*, 2 Jud. Rev. 22, 22 (1997) (U.K.) ("The requirement of consistency is deeply rooted in English law. The rule of law requires that laws be applied equally, without unjustifiable differentiation".); Noele Crossley, *Consistency, Protection, Responsibility Revisiting the Debate on Selective Humanitarianism*, 26 Glob. Governance: Rev. Multilateralism & Int'l. Org. 473, 473 (2020) (Neth.) ("Consistency is an essential characteristic of ethics and the law—inconsistent practice diminishes the prospects of the development of norms of protection and associated practices and institutions".); Stephen A. Smith, Rights, Wrongs, and Injustices The Structure of Remedial Law 199 (2019) (U.K.) ("the most basic requirement of the rule of law—namely, to guide behaviour").

3.1. THE FAILURE TO ACT IN ACCORDANCE WITH THE RULE OF LAW

But there is a gap between the claimed and the actual normativity. The laws and policies only *selectively* address some unsustainable acts. For example, there is plenty of evidence that a vegetarian lifestyle is more sustainable and that meat-eating is unsustainable to the extent of harming the environment.[41] Scholars have been pressing for a "global" implementation of a plant-based diet, and consider this "a reasonable alternative for a sustainable future".[42] Had sustainability been a truly universal and respected norm, meat-eating should be regulated (e.g., proscribing or limiting the consumption of certain types of meat which have a higher carbon footprint;[43] or at least compelling mandatory sustainable cattle farming, etc.). There are many other examples that involve unsustainable behaviours, such as the use of private jets.[44] On top of the absence of sanctions, our society has even allowed anti-sustainability laws.[45]

One may immediately oppose the rather extreme idea of compelling a vegetarian diet since it goes against long-established habits and individual liberty to choose (even

[41] *See, e.g.*, Joan Sabaté & Sam Soret, *Sustainability of Plant-Based Diets: Back to the Future*, 100 J. Am. Clinical Nutrition 476, 476 (2014) ("Plant-based diets in comparison to diets rich in animal products are more sustainable because they use many fewer natural resources and are less taxing on the environment".); Bingli Clark Chai et al., *Which Diet Has the Least Environmental Impact on Our Planet? A Systematic Review of Vegan, Vegetarian and Omnivorous Diets*, 11 Sustainability, no. 15, 2019, at 1, 1.(Switz.) ("Results from our review suggest that the vegan diet is the optimal diet for the environment because, out of all the compared diets, its production results in the lowest level of [greenhouse gas] emissions"); Blisse Kong, *Why have I heard that eating meat is bad for the climate?*, MIT Climate Portal (Mar. 16, 2021), https://climate.mit.edu/ask-mit/why-have-i-heard-eating-meat-bad-climate ("A pound of beef produces, on average, around [fifteen] times as much CO2 as a pound of rice—and around [sixty] times as much as a pound of wheat, corn or peas"); Oliver Milman, *Meat Accounts for Nearly 60% of all Greenhouse Gases from Food Production, Study Finds,* The Guardian, (Sept. 13, 2021), https://www.theguardian.com/environment/2021/sep/13/meat-greenhouses-gases-food-production-study.

[42] Sabaté & Soret, *supra* note 41, *at 476.*

[43] *See, e.g.*, Patrick J. Skerrett, *Raising beef creates more pollution than raising pork, poultry, dairy, or eggs*, Harvard Health Blog (Jul. 22, 2014), https://www.health.harvard.edu/blog/raising-beef-creates-pollution-raising-pork-poultry-dairy-eggs-201407227289.

[44] *See, e.g.*, Junzi Sun et al., *Environmental Footprint of Private and Business Jets*, 28 Eng'g Proc. no. 1, 2022, at 1, 1 (Switz.) ("Private flights are extremely environmentally inefficient and account for the most emissions per passenger in the aviation sector".); Joseph B. Sobieralskia & Stacey Mumbowerb, *Jet-Setting during COVID-19: Environmental Implications of the Pandemic Induced Private Aviation Boom,* 13 Transp. Res. Interdisc. Persp., Mar. 2022, at 1, 5 (U.K.) ("The number of private aviation flights has increased by approximately 20% resulting in an increase of private jet emissions by over 23%. These emissions are significant given that the total CO2-equivalent emissions from private aviation account for 1.3% of all transportation emissions in the U.S.").

[45] Dernbach & Mintz, *supra* note 27, at 535 ("the unsustainable beneficiaries of the present system are supported and encouraged by a variety of laws, and that they use these laws and existing legal institutions to resist change"); Dernbach & Cheever, *supra* note 9, at 257

> An example of how conventional development often benefits some at the expense of others, and how the law supports that result, can be seen in *Sipriano v. Great Spring Waters of America, Inc.*, where a bottled water company used so much of a groundwater aquifer for its operation that its neighbours were deprived of water for their own use. The Texas Supreme Court upheld a grant of summary judgment against the neighbours, holding that the common law rule of capture protected the company from liability.

though this vegetarian example is just a random illustration of one of the unsustainable acts that society endorses). Yet, this objection reflects exactly the weak normativity of sustainability — in four ways.

First, there are already relevant precedents which uphold the sustainability norm on this matter. In 2018, the office-sharing company WeWork banned staff — out of sustainability considerations — from reimbursing meals containing meat, and also stopped their staff from serving meat at company events.[46] In 2023, Oxford City Council in the United Kingdom [U.K.] also adopted a similar sustainability policy that precludes meat and dairy in Council internal events.[47] Furthermore, student unions in the U.K. have been pushing for meat bans to be implemented at more university canteens.[48] In other words, both the private sector (e.g., WeWork) and the public sector (e.g., Oxford City Council and public universities) are enforcing the sustainability norm against meat.

Even if an immediate ban is not feasible, the city of Haarlem in the Netherlands is a demonstration of taking norm-compliant actions as much as possible. They will be the world's first to implement a ban on meat advertisements in 2024 in order to reduce the environmental impact of the meat industry.[49]

These examples compellingly demonstrate that the sustainability norm — if taken seriously just as the Dutch city and the private sector have done — requires that actions be taken against the practice of meat-eating. In this sense, it is just a matter of whether one has the willingness to act on the norm.

By comparison, there are existing social norms which strictly prohibit the eating of certain meats, such as pork and dog meat. The underlying justifications relate to animal rights, cultural or religious reasons, etc. When those norms are being upheld stringently, why can the sustainability norm not address acts that would be considered wrong? The only inference is that "sustainability" is culturally and socially inferior to other norms like animal rights, as the former cannot deliver the same normative change.

[46] Emma Batha, *WeWork goes meat-free 'to leave a better world'*, Reuters (July 19, 2018), https://www.reuters.com/article/us-environment-meat-ban-idUSKBN1K82AF.

[47] Ed Halford, *Oxford City Council approves vegan food only policy*, Oxford Mail (Mar. 21, 2023), https://www.oxfordmail.co.uk/news/23401386.oxford-city-council-approves-vegan-food-policy/.

[48] *See, e.g.*, Daniel Sanderson, *Meat and dairy set to banned at University of Stirling after student union vote*, The Telegraph (Nov. 16, 2022), https://www.telegraph.co.uk/news/2022/11/16/meat-dairy-set-banned-university-stirling-student-union-vote/; Sarah Young, *Growing number of UK universities banning meat in a bid to tackle climate change*, Independent (Feb. 20, 2020), https://www.independent.co.uk/life-style/university-uk-vegan-ban-meat-climate-change-environment-a9347256.html; Olivia Petter, *Cambridge University significantly cuts carbon emissions after taking beef and lamb off menu*, Independent (Sept. 9, 2019), https://www.independent.co.uk/life-style/food-and-drink/cambridge-university-carbon-emissions-food-beef-lamb-plant-based-a9097656.html.

[49] Lydia Chantler-Hicks, *Dutch city Haarlem becomes first in world to ban meat adverts*, Evening Standard (Sept. 7, 2022), https://au.finance.yahoo.com/news/dutch-city-haarlem-becomes-first-113452762.html.

Second, there are bans which are just as radical as restricting the eating of meat. They include, for instance, the sale of new petrol cars in the E.U. and California (as the first in the world) in 2035; single-use cutlery in the U.K.; and even cigarettes in New Zealand (as the world's first).[50] To those who embrace the sustainability norm, they may be "radical" but understandable — but to those who do not feel bound, the bans are "extreme".

The contradictory approaches — that some take environmental actions whilst others do not — lead to confusion as to which side is correct: is it necessary to introduce those environmental measures? Or are they just an extra mile that is voluntary? This confusion will undermine the normativity and proper development of the norm as it will the rule of law.

Third, a properly functioning norm of governance would not carve out exceptions for a known wrong simply to cater for personal preferences and space (or convenience in the case of private jets). The rule of law expects equal application of the law.[51]

Fourth, many others, unfortunately, apply the norm instead as if it were a follow-suit norm — taking environmental actions only after some have done so first.[52] This wrongly confuses the actual obligation under the norm: it requires sustainable actions but not footsteps following on therefrom (though it is still better than doing nothing). The normative force that actually drives law abidance by the followers comes not from the norm but from peer pressure.[53] What if no one takes the first step? In this regard, the norm has failed, not by itself, but by our inactions.

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[50] *See* Kate Abnett, *EU lawmakers approve effective 2035 ban on new fossil fuel cars*, Reuters (Feb. 14, 2023), https://www.reuters.com/business/autos-transportation/eu-lawmakers-approve-effective-2035-ban-new-fossil-fuel-cars-2023-02-14/; Coral Davenport, Lisa Friedman & Brad Plumer, *California to Ban the Sale of New Gasoline Cars*, N.Y. Times (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/climate/california-gas-cars-emissions.html; Marc Ashdown & Lora Jones, *Single-use plastic cutlery and plates to be banned in England*, BBC (Jan. 9, 2023), https://www.bbc.com/news/business-64205460; Tess McClure, New Zealand passes world-first tobacco law to ban smoking for next generation, Guardian (Dec. 13, 2022), https://www.theguardian.com/world/2022/dec/13/new-zealand-passes-world-first-tobacco-law-to-ban-smoking-by-2025. There are many more examples. For example, the E.U. is planning to prohibit various types of electronic chemicals that are harmful to the environment. *See* Arthur Neslen, *EU unveils plan for 'largest ever ban' on dangerous chemicals*, Guardian (Apr. 25, 2022), https://www.theguardian.com/environment/2022/apr/25/eu-unveils-plan-largest-ever-ban-on-dangerous-chemicals.

[51] *See, e.g.*, Robert A. Stein, *What Exactly Is the Rule of Law?,* 57 Hous. L. Rev. 185, 194 (2019).

[52] The footstep-following reasoning is prevalent. *See, e.g.*, Trevor Pritchard, *NCC to cut gas-powered tools, and City of Ottawa could follow suit*, CBC News (Nov. 17, 2021), https://www.cbc.ca/news/canada/ottawa/leaf-blowers-hedge-trimmers-small-tools-banned-ottawa-ncc-1.625238; *see also* Gianna Melillo, *Several states will follow California's lead in banning gas-powered car sales by 2035*, The Hill (Aug. 30, 2022), https://thehill.com/changing-america/sustainability/infrastructure/3620985-several-states-will-follow-californias-lead-in-banning-gas-powered-car-sales-by-2035/.

[53] *See, e.g.*, Olivia Rudgard, *UK to ban shark fin soup, putting pressure on other nations to follow suit*, The Telegraph (Aug. 15, 2021), https://www.telegraph.co.uk/news/2021/08/15/uk-ban-shark-fin-soup-putting-pressure-nations-follow-suit/.

Very importantly, the supposed "look afresh" nature of sustainability is about changing our old mindset, long-held values and accustomed choices, which are entrenched yet unsustainable.[54] So, there should be no excuse to shield unsustainable habits from change.

The "doctrine of common concern of humankind" under international environmental law imposes a duty to take "autonomous measures".[55] Not taking action is already wrongful in this sense. But even worse, the inaction by a country creates room for opposition to discredit the perceived urgency, correctness and authority of the sustainable actions. This is particularly undesirable when there is already a close turf between economic and environmental priorities.[56] This also goes against the international environmental law's duty to cooperate, which expects governments to "proactively [work] together, serving objectives that cannot be attained by just a single actor".[57]

Even more, the negative environmental impact (such as pollution) could spill over to others, or could cancel out the positive progress made by another. Whilst the duty to cooperate expects equitable burden-sharing,[58] the inaction increases the burden of other countries. From another angle, the inert countries can be seen as inequitable free-riders. The failure to act is unfair to those who abide by the norm, and free-riding is considered wrongful from the jurisprudential standpoint.[59]

[54] Affolder, *supra* note 11, at 11 (citing Case concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 92, at 78 (Sept. 25); Lähteenmäki-Uutela et al., *supra* note 17, at 7 ("Transforming the system, however, requires new rules that discriminate against unsustainable goods"); Dernbach & Cheever, *supra* note 9, at 263 ("Sustainability inspires us to change our way of life and develop new solutions to problems that are intractable if the only solutions are development or the environment, but not both".); Bruner, *supra* note 18, at 1225 ("Growing awareness of the sustainability imperative has driven the recent shift away from shareholder-centric corporate governance"); Elder, *supra* note 27, at 839 ("Also crucial for sustainability is law's role in helping to educate and influence people about the boundaries of acceptable behavior").

[55] Iryna Bogdanova, Unilateral Sanctions in International Law and the Enforcement of Human Rights 281 (2022) (Neth.) *See also id.* at 273 ("The concept of common concern emerged in international environmental law in the late 1980s").

[56] *See, e.g.,* Martin Armstrong, *Is the environment or economy a bigger priority? A view from the US*, World Economic Forum (Apr. 19, 2022), https://www.weforum.org/agenda/2022/04/environmental-protection-vs-economic-growth/ ("The battle in the minds of people in the U.S. between prioritizing the environment (even at the risk of curbing economic growth) or the economy (even if the environment suffers), has been a bit of a rollercoaster over the last few decades").

[57] Bharat H. Desai & Balraj K. Sidhu, *International Courts and Tribunals - The New Environmental Sentinels in International Law,* 50 Env't. Pol'y & L. 17, 25 (2020) (Neth.).

[58] Bogdanova, *supra* note 55, at 274, 279.

[59] Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems,* 92 Ethics 616 (1982); Isabella Trifan, *What Makes Free Riding Wrongful? The Shared Preference View of Fair Play,* 28 J. Pol. Phil. 158 (2020).

3.2. THE PROBLEM WITH ARBITRARILY SELECTIVE AND INCONSISTENT ACTIONS

On the one hand, we ban the use of plastic straws or even bags despite the fact that they bring much-liked convenience; deliver user experience (in terms of drinking with straws); have legitimate health advantages (as regards to using straws for acidic drinks to reduce contact with teeth); and can be the more hygienic choice (in the case of using disposable plastic bags for wet products).[60] In addition, the environmental impact of plastic straws is considered proportionally limited (and to some extent the same for plastic bags).[61] Also, society is pressing for environmentally efficient choices, such as the use of electric cars and public transportation.[62]

On the other hand, we preserve the convenience of using private jets despite their environmental inefficiency.[63] But it is justified by comparable considerations such as luxurious user experience and hygiene considerations (with respect to skipping the airport crowd).[64] The rule of law emphasises consistency.[65] A proper norm would not have allowed such a dubious and contradictory logic in a rule-of-law society. It deepens the divide between the call for sustainability and the fondness for unsustainable luxury.

There is no apparent justification as to why some unsustainable acts are not prohibited when they involve the same "wrong" and harm of unsustainability. One might try to argue that the alleged unsustainable acts involve different degree of risk of environmental harm. In reply, the precautionary principle — which is encompassed by sustainability — provides that there does not have to be conclusive evidence before embarking on sustainable transitions.[66] This means the absence of full scientific

[60] *See, e.g.,* Asphat Muposhi, Mercy Mpinganjira & Marius Wait, *Considerations, Benefits and Unintended Consequences of Banning Plastic Shopping Bags for Environmental Sustainability: A Systematic Literature Review,* 40 Waste Mgmt & Rsch.: The J. for Sustainable Circular Econ. 248, 257 (2022) (U.K.) ("There was also general consensus in extant literature that the end of plastic shopping bags is not nigh due to their utilitarian benefits, and that a [plastic bag ban] is coercive and punitive").

[61] *See, e.g.,* Rob Jordan, *Do plastic straws really make a difference?*, Stanford Earth Matters (Sept. 18, 2018), https://earth.stanford.edu/news/do-plastic-straws-really-make-difference ("Plastic straws are only a tiny fraction of the problem – less than [one] percent"); *see also* Riley Schnurr & Tony Robert Walker, *Why you shouldn't be a 'straw-man' environmentalist*, The Conservation (July 25, 2018), https://theconversation.com/why-you-shouldnt-be-a-straw-man-environmentalist-100303 ("Like plastic straws . . . plastic bags are ultra-lightweight, they likely make negligible contributions to municipal waste").

[62] *See, e.g.,* Hua Cai et al., *Environmental Benefits of Taxi Ride Sharing in Beijing,* 174 Energy 503 (2019). (Neth.); Bokolo Anthony Jnr., *Integrating Electric Vehicles to Achieve Sustainable Energy as a Service Business Model in Smart Cities*, 3 Frontiers in Sustainable Cities 1 (2021) (Switz.).

[63] *See* Sun et al., *supra* note 44, at 1, 5 (noting private jets are "extremely" inefficient).

[64] *See, e.g.,* Susan Hornik, *The new jet set - why private plane usage has soared*, BBC News (May 16, 2022), https://www.bbc.com/news/business-61391638 .

[65] *See supra* note 40.

[66] Affolder, *supra* note 11, at 6 ("This principle asserts that in cases dealing with environmental harm, it is not necessary to await full proof or certainty of that harm").

certainty is not an excuse for inaction. Nevertheless, it seems that the principle's requirement for early precautionary actions is not taken seriously. Even when there is strong proof (if not already common knowledge) for the unsustainable impact of certain acts like the excessive use of plastics, actions wil not necessarily be taken.

The selective approach undermines the authority of the norm in many ways.[67] For example, the inactions against certain unsustainable acts (e.g., the use of private jets) could undermine the claimed importance, morality and urgency of sustainability. But the problem is not only about selectiveness. Instead, the failure to recognise (and shame) the unsustainable conduct will also erode the normativity of sustainability.[68]

Even worse, it harms the rule of law by making artificial and arbitrary distinctions. In effect, it means the law turns a blind eye to injustice (unsustainability).

3.3. THE "ENVIRONMENTAL RULE OF LAW"?

A potential counter-argument is that the unique nature of the "environmental rule of law" requires "incremental" transitions, especially when "sustainability" is an "intrinsically evolutive" concept.[69] The incrementality is needed to cater for economic and social considerations. Therefore, the failure to prohibit some unsustainable acts at the moment should not be seen as undermining the rule of law and the authority of the norm. It takes time and education to change existing values and practices, especially deep-rooted ones like meat-eating.

In this sense, the "environmental rule of law" is very different from the traditional "rule of law". The former tolerates injustice (unsustainability) even when there is neither guarantee nor promise that it will be resolved with the best possible effort.

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[67] Andrei Marmor, *The Rule of Law and Its Limits*, 23 L. & PHIL. 1, 27-28 (2004) (Neth.) ("there is some level of coherence which the law must have in order to function properly in guiding its subjects' conduct"); *id. at* 32 ("law cannot function if it is too fragmented and morally incoherent").

[68] *Id.* at 34 ("Rules cannot guide conduct unless deviations from the rule are actually treated as such, namely, as deviations from the rule").

[69] Gitanjali N. Gill & Gopichandran Ramachandran, *Sustainability Transformations, Environmental Rule of Law and the Indian Judiciary: Connecting the Dots Through Climate Change Litigation*, 23 ENV'T L. REV. 228, 236 (2021) (U.K.) ("In this context, the judiciary acts as a proactive and incremental facilitator in actioning the environmental rule of law to further transformational sustainability. Thus, the environmental rule of law is 'incremental and progresses nonlinearly"). *See also* Barral, *supra* note 23, at 388

> ([S]ustainable development itself requires various types of conduct to be adopted, because it is an objective, because it is intrinsically evolutive, and because as an obligation of means it requires a series of different types of effort towards the fulfillment of the objective it lays down. Hence, conduct aimed at achieving sustainable development, even if lacking uniformity, can still form valid precedents constituting evidence of the existence of a general practice of states);

id. at 382 "What is sustainable development will vary in time, as sustainable development is not immune to social, environmental, or scientific evolution".

In reply to the counter-argument, it is no defense for the damage to the rule of law by raising a separate, distinct "environmental rule of law". The application of another yardstick is exactly what undermines our rule of law. First, the traditional rule of law would not allow justice to be delayed. Even if delay is inevitable in practice, it cannot be tolerated, at least, in principle. However, the so-called "incremental" nature of the "environmental rule of law" is just a beautified way of endorsing the delay of justice (sustainability) in principle.

Furthermore, the traditional rule of law (e.g., the requirement of consistent norm applications) would require all unsustainable acts to be considered wrong, at least *in principle*, even if transitions and enforcements cannot be immediately taken. A wrong is a wrong and should be treated as such under the rule of law. Yet, the "sustainability" norm functions differently. If society favours unsustainable acts (like the use of private jets), it is then not considered a wrong on paper. In other words, the inactions against unsustainability are not necessarily caused by impracticality. This is not the rule of "law", but rather its exact opposite: rule by arbitrary preference.[70]

4. THE PATH FORWARD FOR "SUSTAINABILITY": AS A NORM OF GOVERNANCE, OR NOT?

4.1. WEAK GOVERNANCE WITH QUESTIONABLE NORMATIVITY

The problem with equivocal normativity is that it leaves excessive room for debates and doubts on what has to be done. This deters consensus and hinders environmental transitions. For example, Elder suggested that "sustainability probably implies minimization of the need for private automobiles. Perhaps we should reintroduce

[70] *See, e.g.*, Mary Liston, *Governments in Miniature: The Rule of Law in the Administrative State*, *in* Administrative Law in Context 39, 51 (Lorne Sossin & Colleen M. Flood eds., 2013). Under Joseph Raz's theory of the rule of law, "'no rational society should entertain inconsistent [values]': for example, a society cannot endorse the indissolubility of marriage while, at the same time, permit divorce on demand. Inconsistent purposes and values are a form of conflict that is logical, not political"; John E. Coons, *Consistency*, 75 Cal. L. Rev. 59, 60 (1987), "[. . .] consistency prescribes like treatment for successive cases governed by the same"; European Commission Work Package for RECONNECT - Reconciling Europe with its Citizens through Democracy and Rule of Law, 2020, under A.V. Dicey's rule of law, "the first two principles essentially require that people's actions should be governed by legal norms regularly passed as opposed to arbitrary norms"; Douglas E. Edlin, Common Law Judging: Subjectivity, Impartiality, and the Making of Law 5 (2016), "'a government of laws, and not of men' requires that we be governed by the objective rules of law rather than the subjective preferences of judges"; Vern R. Walker, *Discovering the Logic of Legal Reasoning*, 35 Hofstra L. Rev. 1687, 1688 (2007), "the rule of law requires that similar cases should be decided similarly . . . Making the reasoning behind such decision-making transparent and open to scrutiny shifts the decisions away from mere subjective preference and toward objective rationale".

denser, mixed-use, commercial-residential areas".[71] It is noteworthy that Elder used the words "probably implies" and "perhaps". The wavering confirms that the norm does not have the degree of certainty to guide and compellingly call for changes.

This is not a one-off incident showing the norm's weak governance. Prof. Bruner observed that "[m]any scholars have argued that sustainability is best pursued through extra-corporate regulation such as environmental and labor laws — leaving corporate governance itself to focus exclusively on shareholders".[72] At first sight, this seems like a normal debate on the best means of implementation. But the existence of this discussion is perplexing because, had the sustainability notion been truly normative, there would have been no need to debate at all. Bruner's statement implies that corporate governance is exempted from contributing to sustainable transitions. But is sustainability not calling for green capitalism, as opposed to the traditional form of capitalism which merely emphasises developmentalism, profit maximisation and resource extraction?[73] The integrated balancing approach (mentioned in Section 1) requires economic deliberations to take into account environmental implications. Apparently, the debate mentioned by Bruner exists because the sustainability norm fails to penetrate into corporate law and governance.

At its current state, it is just a "framework"[74] or a "goal".[75] It should not be boasted or treated as a substantial "norm" like "justice" because it does not yet have the necessary attributes (e.g., consistency of application to all unsustainable acts) to govern our lives normatively-speaking.[76] It is similar to "kindness" which is merely a promoted, non-obligatory virtue.

Oxford University Professor Vaughan Lowe considers sustainability a mere "interstitial norm" which does "not seek to regulate the conduct of legal persons directly".[77] In other words, it is not a norm of governance, but it merely plays a role only

[71] Elder, *supra* note 27, at 843.
[72] Bruner, *supra* note 18, at 1224.
[73] Kotzé & Adelman, *supra* note 23, at 5; Bradley Loewen, *Revitalizing Varieties of Capitalism for Sustainability Transitions Research: Review, Critique and Way Forward*, 162 Renewable & Sustainable Energy Rev., July 2022, at 1.
[74] Dernbach & Cheever, *supra* note 9, at 247 ("Sustainable development (or sustainability) is a decision-making framework for maintaining and achieving human well-being, both in the present and into the future").
[75] Dovers, *supra* note 32, at 7 ("Sustainability, the agenda that created the integration imperative, is a higher-order social goal akin to democracy, justice, or equity").
[76] There have been claims that it is a "primary norm" which obliges states to "act sustainably" or "to balance social, economic and ecological interests". *See* Oehl, *supra* note 23, at 180-81. This would be the case from a narrow standpoint, where a domestic statute, for example the New Zealand Resource Management Act 1991, explicitly provides for such an obligation applicable in defined situations. Otherwise, the selective approach indicates that it is not properly functioning as a primary norm that governs our behavior.
[77] Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, *in* International Law and Sustainable Development: Past Achievements and Future Challenges 19, 33 (Alan Boyle & David Freestone eds., 1999).

in the law or policy reasoning process by "pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other".[78] In other words, it is "an element of legal reasoning at the discretion of the court".[79] It is comparable to "standards" like the reasonable man test and the balancing of interests.[80]

4.2. STRUCTURAL CHANGES NEEDED TO TRANSFORM INTO A NORM OF GOVERNANCE

If the world truly cares about "sustainability" just as it does "justice", they should be accorded the same paramount status. This is necessary for it to function as a norm of governance. From this perspective, the integrated approach (which requires balancing social and economic considerations) is most detrimental to the normative authority of "sustainability". It situates environmental sustainability as a secondary consideration, which implies that it is acceptable to act unsustainably. It is certainly true that sustainability is not always practical. However, what the integrated approach has failed to stipulate is that it does not require environmentally sustainable acts to be done whenever it is possible. Rather, it leaves open the choice to prioritise economic or social considerations even when environmental transitions could have been feasibly achieved. This approach does not do justice to the claimed importance of environmental sustainability.

Furthermore, contrary to the repeated claims of well-established normativity (as enshrined in international law and academic literature highlighted in Section 1), there are quite a number of confusing structural pointers to the opposite. First, the key U.N. Resolution on sustainable development has adopted a voluntary review mechanism.[81] Under this "Voluntary National Review", individual countries undertake their own national review of their progress towards realising sustainable outcomes, which will then be presented at the U.N. High-level Political Forum on sustainable development (H.L.P.F.).[82] This means the predominant measure of ensuring accountability to the norm is weakly based on a non-mandatory mechanism, of which its effectiveness has been

[78] *Id.* at 31.
[79] Affolder, *supra* note 11, at 11.
[80] *Id.* at 31. *See also* Barral, *supra* note 23, at 389.
[81] *See* G.A. Res. 2015, *supra* note 20, ¶¶ 72-74.
[82] *See*, *e.g.*, Viktor Sebestyén et al., *Focal Points for Sustainable Development Strategies—Text Mining-based Comparative Analysis of Voluntary National Reviews*, 263 J. Env't Mgmt. 1 (2020); Ida Lillehagen et al., *Implementing the UN Sustainable Development Goals: How Is Health Framed in the Norwegian and Swedish Voluntary National Review Reports?,* 11 Int'l J. Health Pol'y Mgmt. 810, 811 n. 6 (2022), noting that the mechanism is termed as "the cornerstone of the follow-up and review system".

doubted.[83] This is inconsistent with the pro-normative statements in the same Resolution, such as: "We are determined to take the bold and transformative steps which are urgently needed to shift the world onto a sustainable and resilient path".[84]

Similarly, S.D.G. 2.6 has adopted loose language in relation to the role of large corporations, which provides that the governments will "encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting". The mere requirement to encourage is unhelpful in both engaging stakeholders and ensuring their accountability to the norm. This is incoherent with the important role of corporations as contemplated by the U.N. Resolution, which explicitly emphasises that "the business sector . . . *must* contribute to changing unsustainable consumption and production patterns".[85] Such a vague and fluctuating stance taken by the U.N. is counterproductive.

Until "sustainability" receives the primacy status, it should not be analogised with "justice" — in order to avoid disappointment and harm to the rule of law. It is necessary to close the expectation gap between its boasted importance and actual application. To uphold environmental justice, there is a need to adopt a truly sustainability-driven approach in both law and policy.

[83] See Frank Biermann et al., *Scientific Evidence on the Political Impact of the Sustainable Development Goals,* 5 NAT. SUSTAINABILITY 795, 796 (2022) (U.K.) noting that:

> there is no robust evidence that such peer learning, reporting and broad participation have steered governments and other actors towards structural and transformative change for sustainable development. The [high-level review] forum has not provided political leadership and effective guidance for achieving the [S.D.G.s], and it has failed to promote system-wide coherence, largely because of its broad and unclear mandate combined with a lack of resources and divergent national interests.

[84] G.A. Res. 2015, *supra* note 20, Preamble.

[85] *Id.* ¶ 28 (emphasis added). *See also* UN forum highlights 'fundamental' role of private sector in advancing new global goals, U.N. News (Sept. 26, 2015), https://news.un.org/en/story/2015/09/509862 (reporting the remark of former Secretary-General Ban Ki-moon that "Governments must take the lead in living up to their pledges. At the same time, I am counting on the private sector to drive success"); *See* Egemen Kücükgül, Pontus Cerin & Yang Liu, *Enhancing the Value of Corporate Sustainability: An Approach for Aligning Multiple SDGs Guides on Reporting,* 333 J. CLEANER PRODUCTION 1, 4 (2022) (U.K.).

CONCLUSION

This article makes two original arguments. First, the current normativity of sustainability has been overstated and is not yet comparable to other norms like justice. Second, the inconsistent applications of the norm undermine the rule of law. As mentioned in Section 4.2, the U.N. instruments that contain the norm are also structurally incoherent.

When pondering on the normativity of the notion of "sustainability", there are two prevailing, yet dismissible, concerns that could divert the focus away from the issues raised by this article. First, there is the often-mentioned concern over its inability to provide detailed and prescriptive guidance.[86] But this is not the real issue against its normativity because abstract notions like "justice" or the "reasonable man" test can still function authoritatively.[87] In addition, the notion of sustainability is intentionally designed to be flexible enough to accommodate different developmental needs and circumstances.[88]

The other misplaced concern sees sustainability as resting on the dubious assumption that "endless growth is actually possible on a finite planet where the human footprint is already far greater than Earth's ability to sustain life".[89] In reply, being practically difficult to accomplish should have no impact on its normativity. By analogy, the difficulty of achieving full "equality" for everyone will not undermine the

[86] *See* Affolder, *supra* note 11, at 1 ("Ambiguous, vague, and amorphous"); *see also* van Hees, *supra* note 13, at 60 ("Currently, neither [E.U.] law nor [E.U.] policy clearly explains what the concept of sustainable development means and how it must be put into practice".); *see* Wood & Richardson, *supra* note 27, at 14 ("sustainable development as riddled with ambiguity and contradictions that undermine its usefulness"), 13 ("No single conception of sustainability is shared by the contributors to this book, let alone the wider environmental law community, and no attempt is made here to impose one"); *see* Gill & Ramachandran, *supra* note 69, at 234 ("Incremental or radical transformations: The debate"); *see* Dernbach & Cheever, *supra* note 9, at 249 ("the concept is 'too vague' or ill-defined to be useful"), 252 ("To be sure, the definitional issue is not new to sustainability; questions about its meaning and implications have surrounded the concept from its beginning").

[87] *See supra* note 80.

[88] *See* Dernbach & Cheever, *supra* note 9, at 253 ("The framework itself, however, does not come with specific environmental and social objectives; those should be determined on a case-by-case basis in light of the overall objective"); *see also* Gill & Ramachandran, *supra* note 69, at 234-35.

[89] *See* Kotzé & Adelman, *supra* note 23, at 2; *see also* Nishan Sakalasooriya, *Conceptual Analysis of Sustainability and Sustainable Development,* 9 Open J. Soc. Sci. 396, 401 (2021)

> No matter what object of sustainability is measured; there is a range of time across which sustainability is not achievable. Even a sustainable system eventually succumbs to entropy, asteroid collisions or other astronomical cataclysms. A universal truth in science and philosophy is that nothing is permanent in a physical sense. Accordingly, social ecological systems cannot be sustainable for indefinite periods of time.

see Dernbach & Cheever, *supra* note 9, at 249 ("there are those who believe that the prospect for a human future on planet Earth is so dire that the idea of anything being sustainable is illusory").

normativity of equality. Similarly, "justice is expensive", but this does not prevent our pursuit of justice.[90]

Instead of these two dismissible issues, the more pertinent question is how we have unsatisfactorily understood and applied the norm. The current normativity of the notion of "sustainability" has been overstated. On the positive side, likening sustainability to the greatest norms like "justice" spreads the message that sustainability is just as important. This may help drive more sustainable changes through this "fake it till it makes it" approach.

However, it is necessary to consider the problems of inflating the standing of sustainability. First, being a norm — in a rule of law society — comes with the expectation of its fair and consistent application. Yet, there are many unsustainable acts that are allowed to exist, such as the use of private jets. The contradictions, and the expectation gap between the boasted normativity and reality, could harm the perception of not just the norm, but also the rule of law, which emphasises consistency.

Second, the comparison with justice creates the false impression that we have already accorded adequate respect for the norm. Yet, it is just one of the three factors (together with economic and social considerations) under the integrated approach. The problem is not just how this integrated approach can lead to capricious balancing exercises, or how the sustainability norm can be subdued by other considerations.[91] Rather, the real issue is that its current normativity does not match its actual importance. It is certainly true that practicalities, like financial considerations, can hinder sustainable transitions. However, no matter how dire the situation, the norm of

[90] *See, e.g.*, Emily Marx, *Justice Is Expensive*, 36 J. Am. Jud. Soc. 75 (1952).

[91] *See, e.g.*, Andrea Ross, *It's Time to Get Serious—Why Legislation Is Needed to Make Sustainable Development a Reality in the UK*, 2 Sustainability 1101, 1106 (2010) (Switz.) ("the attempt to roll three types of sustainability (ecological, economic and social) into one overarching concept of sustainability left it pointing in multiple directions without any central meaning"); *id.* at 1116 ("All three of the Canadian administrations in their Sustainable Development Acts have chosen to define sustainable development using the Brundtland definition . . . [the] imprecision may give the executive (a public body) too much discretion while needlessly taking power away from the judiciary and the legislature"); *see also* Bjørn Hvinden et al., *Sustainable Development and Sustainable Welfare: A Changing International Agenda*, *in* Towards Sustainable welfare States in Europe Social Policy and Climate Change 28, 32 (Bjørn Hvinden, Mi Ah Schoyen & Merethe Dotterud Leiren eds., 2022) (U.K.) ("Governments tend to put unequal weight on economic, social and environmental concerns, often focusing on a single dimension at the time and failing to take a more holistic view").

"justice" remains the most important, at least in principle.[92] Sustainability should be accorded the same paramount status in principle.

Sceptics may question the impact and meaningfulness of merely uplifting its status on paper. But this is more than obvious to those who truly support sustainability — who would have replied with the question as to why sustainability is not even deemed paramount on paper. The inference drawn from the failure and opposition to elevate its standing is that there is still a fundamental divide (e.g., short-termism and self-interest versus long-termism and inter-generational equity) on the importance, necessity and urgency of sustainable development. Therefore, replacing the integrated approach with a sustainability-driven approach could help close this divide by reinforcing its normative authority.

Moreover, the suggestion does not mean sustainability must be successfully achieved at all costs. Likewise, law and justice are not always enforceable or realisable in practice. Instead, there is a need for a pledge that vitally promises sustainability — like justice — that will be upheld to the greatest possible extent, and as such society will strive for sustainable transitions. In other words, it constitutes a stronger social agreement to take it seriously.

[92] *See generally* Mortimer Sellers, *Law, Reason, and Emotion*, *in* Law, Reason and Emotion 11, 13 (Mortimer Sellers ed., 2017) (U.K.) ("justice is the ultimate standard of value in the law"); *see also* Wendell L. Griffen, *The Case For Religious Values In Judicial Decision-Making*, 81 Marq. L. Rev. 513, 519 (1998) ("Law is the preliminary concern; justice is the ultimate concern".); *see* Jerome Hall, *Justice in the 20th Century*, 59 Cal. L.Rev. 752, 752 (1971) ("One can say, for example, that justice is the ultimate social ideal or that it is the ideal ordering of the community"); *see* Sujian Guo et. al., *Conceptualizing and Measuring Global Justice: Theories, Concepts, Principles and Indicators*, 12 Fudan J. Human Soc. Sci. 511, 513 (2019) (Ger.) ("justice is in principle uncompromising"); *see* Alejandro Serrano Caldera, *The Rule of Law in the Nicaraguan Revolution*, 12 Loy. L.A. Int'l & Comp. L. Rev. 341, 449 (1990) (from the perspective of legal philosophy, "justice is the most important value of law and it is toward justice that law is directed").

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Effective Recognition and Protection of Non-Binary Gender Identities in the Council of Europe Framework

A Critical Analysis of Third Gender Marker Options From a Human Rights Law Standpoint

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ABSTRACT

Non-Binary gender identity is slowly growing in visibility across the globe. In at least seven Member States of the Council of Europe, some judicial, administrative or legislative bodies have already started organising a form of legal recognition for gender identities outside of the binary through the creation of "third" gender categories and "X" gender markers. This trend is growing fast and the European Court of Human Rights should pronounce itself soon on a potential positive obligation to organize such recognition in the case of *Y v. France* (pending). In this context, this research reflects on the foundations and flaws of the organisation of gender registration in the Council of Europe Member States. The main focus in this sense is put on the human rights law framework of the Council of Europe and specifically the right to respect for private life (Article 8 of the European Convention on Human Rights (E.C.H.R.)), the prohibition of inhuman and degrading treatment (Article 3 E.C.H.R.) and the freedom of expression (Article 10 E.C.H.R.) in light of the prohibition of discrimination (Article 14 E.C.H.R.). Furthermore, it reflects critically on the recent legal developments that led to the use of "X" gender markers to highlight their inadequacy. In doing so, it points towards the possible abolition of gender registration – or at the very least its suppression from identity documents.

KEYWORDS

Non-binary; Transgender; Legal Gender Recognition; LGBTQ+; Human Rights

EDITORIAL NOTE
Although this manuscript meets the word criteria for the inclusion in the "Articles and Essays" Section, it has been placed in the "Notes" Section for Editorial reasons. Such decision aligns with our Editorial Guidelines, which advocate for a nuanced approach to content classification and presentation.

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INTRODUCTION

In a letter of the 3rd of July 2020, the Dutch Government announced that it would remove the mention of gender from identity documents (not including passports) by 2024/2025.[1] This development comes after over a decade of national developments regarding the recognition and protection of gender identities outside of the male and female binary. Indeed, starting in 2014 with Denmark, a total of seven European countries have now recognised a "third" legal gender category taking the form of an "X" gender marker added to the pre-existing "M" and "F" options.

This article approaches those developments intending to expose their inadequacy in trying to create effective recognition and protection for non-binary persons in Europe. In doing so, it questions the establishment of the gender binary in European societies to expose its inconsistency and its detrimental consequence on the respect and inclusion of all in our societies. Moreover, it uses those conclusions to argue for the fundamental character of legal recognition in accessing protection.

Building on this, it presents the existing legal framework at the European level, focusing mostly on the European Convention on Human Rights and the subsequent case law of the European Court of Human Rights. More specifically, it argues that the existing approach to gender identity under the right to respect for private life (Article 8 E.C.H.R.) is inappropriate. Additionally, it limits the development of legal recognition and protection for non-binary individuals. This Chapter then proposes different avenues in defining the rights of recognition of non-binary persons: the right to not be subjected to inhuman or degrading treatment (Article 3 E.C.H.R.) and the freedom of expression (Article 10 E.C.H.R.).

Then, it introduces the details of all seven European states having created a "third" legal gender category to analyse the causes of those developments and the shortcomings they present for the recognition and protection of non-binary individuals in practice.

Finally, this thesis proposes an alternative to the "X" gender marker in the abandonment of gender as a legal category altogether, or less drastically, the suppression of gender markers on identity documents. This last option being the one recently endorsed by the Dutch and Belgian Governments, this thesis provides an

[1] *See* Ingrid van Engelshoven, Ministerie van Onderwijs, Cultuur en Wetenschap [Ministry of Education, Culture and Science], *Tweede Kamer Voortgangsbrief aanpak onnodige sekseregistratie* [*House of Representatives Progress letter approach unnecessary sex registration*], Rijksoverheid (July 7, 2020), https://www.rijksoverheid.nl/documenten/kamerstukken/2020/07/03/tweede-kamer-voortgangsbrief-aanpak-onnodige-sekseregistratie (Neth.).

analysis of the risks attached to such a development while also exposing the large benefits it would bring to the trans*, non-binary and inter* communities.

SETTING THE SCENE

> Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have [their] dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order.[2]

Those words pronounced by the Caribbean Court of Justice in 2018 set the perfect introduction to this research in establishing the importance of fostering inclusive societies. Such an outset can lead to a myriad of discussions, from the denunciation of racist biases to the call for the of Lesbian, Gay, Bisexual, Transgender, Questioning or Queer and Intersex [hereinafter L.G.B.T.Q.I.*] identities in public spaces. It is through this diversity approach that this research will discuss the inclusion of non-binary gender identities within the protective system of the Council of Europe and its Member States. It presents itself as a response to the recent developments in seven Member States which created legal frameworks to recognise non-binary gender identities through the creation of a "third" or "X" gender marker. This development stems from the long-term fight for the de-medicalisation of trans* identities through the condemnation of sterilization and other medical requirements for legal gender recognition procedures. In slowly separating the conception of one's gender identity from their biological body and sex characteristics, the legal sphere is in the process of creating more opportunities for the inclusion of persons who do not fit the gender binary altogether. Non-binary persons, who do not identify as male or female but rather as an in-between, a combination of both or neither, are thus for the first time in European states given some form of legal recognition. While such a development is a step to be celebrated in the way it has raised awareness and given visibility to the non-binary community, it is flawed in multiple ways and national systems have implemented very different procedures that vary in terms of inclusivity. To this end, this research will ask the following questions: Are third gender-marker options (X), introduced by various European states, providing effective

[2] Mc Ewan et. al. v. Advocate General of Guyana, Caribbean Court of Justice [CCJ], ¶ 1 (Dec. 13, 2018). (pronouns were adapted from "his or her" to "their" in the spirit of gender inclusivity).

recognition and protection for non-binary individuals in light of the European Convention on Human Rights [hereinafter E.C.H.R.] framework? And if not, what better (more sensitive and inclusive) legal approaches at the national level, supported by the European level, can be recommended when analysing the issue through a queer lens?

STRUCTURE OF THE RESEARCH

To explore this issue, I will first set the ground by showing the nuanced character of the concept of gender. Following this, the second Chapter will explore the importance of the legal recognition of non-binary gender identities to ensure protection for all. Then, I will detail the legal framework relevant to this case study by first looking at the existing jurisprudence of the European Court of Human Rights [hereinafter E.Ct.H.R.] under the right to private life. This approach will be completed by an analysis of other potential avenues for the recognition of non-binary gender identities under the European Convention, namely the prohibition of degrading and ill-treatment and the freedom of expression taken in conjunction with the principle of non-discrimination. Following this, I will discuss the practicalities of the various "X" gender marker systems existing in European states and the inadequacies and missed opportunities inherent to them. Finally, I will put forward the alternative option of abolishing gender on identity documents or as a legal category altogether. This research will conclude with an analysis of the impact of queer identities, such as non-binary gender identities, can have in providing a more inclusive and efficient system of recognition and human rights protection.

1. THINKING OF GENDER IDENTITY AND THE BINARY AS A CRISIS

As an introduction to this study, this first Chapter aims to provide definitions for its subjects (non-binary individuals) and the dynamics at play around their existence in our current social constructions. Moreover, this Chapter's purpose is to provide arguments supporting the necessity of legal recognition of non-binary persons as separate subjects of law in ensuring the creation of appropriate protective measures. Hence, it will first provide a definitional analysis of non-binarity, gender identity, and the gender/sex conceptual division and its weaknesses. Then, it will assess the need for specific recognition as a first step towards effective protection through an assessment of the

particularity of non-binary issues, including the convergence and divergence with already existing rights movements and an analysis of the specific harm suffered by non-binary persons.

1.1. DEFINING GENDER OUTSIDE OF THE BINARY

Thinking about the binary is an exercise that challenges much more than the mere gender binary of male and female. Or rather, more than the direct influence of this binary system on gender identity and gender policies, but on the whole of our social institutions. For instance, there is a strong binary incentive in establishing gender identity and sex as well as sexual orientation. Where gender and sex have been divided between female and male, sexual orientation relies on a similar binary opposition between heterosexual and homosexual. Deconstructing such binaries has been the work of human rights scholars and defenders for decades and has successfully resulted in the legal recognition, for example, of bisexuality. Similarly, the last decade has seen more tolerance and legal recognition regarding the status of inter*[3] persons as a remarkable disruption of the binary of biologically assigned sex.[4] However, when it comes to gender within the European territories and others, there is a serious lack of awareness or any meaningful socio-legal development in breaking the male/female binary. In this context, non-binary individuals, whose experience of gender does not align with the gender, usually male or female,[5] that was assigned to them at birth,[6] are significantly left out.

[3] I will use the term "inter*" in this redacted way all across this research as it is more inclusive than others and has been reclaimed by the community.

[4] United Nations [hereinafter U.N.] and regional experts have defined inter* in the following terms:

> Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.

Office of the High Commissioner for Human Rights, Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, U.N. and regional experts urge, OHCHR (Oct. 24, 2016), https://www.ohchr.org/en/2016/10/intersex-awareness-day-wednesday-26-october?LangID=E&NewsID=20739.

[5] This is not to exclude inter* individuals whose experience of gender is fundamentally impacted by the non-binarity of their "primary and secondary sex characteristics" as defined (often wrongly) by medical professionals upon birth.

[6] *See e.g.* the definition provided by the U.N. High Commissioner for Refugees [hereinafter U.N.H.C.R.], Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

> Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual. Transgender individuals dress or act in ways that are often different from what is generally expected by society on the basis of their sex assigned at birth. Also, they may not appear or act in these ways at all times.

This is even furthered by the influence of the binary system even within the trans* community. In this sense, the trans* community does not simply include binary trans* individuals, meaning persons who identify as the opposite gender according to the male/female socially enforced gender binary. Rather, it equally includes persons whose gender identity does not fit this binary division, qualified as non-binary persons. The non-binary community itself, as a sub-part of the trans* community, is inherently diverse as well – ranging across a spectrum that goes from male to female, but also including individuals whose gender identity is not fixed and can vary over time (genderfluid) as well as individuals whose identity is outside the spectrum altogether (agender). Following this, there are various experiences of what it means to be non-binary. Some individuals will feel the need to change their names, and appearance, or else, while others will not. Similarly, some non-binary persons might experience physical gender dysphoria[7] and undergo surgeries and hormone replacement treatment to feel more comfortable in their bodies while others will not.[8]

Before diving in depth into the specificities of legal recognition and protection of non-binary individuals, it is necessary to establish the analytical framework for this study. There are no legally established definitions of non-binarity. However, falling under the broader umbrella of gender identity, it is relevant to note the largely accepted definition of gender identity within the legal sphere contained in the Yogyakarta Principles and expressed through the following words as a first foundation.

> Gender Identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[9]

Incidentally, it is interesting to note that this definition does not include a binary aspect of gender and is therefore useful in the definition of non-binary issues.

[7] Gender dysphoria refers to the physical and mental discomfort linked to the gender assigned at birth for a trans* person. It can present both in relation to the individual's relations to their body and in their social relations and external perception of their gender. *See generally*: DILCRAH & Transat, *Comprendre Les Transidentités: Un Guide à l'usage Des Personnes Cis* 13 (2021), https://www.dilcrah.fr/wp-content/uploads/2022/02/GUIDE_COMPRENDRE-LES-TRANSIDENTITES-TRANSAT-NUMERIQUE-27-12-2021.pdf (Fr.).

[8] *See, e.g.,* Kylin Camburn, *9 young people explain what being non-binary mean to them*, GLAAD (July 14, 2019), https://legacy-glaad.org/amp/9-young-people-explain-what-being-non-binary-means-them.

[9] Yogyakarta Principles, Mar. 2007.

From an analytical point of view, feminist studies and gender studies have theorized "gender" as an alternative to the previously dominant concept of "sex".[10] In doing so, a division was established between sex, as a biological, unchangeable, attribute of the person and gender, as a socially constructed and performed sense of internally felt connection to one's identity.[11] In a sense, gender has been understood as the social translation of sex. This is still the position adopted by the World Health Organization[12] and the Council of Europe.[13] In a time where non-binary individuals are gaining more visibility in mainstream media as well as in the political and legal sphere, it is necessary to rethink this division. Following the position of Judith Butler, it can be argued that, if gender is the social translation of sex, once one is born and assumes a social character and thus, a gender, sex is deprived of all meaning or better, absorbed by gender.[14]

Moreover, one may also argue that sex itself is a social construct. Indeed, the strict binary of bodies is not rooted in a biological reality. All bodies are different. Even within bodies that fit the established list of criteria for "male" or "female" bodies, variations appear in all forms, hormone levels, bone density, weight, height, and more. It can be defended that such categories are broad as they are used to encompass large groups of individuals and thus allow for such fluidity in the application of its criteria. However, going further, it appears clearly that, with the existence of inter* individual, this binary is not only arbitrary but also inefficient in categorizing the reality of the variety of human sex. Furthermore, the existence of trans* individuals' capacity to modify their bodies to fit a sex category that they were not assigned at birth shows that such categories are permeable. This ties back to Butler's argument that upon birth the concept of gender absorbs the concept of sex. Indeed, if one can change their bodies to match their gender identity when discrepancies appear, then sex and gender can be interchangeable. Additionally, it's worth mentioning that in certain cases, transgender individuals may experience fluctuations in hormone levels even prior to initiating hormone replacement therapy.[15]

However, it is necessary to limit the debate on the division of sex and gender and their opposition to some extent. Such discussions are necessary to understand the roots

[10] *See generally* Simone de Beauvoir, The Second Sex (1949).
[11] *See generally* Judith Butler, *Sex and Gender in Simone de Beauvoir's Second Sex*, Yale French Stud. 35 (1986).
[12] *See* World Health Organization, *Gender and Health*, https://www.who.int/health-topics/gender#tab=tab_1.
[13] *See* Eur. Consult. Ass., *Gender Equality Commission Commission pour l'égalité de genre*, *Gender Equality Glossary* 10, 20 (Mar. 2016). See also Eur. Consult. Ass., *Convention on preventing and combating violence against women and domestic violence*, art. 3 (2011).
[14] *See* Judith Butler, Bodies That Matter: On the Discursive Limits of "Sex" (1993).
[15] These changes can occur as a response to their socially experienced gender identity. *See e.g.*; Ai-Mn Bao & Dick Swaab, *Sexual differentiation of the human brain: Relation to gender identity, sexual orientation and neuropsychiatric disorders* 32 Frontiers in Neuroendocrinology 214 (2011).

of identity and the exclusion of those who do not fit the socially built binary system. Nevertheless, it should not impact the legal framework. In this sense, this everlasting debate has created a focus on defining the exact substance of both of those terms and is driving the legal community away from the necessary discussion on what the definitions should be in a context-specific, protection-oriented, legal framework.[16] In this respect, it is interesting to note that, within the Rome Statute, the only ground for persecution defined under Article 7 is gender and yet gender persecution is the least developed framework.[17] By taking the front stage, those approaches to gender and sex have put the individual in the shadow, erasing that there are human beings to whom the definitions of those terms do not matter as much as they require active protection against discrimination, both directly and indirectly, based on their gender identity. Defining gender and sex is not only unachievable as it differs in experience for every individual, but also not necessary to the development of effective protection for non-binary individuals. Moreover, it might even create obstacles as there are movements utilising the distinction between sex and gender as a tool to object to the recognition of non-binary identities.[18] This is made evident by the push of Trans* Exclusive Radical Feminists [hereinafter T.E.R.F.s] for a separate definition of sex and gender to limit the rights of trans* persons whose sex will then be considered to be the one they were assigned at birth rather than the one they are socially living as, regardless of their biological status. Such an argument is often rooted in the need to protect "real" women against the intrusion of men in their safe spaces. In this sense, it argues that, contrary to Simone de Beauvoir's famous saying, one does not become a woman but as to be qualified as one upon birth. Such a movement is fundamentally dangerous as it not only argues for the discrimination, if not persecution, of gender non-conforming individuals. This is a

[16] *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 933 (2019).

[17] See recent developments within the International Criminal Court with the creation of a Policy Paper on Gender and Sexual Based crimes in 2014 and the ongoing work on a report on gender persecution in 2022 Press Release, Int'l Criminal Court, *The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for Gender Persecution under the Rome Statute*, ICC-CPI-20211220-PR1637 (Dec. 20, 2021).

[18] On the exclusion of non-binary individuals by other members of the trans* communities, see specifically the argument made that when entering mainstream societies, minority groups are still held to *mainstream standards* hence have to comply with what is deemed acceptable by society as a whole. This creates a "trans enough" narrative that is inherently harmful to non-binary identifying individuals by its focus on medical transition and compliance with binary gender norms. *See* Luke Armitage, *Explaining Backlash to Trans and Non-binary Genders in the Context of UK Gender Recognition Act Reform*, J. Int'l Network for Sexual Ethics & Pol. 11, 25-26 (2020). See similarly the example of the T.E.R.F.S.who do not recognise the existence or the legitimacy of trans* individuals identities by arguing that the utilization of gender as a concept creates a risks for "real" women whom are defined by their biological sex only. The idea that comes back in those exclusionary movements is the utilization of the socially constructed aspect of gender in order to discredit its validity. In this sense, they rely on the immovability of sex as a "determinate biological" characteristic. Since most non-binary individuals were biologically assigned as either male or female at birth, those movements tend to negate their very existence. When they do, non-binary identities are often approached as "non-threatening" to the established binary with no real tangible existence other than being a political statement. *See also* Dianne Otto, *Queering Gender [Identity] in International Law*, 33 Nordic J. Hum. Rts. 299 (2015).

perfect example of how the socially constructed binary, would it be understood in terms of gender, sex or both as one, is harmful. Indeed, this movement does not solely attack the rights of trans* and non-binary individuals but also turns a blind eye, or sometimes explicitly supports, the continuation of sex reassignment operations on inter* infants and children to attempt to have their body fit the list of binary sexual characteristics that are decided to be needed to fit the boxes of male or female. Such operations are, most times, unnecessary to the good development of the child and have been defined as torture by multiple U.N. bodies including the Committee Against Torture.[19] Moreover, this movement equally harms the development of women's rights as it tends to limit the definition of "woman" to biological characteristics.

Having established that the binary division of sex and/or gender is socially constructed. It is fundamentally relevant to reflect on the origin of such a construction to understand its goal and socio-historical meaning. While some argue that it forms through the self, as a direct expression of one's internal feeling of identity, it is impossible to disconnect it from gender norms that were themselves put into existence by multiple sociological and anthropological, hence artificial, dynamics. Thus, gender would better be understood as the process through which an individual constructs their identity, not as an independent and internal process, but rather as interactive developments of the self in reaction to pre-established language and norms.[20] In this sense, gender is fundamentally linked to the development of culture. Putting this in a more practical context, the experience of gender in different parts of the world is drastically different. Europe, built on strong patriarchal structures, relies on a binary that opposes the man, providing and strong, to the woman, caring and inferior.[21] In that context, gender identities that diverge from the norm are repressed. This is theorized by Butler in putting forward the idea that, in such societies, gender is built not as a characteristic in itself but as an oppositional mechanism. In this sense, a woman is a woman because she is not a man and vice-versa. Thus, the construction of gender is enacted through exclusionary means.[22] Similarly, she argues that the individual builds their identity within a system that strictly regulates the human in opposition to the inhuman. Therefore, "it is not enough to claim that human subjects are constructed, for the construction of the human is a differential operation that produces the more and the

[19] *See 50 UN Reprimands for Intersex Genital Mutilation – and Counting . . .*, StopIGM.org (Oct. 26, 2016), https://stopigm.org/iad-2016-soon-20-un-reprimands-for-intersex-genital-mutilations/.

[20] *See generally* Judith Lorber, *The Social Construction of Gender, in* The Inequality Reader 318 (David B. Grusky & Szonja Szelenyi eds., 2018).

[21] *See* 488 Robert Bahlieda, *The Legacy of Patriarchy, in* The Democratic Gulag: Patriarchy, Leadership and Education 15 (2015) (Switz.).

[22] *See* Butler, *supra* note 14.

less "human", the inhuman, the humanly thinkable".[23] This analysis is fundamental to understanding the position of non-binary individuals who actively diverge from this system. In doing so, rather than being perceived as simply breaking a strict gender binary norm, they are implicitly but automatically stripped of their "human" capacity. This is especially striking when compared to cultural approaches that recognise individuals existing outside of the binary as almost divine figures such as the position of Two-Spirit individuals in indigenous tribes.[24] In this sense, through those processes, non-binary identities can be said to have been rendered "culturally unintelligible" to mainstream Western and European societies.[25] In this sense, when legally approached, non-binary identities tend to not be truly understood for what they mean to the individual in question but rather as a, sometimes acceptable, modern fad. This might be due to the erasure of non-binary individuals in Western history.[26] It can then be argued that non-binary individuals are not approached as an in-between in the gender binary but rather as either under or above it – either as less human or as divine figures.

The consequence of this is fundamental to the further study of the approach adopted by European states in building recognition and protection for non-binary persons. As will be exposed in further Chapters, the inherent binary imposed on individuals in the construction of their inner self is omnipresent in the understanding of non-binary identities by governments and is heavily reflected in their choice of policy. Moreover, the very choice of recognition and protection policies, especially the "X" gender marker itself will be demonstrated to be deeply influenced by the view of non-binary individuals as less-worthy subjects of society.[27]

[23] *Id.*; *See also* Armitage, *supra* note 18, at 15.

[24] *See* Native Center for Behavioral Health, *Native LGBTQ+/ Two Spirit People,* https://www.nativecenter.org/_files/ugd/e6acf4_5b2045f52b9247bf86205e2263b5c434.pdf (last visited Dec. 8, 2023).

[25] *See* Judith Butler, *Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality, in* The Transgender Studies Reader 183 (Susan Stryker and Stephen Whittle eds., 2006).

[26] Western history has long erased the existence of gender diverse persons. A fundamental example of this is the very low number of reports on the fate of trans* and gender non-conforming individuals during World War II. It is mistaken to take from this that they were not targeted, arrested, or killed by Nazi forces. However, it is interesting to reflect on the complete invisibilisation of their existence, when it is evident that they were indeed targeted, either as homosexuals for most female presenting individuals, or sometimes even as spies for male presenting persons. This is developed further in Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 Nw. J. Hum. Rts. 1, 29-35 (2021).

[27] *See infra* Chapter 2.

1.2. THE NEED FOR SPECIFIC RECOGNITION OF NON-BINARY IDENTITIES

1.2.1. LEGAL RECOGNITION AS THE STARTING POINT FOR PROTECTION

Elaborating on the previous observation, legal recognition of non-binary identities is fundamentally necessary to bring non-binary individuals within the scope of human understanding. It is the only way to, in a legal sense, push for the integration of those persons into society. However, just as will be developed later in this paper, gender recognition does not solely imply the need for a third gender marker but rather a recognition of the fluidity of gender by the state. In this sense, it could also be attained by the suppression of gender as a legal category altogether if accompanied by a comprehensive anti-discrimination approach that includes non-binary identities. Doing so would allow for the further development of a protection system adapted to their needs. In this sense, you cannot protect what you do not recognise as existing.

The importance of legal recognition can be shown by analogy with other rights movements. For instance, the legal recognition of women as a separate group and as specific subjects of law was the momentum needed for the expansion of the protection of women's rights. The same goes for the rights of lesbians and homosexuals. In this sense, legal recognition, by adopting a rights discourse, allows for the creation of specific rights systems in accordance with the particular characteristics and associated needs of said groups.[28] We note for example the large impact of the Convention on the Elimination of all forms of Discrimination Against Women [hereinafter C.E.D.A.W.] on the rights of women and the way in which they are treated in societies.[29] Instruments like this one, or case law of international and regional human rights bodies, have helped shape the social recognition of minorities such as women, lesbian, gay, and bisexual individuals, ethnic and racial minorities, disabled persons, etc, by creating a framework of legal recognition as specific and complete subjects of law with their full entitlement to protection of their human rights. Therefore, legal recognition can be envisaged as a way to pursue change and palliate to systematic historical neglect of marginalised groups.[30]

The consequences of the absence of legal recognition can be more clearly illustrated through the study of the case of homosexual persons which can easily be analogically applied to the situation of non-binary individuals – and any other minority

[28] *See* Mahnaz Afkhami, *Identity and Culture: Women as Subjects and Agents of Cultural Change, in* From Basic Needs to Basic Rights: Women's Claim to Human Rights (Margaret A. Schuler. ed., 1995).

[29] For more detail on the impact of C.E.D.A.W., *see Global Success: CEDAW Women's Rights Treaty*, National Organization For Women, https://now.org/resource/global-success-cedaw-womens-rights-treaty/ (last visited Nov. 19, 2023).

[30] *See* José Reinaldo De Lima Lopes, *The Right to Recognition for Gays and Lesbians*, Int'l J. on Hum. Rts. 61, 72 (2004).

group. Lima Lopez, in a study on the right to legal recognition, notes two distinct consequences of such a denial: physical violence meaning the absence of protection against physical acts of violence against a person, and non-physical violence which can be separated into two forms. First, it impacts the individual as an "exclusion from the sphere of rights" which in itself denies the individual access to their personal and social autonomy as well as complicates their capacity to interact with others. Second, it causes a strong form of disrespect which is then easily translated into discriminative, degrading treatment of members of those particular social groups.[31] Thus, the absence of legal recognition – or even more strongly, the explicit denial of legal recognition – is a strong incentive for further exclusion and discrimination by society as a whole: "[U]nder the silence of the legal system. . .an intolerance is cultivated".[32]

Putting this back in perspective of the study of non-binary persons' claim for legal recognition, it appears that, when put into legal language, the framing of non-binary individuals as inhuman in opposition to a human binary, can be translated into a distinction between deserving and undeserving subject of law.

From a legal perspective within the Council of Europe, legal recognition has been flagged as a necessary step in preserving and protecting the human rights of "trans and gender diverse persons".[33] The U.N. Independent Expert on Sexual Orientation and Gender Identity recognises that the denial of legal recognition of gender creates a negative environment in all aspects of life for persons concerned, ranging from the right to health, and housing to freedom of movement and residence. Furthermore, it fuels discrimination and violence against trans and gender-diverse persons – hence including non-binary persons.[34] Moreover, the U.N. Independent Expert includes in their attached Recommendations, the necessity to organise legal recognition for non-binary identities specifically.[35]

[31] *Id.* at 70-71.
[32] *Id.* at 74.
[33] "Trans and gender diverse" is the term adopted by the European Commission to refer to trans* and non-binary persons. It is necessary to note that this formulation is inappropriate as gender diverse does not have a clear meaning and in itself would involve trans* persons both binary and not. *See* European Commission, Directorate-General for Justice and Consumers, Legal Gender Recognition in the EU - The journey of trans people towards full equality 173-96 (2020).
[34] *See The Struggle of trans and gender diverse persons,* Office of the High Commissioner for Human Rights (2022), https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons.
[35] *Id.*

1.2.2. DIVERGENCE AND CONVERGENCE WITH ALREADY ESTABLISHED RIGHTS MOVEMENTS

The development of non-binary rights is adjacent, if not connected, to multiple other rights movements, particularly women's rights, sexual orientation minorities, inter* persons rights as well as the (binary) trans* movement itself. However, it is necessary to expose the divergences between those movements and the non-binary claims to define the need for specific legal protection for non-binary individuals.

First, as mentioned previously, the feminist movement clearly intersects with the interests of the non-binary community through its fight to deconstruct gender norms. However, this is also to be considered a divergence. In many ways, women's rights advocates work to rip apart the socially established gender roles that are attributed to men and women but in doing so, they do not necessarily question the gender binary itself.[36] In other ways, many may feel that the expansion of gender beyond the binary might be detrimental to the fight for women's rights in itself countering the efforts made to provide for a clear and strict definition of what a woman is.[37] However, another relevant development in the field of women's rights is Article 5 of the C.E.D.A.W. which tackles directly the need for states to "modify the social and cultural patterns of conduct of men and women" and harmful gender stereotypes.[38] This provision is interesting in the sense that it shows a questioning of the harm caused by socially entrusted social norms regarding gender. However, it remains fundamentally binary.

Second, the intersection with the fight for sexual minorities is similarly double-folded. First of all, it is necessary to recall that gender identity and sexual orientation are different concepts which are not co-dependent. Thus, persons who identify as non-binary gender-wise may have a variety of different sexual orientations.[39] However, there is a really interesting connection to be made between the non-binary

[36] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 120 (2010).

[37] *See* Hadley Freeman, *Transparent's Jill Soloway: 'The Words Male and Female Describe Who We Used to Be'*, The Guardian (May 21, 2017), https://www.theguardian.com/tv-and-radio/2017/may/21/transparents-jill-soloway-the-words-male-and-female-describe-who-we-used-to-be.

[38] UN Convention on the Eradication of all forms of Discrimination Against Women, Dec. 18, 1979, art. 5, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women#:~:text=States%20parties%20are%20therefore%20obliged,stereotyped%20roles%20for%20men%20and.

[39] Additionally, it is necessary to consider that sexual orientation as a large concept is inherently binary. The definition of different identities, homosexual, lesbian or even bisexual, implicitly relies on the existence of two binary genders. In this sense, someone will identify as homosexual not only because they are attracted to the same gender but also because they identify as said gender as well. Hence, what do we do about non-binary persons in terms of linguistics.

rights movement and the fight for recognition of bisexuality. Where non-binary gender identities come to disrupt the gender binary, bisexuality can be seen as a similar disruption of the binary established between heterosexual and homosexual. In this sense, both threaten the establishment of sex as a "primary category of social organisation".[40]

Third, it is more complex to establish the relationship between the trans* communities and specifically non-binary individuals and the inter* rights movement. All indeed relate to gender identity and all relate to the disruption of the gender binary and its biological origin. It is equally true that a number of inter* persons actually identify as non-binary – but not all.[41] In a way, the new visibility given to non-binary identities may benefit the fight for inter* rights, especially in helping normalise the existence of bodies outside of the gender and sex binaries which in itself would be beneficial in the fight against inter* genital mutilations.[42] Nevertheless, the connection of those two different rights movements might be detrimental to the non-binary movement. As highlighted by Peter Dunne, it might be attractive for trans* and non-binary advocates to use the inter* example as an argument against the existence of a strict gender binary and as supporting the need for the multiplication of gender categories past male and female.[43] But, tying the legal recognition of non-binary individuals to the mere existence of inter* persons implies the determination of gender by sex characteristics. In other words, if inter* persons are given the possibility to be registered as neither male nor female because of their sex characteristics, then what is made of non-binary persons who do not present inter* variations?[44]

Finally, there might even be divergences in the interest of trans* persons as well. This is true when looking at binary trans* persons separately from non-binary individuals. For instance, a number of trans*, and inter*, persons, while disrupting the gender norms by transitioning, still identify as male or female. In this sense, the recognition of non-binary gender identities must ensure that binary trans* and inter* individuals still have access to proper protection of their preferred *binary* gender.[45]

Altogether, the non-binary rights movement takes and learns from all pre-existing movements. But it is necessary to frame it as a specific and independent claim in order

[40] Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 Stan. L. Rev. 353 (2000).
[41] *See* Sharon E. Preves, Intersex and Identity: The Contested Self 60-85 (2003).
[42] Clarke, *supra* note 16, at 929.
[43] Peter Dunne, *Towards Trans and Intersex Equality: Conflict or Complementarity?*, *in* The Legal Status of Intersex Persons 217, 237 (Jens M. Scherpe et al. eds., 2018).
[44] *Id.*
[45] Sally Hines, *What's the Difference? Bringing Particularity to Queer Studies of Transgender*, 15 J. Gender Stud. 49, 64 (2006).

not only to be true to non-binary persons' real needs but also to avoid limiting the rights of others.

1.2.3. SPECIFIC HARM SUFFERED

When it comes to documenting the specific harm suffered by non-binary persons for the reason of their gender identity, there are two paths to be examined: the social acceptance of non-binary identities, and the physical and mental harm suffered in practice by individuals regardless of this social environment.

A lot of information can be obtained by analogy through studies of the situation of binary trans* persons as they interconnect with non-binary issues in the way that they both question the socially established gender binary between male and female. However, non-binary identities are seen in a different light due to the fact that, unlike binary identities, they do not comply with the binary and are often perceived as an attempt to create a "new" gender category. Because of this, non-binary identities are very often considered less threatening to the established social order as they are seen as less legitimate. In this sense, non-binary persons are likely to be more accepted socially when their identity is not linked to any "political claim" regarding their identity.[46] This has been theorized by Burke in a study regarding the social perceptions of bisexual and biracial persons. Similarly, as non-binary persons, they can be qualified as "social group intermediaries".[47] The study shows that, overall, all intermediary groups are "perceived as less socially real than other groups",[48] putting forward the idea that those groups are both less relevant and less threatening to society as an immovable system.

However, this invisibilisation in society does not imply that non-binary persons are exempted from discrimination and violence. Establishing a global picture, the Office of the High Commissioner for Human Rights [hereinafter O.H.C.H.R] defines the harm suffered by the lesbian, gay, bisexual, transgender, queer, intersex, asexual (and more) [hereinafter L.G.B.T.Q.I.A.+] communities in terms of "multiple and intersecting forms of discrimination (including based on age, gender, ethnicity, disability and social status)" as well as "lack of access to their economic, social, and cultural rights".[49] Forms of

[46] Armitage, *supra* note 18, at 24.

[47] Sarah Emily Burke, The Excluded Middle: Attitudes and Beliefs about Bisexual People, Biracial People, and Novel Intermediate Social Groups 1 (Dec., 2016) (Ph.D. dissertation, Yale University) (ProQuest),, https://www.proquest.com/openview/626696401d172b2d628c3ef4fdfc603c/1?pq-origsite=gscholar&cbl=18750.

[48] *Id.* at 3.

[49] Office of the High Commissioner for Human Rights, Statement by Human Rights Experts on the International Day against Homophobia, Transphobia and Biphobia, (May 17, 2018) https://www.ohchr.org/en/statements/2018/05/leave-no-lgbt-person-behind?LangID=E&NewsID=23092.

exclusion and discrimination against L.G.B.T.Q.I.A.+ individuals also include poor access to education as well as increased risk of homelessness and more.[50] More specifically, non-binary persons, as part of the broader trans* community are exposed to significantly higher rates of discrimination in multiple aspects. Studies show that nearly half of trans* and non-binary persons report having been verbally harassed for their gender expression[51] in public spaces. Additionally, about one in ten report having been physically assaulted on the basis of their gender expression. [52] This is particularly strong in the case of non-binary persons who often present in androgynous ways– although it is *not* the case for all non-binary persons – and thus, visibly disrupt the gender binary. Furthermore, they are exposed to a higher risk of suicide and suicide attempts, and associated mental health conditions, especially at young ages – ranging from forty per cent to fifty per cent of trans* and non-binary teenagers having attempted suicide at least once.[53] Similarly, trans* and gender-diverse persons report significantly higher rates of sexual violence.[54] Because of the priorly established social exclusion of non-binary persons, there is evidence that non-binary-identifying individuals are subjected to increased discrimination compared to their binary-identifying counterparts.[55] In this sense, non-binary persons are erased from society, but, when they are visible, especially through their gender expression, they are immediately at higher risk of discrimination and violence.

2. THE INCLUSION OF NON-BINARY CLAIMS TO RECOGNITION AND PROTECTION UNDER THE COUNCIL OF EUROPE FRAMEWORK

In this Chapter, I will explore the existing framework for the expansion of non-binary legal recognition and, more importantly, protection under the Council of Europe. In other words: in what aspects are the non-binary identities protected under the Council

[50] *Id.*

[51] Human Rights Campaign defines "gender expression" as the "[e]xternal appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine".*See Sexual Orientation and Gender Identity definitions*, Human Rights Campaign, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Nov. 19, 2023).

[52] Sandy E. James et al., The report of the 2015 U.S. Transgender Survey (2016).

[53] *See* Russell B. Toomey et al., *Transgender Adolescent Suicide Behavior*, in Pedriatics Vol. 142 Issue 4 (2018), https://publications.aap.org/pediatrics/article-abstract/142/4/e20174218/76767/Transgender-Adolescent-Suicide-Behavior?redirectedFrom=PDF.

[54] *See supra* note 45.

[55] Armitage, *supra* note 18, at 25.

of Europe framework, and specifically the E.C.H.R., and in what ways are their identities an obstacle to reaching equal treatment and the effective realization of their human rights? And following this, what are potential avenues in creating a protective framework for non-binary persons under this framework? In order to answer those questions, I will first explore the idea of a right to non-binary legal recognition under the existing Council of Europe framework before looking into potential avenues for further developments that have not yet been acknowledged by the Court itself but have been rising in other jurisdictions.

2.1. A RIGHT TO NON-BINARY LEGAL RECOGNITION?

2.1.1. ESTABLISHED FRAMEWORK AND LEGAL SOURCES OF RIGHTS AND PROTECTION

Defining a right to legal recognition for non-binary gender identities is not as obvious as it could appear. To this day, the Council of Europe framework does not provide for any binding instrument or case law creating an obligation for states to consider non-binary legal recognition. Additionally, a word search for "non-binary" on the European Court of Human Rights case-law database came back empty meaning that no decision or document of the Court ever mentioned the term, let alone address it directly. However, this is not to say that there are no relevant developments on the matter through alternative avenues.

A starting point to tackle legal gender recognition [hereinafter L.G.R.] under human rights law is the Yogyakarta Principles.[56] While it is not directly a Council of Europe instrument, it is the most influential international law document[57] when it comes to the rights of L.G.B.T.Q.I.A.+ persons. In this sense, the Principles constitute a comprehensive compilation of the principles followed by international and European law on matters of gender identity, sexual orientation and sex characteristics. The principles deliberately use gender-neutral language in order to highlight the principle of universality of human rights – although not textually mentioning "non-binary".[58] In this sense, the rights and principles expressed are to be applied to all persons without distinctions and do not provide specific guidelines on the protection and rights of particular groups.[59] This is particularly interesting when looking at the rights of

[56] Yogyakarta Principles, *supra* note 9; Yogyakarta Principles Plus 10, Nov. 10, 2017.

[57] *See* Paula L. Ettelbrick & Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development A Study of November 2007 – June 2010: Final Report* 52-55 (Sept. 10, 2010) (unpublished manuscript) (on file with author).

[58] Yogyakarta Principles, *supra* note 9, at Principle 1 – The Right to the Universal Enjoyment of Human Rights.

[59] *See* Sheila Quinn & International Commission of Jurists, *An Activist's Guide to The Yogyakarta Principles* 23 (2010), https://yogyakartaprinciples.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf.

non-binary persons. Because of the neutral language, they can be included fully under the ambit of the principles. Moreover, the principles introduce the necessity to avoid requiring individuals to have to categorize themselves into specific identity boxes that might not represent their identity accurately. To this end, the Yogyakarta Principles approach sexual orientation and gender identity as fluid and thus consider that forcing an individual to exist within limited and unrepresentative legal categories consists in the perpetuation of an oppressive system.[60] Those principles are relevant so far as they have been accepted and recognised by the Council of Europe.[61]; A.P., Garçon and Nicot v. France, App. No. 79885/12, 52471/13 and 52596/13, ¶ 111 (Apr. 6, 2017), https://hudoc.echr.coe.int/spa#%22itemid%22:[%22001-172913%22. Note that the Yogyakarta Principles and their updated version do not have a binding effect but can be considered to have strong authoritative value in the field of sexual orientation and gender identity and human rights. In this context, the Committee of Ministers of the Council of Europe put forward a Recommendation on "measures to combat discrimination on grounds of sexual orientation and gender identity" in 2010 which included principles derived from the Yogyakarta Principles, particularly the universality of human rights. Moreover, it highlighted the idea that "neither cultural, traditional or religious values, nor the rule of the dominant culture, can be invoked to justify discrimination on grounds of sexual orientation and gender identity".[62] Although contained in a non-binding document, this could be a good stepping stone in creating a framework for the recognition and protection of non-binary persons.

The Council of Europe framework extended further on the issues in the decade following this first Recommendation. Three documents need to be mentioned: the 2015 Resolution on "Discrimination against transgender people in Europe",[63] the 2017 Resolution on "Promoting the human rights of and eliminating discrimination against intersex people"[64] and the 2022 Resolution on "Combating rising hate against [lesbian, gay, bisexual, transgender, and intersex] [hereinafter L.G.B.T.I.] people in Europe".[65]

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[60] *Id.*

[61] *See* Ettelbrick & Trabucco Zerá, *supra* note 57, at 52-55; *Silvan Agius et al.*, *Human Rights and Gender Identity Best Practices Catalogue*, ILGA Europe *8-10* (2011), https://www.ilga-europe.org/files/uploads/2022/04/Human-Rights-Gender-Identity-Best-Practice-Catalogue.pdf. *See also* references made to the Principles by the E.Ct.H.R. in cases such as Hämäläinen v. Finland, App. No. 37359/09, ¶ 16 (July 16, 2014), https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-145768%22

[62] Council of Europe Committee of Ministers, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, (2010), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a.

[63] Eur. Parl. Ass., *Discrimination against Transgender People in Europe*, 15th Sess., Doc. No. 13742 (2015), https://assembly.coe.int/nw/xml/Xref/Xref-XML2HTML-en.asp?fileid=21630&lang=en.

[64] Eur. Parl. Ass., *Promoting the Human Rights of and Eliminating Discrimination against Intersex People,* 35th Sess., Doc. No. 14404 (2017), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&.

[65] Eur. Parl. Ass., *Combating Rising Hate against LGBTI People in Europe*, 3rd Sess., Doc. No. 15425 (2022), https://pace.coe.int/en/files/29712/html.

The first one, while largely focused on trans* rights within the gender binary, puts the focus on the importance of self-determination as a guiding principle in L.G.R. procedures.[66] Even more striking, the resolution calls for states to "consider including a third gender option in identity documents for those who seek it".[67] This paired with the call for the amendment of all medical requirements in L.G.R. procedures[68] points to the potential opening of non-binary legal gender recognition for all. Furthermore, the Resolution supports the development of a *right to gender identity* in High Contracting Parties from which should flow a right to legal gender recognition for all, in line with the universality principle: *"The Assembly welcomes, in this context, the emergence of a right to gender identity, first enshrined in the legislation of Malta, which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity".* [69]

The second Resolution focuses explicitly on the rights of inter* persons. As defined previously, the inter* rights and the non-binary rights movements are separate and should be treated as such.[70] However, in the absence of direct reference to non-binary gender identities in the Council of Europe framework, it is relevant to look at the principles it upholds for adjacent issues. To this end, the Resolution tackles issues of L.G.R. for inter* persons falling outside of the gender binary in the following terms: "*Ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people, including for those [inter*] persons who do not identify as either male or female*".[71] Because it equally underlines the importance of self-determination as a guiding principle in such procedures, this mention of non-binary legal categories for gender becomes relevant for all persons. It can be argued that non-binary persons are not directly mentioned in those documents because of a lack of social visibility as a group rather than because of a voluntary exclusion on behalf of the authorities. In this sense, the document remains useful in defining a legal approach to the legal recognition and protection of non-binary persons who are not inter*.

The latter is interesting because of how recent it is. While not containing particular mentions of LGR or non-binary gender identities, it urges states to "prevent further backsliding, and to work actively to promote full respect for the rights of [L.G.B.T.I.] people".[72] This recent re-commitment to the development of recognition and

[66] Eur. Parl. Ass., *supra* note 63, ¶ 6.2.1.
[67] *Id.* ¶ 6.2.4.
[68] *Id.* ¶ 6.2.1.
[69] *Id.* ¶ 5.
[70] *See supra* Section 1.2.2.
[71] Eur. Parl. Ass., *supra* note 64, ¶ 7.3.3 (emphasis added).
[72] Eur. Parl. Ass., *supra* note 65, ¶ 7.

protection for L.G.B.T.I. persons is fundamental in defining the direction in which the Council of Europe and its Court are going. In other words, this showed a seemingly deep commitment to the protection of all individuals regardless of their sexual orientation and gender identity that would be contradicted by a refusal to provide effective recognition and protection to non-binary persons.

This was recently turned over by the decision of the E.Ct.H.R.in the case of *Y v. France*.[73] The case related to the refusal of French authorities to grant an intersex applicant the change to a neutral gender registration on their birth certificate as well as a neutral gender marker in the form of an 'X' on their identity documents. In its decision, the E.Ct.H.R. found no violation of Article 8 E.C.H.R. and thus sided with the French Government in saying that it did not come within the State's obligation under the E.C.H.R. to organize the registration of gender outside of the binary. The judgement based itself largely on the idea that such a matter was highly controversial in European states and thus it did not fall under the scope of the Court's ability to impose such major social changes in the absence of a "European consensus". In doing so, the Court decided that the interest of the state in preserving its binary system of registration outweighed the interests of the individual to see their identity properly registered. This is a regrettable take of the Court following a promising development towards inclusive and protective understandings of human rights for intersex and non-binary individuals. Moreover, it is largely reflected in the form of the hypocrisy of the state in maintaining an unrealistic binary division of gender as pointed out by Judge Šimáčková in her dissenting opinion:

> And what are the State's arguments? You were not born male or female, but the law does not allow it. Therefore you must adapt your body (even if you will suffer) and your soul (even if you will feel humiliated) to correspond to the laws adopted by the State. I find this interference so serious that I believe it violates the applicant's right to respect for private life.[74]

Interestingly enough, the Court does make some remarks that are not so negative. Particularly, it rejected the argument of the French *Cour de Cassation* [Court of Cassation] in saying that the fact that the Applicant could be perceived as male by an outside observer, which matched the "male" registration of his gender, indicated that there was a balance of interest. The E.Ct.H.R. further underlined that the appearance of the Applicant could not be used to deduce their felt gender identity and reiterated that gender is an essential aspect of an individual's intimate identity and recognised the

[73] Y v. France, App. No. 76888/17 (Jan. 31, 2023), https://hudoc.echr.coe.int/eng?i=001-222780.
[74] *Id.* ¶ 1 (Judge Šimáčková, dissenting).

harm that may be suffered by individuals whose identity is erased by their national administration.[75]

This decision remains a significant backlash on the development of protection for non-binary gender identities. This is particularly due to the fact that the case of *Y v. France* concerned an inter* person whose body had been proven to not conform to the expected criteria of male and female anatomy. Thus, it further closes the door for non-binary persons who do not have such "biologically receivable proof". In a sense, inter* persons can be seen as the "perfect subject" for states to understand the need to expand their understanding of gender as they are, starting at birth, not fitting the categories that the states persist on maintaining. However, the states, with the support of the Court stand now in a position to refuse the recognition of gender outside of the binary in civil registries and identification documents while still recognizing that such a refusal may create serious harm to the concerned individuals, and goes as far as supporting and advocating for the "normalization" of inter* persons in order to make their natural bodies fit unnatural and socially constructed categories of gender.[76]

2.1.2. THE CHRISTINE GOODWIN V. THE UNITED KINGDOM CASE AND SUBSEQUENT CASE-LAW: IMPLICATIONS FOR NON-BINARY LEGAL RECOGNITION

When it comes to the right to L.G.R. in the Council of Europe framework, the most relevant document is the decision of the Grand Chamber of the E.Ct.H.R. in the *Christine Goodwin v. the United Kingdom* case in 2002. In this decision, the Court upheld the existence of a right for a trans* person (in this case a trans* woman) to see their gender marker legally changed to match their internally felt gender identity. In doing so, the Court reiterated that gender identity constituted an "important aspect of personal identity".[77] In this sense, it considered that the absence of legal gender recognition procedures constituted a "serious interference with the private life" under Article 8 of the Convention and could not be considered a "minor inconvenience arising from a formality" as argued by the British Government.[78] Moreover, the Court went as far as stating that requiring a person to exist within a gender category that does not match

[75] *Id.* ¶ 83 (majority opinion).
[76] Organisation Intersex International Europe [OII], *Comment on Y v. France ECHR decision* (Feb. 22, 2023), https://www.oiieurope.org/comment-on-y-v-france-echr-decision/.
[77] *See*, Dudgeon v. the United Kingdom, App. No. 7525/76, ¶ 41 (Oct. 22, 1981), https://hudoc.echr.coe.int/?i=001-57473, in Christine Goodwin v. the United Kingdom, App. No. 28957/95, ¶ 71 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60596.
[78] Christine Goodwin v. the United Kingdom, ¶ 71.

their lived experience of gender creates a position of "vulnerability, humiliation and anxiety" deriving from the "conflict between social reality and law" they are experiencing.[79]

This case aimed at redressing harm suffered by binary trans* persons and created a positive obligation for states to create effective procedures of L.G.R. Thus, it does not mention non-binary identities nor does it touch upon the possibility of opening gender registration to more categories than the established binary "male" and "female" categories. However, one could argue that the underlying principles the Court applied in this case, in line with those contained in the aforementioned Yogyakarta Principles and Council of Europe Resolutions, could and should be applied similarly to the case of non-binary persons. It has been shown by the Court's decision in *Y v. France* that the moment has not yet come to see this implemented. The argument does not lose in value but it is necessary to take a step back in view of the current jurisprudence of the Court which seems to directly contradict its previous approaches and the potential implication they could have had, and still may have in the future. The Court recognises the harm caused by the inability to see one's gender identity accurately recognised and represented by the law and on their identity documents as a serious breach of the right to private life under Article 8 of the Convention. Furthermore, it recognises the importance of self-determination in the determination of one's legal gender. Hence, if applied to a non-binary person, it would be the logical conclusion to extend the reasoning of the Court in the *Christine Goodwin* case in order to include gender identity outside the binary as well.[80] The Court has extended its stance on gender identity as a ground for discrimination in another few cases and through slightly different avenues: creating an enhanced duty to protect under Article 3 in conjunction with Article 14[81] and establishing a higher threshold of "particularly serious reasons" to justify interferences with the "right to gender identity".[82]

However, national developments in the United Kingdom following the *Christine Goodwin* case seem to have been substantiated the opposite way. In the case of *Elan-Cane*[83] decided by the British Supreme Court in 2021, the following question was asked to the Court:

[79] *Id.*

[80] *See* Neela Goshal, *Transgender, Third Gender, No Gender: Rights Perspectives on Laws Assigning Gender, Part II*, Opinio Juris, (Sep. 4, 2020), https://opiniojuris.org/2020/09/04/transgender-third-gender-no-gender-rights-perspectives-on-laws-assigning-gender-part-ii/.

[81] Identoba and Others v. Georgia, App. No. 73235/12, ¶¶ 63-64 (May 12, 2005), https://hudoc.echr.coe.int/fre?i=001-154400.

[82] P.V. v Spain, App. No. 35159/09, ¶¶ 63-64 (Nov. 30, 2010),https://hudoc.echr.coe.int/tkp197/view.asp?i=002-736.

[83] R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent) [2021] UKSC 56 On appeal from: [2020] EWCA Civ 363 (Eng.).

> Does [A]rticle 8 of the European Convention on Human Rights . . . either taken in isolation or read together with [A]rticle 14, impose an obligation on a contracting state, when it issues passports, to respect the private lives of individuals who identify as non-gendered, by including a nongendered ("X") marker for the passport-holders gender, as an alternative to the markers for male and female?[84]

The Court decided in the negative, defining that the case law of the E.Ct.H.R., and specifically the case of *Christine Goodwin*, did not imply an obligation for the state to open L.G.R. to non-binary categories. It clearly states that "there is no judgment of the European Court of Human Rights which establishes a positive obligation to recognise a gender category other than male or female, and none which would require the Secretary of State to issue passports without any indication of gender".[85] Interestingly enough, the Court recognises that the identity of the individual as non-binary ("non-gendered") falls under the ambit of their private life and is protected by the Convention.[86] However, it does not deduce from it a right to protection of said identity. What becomes particularly important in this decision is the margin of appreciation left by the E.Ct.H.R.to the states on the application of certain of their obligations under the Convention. The British Court mentions the decision of the E.Ct.H.R.in the *Hämäläinen* case in which it defined the factors to be taken into account when defining the extent of the state's margin of appreciation: the existence of a consensus among High Contracting Parties to the Convention, the relative importance of the interests at stake, and the existence of moral or ethical issues linked to the case.[87] Because of the absence of a European consensus regarding non-binary legal gender recognition, the British Court deduced a large margin of appreciation. Since this judgment, the E.Ct.H.R.has notably recognised the right for one to define their gender identity which would likely have influenced the obligations of the United Kingdom in a case like *Elan-Cane.*[88] Furthermore, developments in other Member States regarding the creation of a "third" or "X" gender marker and thus a non-binary form of L.G.R. could have been used for the opposite arguments in substantiating an emerging European trend.[89] In the eyes of the E.Ct.H.R., the threshold in defining such a European trend has not yet been reached as was illustrated by its decision in the case of *Y v. France*. However, the further development of such frameworks

[84] *Id.* at 1, "questions raised by the appeal".
[85] *Id.* § 30.
[86] *Id.*
[87] Hämäläinen v. Finland, App. No. 37359/09, ¶ 67 (July 16, 2014), https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-145768%22].
[88] *L. v Lithuania*, App. No. 27527/03 (Sept. 11, 2017), https://hudoc.echr.coe.int/?i=001-82243.
[89] See *infra* Chapter 3 for the analysis of the national frameworks having recognised a form of non-binary L.G.R.

in High Contracting Parties may eventually, and hopefully, lead to a shift in the Court's position.

This opens a debate about the interpretation of the E.Ct.H.R.'s case law on matters of gender identity and specifically of the implications of the *Christine Goodwin* decision. Indeed, the discussion lies on whether deducing protection for non-binary persons under the *Christine Goodwin* decision would be going "beyond" the state's obligation under the Convention and therefore within the discretion of the state or if, on the contrary, refusing recognition of non-binary persons in light of the existence of this judgment would be "against" the state's obligations. It is clear in the E.Ct.H.R.'s case law that states are given the *opportunity* – and not the obligation – to provide a higher standard of protection on the national level than provided by the Convention framework.[90] In this sense, the British Court argued in the *Elan-Cane* case that it did not go "against" its obligations by deciding the case in the negative but that it merely refused to go "beyond" its obligations by expanding the *Christine Goodwin* jurisprudence.[91] This could easily be argued the opposite way as recognition of non-binary gender identities would be in line with the Convention's aim and purpose. However, in the absence of clear decisions of the E.Ct.H.R. targeting directly the issue of non-binary gender registration, it will be tedious to build a case that would not be struck down because of the margin of appreciation argument. However, the emerging trend on the national level of opening a third legal gender category in the form of an "X" could soon prove to be influential on the stance of the Court.

2.2. OTHER POTENTIAL AVENUES: ARTICLES 3 AND 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

While we wait for the E.Ct.H.R. to take on a case on whether non-binary persons should be included under the reading of the *Christine Goodwin* judgment, and therefore under the ambit of Article 8 of the Convention, it is possible to consider other avenues and rights that could be used in the fight for non-binary recognition and protection. Expanding on this, it is necessary to reflect on the very adequacy of Article 8 to deal with this issue. The case of *Christine Goodwin* discussed priorly is the first case the Court decided positively on this matter and its decision under Article 8 has been highly influential in defining the legal avenue for the defence of gender identity-related rights. This legal basis is as weak as the rights under Article 8 are qualified and not absolute. Thus, the state can argue for

[90] European Convention of Human Rights art. 53, Nov. 4, 1950.

[91] Lewis Graham, *Going beyond, and Going against, the Strasbourg Court*, Uk Constitutional Law Association (Jan. 11, 2022), https://ukconstitutionallaw.org/2022/01/11/lewis-graham-going-beyond-and-going-against-the-strasbourg-court/.

the refusal of legal gender recognition when "proportional" to the public interest. In this context, it is interesting to argue that the denial of L.G.R. could be argued as a violation of the individual's rights on different bases, either as an (almost) absolute right[92] under the prohibition of cruel, inhuman, and degrading treatment (Article 3 E.C.H.R.) or through another, more respectful avenue, namely the right to freedom of expression (Article 10 E.C.H.R.). However, to replace those arguments in the current context, this Subchapter will also reflect on the meaning of the Court's decision in the cases of *Y v. France* and *A.H. and others v. Germany* for the future of the protection of trans*, non-binary and inter* rights by the E.Ct.H.R.

2.2.1. QUALIFYING LACK OF LEGAL GENDER RECOGNITION PROCEDURES AS CRUEL, INHUMAN AND DEGRADING TREATMENT

The approach suggested by Bassetti brings clear relevance to the qualification of denial of legal gender recognition as a violation of the prohibition of torture, cruel inhuman and degrading treatment under international human rights law and more specifically under Article 3 of the European Convention on Human Rights.[93] He puts forward two main issues at play when one is denied recognition of their gender identity by the state: 1) further exposition to human rights violations due to the incongruence of one's perceived and lived identity with their legal identity and, 2) subsequent psychological suffering that may amount to degrading or inhuman treatment.[94]

When it comes to inhuman or degrading treatment, the case law of the E.Ct.H.R. is fruitful. However, applying this case law to the lack of L.G.R. procedures has yet to be done in court proceedings. Nevertheless, the link was made by the Inter-American Court of Human Rights in its Advisory Opinion on "Gender Identity, and Non-Discrimination of Same-Sex Couples".[95] It puts forward the idea that the refusal to recognise one's gender through adequate L.G.R. procedures creates a lack of juridical personality which in terms "harms human dignity because it is an absolute denial of a person's condition as a subject of rights".[96] This can be translated into the language of the E.Ct.H.R. fairly logically through the definition of inhuman and degrading punishment in its case law in

[92] The prohibition of torture under Article 3 has emphatically been defined as an absolute right, however, the prohibition of inhuman and degrading treatment of punishment is less extensive.
[93] Matteo E. Bassetti, *Human Rights Bodies' Adjudication of Trans People's Rights: Shifting the Narrative from the Right to Private Life to Cruel and Inhuman or Degrading Treatment*, Eur. J. Legal Stud. 291 (2020).
[94] *Id.* at 306.
[95] Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (Nov. 24, 2017).
[96] *Id.* ¶ 102.

which the Court finds violations of Article 3 when acts or policies humiliate or debase the individual, "in their own eyes or in the eyes of others".[97] Moreover, the Court has recognised the harm created by the lack of availability of L.G.R. in the *L v. Lithuania* case in which it stated that this impossibility "left the applicant in a situation of distressing uncertainty vis-à-vis his private life".[98] In this sense, the Court recognises the harm that arises when trans* persons are denied L.G.R. in forcing them to publicly disclose intimate aspects of their private lives as well as the incongruence of their legal status.[99] Where the Court's assessment falls short is that it has not, to this day, recognised this harm to be severe enough to reach the threshold it has established for inhuman and degrading treatment. This has been attributed by the Fundamental Rights Agency to general transphobia as well as a lack of awareness regarding the lived experiences of trans* persons in Europe.[100] Indeed, there is no clear legal reason as to why the Court has been underestimating the harm suffered by trans* and non-binary persons under Article 3 of the Convention. There is yet to be a successful application in framing the harm suffered by non-binary persons facing the absence of adequate legal gender recognition as a violation of Article 3 of the Convention. However, the Court has established that the threshold under Article 3 may be reached without physical violence. It may be sufficient that the victim experiences "psychological suffering" which

> causes in its victim feelings of fear, anguish and inferiority, if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes, whether or not that was the aim, if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience, or if it shows a lack of respect for, or *diminishes, human dignity*.[101]

The reference to "human dignity" particularly may be ground to include the suffering and distress felt by non-binary persons when faced with the refusal of recognition of their identity by the state apparatus. Drawing from this we can refer to Bassetti who draws the parallel between the Court's and other human rights bodies' case-law on the right to not be forced to act against one's will or religion and the right to protection

[97] Campbell and Cosans v. The United Kingdom, Apps. Nos. 7511/76, 7743/76, ¶ 28 (Feb. 25, 1982), https://hudoc.echr.coe.int/fre?i=001-57455; *see also* Tyrer v. the United Kingdom, App. No. 5856/72, ¶¶ 30-32 (Apr. 25, 1978), https://hudoc.echr.coe.int/fre?i=001-57587.

[98] *L. v. Lithuania*, Eur. Ct. H.R. (2008).

[99] Bassetti, *supra* note 93, at 307.

[100] European Union Agency for Fundamental Rights, Being Trans in the European Union: Comparative Analysis of EU LGBT survey data 78-92 (Jan. 12, 2014), https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0_en.pdf.

[101] M.C. and A.C. v. Romania, App. No. 12060/12, ¶ 106 (July 12, 2016), https://hudoc.echr.coe.int/eng?i=001-161982; Aghgomelashvili and Japaridze v. Georgie, App. No. 7224/11, ¶ 42 (Oct. 8, 2020), https://hudoc.echr.coe.int/fre?i=001-204815.

against cruel, inhuman or degrading treatment. In this sense, when a person is forced to conceal their gender identity to avoid violence and discrimination or to disclose personal and intimate aspects of their gender history repeatedly because of the absence of L.G.R. by the state, it can be argued that they are then forced to act against their will.[102] This in itself should amount to cruel, inhuman or degrading treatment *per se*. Moreover, the E.Ct.H.R. and other human rights bodies have a consequent body of law and jurisprudence on concealment of sexual orientation under Article 3 in cases of asylum and *non-refoulement*. In this sense, it is considered a violation of the prohibition of torture or inhuman or degrading treatment or punishment when an individual is sent back to a country where they would face ill-treatment if they do not hide their sexual orientation.[103] When L.G.R. is not available and an individual is forced to present identity documents with an inadequate gender marker, they will be forced daily to either conceal their lived gender identity when presenting identification or to disclose their trans* identity – which are both equally harmful. Following the same logic, it should be deduced that forcing an individual to conceal their identity or to be refused the opportunity to express their identity through legal means could amount to ill-treatment in similar ways.

Following this, it is also necessary to underline the other part of this equation: non-binary persons are exposed to further risk of violence and ill-treatment when L.G.R. is not available. Indeed, as defined priorly, non-binary persons are a vulnerable group in society and the absence of appropriate legal gender recognition procedures leads to the absence of an effective system of protection under the law.[104] In this sense, it can be argued that the mention of one's gender on identity documents and in state registries does not simply constitute a person's legal status but impacts largely their "social status".[105] Therefore, as defined by the E.Ct.H.R. in the *Christine Goodwin* case, L.G.R. is not merely an administrative formality but rather is a necessary order to ensure respect and dignity for trans* persons, including non-binary persons.[106] This is supported by recent research projects that have highlighted the negative impact created by incorrect gender markers on non-binary persons' enjoyment of their social life.[107] Thus, if it was shown before that L.G.R. can lead to legal protection, the opposite is also true as the lack or

[102] Bassetti, *supra* note 93, at 307.

[103] *See e.g.*, U.N.H.C.R., *supra* note 6. At the E.Ct.H.R. level see cases like B. and C. v. Switzerland, Apps. Nos. 889/19, 43987/16 (Feb. 17, 2021), https://hudoc.echr.coe.int/fre?i=001-206153. Under the European law framework see the case of Joined cases C-199/12 to C-201/12, X, Y and Z v. Minister voor Immigratie en Asiel, ECLI:EU:C:2013:720 (Nov. 7, 2013).

[104] *See supra* Section 1.2.1.

[105] Lena Holzer, *Legal Gender Recognition in Times of Change at the European Court of Human Rights*, 23 ERA F. 165 (2022).

[106] Christine Goodwin v. the United Kingdom, App. No. 28957/95, ¶ 71 (July 11, 2002); *see also Legal Gender Recognition Archives,* TGEU, https://tgeu.org/issues/legal-gender-recognition/ (last visited Nov. 19, 2023).

[107] *See e.g.*, James et al., *supra* note 52; Holzer, *supra* note 105, at 3.

denial of L.G.R. is cause for attacks on non-binary's (and trans* persons in general) dignity and safety. There are also aggravating factors. Namely, non-binary individuals belonging to other socially vulnerable groups are exposed to a higher level of violence. For instance, non-binary persons of colour, sex workers, homeless persons, as well as persons of (or perceived of) certain religious groups.[108] This is especially because they are more likely to be subjected to identity checks. In this context, the COVID-19 pandemic has further aggravated the vulnerability of those groups by enabling the creation of more security and control checks.[109] Finally, These circumstances become even more oppressive and violence-inducing when the number of laws differentiating between (legal) genders is high in the state.[110]

Following this, Article 3 and the prohibition of inhuman or degrading treatment could be used as an avenue to push non-binary recognition through to the E.Ct.H.R. As Article 3 constitutes an almost absolute right, a decision of the Court in that sense would have a larger impact on the High Contracting Parties to the Convention and hence in creating wider, appropriate and effective recognition and protection for non-binary persons in the Council of Europe territories.

2.2.2. GENDER EXPRESSION AND THE RIGHT TO FREEDOM OF EXPRESSION

Including the right to legal gender recognition under the right to freedom of expression has yet to be achieved in the E.Ct.H.R. case law. However, it has increasingly been considered under other systems and human rights documents. Most relevantly, the Yogyakarta Principles, cited before, which establish international standards regarding the rights and freedoms of L.G.B.T.Q.I.+ persons, define a right to freedom of opinion and expression in Principle 19: "Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means".[111]

Pursuing this Principle, states are called to take "all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood".[112] This Principle interprets the right to freedom of expression as including the right for all persons, and in our case study of non-binary persons, not

[108] *See I Just Try to Make It Home Safe*, HUMAN RIGHTS WATCH (Nov. 18, 2021), https://www.hrw.org/report/2021/11/18/i-just-try-make-it-home-safe/violence-and-human-rights-transgender-people-united.
[109] Holzer, *supra* note 105, at 5.
[110] *Id.* at 3.
[111] Yogyakarta Principles, *supra* note 9, at Principle 19 (emphasis added).
[112] *Id.* at Principle 19-C.

only to express their identity but to see it recognised by the state through adequate procedures. By analogy, we can interpret the open character of the list in the words of "any other means", as well as the mention of the "choice of name", to include L.G.R. and choice of legal gender marker. Thus, Principle 19 of the Yogyakarta Principles can serve as a legal basis for a form of state responsibility in providing effective and adequate legal gender recognition and registration procedures for all genders, including those outside of the binary.

The Inter-American Court of Human Rights takes a similar approach in its 2017 Advisory Opinion.[113] In this non-binding document, the Court states that it "considers that the right to identity and, in particular, the manifestation of identity, is also protected by Article 13, which recognises the right to freedom of expression".[114] It goes on by including gender expression within the scope of this Article:

> [A] lack of recognition of gender or sexual identity could result in indirect censure of gender expressions that diverge from cisnormative or heteronormative standards, which would send a general message that those persons who diverge from these "traditional" standards would not have the legal protection and recognition of their rights in equal conditions to persons who do not diverge from such standards.[115]

Even more specifically than the Yogyakarta Principles, the Inter-American Court points directly at L.G.R. as a right under the right to freedom of expression in conjunction with the right to be free from discrimination on grounds of gender identity. In doing so, the Court emphasizes that gender identity is not merely a private matter but the right to see it respected and recognised extends into the public space.[116] This view is equally supported by the U.N. Committee on the Rights of the Child[117] and the U.N. High Commissioner for Human Rights.[118]

The Indian Supreme Court rendered a judgment in the *National Legal Services Authority (NALSA) v. Union of India* case based on the same legal basis.[119] It defined the

[113] Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (Nov. 24, 2017).
[114] *Id.* ¶ 96.
[115] *Id.* ¶ 97; *see also* Inter-Am. Comm'n H.R., Observation presented by the Commission on February 14, 2007, ¶ 49.
[116] *See* Eduardo J. Arrubia, *The Human Right to Gender Identity: From the International Human Rights Scenario to Latin American Domestic Legislation*, 33 Int'l J. L. Pol'y & Fam. 360 (2019).
[117] U.N. Commitee on the Rights of the child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, ¶ 34 (Dec. 6, 2016).
[118] U.N. Office of the United Nations High Commissioner for Human Rights (O.H.C.H.R.), Living Free & Equal: What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, ¶¶ 86-87, HR/PUB/16/3 (2016).
[119] National Legal Services Authority (NALSA) v. Union of India & Ors., 2014 INSC 275 (SC) (Ind.).

right to "expression of [one's] self-identified gender"[120] for a non-binary person as a fundamental aspects of the right to freedom of expression. Following this, it instructed the Government to organize the legal recognition of a third gender for non-binary persons.[121]

Put together, those legal approaches and case law point to a viable avenue in bringing about L.G.R. procedures for non-binary persons under the right to freedom of expression. As of today, the E.Ct.H.R. has yet to hear a case on this matter under Article 10 of the Convention, but would it be faced with it, the existing international jurisprudence quoted could facilitate the development of an obligation to recognise and protect non-binary identities in High Contracting Parties. More specifically, the Court could be expected to expand on its stance on the right to not have to conceal a fundamental part of one's identity.

The current case law of the E.Ct.H.R. under Article 10 concerning the principle of freedom of expression is extensive but does not mention gender expression as a protected principle under this article – yet. In light of the developments in other jurisdictions exposed priorly, it is interesting to look at the current case law and position of the Court in defining violations of freedom of expression to show in which ways gender expression could see itself integrated under the principle. For a violation of freedom of expression to be justified in the eyes of the Court, it must be proven lawful under national law, to have a legitimate aim and to be necessary in a democratic society.[122]

For the first criterion, one can assess that the refusal to recognise one's gender expression as equally valid to socially accepted gender identities – taking the form of traditional masculinity and femininity – amounts to discrimination based on gender which is considered unlawful in most states. Thus, in a state where gender-based discrimination is unlawful, the justification under Article 10 that the refusal to recognise diverse gender expressions could be deemed not receivable. It is harder to argue that there would be an obligation for states to recognise diverse gender expression through that avenue. But it may be sufficient to prove the negative.

For the second criterion, the difficulty lies in establishing that the arguments that states could, and most likely would raise, are not sufficient or receivable in dismissing the right of gender-diverse persons to see their gender expression respected and thus officially recognised by the state. In this sense, states would probably use arguments along

[120] *Id.* § 62.
[121] *Id.* § 74.
[122] *See* Eu. Ct. H.R., Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression 10.

the lines of the necessity to protect traditional values and establish the gender binary as a legitimate aim. The case law of the Court on this criteria shows that it tends to overlook it to the benefit of a strict evaluation of the third criterion. For the purpose of this analysis, we will then discuss the potential blockages under the third criterion, assuming that the Court would find them non-receivable, it would likely use the same language in rejecting the legitimate aim argument.

The last criterion is the need to prove that the restriction is "necessary in a democratic society". To do so, the state must show that there is a "pressing social need" justifying the restriction. In this sense, the Court evaluates the weight of the interests of the individual against those of the states. Assuming that the Court would see the harm caused by the absence of legal gender recognition, it would thus recognise the extent of the restriction this refusal or absence of recognition represents on non-binary persons' right to freedom of (gender) expression. It is particularly in defining this overriding interest that the Court may find useful references in the case law of other jurisdictions which have paved the way. Thus stating that the interest of the state in preserving a status quo in the gender binary is not significant enough to justify the violation of non-binary persons' fundamental right to see their freedom of (gender) expression protected and respected.

However, it is necessary to come back to the recent decision of the Court in the case of *Y v. France* in which it decided that the similar balancing act of interests under Article 8 did not play to the advantage of the individual as there was no "European consensus" concerning the question of non-binary legal gender recognition. In this sense, the Court decided that the margin of appreciation of the states under Article 9 was broad and allowed for their refusal to create a third gender marker regardless of the harm suffered by the individual. In light of this judgement, the Court would likely have a similar stance if asked to assess this question under Article 10. However, this does not take from the importance of defending gender expression as part of freedom of expression as the Court's position on the matter is nowadays clearly obstructed by the absence of state support for gender non-conforming persons which says nothing of their true existence and suffering. There is a long way to pave the way for appropriate and effective human rights protection for all persons.

2.2.3. CURRENT STANCE OF THE COURT: THE RETURN OF THE "EUROPEAN CONSENSUS" ARGUMENT AND THE MOVE AWAY FROM EFFECTIVE PROTECTION OF L.G.B.T.Q.I.A.+ RIGHTS

In the current state of the Court's case law, it appears that the Court is not ready to take a step forward in establishing protection for non-binary and gender-diverse persons. Particularly, the Court is stepping back on defining protective measures by using the "European consensus" argument, as was reiterated in the case of *Y v. France* concerning the recognition of a third gender marker for a French inter* person, but also in the case of *A.H. and others v. Germany* in refusing the recognition of a trans* mother as the 'mother' of her child regardless of her gender marker officially being female.[123] This does not take away from the importance of reframing the legal discussion around the question of gender identity and expression under the Convention. However, it is unlikely that the Court will make any significant decision in protecting the interests, but also the fundamental human rights, of non-binary, trans* and inter* persons any time soon. While the Court seemed to be making a move from the "European consensus" argument in deciding matters of L.G.B.T.Q.I.A.+ rights in its Grand Chamber decision in the case of *Fedotova and others v. the Russian Federation* (2023) in redefining the threshold from a "consensus" to a simple "ongoing trend".[124] Using this new broader approach, the Court narrowed drastically the margin of appreciation of states. It recognised the data brought by the Russian Federation regarding the lack of social support for same-sex partnerships on its territory, however, it pointed out that the refusal to recognise same-sex relationships would constitute a violation of the "underlying values of the Convention".[125] In doing so, the Court recognised that even in the absence of a clear consensus among European states regarding the legal recognition of same-sex relationships, the rights of the minority could not be a "condition on its being accepted by the majority".[126] In doing so, it underlined that this approach had the aim of ensuring that the rights of minorities under the Convention, in this case, same-sex couples, could not be limited by states even when negative public opinion still existed. This decision signals a potential change in the approach of the Court to L.G.B.T.Q.I.A.+ questions. However, it appears clear from the decision in the case of *A.H. and others v. Germany* and *Y. v.* France that, if the Court has reached enough confidence to support the rights of

[123] Tissandier-Nasom, E., *The refusal of recognition of transgender legal motherhood in the ECtHR's case of A.H. and others v. Germany* GHRD (2023), https://ghrd.org/uploads/reports/pdf/49705f0add4c5a9e8759ec5bc3f183f3.pdf.
[124] Tissandier-Nasom, E., *Fedotova and others v. the Russian Federation: an Overdue Decision on Same-Sex Relationship Recognition*, GHRD, https://ghrd.org/uploads/reports/pdf/f08d59e3121e09a8a6ca3d8fb384f1e0.pdf.
[125] Fedotova and Others v. Russia, Apps. Nos. 40792/10, 30538/14, 43439/14, ¶ 52 (Jan. 17, 2023), https://hudoc.echr.coe.int/fre?i=002-13971.
[126] *Id.*

same-sex couples,[127] it still has a long way to go in being a real support and effective remedy to the harm and violations suffered by transgender persons in the Council of Europe.[128]

Those recent developments show a lack of commitment from the European Court of Human Rights in standing for the protection of gender-diverse individuals which echoes a strong anti-trans* movement worldwide. As we see the rights, and lives, of trans* and non-binary individuals threatened in every corner of the map, it is deplorable that the E.Ct.H.R., a human rights body, fails to deliver judgment that upholds the very principles of its Convention to the benefit of a political agenda of states. Even looking at the established positive obligations to respect one's gender identity under Article 8, the Court is showing a lack of commitment in refusing to extend that obligation, and the protection attached to it, to parenthood in the case of *A.H. and others v. Germany* and the recognition of non-binary gender identity in *Y v. France*.

3. ORGANISING RECOGNITION: THE "X" GENDER MARKER AS A MISSED OPPORTUNITY

As exposed priorly, the need for legal recognition is primordial to the development of a complete and effective framework of protection for non-binary individuals. In this sense, national systems have been faced with a challenge: how to recognise non-binary individuals' gender identity within their administrative registries and official documents? Most Council of Europe Member States do not offer any option of the sort. However, interesting developments have taken place in select countries taking the form of the addition of a third gender marker titled "X" - namely Austria, Belgium, Denmark, Germany, Iceland, Malta, and the Netherlands. This Chapter will present an exposé of the different systems those States have opted for in recognizing gender outside of the binary before reflecting on the real impact of such systems in practice on non-binary individuals.

[127] Which is even debatable as there has yet been no application of the *Fedotova* jurisprudence. It is possible that the Court took such a progressive decision in this specific case which concerned the Russian Federation after its exit from the Council of Europe, thus making it a symbolic decision.

[128] *See* Fedotova and others v. the Russian Federation, ¶ 52.

3.1. PRACTICALITIES OF NATIONAL FRAMEWORKS: EXPOSÉ OF LEGISLATION AND CASE-LAW IN FORCE IN COUNCIL OF EUROPE MEMBER STATES

During the last decade, a clear trend has been developing in European States adopting the "third" or "X" gender marker option as a step in creating a framework of recognition and later on protection for individuals who do not fall within the gender binary. This development was first rendered possible by a switch in the approach to legal gender that was brought about by the Council of Europe Resolution 2048 (2015) which notably seeks to abolish medical requirements such as sterilization, medical treatment or mental health diagnosis from the process of legal gender recognition.[129] While not directly linked to non-binary gender recognition, this has for effect of making states get rid of the congruence between sex characteristics and gender identity in their legal conceptions. In doing so, it creates a space for non-binary identities to even exist within legal systems that were long centred around the binarity of sex and gender – hence excluding inter* persons as much as non-binary persons. Moreover, in the case of *Van Kück v. Germany*[130] in 2003, the E.Ct.H.R. recognised the freedom to determine one's gender identity as an essential part of the principle of self-determination under Article 8 of the E.C.H.R. However, we are far from a binding piece of law from the Council of Europe which would oblige states to organize non-binary gender registration. Thus, the states that did create a framework have done so in slightly different ways, influencing and inspiring each other over time. While all creating a similar outcome, an "X" on identification documents (and/or birth registration), we can separate the different systems into three sub-categories depending on how the State understands the dichotomy of bodily sex characteristic (or "biologically assigned sex") and legal gender.

3.1.1. WEAK LINK BETWEEN BODILY SEX CHARACTERISTICS AND LEGAL GENDER: THE NETHERLANDS, ICELAND, AND BELGIUM

The first group of countries, constituted of the Netherlands, Belgium, and Iceland have enacted gender registration systems which rely on the separation of sex and gender understood respectively as biological and social. In this sense, the Netherlands and Iceland have opened the possibility to register gender under "X" – as a third category separate from the previously recognised binary categories of "male" and "female" – to

[129] Eur. Parl. Ass., Res. 2048, ¶ 6.2 (Apr. 22, 2015).
[130] Van Kück v. Germany, 2003-VII Eur. Ct. H.R., ¶ 73.

all individuals without a requirement of physical medical certification.[131] The State recognises that there is no need for sex to be in congruence with the individual's gender identity and, that gender identity should be given priority in the definition of the individual's legal personality in all aspects of their social life. Thus, both non-binary persons and inter* persons can access non-binary gender registration equally.

Nevertheless, it is fundamental to note that the Netherlands still does require a certificate from a designated expert confirming the person's conviction of their gender identity. In practice, this does create a serious blockage to access to administrative transition for trans* and non-binary persons in the Netherlands. Already in 2013 when the new law was being approved by the Dutch Senate, Human Rights Watch warned that such a requirement, coupled with the very limited number of persons designated as experts under this law, may create a considerable strain on the system and produce very long waiting list for persons requesting this certificate to be able to then access L.G.R.[132] In 2022, this warning has never rung more true with waiting list to access a first assessment by gender experts in the Netherlands is of minimum two years.[133]

The Netherlands introduced its first "X" gender marker in a decision of the *Rechtbank Limburg* [Limburg District Court] in May 2018[134] which was then confirmed by the *Rechtbank Amsterdam* [Amsterdam District Court] in July 2021. The case concerned a non-binary applicant who applied for a name change as well as a change of their gender marker to an "X" or other neutral denomination. The public prosecutor in the case thought that, since an "X" gender marker option had never been granted before, it was the initiative of the legislative to decide on such a policy change.[135] Ultimately, the Court decided that the request was in essence analogous to one of a trans* binary person requesting a change of their gender marker to the "opposite sex" in order to see their gender identity represented on their legal documents.[136]

The interesting point about the Dutch case is the way in which the approach to gender neutrality evolved through the examination of the case which concerned an

[131] *See The Netherlands: Victory for Transgender rights,* Human Rights Watch (Dec. 19, 2013, 11:00 PM), https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights#: :text=The%20new%20law%20will%20allow,personal%20autonomy%20for%20the%20decision. This new law got rid of the requirement for hormone and surgery documentation to access legal gender recognition. It does still require a certificate by an expert regarding the mental state of the person.

[132] *Id.*

[133] *See Radboud University and Radboud university medical center research team issues recommendations for better transgender care in the Netherlands*, RADBOUDUMC (May 9, 2023), https://www.radboudumc.nl/en/news-items/2023/radboud-university-medical-center-research-team-issues-recommendations-for-better-care#: :text=In%202022%2C%20people%20with%20a,could%20be%20explained%20and%20solved.

[134] Rechtbank Limburg [Rb] [Limburg District Court], 28 mei 2018, Case C/03/232248 / FA RK 17-687, ECLI:NL:RBLIM:2018:4931 (Neth.).

[135] *See* Rechtbank Amsterdam [Rb] [Amsterdam District Court], 21 juli 2021, Case C/13/669890 / FA RK 19-4520, ECLI:NL:RBAMS:2021:3732 (Neth.).

[136] *Id.* § 4.3; see *infra* Annex 2 for text in Dutch.

inter* person having undergone multiple feminizing surgeries that left them unable to prove their inter* status. While the Court first ordered chromosome tests in order to recognise their non-binary identity, it then shifted its approach to defining gender identity as a separate concept. Moreover, the doctor in charge of the medical assessment of the Applicant's status declared that the chromosome test could not be carried out as it could not be considered helpful in defining gender identity which the Court was trying to establish.[137] In this sense, the Court shifted from an approach that was based largely on sex characteristics and would have closed off neutral gender registration to non-binary individuals and opted for an inclusive and open-to-all system based on self-determination.

Iceland has followed a similar path in allowing non-binary persons access to gender-neutral registration without conditions through the Gender Autonomy Act.[138] There are specific elements of the Icelandic system which need to be mentioned. Specifically, the Act goes further in adapting national law as it also creates the possibility for individuals registered as "X" to take a gender-neutral family name which translates to "the child of" instead of the previously binary "daughter of" or "son of". While the gender-neutral registration part of the provisions points to an open system, it is interesting to note that this option is only open to individuals registered as "X", hence excluding individuals registered as either male or female.[139] Moreover, Icelanders will only be allowed to change their gender marker once. This raises the question of inclusivity in practice, especially regarding individuals who may have changed their gender marker prior to the creation of the gender-neutral option but who may wish to see themselves referred to as such.

It is to be noted that the Gender Autonomy Act, which creates this opportunity as well as additional recognition and protection for trans* and inter* persons, was passed with an eighteen-month delay to adapt the national registration system. Hence, the "X" gender marker was open only in January 2021, leaving a very short time to evaluate the practical application of the right.

[137] *See* Pieter Cannoot, *De Knuppel in Het Genderhok: Op Weg Naar M/V/X in de Nederlandse Geslachtsregistratie?* [The Bat in the Gender Loft: on the way to M / V / X in the Dutch Gender Registration?], Tijdschrift Voor Familierecht [Journal of Family Law] 49 (2019) (Belg.).

[138] Act on Gender Autonomy 2020, Act No. 80/2019 as amended by Act No. 159/2019, No. 152/2020 and No. 154/2020, https://www.government.is/publications/legislation/lex/2020/05/08/Act-on-Gender-Autonomy/ (Iceland).

[139] *See* Gender and name registration, Þjóðskrá [Registers], https://www.skra.is/english/e-delivery/gender-and-name-registration/ (Iceland) (last visited May 26, 2022).

This comes after the 2017 new "Legal Gender Recognition Law"[140] which introduced a conceptual recognition of the separation of sex and gender by suppressing medical requirements such as sterilization in legal gender recognition procedures. It equally puts self-determination as the central concern in all procedures regarding trans* individuals. However, it strangely upheld the male/female gender binary by not engaging with non-binary issues or organizing any gender-neutral legal recognition. However, in 2019, the Belgian Constitutional Court rendered a judgment declaring the 2017 "Legal Gender Recognition Law" unconstitutional as the lack of a third gender option discriminated against non-binary persons.[141] Additionally, the law only allowed for individuals to change their gender marker once which the Court also declared discriminatory towards gender-fluid individuals. As a concluding point, the Court urged the Government to legislate on the matter through one of the two following options: the recognition of a third gender marker or the abolishment of gender markers as an element of legal identity and civil status. The Court has left the implementation of this judgment to the will of the Government. In the most recent development, the Belgian Federal Government has announced that gender markers will be taken off of identity cards in the near future.[142] Belgium wrestled with the idea of establishing an "X" gender marker in developing its new law on gender. However, the Government leaned towards the suppression of gender markers from identification documents, while still maintaining gender registration in the civil registries which cannot be accessed by the public directly. This echoes the constant attachment to the gender binary in administrative services but does recognise the need to create space for individuals who do not fit said binary in the social realm by getting rid of public displays of gender registration status. In 2021, it was made public that a group of Ministers within the Government had started work on a law proposal to enact such a change in the 2022 agenda.[143] In March 2023, the Belgian Committee of Ministers approved a law proposal getting rid of the irreversible character of the legal gender change procedure allowing individuals to change their

[140] Wet van 25 juni 2017.tot hervorming van regelingen inzake transgenders wat de vermelding van een aanpassing van de registratie van het geslacht in de akten van de burgerlijke stand en de gevolgen hiervan betreft [Law on the Reform of Regulations on Transgender People as Regards the Indication of an Adjustment of the Registration of Sex in the Civil Status Records and Its Consequences] (Belg.), B.S., July 10, 2017, https://www.ejustice.just.fgov.be/eli/wet/2017/06/25/2017012964/staatsblad.

[141] CC [Constitutional Court], June 19, 2019, n° 99/2019, https://www.const-court.be/public/f/2019/2019-099f.pdf (Belg.).

[142] *See La Belgique étudie la suppression de la mention de genre sur la carte d'identité* [Belgium Studies the Deletion of the Mention of Gender on the Identity Card], Têtu (Nov. 30, 2021), https://tetu.com/2021/11/30/europe-genre-non-binaire-belgique-etudie-suppression-mention-sexe-carte-identite/ (Belg.).

[143] *See* Par Belga, *Le gouvernement fédéral supprime le genre de la carte d'identité* [The Federal Government Deletes Gender From the Identity Card], Le Soir (Nov. 30, 2021, 6:40 AM), https://www.lesoir.be/409408/article/2021-11-30/le-gouvernement-federal-supprime-le-genre-de-la-carte-didentite.

name and legal gender multiple times during their life. This is an important step in recognizing the rights of non-binary persons in showing an understanding and inclusivity of the fluidity of gender, slowly shifting away from binary views.

A relevant development regarding those countries stems from the propositions of the Belgian Constitutional Court. Indeed, news reports point to the idea that the Dutch Government is currently entertaining the idea of getting rid of gender markers on identification documents as well.[144] This marks a logical follow-up to the effective distinction between bodily sex characteristics and legal gender and the consecration of self-determination and respect for all gender identities. However, it does not constitute a complete suppression of gender as a form of legal registration as it would remain, with three options (M/F/X), in the administrative registries and, presumably, on the individual's birth certificate and other official documents such as passports.

3.1.2. WEAK LINK BETWEEN BODILY SEX CHARACTERISTICS AND LEGAL GENDER BUT INCOMPLETE IMPLEMENTATION: MALTA AND DENMARK

Following the same reasoning as the first group of States, Malta and Denmark have recognised the possibility for all persons to access a non-binary gender registration without requiring any medical certification or any congruence between gender and the "sex" of the applicant. In this sense, it can be argued that those States are following in the footsteps of the first group and will soon better their system of gender registration to be as inclusive as possible. Indeed, the current frameworks leave details untouched which can have a serious impact on the effective recognition, and later on protection, of non-binary persons wishing to change their gender marker.

In this sense, under the Government's "L.G.B.T.Q.I. Plan of Action" (2015-2017),[145] the Maltese Government introduced the possibility of registering one's gender with an "X" in November 2017. In order to obtain the change, individuals must take an oath in the presence of a notary and fill in the required form. The change only concerns identification documents such as I.D. cards and passports[146] – meaning that it is

[144] Ingrid van Engelshoven, Ministerie van Onderwijs, Cultuur en Wetenschap [Ministry of Education, Culture and Science], *Tweede Kamer Voortgangsbrief aanpak onnodige sekseregistratie* [House of Representatives Progress Letter approach unnecessary sex registration], Rijksoverheid (2020), https://www.rijksoverheid.nl/documenten/kamerstukken/2020/07/03/tweede-kamer-voortgangsbrief-aanpak-onnodige-sekseregistratie (Neth.).

[145] *LGBTQI Plan of Action (2015–2017),* Minister for Social Dialogue, Consumer Affairs and Civil Liberties (2015), https://meae.gov.mt/en/documents/lgbtiq%20action%20plan/lgbti%20action%20plan%20lo%20res.pdf (Malta).

[146] *See Legal Gender Recognition and Bodily Integrity*, Human Rights Directorate (last updated Dec. 12, 2020), https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-

not mentioned in any form on the birth certificate of the applicant which will continue to disclose the binary gender the person was assigned as birth. Moreover, the "X" was chosen to stand for "undeclared". Thus, it does not so much constitute the recognition of a third gender category but rather codifies the non-registration of gender. In this sense, the mention of a binary gender/sex on the birth certificate of the individual will be referred to when coming across gender-differentiating laws.[147]

The Danish system works in a similar manner. On November 28th, 2014, Denmark passed an executive order aimed at simplifying the legal gender change rules which included the possibility to register one's gender under "X".[148] The impact on individuals is comparable to Malta's framework but is limited in practice as the binary gender assigned to the individual prior to the change remains reflected on their social security number[149]. Indeed, within the Danish social security system, "male" is assigned a number ending with an odd digit and "female" with an even one. Individuals have recognised the right to have their social security number changed to reflect their gender identity but only within the limits of the binary. This means someone could have their social security number changed from M to F or F to M but someone whose gender is registered as "X" would still have to carry a binary social security number.[150]

3.1.3. CLOSE LINK BETWEEN BODILY SEX CHARACTERISTICS AND LEGAL GENDER: GERMANY (UNTIL 2022) AND AUSTRIA

Finally, Germany (until 2022 bill[151]) and Austria follow a similar system which can be qualified as closed for non-binary individuals. Indeed, both systems have recognised the possibility to register one's gender as X rather than M or F. However, this opportunity is strictly reserved for inter* persons who can prove, medically, their inter* status.

Recognition-and-Bodily-Integrity.aspx#:%7E:text=The%20'X'%20marker%E2%80%8B%20was,Maltese%20ID%20Card%20or%20Passport.&text=Choosing%20to%20have%20an%20'X,gender%20on%20these%20identity%20documents (Malta).

[147] *See* Lena Holzer, *NON-BINARY GENDER REGISTRATION MODELS IN EUROPE: Report on third gender marker or no gender marker options,* ILGA-Europe 78 (2018), https://ilga-europe.org/files/uploads/2022/04/non-binary-gender-registration-models-europe.pdf.

[148] Justitsministeriet [Ministry of Justice], Bekendtgørelse om ændring af bekendtgørelse om pas m.v. [Executive Order on Amendment of the Executive Order on Passports etc.], BEK nr 953 af 28/08/2014, https://www.retsinformation.dk/eli/lta/2014/953 (Denmark).

[149] Even if not commonly mentioned on identity documents, the social security number is part of documents the individual will have to disclose on a regular basis.

[150] *See* Holzer, *supra* note 147, at 20.

[151] We note that Germany's position on the matter has been drastically changed by the "Self-Determination Act" first introduced in 2022. However, for the sake of the argument, it is interesting to reflect on its approach prior to the introduction of the Bill. A reflection on the impact of the bill will be developed at the end of this Section.

More specifically, on December 14th 2018, the *Deutscher Bundestag* [German Federal Parliament] and the *Deutscher Bundesrat* [German Federal Council], passed a law which introduced a third gender marker option under the term "diverse" to be added to the pre-existing "male" and "female" categories. This was initially made possible by a decision of the *Bundesverfassungsgericht* [Federal Constitutional Court] on October 10th 2017. The Court held that inter* persons should be allowed to register their gender outside of the existing binary categories. The decision links sex characteristics, and thus the inter* status of the applicant, their gender identity, to their legal gender.[152] More specifically, the Court reads the provision on the prohibition of discrimination based on gender.[153]

This shows with no doubt that the Court, whose opinion is the essence of the parliamentary decision, views gender identity as the direct translation of (biological) sex. The opportunity for "diverse" gender registration is only given to inter* persons because they have been recognised as not fitting into the "male" and "female" sex categories. Following this logic, a medical certificate is required to access the right.

An interesting development in the German case is the addition of a fourth option by a recent Court decision consisting of the optional suppression of the gender marker from the person's identity documents. This means you could either present a document mentioning an "M", "F", "X" or no marker.[154] This points towards a slight departure from the direct connection between (biological) sex and gender as it seems to recognise the possibility of having no gender and hence a dissociation of gender identity with the sex assigned at birth. This approach by the Court could mean the start of Germany's transition from a closed system to a more inclusive one in echo of the Belgian Constitutional Court's developments. Furthermore, Germany already does not display gender on identity cards. In this sense, the upholding of the medical requirements seems backwards and inconsistent which points to its potential suppression shortly.

Similarly, the *Verfassungsgerichtshof Österreich* [Austrian Constitutional Court] held that inter* persons should be granted the possibility to register their gender as other than "male" and "female" in a way that conforms with their gender identity.[155] Consequently, inter* persons are now allowed to register as either "inter", "other" or "X". In doing so, it

[152] Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], Oct. 10, 2017, 1 BvR 2019/16, §§ 1, 35 (Ger.).

[153] *Id.* § 36.; *see infra* Annex 2 for original text in German.

[154] Since 2013, Germany has created a "blank" option for gender registration, nevertheless this option was not open to non-binary persons but rather reserved for inter* infants whose gender identity could not be determined at birth in order to let the parents/doctors come to a conclusion in the months following the birth. Bundergerichtshof [BGH] [Federal Court of Justice] Apr. 22, 2020, XII ZB 383/19, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=106062 (Ger.).

[155] Verfassungsgerichtshof [VfGH] [Constitutional Court], June 15, 2018. Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 77/2018-9 (Austria).

recognised that limiting the term "gender" in the Austrian Constitution to binary genders would amount to a violation of Article 8 of the European Convention on Human Rights which has constitutional status in Austria.[156] The Austrian decision referred directly to the decision of the German Constitutional Court, particularly putting forward the idea that "gender assignment. . .typically plays a key role both in a person's self-perception and in the way this person is perceived by others".[157] This sentence in itself seems to point at the possibility of opening gender categories to non-binary persons. However, Austria stays in line with the German approach by connecting directly gender to sex. In this sense, the use of the word "gender" by the Court is to be understood as referring to biological sex as it is only understood when the biologically defined sex and gender categories are in congruence – hence an inter* person identifying outside of the binary.

In June 2022, the German Government first introduced a "Self-Determination Act" which enacts a move towards self-identification for all without medical gatekeeping of any sort and includes access to the diverse category and "X" marker.[158] The Bill opens the possibility for adults and minors over fourteen years of age to change their registered gender and/or name freely once a year, every year. The Government introduced the Bill to highlight that "in many areas, society is further ahead of legislation. As a [Government], we have decided to create a legal framework for an open, diverse and modern society".[159] This is an interesting take as it echoes directly the basis of this research in arguing that gender is a largely fluid social construct that belongs in the social sphere and is not intelligible efficiently by the legal system. In allowing for this change, Germany pulls itself above other systems and recognises fully the rights of all to see their gender identity recognised by the State, including when it may vary over time with the possibility to change one's registered gender once a year. Nevertheless, a discussion on the appropriateness of the practice of registering gender is necessary and will be carried out later on in this paper. Indeed, while such a system of self-identification is what is hoped for in light of the current route taken by European states in creating third-gender categories, it may not be the adequate answer to the infinite variability of human experiences of gender.

[156] *See Austria: Court Allows Intersex Individuals to Register Third Gender Other Than Male or Female*, Library of Congress (July 6, 2018), https://www.loc.gov/item/global-legal-monitor/2018-07-06/austria-court-allows-intersex-individuals-to-register-third-gender-other-than-male-or-female/ (Austria).

[157] Verfassungsgerichtshof [VfGH] [Constitutional Court] June 15, 2018. Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 77/2018-9 (Austria), § 31.

[158] *See* Kirsten Sibbald, *Germany Introduces New Gender Recognition Procedure : Proposal would replace antiquated system*, Human Rights Watch (Oct. 21, 2022, 1:22 PM), https://www.hrw.org/news/2022/10/21/germany-introduces-new-gender-recognition-procedure.

[159] *See* Emily Chudy, *Germany to introduce landmark self-ID law as part of sweeping reform of LGBTQ+ rights*, PinkNews (Aug. 09, 2022), https://www.thepinknews.com/2022/08/09/germany-trans-rights-self-id/.

3.1.4. COMPARATIVE TABLE: RECOGNITION OF A "THIRD" GENDER CATEGORY IN STUDY COUNTRIES

	"X" gender marker available		De-pathologisation of L.G.R.		Avenues through which "X" option was created	Documents on which the "X" or neutral gender appears
	For inter* persons	For all incl. non-binary persons	Diagnosis	Medical transition*		
Austria	June 2018	×	Required	Required	Judicial	Identity documents, administrative registries and birth certificate
Belgium**	June 2019 (Judgment not yet implemented)		Not required January 2018		Judicial	Identity documents, administrative registries and birth certificate
Denmark	November 2014		Not required September 2014		Legislative	Identity documents *(except social security number)*
Germany	December 2018	×	Required	Required	Judicial	Identity documents, administrative registries and birth certificate
Iceland	May 2020		Not required June 2019		Legislative	Identity documents, administrative registries and birth certificate
Malta	September 2017		Not required December 2016		Legislative	Identity documents
The Netherlands**	May 2018		Required***	Not required December 2013	Judicial	Identity documents, administrative registries and birth certificate

(*).[160]

(**). Those countries are currently moving towards the suppression of gender markers on identity documents (excl. passports).

(***).[161]

[160] Hormone therapy, surgery, sterilisation.

[161] A bill was presented to the Dutch Parliament to abolish the diagnosis requirement for L.G.R. procedure on the 3rd of May 2021 but has yet to be discussed. *See* "Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het veranderen van de voorwaarden voor wijziging van de vermelding van het geslacht in de akte van geboorte" [Amendments to Book 1 of the Civil Code in Connection with Changing the Conditions for Changing the Indication of the Sex in the Deed of Birth], Tweede Kamer der Staten-Generaal [Second Chamber of the Parliament] (2021), https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2021Z07392dossier=35825 (Neth.).

3.2. THE "X" GENDER MARKER AS A MISSED OPPORTUNITY IN CONSECRATING RECOGNITION AND PROTECTION FOR NON-BINARY INDIVIDUALS

Recognising a "third gender" option in legal gender registration may directly increase the social visibility of non-binary persons. Additionally, the introduction of the "X" gender marker by Denmark and others has allowed for the initiation of a European discussion on the inadequacy and unnecessariness of the gender binary.[162] This corroborates the observation made in Chapter 1 that legal recognition of gender identity is fundamental in protecting non-binary persons – see for instance the United Kingdom survey showing that non-binary persons' mental health and self-esteem is directly affected by the absence of legal recognition and social visibility.[163] In this sense, the establishment of an "X" marker creates a space for non-binary persons to exist in the legal sphere by officially recognising their "position [as a] person within the legal system".[164] Moreover, it may facilitate data collection regarding non-binary persons to build affirmative action to respond to specific issues the community faces.[165]

However, several drawbacks may be associated with the creation of an "X" legal gender category. Therefore, we will first look at the overall inappropriateness of third-gender markers as a response to the need for non-binary inclusion in law and society, before going more in-depth into the risks and dangers such an approach may entail for the concerned individuals.

3.2.1. OVERALL INAPPROPRIATENESS

An interesting illustration to introduce the inappropriateness of "X" gender markers is the case of Pakistani *Khawaja Sira*, a non-binary identifying community which, despite having the possibility since 2018 to register their gender as "X" has, in the majority, chosen to keep their "M" gender marker.[166] Following this, it can be argued that the benefits of opening up legal recognition outside of the binary may be purely symbolic if

[162] *See* Holzer, *supra* note 147, at 39.

[163] *See* Vic Valentine, Non-binary People's Experiences in the UK (2016); Greta R. Bauer et al., *Intervenable Factors Associated with Suicide Risk in Transgender Persons: A Respondent Driven Sampling Study in Ontario, Canada*, BMC Pub. Health (2015).

[164] Press Release No. 95/2017, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Civil Status Law Must Allow a Third Gender Option (Nov. 8, 2017), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html (Ger.); *see also* Clarke, *supra* note 16, at 937.

[165] *See* Clarke, *supra* note 16, at 937.

[166] *See* Holzer, *supra* note 147, at 39.

it entails further precarity and even loss of rights.[167] In other words, recognition through an "X" marker may be "purely expressive" in that it only aims to accommodate non-binary identities so far as it does not disrupt the binary in other institutional settings.[168] This is perfectly illustrated by the case of Denmark. In creating an "X" gender marker, the state opens a form of legal recognition for non-binary persons which appears beneficial on the surface, but in reality does not extend to respect in all aspects as, for example, a binary gender remains mentioned and accessible to all on the individual's social security number. Thus, in such cases, the creation of a "third gender" category can be seen as a small concession of the majority to integrate non-binary individuals while preserving the binary where it serves its interests. More specifically, it might also be linked to the perceived costs of accommodating the system for non-binary persons which can act as a political deterrent to creating full effective recognition and protection outside of the binary.[169] Additionally, it is necessary to consider that the choice of the "X" gender marker might be one of convenience as well as it was pre-existent in most countries in different contexts.[170] For instance, it is a routinely established procedure in the Netherlands to register children under "X" when the sex/gender cannot be defined directly at birth.[171]

Furthermore, the "X" gender marker does not create effective recognition for all non-binary persons. By adding an "X" category to the previously recognised "M" and "F", the states only expand the list of legally accepted gender classifications from two options to three. As established priorly, "non-binary" needs to be understood as an umbrella term which covers a multitude of specific gender identities. In this sense, a single "X" option may not encompass all non-binary identities.[172] While it may satisfy some non-binary individuals, it appears clear that it does not adequately represent persons who do not identify with one fixed gender (gender-fluid), no gender at all (agender) or even persons who define their gender identity as a mix of male and female. While one could argue that the "X" is a starting point for opening up more alternative gender categories in the future, it needs to be noted that the law is not an instrument made to deal with infinite variations.[173] For instance, a system like the one adopted by

[167] *Id.*
[168] *See* Clarke, *supra* note 16, at 939.
[169] *See id.*
[170] *See*, *e.g.*, Holzer, *supra* note 147, at 19 (reference to Malta).
[171] *See* Marjolein van den Brink & Jet Tigchelaar, *M/F and beyond Gender Registration by the State and the Legal Position of Transgender Persons (English Summary)*, Ministerie van Veiligheid & Justitie [Ministry of Security & Justice] (2014), https://repository.wodc.nl/bitstream/handle/20.500.12832/2087/2393-summary_tcm28-73314.pdf?sequence=4&isAllowed=y (Neth.).
[172] *See* Holzer, *supra* note 147, at 40.
[173] *See* Clarke, *supra* note 16, at 939.

social media platforms such as Facebook/META[174] where one can fill in freely a blank space defining their gender identity, is hardly viable for the legal sphere. Indeed, states and legal authorities are usually averse to what Clarke qualifies as "inauthenticity and disuniformity".[175] A counter-example to this may lie in the approach taken by Tasmania which allows individuals to self-determine their gender identity without any medical gate-keeping and without limitation on the category they wish to see reflected on their documents. However, it is fundamental to note that Tasmania remains a small state with a small population which makes the management of such an administrative diversity more plausible. Nevertheless, it remains an approach that may come in handy when arguing for the unnecessary character of gender as a legal category. Indeed, it shows that there is no need for the state to have certainty regarding the possible gender categories in the civil status (since individuals can fill in a blank space as they please) while still having a very developed anti-discrimination system which provides effective protection for trans* including non-binary persons and inter* persons. In a sense, the infinite possibilities of gender categories have a similar effect on the gendered basis of the legal system as the suppression of gender as a legal category.

Inauthenticity refers to the risk of fraud that could arise when individuals are allowed to make claims regarding their identity without a fixed framework controlled by the state. More specifically, when affirmative action, organized to diminish the harm and disadvantages suffered by a specific community, is being combined with a form of self-determination, authorities may have concerns that one might attempt to benefit from such advantages on a fraudulent basis.[176] This argument is omnipresent in the discourse about trans* and non-binary person's existence in society – see for example the often-mentioned argument that men might fraudulently assert themselves as female to enter women's bathrooms or participate in women's sports. To this end, elective systems of self-determination for gender identity registration do not allow the state to ensure that an individual will truthfully "belong" to the category they assert themselves to be and thus ensure that the individuals will take on the burden as much as the advantages that come with being in such a legal category.[177]

The second obstacle is the lack of uniformity that a free-elective system for gender registration would create for the state legal system. Clarke draws the connection

[174] *See* Meta Diversity, Facebook (Feb. 26, 2015), https://www.facebook.com/MetaDiversity/posts/774221582674346.

[175] *See* Jessica A. Clarke, *Identity and Form*, 103 Calif. L. Rev. 747, 767 (2014).

[176] *See*, *e.g.*, Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 Mich. J. Race & L. 367, 369 (2006) (studies made regarding the complicated regulation of Hispanic and Native Americans categories in the United States).

[177] *See* Clarke, *supra* note 175, at 768.

between such an approach and the *numerus clausus* principle in property law.[178] In this sense, the legal system offers a limited number of options when registering the individual's gender identity for similar administrative purposes as there are limited standard forms for property registration. This is not to disregard that individuals may identify in an array of manners but to highlight that this multitude may not always be intelligible legally as it entails a more individualized approach to legal registration which, once again, implies a higher administrative cost both in terms of money and time.[179] Following this, the state's interest in recognizing infinite, or even simply some additional, gender categories is overpowered by the burden it would place on its administrative and legal branches.

The response of states to those obstacles has so far been to limit the recognition of non-binary individuals to "one-third" gender category – thus limiting the cost and maintaining a form of control over the criteria of accession to the category as well as the extension of said recognition.

Finally, it may be added that the choice of the letter "X" or the category of "unspecified" gender is fundamentally disrespectful to non-binary persons regardless of their overall inappropriateness. Florence Ashley states in her article regarding the introduction of the "X" gender marker in Canada that they "would not be satisfied with 'X' as a gender marker".[180] They go on to argue that the "X" marker, when referring to an "unspecified" gender category, is fundamentally not in line with the demands of non-binary individuals in the sense that it does not effectively create a third category but implies that one's gender remains either male or female but simply that the person does not wish to disclose which one of the two. Going back to the discussion on the social visibility of non-binary persons about the established binary of sex and gender (i.e., Chapter 1), the choice of "X" as the mark of a "third gender" reflects directly how non-binary persons are perceived as inferior subjects of law. In grouping all non-binary identities under this concept of "unknown" gender, the law implies that "non-binary" is on the same level of specificity as "male" and "female". However, those are specific gender identities that are comparable to specific non-binary identities such as agender or genderfluid. To this end, the antonym of non-binary is binary and not "male" and "female".[181] Therefore, in limiting legal gender categories to "M", "F" and "X", states subsume all non-binary gender identities within one unspecified category and, more

[178] *Id.* at 769.
[179] *Id.*
[180] *See* Florence Ashley, *'X' Why? Gender Markers and Non-Binary Transgender People, in* Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons 33 (Isabel C. Jaramillo & Laura Carlson eds., 2021) (Switz.).
[181] *Id.* at 38.

specifically, openly classify them as less deserving than binary categories of gender.[182] This echoes directly how non-binary identities are perceived socially in the European States.[183] To this needs to be added the obvious observation that the choice of the letter "X" as the marker for non-binary persons is a further illustration of the approach of states to non-binary identities as it is commonly used in all languages to designate anonymity.

3.2.2. FURTHER RISKS AND COUNTER-PRODUCTIVENESS

More than concerns linked to the inadequacy of the "X" option as a source of recognition for non-binary persons, it may also be counterproductive as it may create new risks for individuals concerned. Thus, while supposedly being the first step towards effective protection, it may in reality bring new challenges to the security and dignity of non-binary persons. Two main areas of concern arise the reinforcement of stereotypes, violence and stigma and the growing power of the state over personal matters of gender identity.

Firstly, the "X" gender marker is likely to create further marginalisation and discrimination, if not direct violence, against non-binary persons. Indeed, it needs to be considered that the mere creation of this third category may reinforce stereotypes by creating exclusionary social categories – even within the non-binary community.[184] In this sense, it creates a new "package" of stereotypes for what is meant to characterize a non-binary person.[185] For instance, there is a risk of seeing the non-binary community itself classifying persons from legitimate to illegitimate as part of the community depending on whether they have changed their gender marker to "X" or not.

Moreover, even when individuals decide freely to change their gender marker to "X", the mere mention of a gender-neutral category on their identification documents will likely bear stigma. Even in societies where non-binary persons were considered holy and divine in tradition, the legal recognition of a third gender has contributed to the subordination of those groups and an increase in discrimination against them.[186] Take for example the *Hijras* community in India.[187] Supporting this, I found, after asking over

[182] *See* Dylan Amy Davis, *The Normativity of Recognition: Non-Binary Gender Markers in Australian Law and Policy*, *in* 24 Gender Panic, Gender Policy 227, 250 (Vasilikie Demos & Marcia Texler Segal eds., 2017).

[183] *See supra* Section 1.1.

[184] *See* Clarke, *supra* note 16, at 939.

[185] *See* Mary A. C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L. J. (1995).

[186] *See* Dipayan Chowdhury & Atmaja Tripathy, *Recognizing the Right of the Third Gender to Marriage and Inheritance Under Hindu Personal Law in India*, BRICS L. J. 43, 48-49 (2016).

[187] *Id.* As a framework of reference, Pakistan created an "X" gender marker in 2018 and India has had a form of three-category gender registration model since 2005 (modified in 2009).

100 individuals who self-identified as non-binary[188], that a strong majority declared that they would not feel *safe* having an "X" mentioned on their identification documents.[189] Responses to the open question in the questionnaire reveal that most non-binary individuals do not believe that their societies are safe for non-binary persons and that the "X" mentioned on their identification document would put them in danger of discrimination and violence if exposed to the wrong persons.[190]

3.3. RESULTS OF THE SURVEY CARRIED ON DURING THIS RESEARCH

	I feel inadequate with the mention of M/F gender markers on my identity documents	I want the mention of an "X" on my identity documents	I want the mention of any gender taken off my identity documents	I would feel safe with the mention of an "X" on my identity documents
Disagree	1% (1)	24% (25)	1% (1)	29,8% (31)
Somewhat disagree	7,8% (8)	15,4% (16)	1% (1)	27,9% (29)
Neutral	2,9% (3)	18,3% (19)	6,8% (7)	16,3% (17)
Somewhat agree	33,3% (34)	22,1% (23)	12,6% (13)	15,4% (16)
Agree	54,9% (56)	20,2% (21)	78,6% (81)	10,6% (11)

This echoes the point made in Chapter 1 regarding the vulnerability of non-binary persons in European societies. Adding to this all daily occurrences when one is required to show an identification document, including when coming in contact with law enforcement, it is clear that having an official mark of their non-binary gender identity could expose individuals to increased risks of discrimination and hate-motivated violence. Moreover, this goes back to the idea of a right to not have to conceal one's gender identity, as it is a fundamental part of one's identity, to ensure one's safety articulated in Chapter 2.

Secondly, by creating a new "gender category", the "X" gender marker laws follow the traditional legal and social constructive norms for gender categories. As exposed before, if men are only men because they are not women and vice-versa, then it is the same for non-binary as a category.[191] To this end, legal categories are created through normative exclusions and thus organise the opposition between what belongs in

[188] Keeping in mind that non-binary is an umbrella term, hence most participants also mentioned the specific gender identity they identify with which impacts the way in which they think of the "X" gender marker as it might be more or less aligned with the way they perceived their non-binary identity.
[189] *See infra* results of my questionnaire in Annex 1.
[190] *See infra* results of my questionnaire in Annex 1.
[191] *See supra* Section 1.1.

a certain category and what does not.[192] In other words, the creation of legal gender categories creates the separation between the "legitimate" and the "illegitimate" gender identities. In doing so, it equally creates a responsibility for authorities in charge of the law to exercise a form of control over who is "truly" non-binary and who is not. By analogy, Clarke refers to the developments of racial categorising which, in practice, did not create more liberation or empowerment for racial minorities but rather was implicitly used as a tool of subordination.[193] Furthermore, as mentioned earlier in this Chapter, the state's willingness to accommodate the law to include new categories, such as non-binary persons when it comes to gender, is largely limited by the cost and effort required to render it effective. In this sense, there is one more consideration to add to the equation when reflecting on the state's interest in creating a third gender category: the "lesser" cost. Indeed, because legal categories need be of a limited amount, the state concedes that one extra category is necessary, regardless of the administrative cost its creation might incur, to avoid the other option which would represent a much larger legal and administrative deconstruction: the suppression of gender from administrative registration or legal documents. The inclusion of non-binary persons in this new "third" category, however inadequate it might be in practice, replies to a social need and demand of a certain part of society and in consequence reduces the pressure on the state to give up its power to control gender identity through law.[194] Thus, in creating a third gender category, the state creates the illusion of inclusion while increasing its power of control over an individual's core identity. It can be argued that, where access to legal gender change is fully organised around individual self-determination, there is no intent of control on behalf of the state. However, such systems, like in Malta, only give the individual freedom within the classifications the state has deemed legitimate. This is further supported by the example of Denmark where the individual is free to self-determine their gender but only to the extent that it does not encroach on other state prerogatives such as the binary gender differentiation for matters of social security. In this sense, it is exaggerated to consider that those systems rely completely on self-determination, also since some still require a diagnosis to even access L.G.R. procedures.[195] In this sense, it may be inaccurate to say that they rely on pure self-determination, however, in practical terms, they offer significantly more accessible and protective L.G.R. procedures while thriving towards full self-determination. In addition, this same reasoning is even more evident in systems that limit access to the "X"

[192] *See* Holzer, *supra* note 147, at 40.
[193] Case, *supra* note 185; Clarke, *supra* note 16, at 940.
[194] *See* Paisley Currah, *Transgender Rights Without a Theory of Gender ?,* 52 Tulsa L. Rev. 441, 445-46 (2017); Clarke, *supra* note 16, at 940.
[195] *See supra* Comparative Table in Section 3.1.4.

gender marker to inter* persons with a medical certificate requirement (Germany, Austria). Indeed, in such systems, the state exercises explicit control over who may receive the third gender marker, creating a clear normative framework regulating non-binary bodies even stricter than it regulates male and female sex classifications. Going back to the argument made in Chapter 1, non-binary persons are once again put outside the norm, only allowed to qualify as legal persons when they fit the framework organised by the state – which is either fairly accessible in self-determination-based systems, or almost impenetrable. In light of this, it can be argued that the "X" gender marker allows the state to somehow "domesticate" non-binary identities.[196] In other words, it includes non-binary in the norm to exercise control over its limits and implications.

Following the observations and conclusions made in this Chapter, it is legitimate to ask: then what is the better option? Indeed, all said above is not to deny the serious claim for legal recognition and protection for non-binary persons, but simply to show that the "X" gender marker, as the option favourited by European states so far, is neither appropriate nor desirable in responding to this claim. Rather, it points toward the other option, as put forward by the Belgian Constitutional Court[197]: the suppression of gender registration or official documents.

4. ENACTING THE END OF GENDER ON IDENTITY DOCUMENTS OR AS A LEGAL CATEGORY

In this last Chapter, I will explore an alternative avenue for the adequate legal recognition of non-binary identities and subsequent effective protection: the suppression of gender markers or gender registration altogether. After looking at the benefits of such an approach and the legal basis pre-existing for it, I will equally expose the risks inherent to such an approach, particularly in the context of gender equality.

[196] *See* Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1399 (2004).

[197] *See* Federale Overdheidsdienst Justitie, *25 juni 2017.- Tot Hervorming van Regelingen Inzake Transgenders wat de Vermelding van een Aanpassing van de Registratie van het Geslacht in de Akten van de Burgerlijke Stand en de Gevolgen Hiervan Betreft,* ejustice.just.fgov.be (Jul. 10, 2017) [Law on the Reform of Regulations on Transgender People as Regards the Indication of an Adjustment of the Registration of Sex in the Civil Status Records and Its Consequences], https://www.ejustice.just.fgov.be/eli/wet/2017/06/25/2017012964/staatsblad.

4.1. REMOVING GENDER FROM IDENTITY DOCUMENTS OR REGISTRIES

As of today, no European states, or any other state, have enacted the total suppression of gender in civil registration.[198] However, Germany does not display an individual's gender on their identity cards (not passports). In this sense, the decision of the German Constitutional Court which empowered the State to create the "X" gender marker is a great starting point.[199] In its decision, the Court pointed out that there were two ways to answer the applicant's request and to ensure the proper legal recognition of non-binary persons: the creation of a third gender category or the suppression of gender registration altogether.[200] To this end, the Court highlights that the system of gender registration is only discriminatory against non-binary persons when it is a mandatory[201] part of the public registration. Therefore, if the State were to get rid of gender as a legal category there would no longer be any issue arising regarding any potential lack of legal recognition for all gender identities. However, the suppression of gender as a legal category is a tricky question. First of all, it can refer to very different applications in practice: the suppression of gender markers from (all or some) identity documents while maintaining gender as an identifier in civil registries and other official documents – which Germany did subsequently –, or the suppression of gender as a legal category altogether meaning the state would give up all access to individual's gender information. While both attain a form of gender neutrality that would protect non-binary individuals in their daily lives from having to conceal or disclose their gender identity, the first option is limited as the state retains power over gender as a legal category, meaning it could be used for various purposes such as affirmative action but also gender differentiating laws. To shed light on the possible vices and virtues of getting rid of gender on identity documents or as a whole, it is necessary to first look at the arguments put forward by states, particularly Germany, in rejecting the option. Then, this Subchapter will expose the absurdity of "gender markers"[202] and present the existing legal basis to support the end of gender as a legal category.

When it was faced with the Constitutional Court judgment, the German Government had to enter a discussion on the necessity of gender markers or even of

[198] *See* Holzer, *supra* note 147, at 44.
[199] *See* BVerfG, 1 BvR 2019/16, Oct. 10, 2017, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html.
[200] CC [Constitutional Court], Juin 19, 2019, n° 99/2019, https://www.const-court.be/public/f/2019/2019-099f.pdf.
[201] This points to another possibility for the state: making gender registration optional. However, the risks and inherent issues with this options are similar to the ones attached to the "third" or "X" gender marker as will be exposed further later on in this Chapter.
[202] *See* Ashley, *supra* note 180, at 40.

gender as a useful legal category altogether. The draft document for the law that later on introduced the "X" gender marker, presented the obstacles to picking the second option – the suppression of gender markers.[203] Its main argument in doing so was two-fold. First, German law relies on gender in several areas and the suppression of gender would require the amendment and re-writing of a considerable part of the national legislation, something that the Government was not inclined to do.[204] Second, the Government relied on its commitment to the U.N. International Civil Aviation Organisation [hereinafter I.C.A.O.] which sets international standards for air travel and therefore passport requirements. The currently enforced I.C.A.O. standards require the mention of a gender marker ("sex") on passports[205] – while allowing for a third option in the form of an "X", it does not allow the suppression of gender from passports and other machine-readable documents compatible with international travel.[206] Interestingly enough, the I.C.A.O. requirement of gender has been questioned before but was upheld to this day. Through a review discussion of the gender marker requirement started by the Government of New Zealand, the I.C.A.O. argued that the removal of gender from machine-readable travel documents would engage too high of a cost for border control agencies and states to upgrade all software to be able to process new documents that do not show a gender marker.[207] However, the I.C.A.O. does see the benefits of removing gender makers in theory as it does highlight that it would create a safer travel environment for trans* persons, it would ensure the issuance of fewer incorrect documents since less information would need to be collected and finally it would show the I.C.A.O. as a trailblazing organisation.[208] Simply, it does not consider that those benefits outweigh the costs of enacting the change just yet.

[203] Referentenentwurf [Draft Bill]. Bundesministeriums für Inneres, für Bau und Heimat [Federal Ministry of the Interior, Building and Homeland]. Entwurf eines Gesetzes zur Änderung der in das Geburtenregister einzutragenden Angaben [Draft law amending the birth register] (n 113) 7, https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetzestexte/gesetzesentwuerfe/entwurf-aenderung-personenstandsgesetz.pdf?__blob=publicationFile&v=1 (Ger.); *see also* Holzer, *supra* note 147, at 45.

[204] For instance, see the differentiation in regime for divorce depending on gender.

[205] This requirement is limited to passports and machine readable travel documents, hence it does not exclude the suppression of gender from other identity documents. However, Germany relied on these provisions and the necessity for harmony between all identity documents. Interestingly, this is how the Dutch Government justified the possibility of moving forward with the abolition of gender markers on identity documents (excl. passports).

[206] Int'l Civil Aviation Organisation (I.C.A.O.), Machine Readable Travel Documents, Part 6: Specifications for TD2 Size Machine Readable Official Travel Documents (MROTDs), at 10, Doc 9303 (2021), https://www.icao.int/publications/Documents/9303_p6_cons_en.pdf.

[207] Int'l Civil Aviation Organization (I.C.A.O.), A review of the requirement to display the holder's gender on travel documents, TAG/MRTD/21-IP/4 (Nov. 20, 2012), .https://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_IP04.pdf.

[208] *Id.*

Going more in-depth in reflecting on the necessity of gender markers and gender as a legal category altogether, it is fundamental to point out that all arguments put forward by the Government of Germany and the I.C.A.O. are purely practical matters rather than linked to a strong belief that gender is a fundamental characteristic of the individual. It is mainly, because "that is how it's always been done". In this context, authorities just pass on the blame. The governments argue that they cannot change it because they are bound by the I.C.A.O. standards. In addition, those standards have been endorsed under the Council of the European Union Regulation 2252/2004 which makes direct reference to the I.C.A.O. in Article 2 and makes it doubly binding on the states.[209] The I.C.A.O. argues that the suppression of gender would undermine the inclusion of individuals in national settings where gender is used to differentiate between people, for instance when spaces are separated between genders.[210] An interesting parallel to establish is the one with race and religion. Indeed, gender is not the first *unnecessary* legal category to be presented on travel documents, racial and religious markers used to be mentioned on identification documents and similarly used as a means of segregating spaces.[211] Both are no longer required on travel documents in European states and, even more, are rarely considered to be legitimate ways for the state to register individuals.[212] This is also true of the mention of marital status.[213] Where a difference in opportunities is based on race or religion, the E.Ct.H.R. has usually found a violation of the prohibition of discrimination under Article 14 of the Convention.[214] Thus, proving it is not impossible to have both the suppression of such characteristics as legal categories and in such gender as well, while still effectively providing comprehensive protection based on those social markers. Just because race, religion, or even gender, are erased from civil registries or identification documents, does not mean that they are erased in the eyes of the justice system.

Moreover, the mention of gender does not provide essential information that would render the identification of a person much easier. This is particularly true in a time where facial recognition and other biometrics software are widespread nowadays

[209] Council Regulation (EC) No. 2252/2004 of 13 December 2004 on Standards for Security Features and Biometrics in Passports and Travel Documents Issued by Member States, 2004 O.J. (L 385), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R2252.

[210] *Id.*

[211] See, e.g., the separation of bathrooms, sports environment, healthcare, and others according to gender; Clarke, *supra* note 16, at 942; Clarke, *supra* note 175, at 800.

[212] In some states like Germany or Austria religion can be added to the birth certificate in later life if the individual desires it, but it is not a requirement; *see* Holzer, *supra* note 147, at 45-46.

[213] *See* Neela Goshal & Kyle Knight, *Netherlands Sees No Role for Gender Marker on ID Documents*, Human Rights Watch (July 8, 2020), https://www.hrw.org/news/2020/07/08/netherlands-sees-no-role-gender-marker-id-documents.

[214] *See, e.g.,* Holzer, *supra* note 147, at 46 the system of Bosnia and Herzegovina which used registered religion as a defining criteria when standing for election concerning which the European Court of Human Rights found a violation in the case of *Sejdić and Finci v. Bosn. & Herz.*, 104 Eur. Ct. H.R. 4 (2009).

and offer a significantly more accurate way of ensuring one is who they say they are. More than this, the mention of gender, while not particularly helpful in general, is actually detrimental to the trans* community and particularly to non-binary persons and any trans* person whose presented gender identity does not match their gender marker. In this sense, an overwhelming majority of non-binary respondents to my questionnaire (78.6%) indicated that they want the mention of gender taken off their identity documents.[215] This echoes the fact that they do not or would not feel safe holding an "X" [216] or an inadequate gender marker.[217]

While from a legal standpoint, the I.C.A.O. standards requirement is an obstacle that cannot be ignored, there is a significant legal basis to argue for its inconsistency with modern times and thus to argue for the removal of gender from identity documents or registries. First of all, it is important to mention that the I.C.A.O. standards themselves did not include gender as a mandatory mention on travel documents until the current standards were set in 1980.[218] Furthermore, the Yogyakarta Principles calls clearly in Principle 31 for the termination of gender registration:

> Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality.[219]

The position taken by the Council of Europe in its Resolution 2191 (2017) on the rights of inter* people proposes a different, and weaker, approach: "With regard to civil status and legal gender recognition . . . consider making the registration of sex on birth certificates and other identity documents optional for everyone".[220]

However, this proposal does not argue for the direct, complete, removal of gender but rather for making it an optional mention. Thus, individuals could request the removal of gender from their identity documents but it would remain mentioned on such documents of people who do not do so. This approach is very limited as it would bring back similar concerns brought up by the creation of a "third" gender marker in

[215] See *infra* Annex 1 for results of my questionnaire.
[216] See *infra* Annex 1 for results of my questionnaire.
[217] *See supra* Section 1.2.
[218] *See* Goshal & Knight, *supra* note 213.
[219] Yogyakarta Principles plus 10, *supra* note 54, at Principle 31.
[220] Eur. Parl. Ass., Promoting the human rights of and eliminating discrimination against intersex people, 35th Sess., Res. No. 2191, § 7.3.4. (2017), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&.

practice. Indeed, it is to be expected that, in such a scenario, individuals who would request the removal of gender from their documents would be in the majority of persons who feel uneasy, or unsafe, with the mention of their legal gender. Therefore, individuals who would present an identification document that does not mention a gender while others still do would be at risk of implicitly disclosing that they are non-binary or, at the very least, would be presumed to be. Then all concerns regarding the unwanted disclosure of gender identity exposed in Chapter 3 would arise again. Additionally, it needs to be mentioned that the removal of gender from identity documents and further the suppression of gender as a legal category altogether, is one of the predominant demands from the wider trans* and inter* communities. For instance, it was heavily supported in the Malta Declaration[221] which puts forward the conclusions of the Third International Intersex Forum held in 2013. This points to the idea that all concerns expressed priorly concerning the inadequacy of the creation of a "third" gender category would be resolved through the suppression of gender.

Therefore, the removal of gender markers from identity documents would provide relief to non-binary individuals, and many other trans* or inter* persons, while not creating real obstacles to the control of identity by authorities.[222] It might be argued that the suppression of gender in registries may impact the functioning of the state in other ways, notably regarding the collection of data or affirmative action based on gender. While those concerns will be addressed in the next part of this Chapter, the main conclusion here is that the removal of gender from identity documents could be enacted given the existing legal basis and would provide immediate relief for non-binary individuals – while states slowly move towards the suppression of gender altogether.[223] This is what seems to be aimed for by the Dutch and Belgian Governments which should enact the removal of gender markers from identity documents (excl. passports) in the (hopefully) near future. This leaves open the question as to how they will organise compliance with the I.C.A.O. regulations if they are not changed by then. Most likely, and quite counter-productively, it is probable that individuals will have a mention of gender on their passport while no longer having it on their national identity cards – like the current German framework. Additionally, it could be argued that the I.C.A.O. regulations do not prevent states from registering a third gender marker (X) *per se*. This can explain

[221] *See* ILGA & ILGA Europe, *Malta Declaration (International Intersex Forum)* (Dec. 2013), https://nnid.nl/gevorderdenniveau/malta-statement/.

[222] See for the case of Germany, while the suppression of gender markers on identity cards may provide for such relief, it is still limited by the medicalized approach to transitions and inter* status that pathologizes trans*, non-binary and inter* persons.

[223] It is to be noted that even with a significant soft law basis for this, both the I.C.A.O. and European Union regulations/legislation would have to be amended in order to allow for this change which in practice always proves to be tedious.

in part why states may have leaned towards this option rather than investing in the deconstruction of gender as a legal category altogether. However, this is not a way to explore in this paper since, as shown previously, this third category does not provide the complete, effective and dignified recognition and protection needed by non-binary individuals.

4.2. CONSIDERING THE RISKS AND POTENTIAL OBSTACLES TO THE SUPPRESSION OF GENDER FROM REGISTRATION SYSTEMS OR IDENTITY DOCUMENTS

The registration of gender and, even more, its mention on identity documents is detrimental to non-binary individuals and to the trans* and inter* communities in general. It has also been shown in the previous part of this Chapter that the suppression of gender (on I.D.s) is not an unreachable goal in the Council of Europe. However, it is necessary to also evaluate the potential negative consequences such a change could incur. Two main concerns arise on two different levels. First, the legal implications for the functioning of national systems, particularly regarding the collection of data and cross-border movements. Second, on a general scope, the risks that abandoning the registration of gender might imply for the organisation of affirmative action and the fight against gender-based violations of human rights.

4.2.1. LEGAL IMPLICATIONS: DATA COLLECTION AND CROSS-BORDER MOVEMENTS

At the national level, the suppression of gender as a legal category or the suppression of gender markers on identity documents might be complicated to achieve as states will likely argue that it would create an obstacle to the protection of rights and the monitoring of the population. More specifically, the main concerns that have arisen are the impossibility of collecting gender-disaggregated data in the absence of gender registration or gender markers, the obstacles it might create for individuals in situations of cross-border movement to a third country that has not enacted the abolition of gender registration – or with an airline company similarly bound by the I.C.A.O. – and more broadly the suppression of gender from travel documents as a violation of the I.C.A.O. standards.

Concerning the difficulties, it would cause to the collection of gender-disaggregated data, the example of race and ethnic data points to the possibility

of doing so without gender being a legal category. If statistic offices cannot rely on legally registered gender or gender markers on identity documents to obtain data on the population's gender composition, they may do so through other means, mainly self-identification through surveys. This renders it possible for all individuals to declare their real gender identity without being limited by the categories recognised by the legal framework. Moreover, it is to be noted that the collection of gender-disaggregated data based on legal gender has traditionally not been fully accurate in itself to the extent that it does not account for trans* persons whose legal gender marker is not (yet) in accordance with their gender identity and for the condition of intersex persons.[224] This is even more impactful in states that do not recognise at least a third gender option as it implies that all persons identifying outside of the binary are wrongly registered and thus the data drawn from registration is falsified in turn.

Then, concerning cross-border movement, the main concern regards the difficulties that would be created for individuals whose legal personality, and particularly whose identity documents would no longer present a gender marker when they cross-border to a third country where gender registration is mandatory. Because the current I.C.A.O. standards require the mention of gender on passports, countries that get rid of gender registration would have to display an "X" on every citizen's passport. The "X" in itself could create further complications for individuals in cross-border situations, particularly for the obtention of visas and other foreign registration documents. Additionally, many electronic software used by airlines to process identity documents are not equipped to process non-binary options.[225]

An interesting point to be raised is the jurisprudence of the E.Ct.H.R. when it comes to protection across borders. In this sense, we can cite the case of *Orlandi and others v. Italy* in which the Court recognised the right to same-sex couples married abroad to see their marriage recognised in their home state (Italy).[226] Similarly, the Court has recognised a right of recognition and registration concerning adoption in a third country.[227] It is easy to deduce from this jurisprudence that the Court would most likely

[224] *See* Holzer, *supra* note 147, at 48.

[225] *See id.* at 21.

[226] *See Orlandi and Others v. Italy*, App(s). No(s). 26431/12, 26742/12, 44057/12, 60088/12, (Dec. 14, 2017), https://hudoc.echr.coe.int/fre?i=001-139934; *see also Handzlik-Rosul and Rosul v. Poland*, App. No. 45301/19 (pending) The Court of Justice of the European Union has recognised a similar right in Case C-673/16, *Coman and Others v. General Inspectorate for Immigration and Ministry of the Interior*, ECLI:EU:C:2018:385 (June 5, 2018).

[227] *See Wagner and J.M.W.L. v. Luxembourg,* App. No. 7624/01, ¶¶ 143-146 (June 18, 2017), https://hudoc.echr.coe.int/fre?i=001-81328 (Note that this judgment concerned a single mother adopting abroad and seeking recognition for her child in her country of origin, and not a L.G.B.T.Q.I.A.+ applicant. However, it establishes a strong precedent regarding the right for recognition of birth and regarding the unacceptable burden non-recognition puts on both the parent and the child). *See also A.D.-K. and Others v. Poland*, App. No. 30806/15 (pending) (the Court will approach the same question regarding the recognition of child adopted by a same-sex couple in a third country).

decide in favour of the individual's right to see their "X" gender marker recognised abroad. However, it is more complicated to assume what the Court would deduce regarding the absence of a marker on one's documents. Under the right to private life, it is reasonable to say that the Court would be likely to find a violation if an individual was forced to declare a gender when abroad if they were not registered in their state and did not wish to do so. Similarly, a difference in treatment based on gender that would incur following one's lack of a registered gender would most likely be considered a violation of Article 8 in conjunction with Article 14 of the Convention.

4.2.2. OVERCOMING THE RISK OF GENDER-BLIND LAWS

Another concern when conceptualizing the end of gender registration is the impact it would have on the approach to gender discrimination. In this sense, a gender-neutral registration could translate into "gender-blind" laws. The term gender blind is defined by the Council of Europe as "ignoring/failing to address the gender dimension (as opposed to gender-sensitive or gender neutral)".[228] In this context, "gender blind" refers to the way legislation could fail to address discrimination on the grounds of gender as a result of the absence of registration of gender. Policies or legislation built that way would have a detrimental effect on the rights and protection of all gender minorities, particularly girls, L.G.B.T.Q.I. and non-binary persons. Indeed, they would risk being blind to the differences in opportunities and responsibilities imposed on different groups based on their gender identity.[229] However, there are multiple ways to define this issue and especially, there are different ways of conceptualizing the consequence of the end of gender registration on the protection of gender minorities. Firstly, it is fundamental to remember that gender marker and legal gender personality do not equate to gender. In this sense, the suppression of gender from the *legal* framework does not mean its enforced suppression in the *social* sphere as well. Just because gender would no longer be registered by the state does not imply a generalised enforced androgyny.[230]

However, the end of gender as a legal category comes with the impossibility of the state using registered gender as a way to determine who necessitates increased protection from the state – for instance, in fighting gender-based violence. In this context, Davis points out that "gender-based violence eradication requires recognition

[228] *See* Council of Europe, *Gender Equality Glossary* 35 (2014), https://edoc.coe.int/en/gender-equality/6947-gender-equality-glossary.html.
[229] *See generally* European Institute for Gender Equality: *"gender blindness"*, https://eige.europa.eu/thesaurus/terms/1157 (last visited June 13, 2022).
[230] Clarke, *supra* note 16, at 940-41.

and redress for the underlying discrimination that dictates greater freedom for some while curtailing them for others".[231] What is fundamental to consider in this context is the necessity to maintain a discrimination approach to gender regardless of whether it is legally registered or not. When laws are written in a gender-blind manner, there is a serious risk that governments will use them to avoid dealing with gender-based violence and discrimination. For instance, where assault is prohibited under general law, the state might point out that such a provision encompasses gender-based assault when in practice such an interpretation fails to take into account the patriarchal, discriminatory roots of violence against vulnerable gender groups.[232] Similarly, the acknowledgement of gender discrimination by the state is fundamental in developing a protective framework for minorities. Historically, the recognition of women's struggle has been decisive in qualifying certain acts such as marital rape, as crimes. Consequently, if the law ignores gender as a source of discrimination, it implicitly enforces socially constructed gender stereotypes that harm all individuals who are not perceived as cisgender men.[233] As pointed out by Bunch and Davis[234], the deep roots of the patriarchy have rendered gender-based violence a seemingly unavoidable occurrence rather than being understood as a tool used by those in power to maintain what they define as "patriarchal interests, anti-gender rights ideology, and authoritarianism".[235] In doing so, any form of gender-based violence or discrimination tends to be defined as a women's rights issue solely, therefore significantly invisibilising L.G.B.T.Q.I.A.+ and gender non-conforming persons. It is fundamental here to remember that the development of women's rights had for objective of the achievement of equal rights for women and not the creation of new rights tailored to women. All, regardless of their gender identity, have a right to safety and protection against gender-based violence and discrimination, but women were recognised as a particularly vulnerable group and thus emphasis was put on including women textually as the subject of human rights to combat the inequality they were faced with due to patriarchal prejudice. In this sense, the development of women's rights has never been and should never be a hindrance to the development of rights of other gender minorities, and vice-versa.

[231] Davis, *supra* note 26, at 23.
[232] *See* C.E.D.A.W., List of Issues and Questions In Relation to the Second Periodic Report of the Syrian Arab Republic, §10, U.N. Doc. CEDAW/C/SYR/Q/2 (2013) (questioning the Syrian government on measures taken to address domestic violence); Government of Syrian Arab Republic, Replies of the Syrian Arab Republic, §§11- 13, U.N. Doc. CEDAW/C/SYR/Q/2/Add.1 (Jan. 22, 2014); Davis, *supra* note 26, at 24.
[233] *See* Davis, *supra note* 26, at 27.
[234] *See* Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 Hum. Rts. Q. 486 (1990). Davis, *supra* note 26, at 27.
[235] *Id.*

Therefore, the abandonment of gender as a legal category needs to be done in a way that would not mean the state's total blindness to the existence of gender. Thus, it would need to be approached as the mere end to the legal classification of individuals by gender and hence treating gender in a similar way to race, ethnicity or religion. Then, it would not necessarily imply the end of the protection against gender discrimination in the same way that the end of racial/ethnic markers did not end the fight against racial and ethnic discrimination. To this end, the state would adopt a model that Cruz qualified as "non-endorsement and pluralism" that has been applied to religion in many countries.[236] In doing so, the legal system protects all gender identities without giving any particular endorsement to specific identities and thus, without establishing boundaries on what is and what is not legally recognised. Such an approach would mean the acknowledgment of the existence, and importance, of gender as (often hostile) social classification and hence the continuation of the prohibition of gender discrimination and all gender-based violence. An interesting development in this sense was the shift in feminist discourse from "violence against women" to "gender-based violence".[237] In refocusing the discourse from a women-only issue to a more general gender framework, the term includes acts of violence against all persons regardless of their gender or of the gender of the perpetrator, but for the reason of their real or perceived gender.[238] In doing such an analysis, it is fundamental that a gender discrimination approach be taken in order to expose the contextual causes of gender-biased actions. Omitting the gender discrimination present for instance in cases of sexual violence would amount to gender blindness and create a dangerous analysis which may reinforce the gender prejudice and difference in treatment that has historically been enforced on women, L.G.B.T.Q.I.A.+ persons and gender non-conforming persons.

Such an approach applied to all of the legal frameworks at the national and Council of Europe level would enable effective protection against gender-based discrimination and violence without having a system of registration of gender. Moreover, this approach would be beneficial to all as it would allow for the broadening of the approach to gender discrimination to include all gender identities and expressions, thus including non-binary persons, and also giving more visibility to men and L.G.B.T.Q. persons victim of sexual and gender-based violence. Similarly, it would help to diminish the stigma on sexual and gender-based violence and gender stereotypes that are generally detrimental to the position of women and female-presenting individuals in

[236] *See* Clarke, *supra* note 16, at 944.
[237] *See generally* Davis, *supra* note 26, at 27.
[238] *See generally* Julie Goldscheid, *Gender Neutrality and the "Violence Against Women" Frame*, 5 U. Mia. Race & Soc. Just. L. Rev. 307 (2015).

society. Altogether, the end of gender registration, and at the very least ending its mention on identity documents, is fundamental to end state control of gender.[239] In this context, if the state does not need to classify individuals based on their gender, it also has no purpose in policing gender identities and expressions and assigning gender labels according to hetero-cis-normative and binary norms.

CONCLUSION

Concluding this research is a complicated endeavour because of the dynamic and ongoing character of the developments regarding the legal recognition and protection of non-binary gender identities in the Council of Europe's legal sphere. However, I believe this thesis has demonstrated a strong basis for creating further legal recognition and protection in a safe, inclusive and dignified way for all individuals in and outside of the gender binary. The quote from the Caribbean Court of Justice with which I introduced my reasoning resonates with a much larger project than the limitation of inclusivity of legal gender recognition. Indeed, as it was argued all along this research, the current avenues chosen by both the European Court of Human Rights and national systems focus on including queer identities within the boundaries of what is seen as "natural" and "normal". In this context, it has been argued that the functioning of the Western nation-state needs to be challenged in order to redefine normality and nature and open the way for the full inclusion of non-binary individuals and queer identities in the social and legal spheres.[240] In trying to achieve this inclusion, the majority of queer advocacy in the legal system has been hyper-focused on the establishment of legal recognition in order to include queer gender identities in an extended binary system – through "third" or "X" gender marker options. However, this fails to question the inadequacy of the system to begin with and the normative framework within which queer identities are discussed.[241] The E.Ct.H.R. has yet to even mention the term "non-binary" in any decision. Furthermore, the position of the Court, in only addressing gender identity issues through the right to private life in conjunction with the prohibition of discrimination, acts as a limitation on the potential of the Convention rights as the legal basis for the development of a more inclusive and protective framework. Nevertheless,

[239] *See* Clarke, *supra* note 16, at 942-43.
[240] *See* Dianne Otto, *Resisting the Heteronormative Imaginary of the Nation-state: Rethinking Kinship and Border Protection*, *in* Queering International Law 236, 241 (Dianne Otto ed., 2017).
[241] *See* Ratna Kapur, *The (Im)possibility of Queering International Human Rights Law*, *in* Queering International Law, *supra* note 240, at 131.

the Council of Europe remains a community of states which also need to process such a significant change within their national systems if there is to be any proactive change on the ground. The study of the national systems that have started this reflection and developed more inclusive gender registration frameworks has shown a slow but steady propagation of the discussion over the foundations of the gender binary and the (non-)necessity of gender as a legal category. In this aspect, the "third" or "X" gender marker options created in those states constitute a strong commitment to making European states more inclusive of non-binary gender identities. However, it has been argued in Chapter 3 of this research, that those systems are flawed and, while the intent behind them is commendable, they fail to create effective recognition and to provide non-binary persons with the dignity, privacy and protection they need. Rather, they organise the domestication of non-binary gender identities and create what Lena Duggan qualifies as the "new homonormativity",[242] which installs a gender binary normativity. In this sense, we can go back to the work of Judith Butler in stating that "thinkability" is the fundamental basis for the understanding of one's lived experience of humanity in politics and society, nevertheless, the state has control over the limits of that "thinkability".[243] Thus, there is a strong need for the restructuring of the approach to gender, which could be achieved by the *regularisation* of queerness and gender identity through the abandonment of gender as a legal category. In suppressing gender as a legal category for persons, the state may stop classifying gender expressions, sexual orientations, and relationships in terms of gender and more specifically, through the lens of the gender binary. In this sense, sexual orientation cannot be defined without gender – one's sexual orientation is defined by which *gender* they are attracted to. Thus, the abandonment of gender does not solely impact the position of non-binary persons and non-conforming gender expression but rather would have an impact on the broader binary hetero-cis-normative framework of the state. To this end, the fight for inclusion of non-binary and queer identities in fundamentally hetero-cis-normative societies implies striving towards what Dianne Otto qualifies as "rethinking kinship ties" from militaristic and nationalist to queer and inclusive.[244] To do so, the inclusion and the visibility of queer identities and particularly gender identities outside of the binary is fundamental in breaking down traditional kinship and separating it from the Malthusian couple[245] incentive (heterosexual, monogamous and reproductive) that acts as a

[242] *See* Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, *in* Materializing Democracy 175, 190 (Russ Castronovo et al. eds., 2002).
[243] Judith Butler, Undoing Gender 106 (2004).
[244] *See* Otto, *supra* note 240, at 251.
[245] *See generally* Michel Foucault, The History of Sexuality (Robert Hurley trans., 1978).

foundation for Western states.[246] In putting forward the possibility of abandoning gender as a legal category, the last part of this research, seeks to push the state towards its duty as a protector of all without distinctions and the acceptance of all forms of lived experiences of gender. Furthermore, this research, and queer approaches to international law in general, aim to open space on the front of the stage for the questioning of the hetero-cis-normative framework that underpins Western societies. In the words of Dianne Otto: "[J]ust as feminist curiosity exposed international law's gendered framework, and postcolonial curiosity its European underpinnings, queer curiosity makes visible its (hetero)sexual ordering that is so taken for granted that it is considered 'natural'".[247] If "third" or "X" gender markers and other developments may have provided for temporary relief to the exclusion and harm suffered by non-binary persons, only the eradication of this bias will ensure complete equality for and integration of queer gender identities, orientations and expressions in the legal and social frameworks. To do so, human rights law has offered legal avenues, through Article 8 E.C.H.R., and promises to keep moving forward, even slowly, to reach the full equality and inclusion of all gender identities within the Council of Europe. However, in light of the recent decisions of the E.Ct.H.R. in the cases of *Y v. France* and *M.A. v. Germany,* it appears that the Court has taken a backwards approach in cases of sexual orientation, gender identity, gender expression and sex characteristics [hereinafter S.O.G.I.E.S.C.] matters. While it could have used such cases, particularly *Y v. France*, to develop the obligations of states to protect non-binary and intersex person's rights to identity, it has sided with states in leaving a large margin of appreciation and retracting in the "European consensus" argument to avoid having to legislate on matters of S.O.G.I.E.S.C. identities. This is a regrettable take that points a still long way to the creation of effective recognition and protection of non-binary gender identities in the Council of Europe. Nevertheless, non-binary persons will continue to exist on European soil, argue for the recognition of their identity, and hopefully enact positive change shortly.

ANNEX 1. RESULTS OF THE QUESTIONNAIRE CARRIED OUT IN THE SCOPE OF THIS STUDY

This research was carried out between October 2022 and June 2022 through an online questionnaire I created and disseminated through queer spaces – hence the

[246] *See* Otto, *supra* note 240, at 241.
[247] Otto, *supra* note 18, at 2.

overrepresentation of non-binary persons. It was first created as a way to grasp how the non-binary community had, or would, receive the possibility of having an "X" gender marker on their identity documents.

Total number of entries: 101

1. **Where are you from?**

EUROPE: **100%**

- The NL: 34 **33,6%** of total
- France: 40 **39,5%** of total
- Belgium: 5 **5%** of total
- Austria: 3 **3%** of total
- Portugal: 5 **5%** of total
- Switzerland: 3 **3%** of total
- Germany: 11 **10,9%** of total

2. **How do you identify?**

Non-Binary: 96 **95%** of total

- Non-Binary: 40 **41,7%** of NB **39,6%** of total
- Genderqueer: 11 **11,5%** of NB **10,9%** of total
- Genderfluid: 11 **11,5%** of NB **10,9%** of total
- Agender: 11 **11,5%** of NB **10,9%** of total
- NB transfem/demigirl: 7 **7,3%** of NB **7%** of total
- NB transmasc/demiboy: 14 **14,5%** of NB **13,9%** of total
- Bigender: 2 **2,1%** of NB **2%** of total

Questioning: 4 **4%** of total
Cisgender male: 1 **1%** of total
Results:

	I feel inadequate with the mention of M/F gender markers on my identity documents	I want the mention of an "X" on my identity documents	I want the mention of any gender taken off my identity documents	I would feel safe with the mention of an "X" on my identity documents
Disagree	1% (1)	24% (25)	1% (1)	29,8% (31)
Somewhat disagree	7,8% (8)	15,4% (16)	1% (1)	27,9% (29)
Neutral	2,9% (3)	18,3% (19)	6,8% (7)	16,3% (17)
Somewhat agree	33,3% (34)	22,1% (23)	12,6% (13)	15,4% (16)
Agree	54,9% (56)	20,2% (21)	78,6% (81)	10,6% (11)

N.B.: The questionnaire contained an open box for "[a]dditional views on the legal recognition of non-binary identities" of which the result will remain hidden for reasons of anonymity. The views expressed in this part were taken into consideration in formulating an answer to the question at hand in this thesis.

ANNEX 2. NATIONAL LEGISLATION QUOTES

- THE NETHERLANDS Rechtbank Amsterdam [Rb] [Amsterdam District Court], 21 Juli 2021, Case C/13/669890 / FA RK 19-4520, ECLI:NL:RBAMS:2021:3732 (Neth.).

> 4.3. De rechtbank is van oordeel dat het onderhavige verzoek tot wijziging van de geslachtsaanduiding op dezelfde wijze dient te worden benaderd als die welke is omschreven in de artikelen 1:28a-c BW, voor mensen van zestien jaar en ouder die de - door een deskundige getoetste en onderschreven - overtuiging hebben tot "het andere geslacht" te behoren. Deze artikelen voorzien niet in de mogelijkheid om te kiezen voor een non-binaire geslachtsaanduiding, waarmee naar het oordeel van de rechtbank in deze artikelen een ongerechtvaardigd onderscheid wordt gemaakt tussen personen die de overtuiging hebben tot *het* andere geslacht te behoren en personen die de overtuiging hebben buiten de exclusief mannelijk of vrouwelijke geslachtsaanduiding te vallen (non-binair).

- GERMANY Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], Oct. 10, 2017, 1 BvR 2019/16, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html (Ger.).

> 36. § 21 Abs. 1 Nr. 3 in Verbindung mit § 22 Abs. 3 PStG verstößt gegen das allgemeine Persönlichkeitsrecht (Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG) in seiner Ausprägung als Schutz der geschlechtlichen Identität. Das allgemeine Persönlichkeitsrecht schützt die geschlechtliche Identität auch jener Personen, die weder dem männlichen noch dem weiblichen Geschlecht zuzuordnen sind (1). In deren Grundrecht wird eingegriffen, weil das geltende Personenstandsrecht dazu zwingt, das Geschlecht zu registrieren, aber keinen anderen Geschlechtseintrag als weiblich oder männlich zulässt (2). Der Grundrechtseingriff ist nicht gerechtfertigt (3).
>
> [§ 21(1) no. 3 in conjunction with § 22(3) PStG violates the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) in its manifestation as the protection of one's gender identity. The general right of personality also protects the gender identity of persons who can be assigned neither the male nor the female sex (see 1 below).

> There is an interference with their fundamental right because current civil status law requires that sex be registered, but does not allow a gender entry other than female or male (see 2 below). This interference with fundamental rights is not justified (see 3 below).]

- ICELAND Government of Iceland. Act on Gender Autonomy No. 80/2019 as amended by Act No. 159/2019, No. 152/2020 and No. 154/2020. (2020, May 8). Retrieved May 26, 2022, from https://www.government.is/publications/legislation/lex/2020/05/08/Act-on-Gender-Autonomy/ (Iceland).

> Article 6 - Neutral Gender Registration.
>
> Neutral gender registration is permitted. Public and private bodies that register gender shall provide for the possibility of registering gender as neutral, inter alia in identity documents, forms and databases, and provide for a clear denotation of such registration. In passports, neutral gender registration shall always be denoted with the letter X.

- BELGIUM Cour Constitutionnelle [CC] [Constitutional Court], decision no. 99/2019, June 19, 2019. https://www.const-court.be/fr/ (Belg.).

> B.6.1. Le moyen unique, en sa seconde branche, est pris de la violation des articles 10, 11 et 22 de la Constitution, lus en combinaison avec l'article 8 de la Convention européenne des droits de l'homme, par les dispositions attaquées, en ce que celles-ci prévoient un système 31 binaire qui contraint les personnes dont l'identité de genre est non binaire à accepter, dans leur acte de naissance, un enregistrement du sexe qui ne correspond pas à leur identité de genre, alors que les personnes dont l'identité de genre est binaire mais ne correspond pas au sexe enregistré dans leur acte de naissance peuvent faire modifier cet enregistrement.


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