Vol. 9

University of Bologna Law Review

ISSUE 2. 2024

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Conference Papers

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Tamás Szabados

• E-ISSN 2531-6133 10.6092/issn.2531-6133/v9-n2-2024

UNIVERSITY OF BOLOGNA LAW REVIEW

E-ISSN 2531-6133

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UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/20959

On the Economy of the Person

Work Environment Technology

INTRODUCTION

In the last decade, the world of economy has 'promised' progress and freedom to men and women on this planet by virtue of the great technological advancement that characterizes the quotidian life. The size of techno-science, which "aims to get a form of life apart, endowed with own symbolic and value universe, a very precise delimitation of the cognitive scope of human reason",[1] has taken up more and more space intended as an epistemological solution. "The ideologically more disturbing element is constituted by the fact that science has ended up becoming a sort of ethical cover for all the distortions of trade and power. Scientist-managers aim to legitimize their every decision by the idea that the alleged purity and transcendence of scientific discovery eliminate, always and in any case, contingent manipulation caused by its use through trade"[2]. Furthermore, the power of the Internet seems to favor pluralism and the exchange of ideas. Actually, the transmission modules are the coordinates of space and time in use that modify the type of reading, reflection and verification, setting in motion an unconscious process of disinformation that tends to neutralize comparison and difference, where politics submits to the efficiency paradigm of technocracy. In the years of globalization, by the mutation of the political body into an economic corporation, we encountered a form of economic theology, understood as 'market fundamentalism', as a new form of fundamentalism. Economic corporations were the fortified institutions arising from consequence of a manifestation of the 'state of exception', which saw the weak 'political' giving way to 'advancing economic'. If political theology has secularized theological concepts, economic theology made political concepts functional for their purposes through a winning language marked by the times

[1] F. Viola, *Identità culturali e religiose. Connessioni e distinzioni [Cultural and Religious Identities. Connections and Distinctions]*, in FILOSOFIA GIURIDICA DELLA GUERRA E DELLA PACE 259 [LEGAL PHILOSOPHY OF WAR AND PEACE], (V. Ferrari ed., Franco Angeli, 2008).

[2] S. Amato, *Diritti fondamentali e "governo" della scienza [Fundamental Rights and the "Governance" of Science], in* SCIENZA E NORMATIVITÀ. PROFILI ETICI, GIURIDICI E POLITICO-SOCIALI 221 [SCIENCE AND NORMATIVITY. ETHICAL, LEGAL AND SOCIAL-POLITICAL PROFILES] (Scripta Web, 2006).

of advertising formats in the dual dimension of buying/selling. Starting from the deregulation of the 1980s, society is forced to slow down its impact in the face of the State's escape from its social commitments, with Welfare in a strong phase of rethinking throughout the Western world. Once again, the threat of economic fundamentalism looms in social and political history, by virtue of which society becomes prey for a faith of fragmenting consumerism, recognized in the profiles of ostentatious and empty communicative hedonism, significantly depriving the share capital. Faced with the obstinacy of economic fundamentalism, society suffers in formulating 'short relationships' that mark an index of proximity among social beings. Society, as an 'agency for representing needs' "capable of transforming individual problems into collective requests, has eroded its function. The intermediate forces that represented the backbone of the post-war democratic system are today increasingly being transformed into service structures"[3]. The modification of economic structures is simply preparatory to the formulation of a social recomposition, through which the pillars of democracy and participation are demolished in crescendo of regulation, such as to overturn from the foundations the strengths of civil coexistence. Just think about the attack on education, public health, and the philosophy of supportive inclusion of others, whoever they are. But the message that wins is 'there is nothing for everyone,' in a paradoxical reversal of Sartre's scarcity. A perverse sense of one-dimensional, instinctual, and shared belonging is strengthened, which fuels fragmentation. In the last twenty years the attempt at social recomposition has involved the demolition of the social. The residual part of the citizens escapes the productive and participatory circle in the name of a new and exclusive recomposition. It is the phase of 'painful but necessary cuts'. Anyone who remains outside the productive circle is guilty. The traditional values of private affirmation in framework of public legitimation are replaced by an ephemeral and expanded consecration of the citizen who takes shape as a 'consumer'. The public, the Welfare State, and the network systems of social solidarity are denounced as 'waste'. As Dahrendorf wrote, "Perhaps the most serious effect of the triumph of values linked to productivity, efficiency, competitiveness, and utility is the destruction of public services. I think about the destruction of public spaces and the decline of the service values they bring. Introducing pseudo-economic motivations and terms into public spaces means depriving them of their essential quality. And then the national health service, public education for all, and guaranteed minimum wages, whatever they are called, become victims of unbridled economism"[4]. The only source of resistance to the possible

[3] N. Pagnoncelli, *Disintermediazione [Disintermediation], in* CORPI INTERMEDI. UNA SCOMMESSA DEMOCRATICA [INTERMEDIATE BODIES. A DEMOCRATIC BET] (Ancora ed., 2015).

[4] R. DAHRENDORF, QUADRARE IL CERCHIO. BENESSERE ECONOMICO, COESIONE SOCIALE, E LIBERTÀ POLITICA 40 [SQUARING THE CIRCLE. ECONOMIC WEALTH, SOCIAL COHESION AND POLITICAL FREEDOM] (Editori Laterza, 2009).

flowering of critical thinking is struck. Work in its traditional forms loses its meaning. It becomes part of consumption as an ultimate purpose. "Our entire economy has become an economy of waste, in which things must be devoured and eliminated as quickly as they were produced"[5] writes Hannah Arendt. With disastrous results for the new generations. The generations of young citizens, with their eyes full of images of personal breakthroughs and successes but void of critical thought, now prey to the mystification of truth, and see their future waiting in the grip of the structural mutation of society.

1. TWO FACES OF TECHNO-ECONOMICS

In a world where technology and economics meet and clash, in the search for a balance that we could define as the dimension of techno-economy, the conditions of the present must all be reviewed in the direction of possible reformist visions. Starting from central issues of the current economic and political debate in the search for a possible 'Good Economy'. As Cottarelli warns, "Our daily lives are increasingly influenced by powerful economic forces about which we know too little"[6]. Therefore, it isa question of knowing these economic forces better to understand what distortion has been made in relation to issues considered central. As regards the cultural challenges that must be considered in the search for a 'good economy', technical issues are undoubtedly primary since they condition all the others. The algorithm is present in the formation of electronic money, which has been talked about for some time, such as cryptocurrencies. So technology frees individuals from the power of institutions; in fact, "the main element on which the creation of cryptocurrencies is based [is] the fact that people trust more in an algorithm they know nothing about rather than traditional financial intermediaries"[7]. As the crisis of 2008-09 demonstrated, the abnormal growth of the financial system has annihilated the real production system. The engineering of finance is found in the concentration of the banking system, which remains dangerously at risk for the world economy regarding liquidity. Regarding globalization, the impact of technology on the distribution of income, even in a world that is now substantially globalized and hardly thought about in reverse, has been devastating in terms of ever-widening inequality. As Yascka Mounk acutely writes, "moving the clock back is not a realistic option: populists delude themselves if they think they can bring us back to the world as we imagine it was thirty

[5] H. ARENDT, VITA ACTIVA. LA CONDIZIONE UMANA 95 [VITA ACTIVA. THE HUMAN CONDITION] (Bompiani, 2017).
[6] C. COTTARELLI, CHIMERE. SOGNI E FALLIMENTI DELL'ECONOMIA 11 [CHIMERAS. DREAMS AND FAILURES OF THE ECONOMY] (Feltrinelli, 2023).
[7] *Id.*

or fifty or a hundred years ago. However, although it is naive to aspire to return to an idealized past, it is certainly possible to find concrete ways to respond to the growing sense of economic frustration"[8]. Nevertheless, the information revolution, artificial intelligence, in particular technologies, should have freed humanity from the need to work also by increasing productivity. Actually, labor productivity has slowed substantially. The vision of a profound faith in the continuous scientific and technological development that has marked the last centuries and that should, regardless of contingencies, continue on the same path, has failed. However the slowdown in growth that was mentioned occurred despite the indisputable advances in technology, especially ICT with the development of AI and robotics. Why? Paradoxically, the results obtained from new technologies are inferior in terms of the impact of those of the second industrial revolutionor less human intelligence behind the slowdown, but it is probably too early to express a definitive judgment. Just as it falls within the category of cultural challenges that can no longer be postponed, that relates to limits of economic growth in relation to environmental problems such as global warming or the necessary decarbonization for the well-being of future generations. The dream of endless growth, well-being, and wealth for all humanity comes to terms with the limitation of resources, with pollution of no longer renewable sources, and consequently with global warming. Decarbonization is not a choice but a responsibility to the extent that all countries, each with their own needs and specificities, beyond further protocols, understand while being aware "that no action will be easy, politically and economically. But the alternative of doing nothing or not doing enough is even worse"[9]. These are the themes that are intertwined in the correlation between technology, work, and environment in the post-global framework and which are united in the hope of a better world by virtue of the vision of the economy on the right side of history or the vision of the well-being of people.

[8] Y. MOUNCK, POPOLO VS. DEMOCRAZIA. DALLA CITTADINANZA ALLA DITTATURA ELETTORALE 212 [POPULATION VS DEMOCRACY. FROM CITIZENSHIP TO ELECTORAL DICTATORSHIP] (Feltrinelli, 2018).

[9] COTTARELLI, *supra* note 6, at 168.

2. LABOR ISSUES

Regardingthe vision of the Good Economy, the relationship between work and the technological revolution cannot only concern the productivity category. We know that the absence of work has a dangerous impact on the structural and functional balance of the community as it does not allow the person who lives and works in this context to pour his vitality into work for the transformation of things and for the building of society[10]. Poverty translates precisely into the impossibility of the person to acquire skills and transform his value into cultural impulses capable of enriching the political horizon of society. The new unemployment characterized by scarcity, due to third industrial revolution linked to global computerization processes, requires, in order to be addressed, in an already tested environmental context, a new conception of activity that allows the unemployed and the unemployed who have fallen into the cone of shadow of the post-industrial society to find one's place of social identity, through a pre-work educational process for the satisfaction of real needs, such as "the adoption of legal instruments that serve to concretely promote cohesion and inclusion social such as, for example, the citizen's right to continuous professional training and income replacement benefits in the transition from one job to another"[11]. Bauman writes, "while the level of consumption necessary for biological and social survival is stable by its nature, that of consumption necessary to gratify the other needs that consumption promises, hopes and demands to satisfy is, again due to nature of these needs, intrinsically destined to increase. The satisfaction of those additional needs does not depend on the maintenance of stable standards but on the speed and degree of their rise. Consumers who turn to the market in search of satisfaction for their moral impulses and fulfillment for their duties of self-identification (i.e., self-commodification) are forced to find continuous gaps between values and volumes, and therefore this type of 'consumption demand' is an overwhelming and irresistible factor in the upward push. [...] Once set in motion and maintained by moral energy, the consumer economy has no limit other than the sky"[12]. Technique is the rule. There has been talk of the end of the work society for some time. The criticism of the reality of functional work, which produces the deterioration of authentic politics, recalls the impoverishment of existence where man, as written by Arendt, is reduced to animal laborans. "The danger is that such a society, dazzled by the

[10] G. CAPOZZI, FORZE, LEGGI E POTERI. I SISTEMI DEI DIRITTI DELL'UOMO 64, 104 [FORCES, LAWS AND POWERS. HUMAN RIGHTS SYSTEMS] (Satura editore, 2005).

[11] E. Ales, *Dalla politica sociale europea alla politica europea di coesione economica e sociale [From European Social Policy to European Economic and Social Cohesion Policy], in* LAVORO WELFARE E DEMOCRAZIA DELIBERATIVA 366 (Giuffrè editore, 2010).

[12] Z. BAUMAN, DANNI COLLATERALI. DISEGUAGLIANZE SOCIALI NELL'ETÀ GLOBALE 89, 90 [COLLATERAL DAMAGES. SOCIAL INEQUALITIES IN THE GLOBAL AGE] (Editori Laterza, 2013).

abundance of its growing fecundity and absorbed in the full functioning of a process, is no longer able to recognize its own futility"[13]. It is worrying as work should be interpreted as a negative factor that must be eliminated. Work allows human beings to be free in the relationship between active citizenship and social rights. The question that needs to be reformulated is the following: is it the right way to free oneself from work? Undoubtedly, it is an attractive proposal, but the danger that by getting rid of work, we get rid of a fundamental part of us seems evident to the extent that the very meaning of the training and educational value inherent in work which has always saved man would fall into oblivion. There are other ways. In 2019, the Judge of the Constitutional Court, Giulio Prosperetti, published his work under the significant title Rethink the Welfare State, through which we aim to analyze the welfare crisis, starting from the evident difficulties of satisfying the constitutional principles with current forms of the Welfare State. Furthermore, it is a question of addressing the issue of income redistribution in its direct relationship with the issue of work, which today more than ever can be integrated with increasingly present volunteering and civil service activities, in the name of a conviction: "Why not finance work instead of sterilely assisting unemployment?" [14] . To implement the principle of financing work and not unemployment, we should first react to social dumping by guaranteeing the worker an income integrated by general taxation. There is no doubt, as Piketty writes, that "modern remuneration is built around a logic of rights and a principle of equal access to a certain number of goods considered fundamental" [15]. In order to be guaranteed regardless of the economic context, social rights need to be conceived in their essence as immediate protection of the person and not mediated by the intertwining of the various economic and fiscal policies, which are the basis of employment and labor interventions and regulation interventions of the market. This finds its fulfillment within communities given that, in the global world, individual States are not able to offer definitive solutions. In recent years, therefore, the debate around the prospect of a jobless society in the near future has become increasingly popular. In 1995, Jeremy Rifkin wrote *The End of Work*. This scenario was feared in this essay, which would become well known beyond academic circles: "Everywhere people are worried about their future. Young people have begun to vent their frustrations and anger with increasingly antisocial behavior. Older workers, caught between a prosperous past and an uncertain future, appear resigned and always feel trapped by social forces over which they have little or no control. The sensation pervades

[13] ARENDT, *supra* note 5, at 96.
[14] G. Prosperetti, RIPENSIAMO LO STATO SOCIALE 13 [RETHINKING THE WELFARE STATE] (Wolters Kluwer, 2019) https://legacy.ipsoa.it/Marketing/shopwki/pdf/9788813381448.
[15] T. PIKETTY, IL CAPITALE NEL XXI SECOLO 744 [CAPITAL IN 21ST CENTURY] (Bompiani, 2018).

the whole world that an unstoppable change is underway, so broad in scope that it is almost incapable of hypothesizing its impact. Life, as we know it, is being modified in its fundamental aspects"[16]. Rifkin's analysis undoubtedly proved to be substantially correct. But did the end of the work really take place? Or is the labor society under accusation? Or would it be necessary to say that it is, above all, the work society that is coming to an end? Honneth writes, "However, there is no doubt that the intellectual tendencies aimed at abandoning the world of work do not correspond at all to the atmosphere that reigns among the population. Despite all those prognoses in which there has been talk of an end to the work society, in the world of social life there has not been a loss of relevance of work at all: as in the past, the majority of the population continues to anchor its social identity in first and foremost to the role played within the organized work processes"[17]. The words of the German philosopher draw a very clear line on the hypothesis of the end of work. Undoubtedly, the world of work has changed rapidly due to the ever-accelerating advance of technology. And with it the law that follows social changes with difficulty, starting, in this case, from the emptying of the meaning of work. But we believe that there is neither the end of work nor the end of the work society. Yet, there have been many changes that have affected society and work. The attack on work and its rights comes in particular from a certain liberal horizon which has strongly "promoted and managed the dismantling of Welfare State and the archiving of Keynesian compromise between capital and work. And it was supported by the development of a powerful ideology of legitimation which made use of the joint action of economic doctrines, such as monetarist theories and the anti-Keynesian doctrines of the primacy of market over the State, of legal doctrines, such as the theoretical movement, *Law and Economics* based on the extension to political institutions of the models of exchange and the rational action of economic operators on the market. In short, economics has supplanted or worse, colonized legal and political philosophy as the terrain of public debate"[18]. The consequence of these actions is concentrated in the intensity of growth throughout the world of precarious, fragile, flexible work, self-employment, work with short-term contracts, and socially differentiated black work. About the deliberate confusion between freedom and liberalism, the idea that ousting work would pave the way for a new 'reign of freedom' passes. In fact, Gorz is convinced that "in principle, the massive abolition of work, its post-Fordist de-standardization, and demassification, the destatization and de-bureaucratization of social protection could or should have opened

[16] J. RIFKIN, LA FINE DEL LAVORO. IL DECLINO DELLA FORZA GLOBALE E L'AVVENTO DELL'ERA POST-MERCATO 26 [THE END OF WORK. THE DECLINE OF GLOBAL POWER AND THE ADVENT OF POST-MARKET ERA] (Dalai editore, 1997).

[17] A. Honneth, *Lavoro e riconoscimento. Per una ridefinizione in* CAPITALISMO E RICONOSCIMENTO 20 [WORK AND RECOGNITION. FOR A REDEFINITION, IN CAPITALISM AND RECOGNITION] (Firenze University Press, 2010).

[18] L. FERRAJOLI, MANIFESTO PER L'EGUAGLIANZA 81, 82 [MANIFESTO FOR EQUALITY] (Editori Laterza, 2018).

the social space to a swarm of self-organized and self-determined activities in function of immediate and mediated needs. This liberalization of work and this expansion of public space did not happen: they would have presupposed the birth of a different civilization, society, and economy, which would put an end to the power of capital over work"[19]. In this perspective, the end of the work society would allow sociality to express itself in subjective and therefore free dimension. Paradoxical and optimistic vision. Piketty says "from a strictly theoretical point of view, there are potentially other elements of strength in achieving greater equality. For example, we might think, over the course of history, production techniques assign ever greater importance to man's work and his skills so that the share of income from work shows a trend of growth: a hypothesis that we could call 'growth or redemption of human capital'. In other words, if this were the case, the progressive adaptation to technical rationality would automatically lead to the victory of human capital over financial and real estate capital. [...] in some way, economic rationality would mechanically translate, if this were the case, into democratic rationality"[20]. But this approach did not occur in reality. The picture is very different. Due to the new condition experienced by the worker who becomes a consumer, always imprisoned in the acquisition of goods that confirm his social existence, moreover often defenseless and at the same time neurotically in competition with machines that take his place and produce the goods purchased by him. Society is not finished and is not contained in a functional development in compliance with any kind of change. Yet the theme of a reductio is never put in the attic. The attempt to denuclearize work and life, therefore, remains active and ongoing. Flexibility and an economy of uncertainty are 'sirens' that raise the call for a quality of life that seems to forget the dangers inherent in technology and massification. But the noise of the machines, increasingly obsessive, with rhythms dictated by clocks that simply mark the times of work, as in the famous Metropolis by Fritz Lang, seems to close all space to the 'voices within', to the conscience which, disoriented, exacerbates the germs of anguish on the one hand and boredom on the other. Social recognition must reclaim the public dimension of work. It has come to this extent in global capitalism because work has been interpreted as social randomness and nothing more. Through the modality of insecurity, the strategy of social emptying ensures the return of new forms of slavery, which are embodied in individual and collective fragility, giving space to a 'blocked system' that breaks experiences. With destructuring of the social bond and growing individualism, supported by an epistemic of precarization that has grown in the arms of the primacy of the market and the

[19] A. GORZ, MISERIA DEL PRESENTE, RICCHEZZA DEL POSSIBILE 13 [PRESENT POVERTY, WEALTH OF THE POSSIBLE] (Manifestolibri, 2009).
[20] PIKETTY, *supra* note 15, at 44.

individual, the "utopian nucleus of the capitalist ideology that has determined both the crisis itself and our perceptions and reactions of it"[21], social change takes the place of society precisely because it possesses its benefits without having to discount its limits any longer. A social reality addressed by the exception as an opportunity, by the 'shock doctrine'[22] which, as Naomi Klein wrote, uses every crisis of various kinds to be able to impose neoliberal policies, without any popular consensus, causing unemployment and poverty and destroying any semblance of connection social. Domination practices are always present in the DNA of historical eras. With the advent of the risk regime, populations, for the most part, adapted to new forms of individual and social life based on comparison with technology and information technology. The watchwords are compulsive dynamism and mobility in the latency of a regulatory order. In the risk regime, the only possible 'order' is that which is expressed through markets and competition, namely information technologies that simultaneously make possible new types of decentralized forms of production, with less use of men, increases of productivity, and alteration of lifetimes. Work is changing through the conversion of production achieved by intelligent technologies at the expense of humans. Technological unemployment has been predictable for years, as has the growth of uncertainty and risk. The correlation between growth, work, income, and security does not play out on the level of complementarity but on the field of competition. Due to this condition of ideal precariousness, work, and the social state are in crisis by the climate of exclusion of the most fragile classes in the name of the idea of flexibility. As Maffettone wrote, speaking about the concept of Community in Adriano Olivetti, "the old way of doing things is no longer acceptable because the economy is not only profit but also and above all human relationship, the economy is a means to achieve the human potential and not a purpose."[23].

[21] S. Zizek, DALLA TRAGEDIA ALLA FARSA. IDEOLOGIA DELLA CRISI E SUPERAMENTO DEL CAPITALISMO 6 [FROM TRAGEDY TO FARCE. IDEOLOGY OF THE CRISIS AND THE OVERCOMING OF CAPITALISM] (Ponte delle Grazie, 2010).

[22] N. KLEIN, SHOCK ECONOMY. L'ASCESA DEL CAPITALISMO DEI DISASTRI [THE RISE OF DISASTER CAPITALISM] (Rizzoli, 2008).

[23] JACQUES MARITAIN ET AL., PER UNA ECONOMIA UMANA 56 [FOR A HUMAN ECONOMY] (Edizioni di Comunità, 2016).

3. ARTIFICIAL INTELLIGENCE: THE WORLD TO COME?

Human time may no longer be exclusive but shared with machine time, not intended as an expression of social organization,[24] but as an anthropomachinic metaphor. The man-machine is near horizon, ready to 'integrate' or 'replace' the old historical man in his corporeity[25], both in his physical and intellectual functions; now incapable of carrying out all the tasks required by productive development, the body is preparing to integrate its activity with machines that process information, thus carrying out both material and immaterial work through the definitive rise of Artificial Intelligence. "Artificial intelligence could actually represent a turning point because its advantages in terms of productivity would not simply be limited to doing things better than we already do, but would allow us to strengthen the creative capacity at our disposal, and therefore accelerate the development process itself technologically. In short, machines would not only create new things but would also create new ideas"[26]. The feeling of fear, if not of bewilderment, experienced in the 'new world' signals the expulsion of subjectivity disconnected from reality due to computer and information conditioning. For Lyotard, power is completely posthumanistic, in the sense that the aspirations of individuals are simply thought of as dependent variables of the 'system'. "In this sense the system presents itself as the avant-garde machine that drags humanity along, dehumanizing it to rehumanize it on another level".[27]. At this point, multiple opportunities are possible to rewrite human identity. Starting from the desire to return to opening one's identity despite the difficulty of access. In the new forms of politics, therefore, the problem arises of access to the participatory dimension today deluded by the 'network democracy', which is not for everyone and, therefore, for a few autocrats with partial rules and no collective guarantee. In fact, Severino clarified that a political-social reality without mediation only favors capitalism. "When democracy is direct, those who go directly to the people without the obstacles of the political structure are not so much the defenders of democracy but rather capital"[28]. Globalization was probably the final phase of a complete capitalist society, with the consequent adaptation of the State, which certainly does not disappear from the scene despite the indisputable crisis, where the condition of reciprocity between the economic and the political must be underlined. In particular, at

[24] S. LATOUCHE, LA MEGAMACCHINA. RAGIONE TECNOSCIENTIFICA, RAGIONE ECONOMICA E MITO DEL PROGRESSO 9, 17 [THE MEGAMACHINE. TECHNOSCIENTIFIC REASON. ECONOMIC REASON AND THE MYTH OF PROGRESS] (Bollati Boringhieri, 1995.)

[25] A. PUNZI, L'ORDINE GIURIDICO DELLE MACCHINE. LA METTRIE - HELVÉTIUS - D'HOLBACH. L'UOMO MACCHINA VERSO L'INTELLIGENZA COLLETTIVA 373, 405 [THE LEGAL ORDER OF MACHINES. LA METTRIE - HELVETIUS - D'HOLBACH. MACHINE MAN TOWARDS COLLECTIVE INTELLIGENCE] (Giappichelli, 2003).

[26] COTTARELLI, *supra* note 6, 123, 124.

[27] J. F. LYOTARD, LA CONDIZIONE POSTMODERNA 114 [THE POSTMODERN CONDITION] (Feltrinelli, 2014).

[28] E. SEVERINO, IL DESTINO DELLA TECNICA 20 [THE FATE OF TECNICHE] (Rizzoli, 2009).

the end of the first decade of the third millennium, through the great financialization of the economy of a concentrated nature compared to the distribution standards that had marked the principle of equality in developed Western society in previous decades. Technology is now an essential tool in everyday life. The socio-economic sector, in its various partitions, is strongly influenced by it, starting from the relational phenomenon remodeled through social networks, passing through the area of e-commerce, up to the creation of an alternative justice to the traditional one necessarily homologated - in terms of implementation times and tools - to the changed condition of economic exchanges. The digital technologies that underpin the fourth industrial revolution, also known as 'Industry 4.0', have significantly accelerated the evolution of production processes. In particular, new digital technologies impact four lines of development: data collection, which encompasses issues related to big data, cloud computing, and the Internet of Things; data analysis, from which it is possible to profit also thanks to machine learning processes; human-machine interaction, which mainly concerns touch devices and augmented reality; 'additive manufacturing', which acts as a bridge between the digital and the real through tools, robots, and machine-to-machine interactions. Technological progress is therefore presented as the main road to a 'new' industrial success, a harbinger of new work and production models in which men and machines are the protagonists together. However, it is not yet possible to know precisely how human-machine interaction will manifest itself and what scenarios may emerge, so it is necessary to keep in mind that the machine "is not the docile servant it was supposed to be"[29]. and that forms of control and oppression are still possible. "Perhaps this is precisely the task our time calls us to learning to understand each other with artificial intelligence that, on the one hand, using algorithms that imitate our neural networks, will become increasingly intelligent; on the other, using increasingly sophisticated conversational agents, they will be able to establish more natural relationships with us, if the expression is allowed"[30]. And so it is clear that we can say that the central issue is not to flee from technology. But, to paraphrase a very beautiful expression by Blumenberg, the truth, in any case, is reflected in the background and must be sought because it will always go beyond the possibility of being of simple assistance through technology. All this must lead us to think technology, machines, robotics, and everything in this world, as Anders would say, can simply herald a positive catastrophe that can once again make us reflect on what humanity is. This is the final point: to go beyond the aid but to return

[29] P. Piovani, *Salus a machina*, in 6 ETHICA. RASSEGNA DI FILOSOFIA MORALE 35, 45 [SALUS A MACHINA, ETHICA. REVIEW OF MORAL PHILOSOPHY] (1967).

[30] A. Punzi, *L'Umanesimo digitale: verso un nuovo principio di responsabilità? [Digital Humanism: Towards a new Principle of a Responsibility?] in* 1 DEMOCRAZIA E DIRITTI SOCIALI. RIVISTA TELEMATICA DI FILOSOFIA DEL DIRITTO (2023).

to thinking perhaps the technique is still an accepted path today simply because our image, *Imago Dei*, the one that is reflected in the mirror, is still recognized. It is the comforting image of the *Imago Dei* in its image and likeness. But if one day, looking in the mirror, we find the Imago-machine, then terror can arise, or even the possibility of a non-recognition of one's own identity. Then we must be vigilant, as the forbidden algorithm that we find in the Tree of Knowledge is an algorithm that fundamentally cannot be acceptable in a "paradise lost," to quote the poet Milton. The forbidden algorithm fundamentally detaches us from the truth and must still be, in our view, capable of marking the final boundary, because from the tree of the knowledge of good and evil, as it is said in Genesis, "you must not eat"[31], without knowing and without seeking the truth. The algorithm, the machine, the robot must not seduce us but make us once again recognize man in the truth, in the splendor of truth. This is the challenge that we must accept not by fleeing but by trying to perceive its beauty so that the technique is always subjected to our creative will. In this direction, today, more than ever, we have the opportunity to reason about the theme with an eye focused on new technologies. Starting from the possibility of using these technologies, a wide window opens onto a fundamental point, which is that of the erosion of responsibility, which is crucial because when we talk about AI and robotics, we are still fascinated by a mystery.

4. THE BOUNDARIES OF FRAGILITY: ECOLOGICAL TRANSITION OR TRANSITIONAL ECOLOGY?

Cottarelli wonders how the dream of limitless growth can still be realistic and concludes that without decarbonization, the world we will leave to our children will be worse than the one our parents left us[32]. As Ferrajoli writes, "we must know, this is a future of global regression, marked by the explosion of inequalities and discriminations and fears"[33]. The paradigm of 'sustainability' invests the epistemological, conceptual and lexical structure of all sciences, opening it up to new meanings, starting from the cognitive resource that is the other. This brings back into play the reflection on the 'intermediate bodies', today folded in on themselves. They should recover their original role as organisms of proximity, capable of creating networks between the center and the peripheries, between the totality in crisis and the unexpressed residuality through a renewed social

[31] 2 *Genesis* 16:17.
[32] COTTARELLI, *supra* note 6, 145, 168.
[33] L. FERRAJOLI, *supra* note 18, at 246.

culture, capable of providing answers to the current drift of 'disintermediation', a new expression of the technocracy of our times. As Rifkin wrote in *Entropy*, "Many diseases caused by the environment arise from the accumulation of wastes and other forms of wasted energy, as the entropy of a given environmental site increases. [...] As the wastes and exhausted materials created by the intense flows of non-renewable energy accumulate in a race to grow all kinds of disorder, a point will be reached where the population will no longer have a choice and will have to change course and return to renewable energy and limited uses, or face disease and death in epidemic proportions"[34]. The call to the right to prevention, both individual and collective, becomes forceful and perhaps we understand even better what Pope Francis meant when he spoke of 'human ecology'. In the Christian dimension, the environment is part of Creation, towards which man has an unlimited responsibility both inside and outside of it. In this perspective, establishing a relationship between principles and rights allows us to imagine. The call for the right to prevention, both individual and collective, becomes forceful, and perhaps we understand even better what Pope Francis meant when he spoke of 'human ecology'. In the Christian dimension, the environment is part of Creation, towards which man has an unlimited responsibility both inside and outside of it. In this perspective, establishing a relationship between principles and rights allows us to imagine. All men have a specific function in proclaiming an ecological awareness, which is nothing other than the responsibility assumed towards themselves, towards others, and creation. A global issue, which, as theologian Hans Küng stated, refers to a project of global ethos to be considered on the basis of social principles starting from that inherent to the person, taking into account the principle of solidarity, in the direction of subsidiarity which translates into the perspective of sustainable development which also becomes a principle in teleological key. It could be argued that through the reconstruction presented, it is possible to develop an environmental ethic that has as its purpose, on the one hand, the development of a suitable regulation for the defense and protection of the environment and on the other, the change of the individual's point of view towards the environmental issue. We are not only talking about Hans Jonas's principle of responsibility,[35] but of the attempt to take into consideration the value of nature, of everything that has been created together with us, and to adopt a sustainable lifestyle from an ecological and social point of view. The ethics of technology proposed by Jonas tends to go beyond a rational foundation through which to question the evaluative program of science. But this is not enough since the sociologist believes that the

[34] J. RIFKIN, ENTROPIA 292, 294 (Dalai, 2000).

[35] H. JONAS, IL PRINCIPIO RESPONSABILITÀ. UN' ETICA PER LA CIVILTÀ ECOLOGICA [THE PRINCIPLE OF RESPONSIBILITY. AN ETHIC FOR ECOLOGICAL CIVILIZATION] (Einaudi, 2002).

constitutive principle of his reasoning is 'the self-affirmation of being.' In our view, it is not a matter of simple survival, but of 'something more'. In this sense, man would occupy one of the many places in the natural scale, to the point that he could be identified as a simple 'collateral damage' of the successful development model. However, the human being understood as a person is not 'calculable' in his relational and exclusive proposition. As Karl Popper wrote, "The most serious scandal of philosophy consists in questioning the existence of the world precisely while around us the natural world is perishing."[36] In recent decades, the environmental issue has taken a serious hold on the stage of political discussion, often agitated in the name of fads but undoubtedly present in the agendas of every government on a global scale. Nature has no voice and does not vote. Nature does not exist except through the 'presence' of man. Determination is completed in the density of the relationship between man and nature, of which the latter is denoted as being correlated to the conscience of the former, revealing its objectification. The theses of the so-called 'historical environmentalists', are developed, in our opinion, on the sustainability of the idea of a sort of humanization of nature, almost in an autopoietic and functional way. In reality, the problem is posed differently. At the center of the discussion remains the man-creature with his limits. It is not enough to turn one's 'gaze' towards the natural world in a phenomenological way, underlining the distance, but, in the current situation of 'shortage,' it seems remarkable to illuminate the proximity through an attitude of profound 'regard.' Ecology not only has a conservative habitus, but expands and dilates in relation to the regions of the structural formation of social communities. In this sense, one can certainly assert that the existence of a social ecology is not bound to unsustainable commercial outcomes. "The economy is only one aspect and one dimension of complex human activity. If it is absolutized, if the production and consumption of goods end up occupying the center of social life and become the only value of society, not subordinated to any other, the cause must be sought not only and not so much in the economic system itself, but in the fact that the entire socio-cultural system, ignoring the ethical dimension, has weakened and now limits itself only to the production of goods and services".[37] These words clarify the points of distinction between a vision of the dominant and unlimited supremacy of the unipolar market and a reminder of the limits of human action that cannot use and abuse nature. It was impossible to symbolically 'eat the fruit of the tree', without moral implications beyond mere biological laws. This purpose is based on the increasingly evident formation of an ecological conscience among the peoples of the Earth that must find 'adequate expression in concrete programs and initiatives'. Questions such as the

[36] K. POPPER, CONOSCENZA OGGETTIVA 57, 58 [OBJECTIVE KNOWLEDGE] (Armando Editore, 2002).
[37] *Id.*

theme of interdependence, the unfounded neutrality of science, the fragility of the ecosystem, the threat of meteorological changes in relation to the biosphere, and the disposal of toxic waste enter into reflection. More than ever, in this case, it is legitimate to affirm that the *Imago Dei* can be found in the suffering Face of the Earth. Redesigning the environment according to the tenets of a true humanism that has at heart a shared interest in models and rules for a project of intergenerational solidarity. "Projects for integral human development cannot ignore subsequent generations, but must be marked by intergenerational solidarity and justice, taking into account multiple spheres: the ecological, the legal, the economic, the political, the cultural. Theses that see, on the one hand, a naturalistic and pantheistic attitude, on the other, the temptation to completely technize nature, must be equally rejected. The visions denounced are equally nihilistic in that they relieve man of responsibility in the face of the superpower of nature and technology. Nature, on the contrary, especially in our era, is so integrated into cultural and social dynamics that it does not constitute an independent variable." [38] The degradation of nature is the other side of the cultural degradation that exacerbates the meaning of the current crisis of human coexistence. "When human ecology is respected within society, environmental ecology also benefits".[39] Human ecology is fullness. "While it has been relatively easy to integrate the entire world into a single techno-economic apparatus, today we do not know how to contain and govern the cumulative effects of this process. [...] The theme of sustainability – which cannot be reduced to the environmental dimension, but involves the human, social, economic one – is an extraordinary opportunity to return to a concrete thought and practice".[40] To guard is to contemplate, not to dominate. Care cannot be limited to a 'trendy' ecological approach, generic and insufficient, preparatory to moral desertification. Man's dwelling on Earth is not delimited by 'open spaces' but simply by the fragility of 'closed living' that does not experience the hope of including and being included. Carlo Cottarelli's words are simultaneously full of concern but also lucid hope: "There remains then the ultimate dream, that of endless growth but in balance with the planet we live on. This is the dream for which I fear most that a rude awakening awaits us if we do not change course soon. We have been dreaming for too long, and, in the meantime, we are not doing what would be necessary to make the dream of sustainable growth a reality. There is still time, it is true, but it is above all in this field that we must realize that dreaming is not enough"[41].

[38] GIOVANNI PAOLO II, EVANGELIUM VITAE (1995), https://www.vatican.va/content/john-paul-ii/it/encyclicals/documents/.
[39] *Id.*
[40] C. GIACCARDI & M. MAGATTI, LA SCOMMESSA CATTOLICA 181 [THE CATHOLIC BET], (Il Mulino, 2019).
[41] COTTARELLI, *supra* note 6, at 170.

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VOLUME 9 ISSUE 2 NOTES

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/19317

Received: 28 March 2024 | Accepted: 26 June 2024 | Published: 09 Jan. 2025

Originalism and Non-Originalism as Legal Hermeneutics

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ABSTRACT

One of the hermeneutic elements that are decisive in the development of legislative acts and judicial decisions is the interpretation of the Constitution, the pillar of the legal system. In the United States, the debate on the interpretation of the Constitution by the Supreme Court has become a classic of constitutional law and, therefore, affects reflection on legal hermeneutics. This paper examines originalist and non-originalist approaches to constitutional interpretation and explores how political positions shape hermeneutic analysis, even in continental European legal systems, and specifically in the Spanish one.

KEYWORDS

Legal Hermeneutics; Originalism; Non-Originalism; American Constitutionalism; Constitutional Interpretation

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INTRODUCTION

With the appointment in 2018 by President Trump of three conservative Justices to the Supreme Court of the United States (U.S.) (Neil Gorsuch in 2017, Brett Kavanaugh in 2018 and Amy Coney Barrett in 2020), the American constitutional legal debate centered on the method of constitutional interpretation in the U.S. reached the non-specialist public, with those who defend the originalist hermeneutic method and those who, on the contrary, opt for a non-originalist approach when interpreting the Constitution. The three Justices cited joined Justices Samuel Alito and Clarence Thomas, both supporters of the originalist doctrine, thus reinforcing their presence on the highest court in the U.S.

The method of constitutional interpretation in the Supreme Court is significant since this Court is in charge of reviewing the constitutionality of federal laws and, therefore, of reviewing the constitutionality of laws adopted by the legislature. It should be recalled that the Supreme Court was established as the guarantor of the Federal Constitution in *Marbury v. Madison* in 1803. Since then, it has been the supreme instance of the federal judiciary.[1] It is composed of nine Justices, nominated for life by the President of the United States with the approval of the Senate. Federal judges can only be removed from office by impeachment in the House of Representatives and conviction in the Senate. This assumes that the U.S. Supreme Court currently has a majority of originalist justices and that this interpretation will dominate for years and even decades.

1. THE HERMENEUTIC CHARACTER OF THE U.S. CONSTITUTIONAL TEXT

The Constitution is a set of rules and principles expressed in legal texts that establish the foundations and limits of power, define the various institutions that make up the state and organise its relations.

Regardless of its presentation and content, the constitution is considered the top-ranking rule of any country's legal system. It has been the supreme rule since its publication. Its purpose justifies the authority attributed to its provisions. However, being the supreme norm does not mean it is untouchable; it can be amended by the mechanisms established in the norm itself.

[1] *See* Francisco Fernández, *La sentencia Marbury v. Madison* [*The Marbury v. Madison Ruling*], 83 Revista de las Cortes Generales 7 (2011).

A written constitution is usually organised into several parts called titles, which are further divided into articles and paragraphs. It may also include a Charter of Fundamental Rights.

Some states, such as the United Kingdom, do not have a written constitution. The custom prevails in the organisation of relations between institutions. Other states, such as the U.S., have a constitution in the form of a single text, which contains both a list of the fundamental rights granted to citizens and a definition of the various powers. The U.S. Constitution is short, and most of its provisions are general. This characteristic of a text over two hundred years old is a solid invitation to interpretation and what it means, which leads to a vast literature on its techniques and limits, especially from the rulings of the Supreme Court, as we are about to see.

Indeed, despite the different forms of state and legal organisation, the constitution appears as a fundamental text. This means that its drafting and interpretation have a special significance, which is why the analysis of the constitution, both in its constituent and judicial phases, requires special attention: a hermeneutic interpretation. Its very nature, its relevance, calls for hermeneutical interest. It is not just any legal text. Indeed, the constitution is a script written on the government's authority and the people's rights. This is why hermeneutic reflection is necessary. This is how the former President of the Supreme Court of Israel, Aharon Barak, put it:

> I am a judge. For me, a constitution is an operational document. I decide cases by extracting meaning from its text. . . . In order to know how to read a constitution I must have a better understanding of interpretation. . . . By now it is clear to me: I need a theory of interpretation. Not a meta-theory – a theory about theories – but a workable theory of how to read a legal text generally and a constitutional text in particular.[2]

The nature of the constitutional text, its hierarchical importance, its normative force and its character as the backbone of the legal, political and social order invite legal reflection. In this way, constitutional law goes beyond the constitutional text and jurisprudence. Constitutional law invites reflection on the foundations of the supreme law and its principles. Yale professor Bruce A. Ackerman emphasises this:

> There is more to law than rules. But this is a very uncontroversial notion in jurisprudence. Every thoughtful lawyer, I would hope, recognises that law includes the study of principles and precedents

[2] Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 Cardozo L. Rev. 767, 767–68 (1993).

> no less than rules - and that he or she must try to state the law in a way that takes all three into account.[3]

There is an initial moment of hermeneutic reflection on the origin and source of the constitutional text that internally affects the text itself and which has as its axis the powers of the state and its political and social significance. Once the constitution has been drafted and sanctioned, its legal authority serves as a guarantee of institutional balance. The constitution protects the separation of powers; it presents itself as its custodian, maintaining this balance if those participating in it endanger it. [4] However, by virtue of this evaluative function of political action, fundamentally in its legislative work, the question arises as to its solidity and the durability of its dogmatic force. The question lies in knowing to what extent its jurisdictional interpretation by the competent judicial body (the Supreme Court in the U.S. case or the Constitutional Court, depending on the legal tradition) should allow it to be updated. On the one hand, the constitution has a vocation for stability and solidity; otherwise, it would hardly be the guarantor and guardian of the separation of powers and the custodian of fundamental rights. On the other hand, the constitution, written and promulgated in specific historical and socio-political circumstances, is not immune to the passage of time and to the evolution of the forms of cultural, social, political and legal representation inherent in human life. A tension arises between permanence and social reality.

This tension has repercussions on how to approach the interpretation of the constitution. Sometimes, the constitution is understood as a foundational text of the state itself and of the nation itself, so the tension is reflected in a theoretical struggle between the universality of the norm and the particularity of the cases (as in the case of the U.S.). On other occasions, the constitution is born of a change in the foundational perspective of the state. So, tensions can lead not only to interpretative divergence but also to constitutional instability, which is the opening of constituent processes that weaken the guaranteeing force of the constitutional text. The weakness and fragility of the succession of constituent processes diminishes constitutional law. Suppose the interpretative struggle has as its background the danger of distorting the Constitution by making it too rigid or malleable. The danger of constitutional rupture is the reduction of the constitution and constitutional law itself to a foundational appendix of political law, and thus to the disappearance *in fieri* of the rule of law.

[3] Bruce A. Ackerman, We the People: Transformations Vol. 2 30 (1998).
[4] *See* Benjamin Constant, *Principes de politique* [*Principles of Politics*], *in* Écrits Politiques 329 (Marcel Gauchet ed., 1997).

Thus, although the existence of constitutional interpretation is inevitable since it is necessary in the exercise of law to interpret constitutional principles, it is also necessary not to go beyond certain limits since, without admitting absolute validity, it is also unthinkable that interpretation should be subject to the political orientation of the moment. Constitutional hermeneutics must seek an adjustment between the two positions, which must be based on knowledge of the social reality (contextual criterion). The constitution is not a dogmatic body closed in on itself which imposes itself as a revealed and unique truth on all legal operators, but is the result of a process of conciliation of interests which is developed and extended in order to constantly renew this conciliation and social pacification,[5] as well as to guarantee the rule of law.

In 1986, on the eve of the celebration of the bicentenary of the U.S. Constitution, Robert A. Goldwin and Art Kaufman, in a volume somewhat scattered in its eight contributions, asked in the title[6] whether the separation of powers still functioned in a country where some analysts and jurists perceived a battle for institutional reform. This conflict mainly affected the relationship between the legislature and the executive, which led to a debate on constitutional reform and its role, which was perhaps not as important as government action itself, as James L. Sundquist (senior fellow emeritus in the Government Studies programme at the Brookings Institution) pointed out from another point of view and coinciding in time and the debate.[7] The substantive question went beyond the parliamentary discussion to the question of how the Constitution could contribute to the process of institutionalisation and, thus, the particular form of constitutional interpretation that would guarantee the rule of law and its stability. As Richard H. Fallon points out, the agreement between all the theories is established in the recognition that:

> [T]he choice among theories should be based on which theory will best advance shared, though vague and sometimes competing goals of: (i) satisfying the requirements of the rule of law, (ii) preserving fair opportunity for majority rule under a scheme of political democracy, and (iii) promoting substantive justice by protecting a morally and politically acceptable set of individual rights.[8]

[5] *See* María L. Balaguer Callejón, Interpretación de la Constitución y Ordenamiento Jurídico [Interpretation of the Constitution and Legal System] 24 (1997).
[6] American Enterprise Institute for Public Research, Separation of Powers: Does It Still Work? (Robert A. Goldwin & Art Kaufman eds., 1986).
[7] James L. Sundquist, Constitutional Reform and Effective Government (1986).
[8] Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Calif. L. Rev. 535, 539 (1999).

We should not engage in simplistic reasoning to equate non-originalism with the claim that the U.S. Constitution is hermeneutical, as opposed to non-originalists who would deny any interpretation. We want to make a different point. Originalism and non-originalism employ hermeneutic methods but with different criteria and approaches. That is the discussion we want to present. Both consider diachronic and synchronic aspects when interpreting the Constitution for current jurisdictional and jurisprudential situations.

2. HERMENEUTIC APPROACHES IN AMERICAN CONSTITUTIONAL THEORY: ORIGINALISM AND NON-ORIGINALISM

In American literature, a great debate[9] has become central to contemporary constitutional theory as to the essential elements that should prevail when dealing with the interpretation of the Constitution. The question is whether or not when judges and interpreters of the Constitution invoke the original intention of the first legislators, they should take into account the 'original intention' or whether it should be irrelevant in today's interpretation. Extensive literature contains different hermeneutical positions since the discussion revolves around theoretical and methodological positions on constitutional interpretation. However, this interpretative multiplicity is grouped around two large hermeneutical nuclei or circles, differentiating between originalism and non-originalism or living constitutionalism.[10] This practical-theoretical classification is not uniform. In both classificatory groups, there is room for various theories and approaches.

2.1. ORIGINALISM

In 1980, Paul Brest noted: "[B]y 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."[11] The author used a neologism, which had its roots in constitutional literature since the beginning of the twentieth century. Edwin Borchard

[9] *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243 (2019).

[10] While originalism is also opposed to the moral reading of the Constitution. *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 1–12 (1996).

[11] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. Rev. 204 (1980).

had already used 'original meaning' in an article on due process in 1938,[12] and Howard Jay Graham used 'original intentions' in the legal field of due process. However, it was not until 1966 that the Supreme Court used the expression 'original' about the Constitution in a text.

In *Harper v. Virginia State Bd. of Elections*, in which the appellants, residents of Virginia, challenged the unconstitutionality of Virginia's poll tax because the Fourteenth Amendment prohibits states from requiring citizens to pay a fee or tax for access to the polls, the Court ruled that the rule was unconstitutional. It argued that no new meanings can be given to concepts inherent in the constitutional text, as the Virginia Court had done. The text is enlightening on the two hermeneutic methodologies at stake and initiates the question we are presenting using an 'originalist' argument:

> The Court's justification for consulting its own notions, rather than following *the original meaning of the Constitution*, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the *original meaning of the Constitution* is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that, to save the country from the original Constitution, the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society.[13]

Constitutional originalism has, therefore, a long history which has taken on new forms.[14] Although originalism is presented as a method applied to the Constitution, it is a theory of the interpretation of legal texts.[15] If we had to define its fundamental thesis succinctly, it states that interpreting the Constitution means defining its original meaning.[16] However, as we have pointed out, there are several approaches to legal interpretation, among which, as Lawrence B. Solum points out, 'originalism' is a theory of interpretation of legal texts.[17] In support, Solum further points out, "'originalism' is just a name for a theory or a set of theories"[18] which attempts to show the original meaning of the Constitution as a fundamental hermeneutical criterion. In this sense, from the descriptive thesis of originalism, which affirms that the truthfulness of the

[12] Edwin Borchard, *The Supreme Court and Private Rights*, 47 Yale L. J. 1051 (1938).
[13] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
[14] *See* Keith E. Whittington, *The New Originalism*, 2 Geo. J. L. & Pub. Pol'y 599 (2004).
[15] *See* Johnathan G. O'Neill, Originalism in American Law and Politics 112 (2007).
[16] *See* Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 Const. Comment. 231, 236 (1989).
[17] Solum, *supra* note 9.
[18] *Id.*, at 1247.

meaning of the Constitution rests on its original meaning, it is possible to derive the normative thesis according to which the interpreter must always refer to this true meaning and not, for example, change it at will.[19]

Originalism limits judicial activism by interpreting the Constitution in a way that is faithful to its original meaning. The problem lies in discerning what 'the original meaning of the Constitution' consists of. In a more restricted approach, this task assumes that the meaning of the text is invariable, does not change, and does not follow the interpreter's intention. The meaning of the originalist paradigm in contemporary constitutional theory stresses that the purpose of the Constitution is to secure the future so that it remains grounded in the fundamental norms included in the text of the Constitution.

Insofar as originalism is not a univocal term, the family of contemporary originalist-constitutional theories contains a temporal and substantial diversity (old and new originalism), and there is no single thesis on which all self-styled originalists agree.[20] Indeed, it is expected to oppose old and new originalism, and many contributions refer to this evolution of originalist doctrine.[21] Thus, as Berman points out, we could distinguish between hard and soft constitutionalists. Indeed, some present themselves as being close to progressivism.[22]

Most originalists agree that the Constitution's original meaning should strongly limit the content of constitutional doctrine. Following Primus, we can define originalism as a family of ideas and practices that assign the authority of the content of legal provisions in the original directions that have prevailed since the constitutional text was enacted.[23] Constitutional hermeneutics results in amendments to the text of the Constitution. Despite the differences in nuances, not a few authors claim, in turn, that originalism maintains a line of continuity. Two central ideas serve as the focal point or core of contemporary originalism.

The first idea or thesis is that the linguistic meaning of each constitutional provision, i.e., of the constitutional text, was fixed at the time each provision was framed, adopted, and ratified (fixity thesis). This assumes that the meaning of the Constitution is determined by the intentions of its authors, its ratifiers, or both (original

[19] *See generally* Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty 427 (2004).
[20] *See* Andrew Coan, *Living Constitutional Theory*, 66 Duke L. J. Online 99 (2017).
[21] *See* James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms 433–37, 446–52 (2015).
[22] *See* Keith E. Whittington, *Is Originalism too Conservative?*, 34 Harv. J. L. Pub. Pol'y 29, 38 (2010).
[23] Richard A. Primus, *When Should Original Meanings Matter?*, 107, 2 Mich. L. Rev. 165, 186 (2008).

intentions). The meaning of the text is determined by the meaning of the words and phrases existing at the time the Constitution was adopted (original public meaning).[24]

Despite evolution and continued disagreement, however, contemporary originalist theory has a core of agreement on two propositions. First, almost all originalists agree that the inguistic meaning of each constitutional provision was fixed at the time that provision was adopted. Second, originalists agree that our constitutional practice both is (albeit imperfectly) and should be committed to the principle that the original meaning of the Constitution constrains judicial practice.[25] Says Robert Clinton: "[T]he Constitution or any amendment thereto should be interpreted as its spirit and language were understood when the relevant provision was drafted rather than in the light of new and different meanings that later generations have created and supplied."[26]

If the first originalism was a reaction to a line of argument of the Court (the Warren era), the new originalism, which originated in the nineties of the last century, has a more propositional character. The emphasis is not so much on the Court's self-limitation and respect for the legislative act but rather on the fact that the Court is a guarantor of the Constitution and, therefore, has a responsibility to defend it. This leads to a constitutional reading that considers the historical context of significance at the enactment, those above 'original public meaning'.

According to originalism, hermeneutics must follow the original meaning of the source if it is discernible. Thus, originalist interpretation uses textual and contextual hermeneutics, taking into account objective criteria. It will consider the original meaning of constitutional texts, studying their semantic and syntactic content,[27] their legal doctrinal sources, the underlying legal events and the public debate that led to the constitutional provision. Starting from the 'genetic' reading, it operates with the logic of the common sense of the civic man, applying situationism.

[24] *See* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 Notre Dame L. Rev. 1945 (2017).
[25] *See* Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory, in* The Challenge of Originalism: Theories of Constitutional Interpretation 12 (Grant Huscroft & Bradley W. Miller eds., 2011).
[26] Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 Iowa L. Rev. 1177, 1180 (1987).
[27] *See* Robert H. Bork, A Time To Speak: Selected Writings and Documents 167 (2008).

2.2. NEO-ORIGINALISM OR LIVING CONSTITUTIONALISM

In contrast to the originalist position, there is a group of theories called non-originalists. As in the case of originalism, this group is made up of a heterogeneous group of versions,[28] among which the supporters of living constitutionalism stand out. They feel progressive and affirm non-originalist positions.[29] They deny the original force of the text as a criterion of interpretative fixity, "the proponents of constitutional interpretation labeled as the *living constitution* are of the opinion that the Constitution should be treated as a legal act with a dynamic meaning depending on the time of interpretation."[30] Authors who defend this position see themselves as more pragmatic, instrumentalist and progressive in their approaches to the Constitution and, as such, tend to be averse to fidelity as an interpretative value, i.e., to assert that the text changes from time to time according to the interpreter's perspectives and interests. This leads to a denial of the originalist thesis, some authors even forcefully, such as the article by Mitchell N. Berman: "*Originalism Is Bunk*".[31] Indeed, according to this hermeneutic current, it is difficult to establish an 'original' (fixed) meaning of the primary source (Constitution).

The question arises from the fact that the U.S. Constitution has more than two centuries of history, and while it remains, the world it regulates is changing very rapidly and profoundly, not only territorially and in terms of population but also in its social, economic and, now, technological forms. The system of interpretative renewal based on amendments does not seem sufficient to keep up with these changes, and the solution of immutability does not seem reasonable to many since the speed of social transformation was not in the legislator's mind.[32] In the face of these facts, non-originalists argue for the inevitability of a constitutional change that also accompanies the perception of its validity in society. According to the non-originalists, interpretative fixism and the legislator's intentionality lead to a dependence on history, which makes the jurist a historian or a specialist in philosophical hermeneutics since he should be able to guess the original intention and understand it in the interpretative context of the eighteenth

[28] *See* Cynthia Vroom, *États-Unis* [*The United States*], 33 Annuaire International de Justice Constitutionnelle 265, 272 (2017) (Fr).
[29] *See generally* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549 (2009) [hereinafter Balkin, Framework Originalism]; Jack M. Balkin, Living Originalism (2011) [hereinafter Balkin, Living Originalism].
[30] Edyta Sokalska, *Interpretations of the 'Living Constitution' in the American Legal and Political Discourse. Selected Problems*, 69 Zbornik Pravnog Fakulteta u Zagreb [Collected Papers of Zagreb Law Faculty] 433, 437 (2019).
[31] Mitchell N. Berman, *Originalism Is Bunk*, 84 N. Y. U. L. Rev. 1 (2009).
[32] *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001).

century, as well as knowing how to bring it into the modern world. This is an almost impossible task for a jurist.

Given the above, other hermeneutical solutions have to be introduced. This means that interpretation must be done based on the objectives to be achieved by the interpreter. The interpreter evaluating a written constitution cannot anticipate all events occurring in the future, so the necessary interpretation aims to answer the Constitution's problems. The original understanding is an essential source of the meaning of the Constitution, but so are other sources, namely the evolution of community norms and traditions.

'Interpretation' is a dynamic process that enables people to keep faith in the Constitution from generation to generation. In the eyes of living constitutionalism, it is precisely this interpretative life that is intended by the constitutional text, insofar as the legislator (the drafter) of the constitutional text intended that the Constitution should not be interpreted in an originalist sense. The text is not fixist in its original sense, but it is a text that is full of meaning since the meaning of the text is not unique. One meaning of the constitutional text is the original meaning, but it is only one meaning of the text and not the meaning of the text.[33] The core of the debate lies in the presence of an existence (the original constitutional text) and an interpreter. The constitutional text invites interpretation since it responds to a text and a fact. According to the non-originalist approach, the U.S. Constitution was for the Founders not just a text but a fact "a *constituting*", writes Amar.[34] The meaning of the constitutional text changes over time as social attitudes change. Thus, only some interpretative factors can be taken into account. Some theorists of living constitutionalism, such as Kramer, argue for the relevance of citizens' control over the application and interpretation of constitutional law in deliberative democracy: "[T]he power of the Constitution will always be in the hands of the people."[35]

Faced with the criticism of originalism, 'living constitutionalism' is too vague and manipulable. Given that society is changing, some American constitutionalists, such as David Strauss, propose common law as a non-originalist solution, nuancing living constitutionalism.[36] Especially in the standard law system, common law has existed for centuries. Common law is presented as a source of law that limits judges' discretion and guides individuals' behaviour. Moreover, while the common law does not always provide clear answers, advocates of this constitutional interpretation deny that imprecision is

[33] *See* Perry, *supra* note 16, at 246.
[34] "Thus the Founders' 'Constitution' was nor merely a text but a deed–a *constituting*". Akhil R. Amar, America's Constitution: A Biography 5 (2005).
[35] Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 173 (2004).
[36] *See* David A. Strauss, The Living Constitution (2010).

tantamount to or leads to manipulation. In this sense, rather than defending the Living Constitution, they defend the evolutionary character of the Constitution, which takes into account the sources prior to the text. In this sense, intergenerational interpretative incorporation frees each generation from the obligation to follow the mandates of the deceased Founders. In this way, repeated practice is understood as a source of constitutional law, i.e., when democratically accountable institutions, both state and federal, act over many years based on a particular interpretation of the constitutional principle, that interpretation becomes an authority.[37] One fact that would demonstrate this common law-based interpretive wisdom and show generational relevance would lie in the discovery of various legal and political milestones such as the end of racial segregation, the expansion of women's rights and freedom of expression.

3. THE ROLE OF POLITICS IN CONSTITUTIONAL INTERPRETATION

The debate arising from the very silence of the U.S. Constitution on interpretative mechanisms is overcoming its combative and polemical nature over time. No one doubts the life of the constitutional text, its permanent and stable character. The discussion as to whether its vitality emanates from the text itself towards society, orienting it axiologically and legally, or whether its vitality is reinforced in dialogue with the multiple historical-social factors does not tarnish a positive view of the constitutional text. In this sense, we can understand Balkin's words when he states that the text of the Constitution serves as a framework and an essential blueprint for politics.[38] Indeed, the Supreme Court has to interpret the Constitution, which is essential since, among other things, it means carrying out an essential activity to protect fundamental rights through its constitutional interpretation. It also indicates that the President is crucial in determining what view of fundamental rights the Supreme Court adopts.

It is worth recalling the fire that fueled the originalism debate: the Warren era (the fifteenth Chief Justice of the United States from 1969 to 1986) and the Court's embrace of living constitutionalism. Various rulings by the Warren Court (such as the one that gave rise to the *Miranda* warning) imposed the idea that judges were substituting their judgement for the legislature, interpreting areas of penumbra arising

[37] "Longstanding practice is the idea that when democratically accountable institutions, state as well as federal, act for many years on the basis of a particular understanding of constitutional principle, that interpretation becomes authoritative". Michael McConnell, *Time, Institutions, and Interpretation*, 95 B. U. L. Rev. 1745, 1771 (2015).

[38] *See* Balkin, Framework Originalism, *supra* note 29, at 549-614.

from the constitutional text. In other words, constitutional interpretation (by the Court), characterised by unrestricted interpretative openness, threatened legislative majorities; they were capable of substituting legislative action itself, thus exercising an unlimited discretionary power of the judges. In this sense, originalism awoke as a self-limiting constraint based on text, history and constant practices taking shape in the Berger Court.[39] Judges should interpret the Constitution according to the will of the political majority and discern the Founding Fathers' original intentions, thus adding objective hermeneutical elements that can prevail over subjective preferences.[40] The critique of judicial activism underlined the tendency of judges to try to impose their own political and social values on constitutional issues. Originalism appears as a barrier to voluntarist and creative jurisprudence (paradigmatically represented in the Warren era in the Supreme Court). The danger of subjective deviation causes the originalist doctrine to be disdained in academic circles but to remain entrenched, if not augmented, in the judiciary. As Delahunty and Yoo emphasised: "Even liberal justices now speak in an originalist dialect."[41]

The fundamental theoretical question is that the need to make the founding text converge with the rapidly changing reality cannot break the founding reality. Indeed, the Constitution cannot be a relic, but neither can it be changeable, for then it would not be a constitution. This observation has led even constitutionalists of a non-originalist interpretation to abandon the theory of the 'living constitution' because it is indeed inherent in the concept of the Constitution that it should be firm and solid, that it should be presented as a source for the legal order and a rock that embodies the fundamental principles. Moreover, the principles cannot have a strongly contingent vocation, that is to say, be at the mercy of space and time, because if these principles are not essential, the Constitution will lose its *raison d'être* [reason for being]. An intrinsically dynamic reason would not only lose its meaning but would also be easy prey to manipulation: perspective would prevail over solidity, it would be an infiltration of politics, and all of this would break the legal character of the constitutional text itself, since it would be the interpreter (a group of judges) who would provide the valid meaning, at least for a time, of the Constitution. We must bear in mind that in politics, time and space are fundamental interpretative axes.[42]

[39] *See* O'Neill, *supra* note 15, at 111-32.
[40] *See* Whittington, *supra* note 14, at 602-03.
[41] Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 Mich. L. Rev., 1081, 1088 (2015).
[42] "I have attempted to show that the principal methodologies logically arise from the intersections of two considerations: time and institutions. Each of the principal methodologies reflects a focus on how a particular set of institutions interpreted the constitutional principle within a particular time frame". McConnell, *supra* note 37, at 1790.

This temporal reality is imposed so there is no unrestricted view of originalist fixism. Originalism – or part of it – accepts that the meaning of the text may change over time.[43] What is proposed is not so much that the Constitution changes its original meaning but that it can be interpreted in the present time through instruments that allow the original meaning and intention to be interpreted through the mediation of judicial interpretations without this being a version of the pluralism of non-originalism. This would be the case of the 'Inclusive Originalism' of Professor William Baude, Director of the Constitutional Law Institute of the University of Chicago.[44] This implies a positive turn in the interpretation of the intersection between law and history (the institution and time) that respects the law of the Founders and the articulation of the founding law with the law in force. This method attempts to provide a structural solution to the interpretation of the law in the awareness that a method cannot resolve all casuistry by itself but must provide guidance in decision-making and that this method must take into account "the present force of the past law" which reinforces the confidence of the law in force in the law of the past. This means taking history into account but not living in history: "What was thought and said in the past are questions of history; which of the answers supply legal rules today is a matter for jurisprudence and substantive law."[45] As Primus points out, commenting on Baude's proposal, inclusive originalism has different virtues, among them "[i]t avoids the dead-hand problem because it grounds the authority of original meanings not in actions that occurred long ago but in the practices of the living",[46] it is a matter of observing what judges do in their legal practice.

History and tradition (a term not used in the Anglo-Saxon sphere but better understood in our mental universe) are presented by the originalists as a brake on the plurality of interpretations, which they call "insubstantial"[47] because they are born of political decision; however, the non-originalists also accuse originalism of interference

[43] Most modern originalists accept that the meaning of text can change over time. As a result, many are abandoning strict reliance on text and, in exchange, some are seeking structural measures of original intent. Easterbrook's lecture is an example of this shift. It offers a way to make substantive constitutional decisions based on the Framers' original view of the separation of powers as inferred from the text, rather than based on the original meaning of any specific constitutional provision.

Wyatt Sassman, *Applying Originalism*, 63 UCLA L. Disc. 154, 156 (2015).

[44] Originalism might incorporate other legal doctrines into itself, the same way that American law might choose to incorporate a foreign legal rule or an economic standard. Originalism might also simply permit a given actor to choose a rule governing some defined issue, the same way that a court might be allowed to choose rules governing its own proceedings.

William Baude, *Is Originalism our Law?*, 115 Colum. L. Rev. 2349, 2356 (2015).

[45] William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 Law & Hist. Rev. 809, 820 (2019).

[46] Richard A. Primus, *Is Theocracy Our Politics? Thoughts on William Baude's 'Is Originalism Our Law?'*, 116 Colum. L. Rev. Sidebar 44, 45 (2016).

[47] Solum, *supra* note 9, at 1261.

by political practice. The attack by originalists (such as Bork and Berger) on the decisions of the Warren Court, which, as we have noted, is paradigmatic of a living constitutionalist Supreme Court in U.S. history,[48] would become "a central organizing principle for the Reagan Justice Department's assault on what it saw as a liberal federal judiciary."[49] This struggle makes it clear that politics and values play an essential role in all legal interpretative theories, especially constitutional ones. Moreover, it is true that, in this sense, originalist theories cannot escape the political sphere to which all regulation is oriented (which, in essence, organizes it). In that case, living constitutionalism provides a propitious (and, for them, solid) framework for understanding the Constitution and the role that (political) values should play in constitutional interpretation.

In this sense, since the Constitution is a written text ratified by the Founders without an established hermeneutic method, and since this text determines the American nation itself, the theoretical question is marked by political debate and the tension between the various political forces. However, this tension must be understood in the fact that the U.S. Constitution has a foundational background; it is a constitution that, as Sanford Levinson[50] points out and Stephen M. Griffin, among others, recalls, constitutes an "essential element of the American civil religion"[51] and is thus 'revered and venerated'. This element must be balanced in understanding its interpretation, even if we cannot address it now.[52]

Despite its foundational character, the Constitution is understood as the supreme law of the United States that provides a framework for government and a legitimate vehicle for granting and limiting the power of government officials. However, the truth is that human beings interpret it, and they have a personality and a political mind of their own. Constitutional lawyers also need several vital concepts that emanate from politics and are necessary to properly understand the meaning of the constitutional text, especially in a constitution such as the American one that "laid down a structure, and implicitly a philosophy, of government that for the better part of two centuries has fulfilled the needs of American public life."[53]

The interpretative battle has been played out theoretically and politically, identifying traditional republicanism with originalism and democratic liberalism with

[48] *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 Wash. & Lee L. Rev. 5 (1993).
[49] O'Neill, *supra* note 15, at 112.
[50] *See* Sanford Levinson, *'The Constitution' in American Civil Religion*, 1979 Sup. Ct. Rev., 1979, at 123.
[51] "The rhetoric of the bicentennial confirmed the judgement of Sanford Levinson and others that an essential element of the American civil religion is reverence and veneration of the Constitution". Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, 10 Oxford J. Legal Stud. 200 (1990).
[52] *See* Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984).
[53] Morton Keller, *Powers and Rights: Two Centuries of American Constitutionalism*, 74 J. Am. Hist. 625 (1987).

non-originalism in different versions and at different times. Thus, if conservative judges are originalists and use this hermeneutic weapon to cover controversial situations, the democratic courts are committed to living constitutionalism, introducing elements that skirt under the umbrella of democracy of the living people elements that escape the original spirit of the Constitution. In this sense, the banner of the ghost of the past that suffocates the living (the dead hand in American legal literature) is waved, as Baude underlines:

> This positive turn answers the dead-hand argument famously leveled against originalism: The earth belongs to the living, so why should constitutional law be controlled by the decisions of the dead? The original meaning of the Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document's past. So the decisions of the dead still govern, but only because we the living, for reasons of our own, receive them as law.[54]

[54] Baude, *supra* note 44, at 2408.

CONCLUSION

Jack Balkin explained in *Living Originalism*[55] the role of a constitution in a democratic state and, conversely, the role of the democratic process in the evolution of the constitution. The question is how the democratic state can develop in the present in the light of a text that is its foundation without betraying the very text that makes the democratic state possible and without disappointing the lives of those who make up the democratic state; how to bring decision-making (legal rulings) up to date in a way that does not delegitimise the text (in its formation and intention) that it is intended to defend. In the background, there is also the question of the legal training of judges, whether they have to be meta-legal technicians or whether they have to be able to understand the context of the formation of the legal text; the question of originalism and non-originalism is a theoretical problem that is part of American constitutional theory because it depends for its object on a text of a specific nature such as the constitutional text understood as the founding text of the United States, which has been in existence for more than two hundred years and which has been enriched in forms of interpretation (amendments) but not modified, and all of this within a tradition of great customary (Common Law) and jurisprudence. The quasi-sacred character of the constitutional text understood within the American civil religion helps to understand better the issues underlying the constitutional problem, which are very different from the central character of continental constitutions.

In this sense, it would be interesting to consider the need to introduce a hermeneutic capable of combining the strength of the full meaning with the need to respect, in the sense of not contradicting, the literal meaning of the original constitutional text. Legal hermeneutic reflections in the Anglo-Saxon field could take elements from other hermeneutics of original (non-legal) texts and consider not only the author's hermeneutics (whole meaning-literal meaning) but also the hermeneutics of the reader. The author does indeed influence the reader. However, this reader is, on the one hand, the implicit reader; by this expression, we mean the person or persons the author had in mind when he wrote and whom he wanted to influence (in this case, the constitutional text). Moreover, this means that it directly influences the author's or drafter's spirit. However, at the same time, we have to consider the explicit reader: the one who will continue to read over time and who will still be influenced by the original text. The question arises about the capacity of the explicit reader (the one who continues to read over time) to influence the author, in this case, those who must interpret the author's intention. The answer is not easy and, in any case, will require a

[55] *See* Balkin, Living Originalism, *supra* note 29.

commitment to objective research on the reader's part. This hermeneutic becomes more vivid in the case we have discussed of the U.S. Constitution. I want to end with a comparative reflection on the continental situation at crucial moments in various European countries, including Spain.

On the continental shore, the debate is different since the underlying question relates to the very nature of the constitution and responds to the difficulty of reconciling the justification of the power entrusted to judges with that of democracy. In the background, the polemic between Hans Kelsen and Carl Schmitt on the "guardian of the constitution" and constitutional justice, between the function of the Head of State and the judicial control of the constitution and the review of the constitutionality of the acts of the state, is felt. [56]

Both Schmitt and Kelsen agree that the fact that the constitutional court can interpret the constitution means that it can allow or prevent its development in a particular direction, which is a problem. The solution is, however, different. For Schmitt, the guardian must be a different body from the constitutional court. The Head of State should exercise the function of guardian of the constitution to control or limit judicial control of the constitutionality of laws. For Kelsen, the solution to the problem is determined by the drafting of a good constitution, an essential constitution.[57]

Indeed, suppose the constitution is attacked by the institutions themselves, from the perversion of the idea of legislative and judicial control and its interpretative and decision-making tools that perversely modulate constitutional law. In that case, the Head of State appears as the guarantor of the spirit of the constitution. If the Head of State modulates his power, especially in republics where he has executive powers and not only representative and sanctioning powers, a constitutional judiciary is necessary to safeguard the constitution. Today, the danger enunciated in the classic polemic is qualified as the constitutional courts do not possess sufficient effective political force and know procedural limitations. Hence, their decisions have an executive limit. However, they do have a directive power. On the other hand, the Head of State also has power limited to the functions assigned to him by the constitutional text itself.

[56] *See* Olivier Beaud & Pasquale Pasquino, La controverse sur " Le gardien de la constitution" et la justice constitutionnelle. Kelsen contre Schmitt [The Controversy on " The Guardian of the Constitution" and Constitutional Justice. Kelsen versus Schmitt] (2007) (Fr.).

[57] *See* Nicolò Zanon, *La polémique entre Hans Kelsen et Carl Schmitt sur la justice constitutionnelle* [*The Debate Between Hans Kelsen and Carl Schmitt on Constitutional Justice*], 5 Annuaire International de Justice Constitutionnelle [International Yearbook of Constitutional Justice] 177, 189 (1989) (Fr.).

In the case of Spain, Title II of the Constitution assigns to the King the office of Head of State as a "symbol of its unity and permanence, he arbitrates and moderates the regular functioning of the institutions, assumes the highest representation of the Spanish State in international relations . . . and exercises the functions expressly attributed to him by the Constitution and the laws."[58] It is not surprising that supporters of totalitarian regimes, in turn, seek to take legislative and judicial control, so that they can manipulate constitutional interpretation in its various phases, while at the same time seeking to politicise the Head of State under the political cover of the Republic in order to give it back more executive power, thus breaking its constitutional neutrality.

The solution to the constitutional interpretative problem takes work. However, it leads us to consider the need to ensure a constitutional hermeneutics that tries to ensure excellent constitutional drafting and an adequate interpretation that solves the issues we have pointed out, especially the tension between the original text and the adaptation to the social and political moment without the dissolution of the constitutional spirit, as pointed out in the American legal literature.

[58] Constitución Española, BOE n. 311, Dec. 29, 1978, art. 56.1.

VOLUME 9 ISSUE 2 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/19196

Received: 27 April 2024 | Accepted: 12 Sept. 2024 | Published: 28 Jan. 2025

Legitimacy and Rationalization in European Criminal Law: A Critical Analysis of the Criminalization of Migrant Smuggling

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ABSTRACT

The article critically examines the legitimacy of European criminal law through the perspective of migrant smuggling incrimination. By analyzing the complex intersection of legal principles and migration policies, the research investigates whether applying a principled criminalization approach can resolve existing systemic legitimacy challenges in European criminal law. The study systematically deconstructs migrant smuggling as a legal concept, evaluates its alignment with broader criminal law functions, and critically assesses the legal and ethical implications of current European Union incrimination strategies. Through a comprehensive methodology examining normative frameworks, interests, and legal principles, the research aims to provide a nuanced evaluation of criminal law rationalization in the European context. After defining the conduct and differentiating it from related concepts in the Introduction, Section 1 explores the relationship between migrant smuggling and the functions of European criminal law. Section 2 undertakes a step-by-step analysis of the criminalization process, examining all relevant interests and principles. Section 3 critically assesses the adequacy of this process's outcomes, followed by concluding observations on the broader implications for European criminal law legitimacy.

KEYWORDS

Migrant Smuggling; Function of the European Criminal Law; Material Legitimacy; Criminalisation Principles; Criminalisation Process

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INTRODUCTION: IDENTIFYING THE CONDUCT

Migration as a global phenomenon is not a recent one: people have always left their country looking for different opportunities in other parts of the world, regardless of the reason that motivated them to leave.[1] However, it is only with the creation of the nation-state – with fixed borders and the exercise of its sovereign power within them – that the phenomenon of migrant smuggling becomes relevant. With the policing of borders and the determination, by the internal law, of who could legitimately cross them, the parallel need to access the opportunities presented by that territory without respecting the requirements for entry is simultaneously created.

Migrant smuggling is therefore undeniably linked to the concept of "irregularity", stemming from the formalisation of the entry into a given territory;[2] the requirements for such a lawful entry and stay in a given territory are defined by the internal law of a given country. As a consequence, when an irregular situation is not identified and reported by the responsible bodies of each state, that irregularity will not exist; thus, a migrant's status can be fluid, depending on the fulfilment of the requirements established by law.[3]

This article aims to analyse the European legal definition of migrant smuggling, as it exists now in the legislation of the European Union [hereinafter EU], regarding its material legitimacy, to evaluate the need for a legislative revision. For that purpose, a proposed three-step criminalisation process will be followed, where the interests that can be subjacent to the criminalisation of migrant smuggling will be critically assessed to identify the ones (if any) that are capable of lending the necessary legitimacy to European criminal law. As migrant smuggling is a very plastic issue, in the sense that it can be used to simultaneously justify opposing views (depending on the adopted point of view), there are three dichotomies worthy of bearing in mind. First, migrant smuggling is not the same as human trafficking. Although the main elements to differentiate between the two, while fairly simple to identify in theory, can be quite difficult to extricate in practice. Secondly, with regard to protected interests, this subject can be

[1] On the "push and pull" factors of migration, see Marta Minetti, Human Trafficking and Migrant Smuggling: Analysis of the Distinction through the Lens of the "European Migration Crisis" and of the Italian Policy Response 11-12 (Sept. 2016) (LLM dissertation, University of Kent) (U.K.).

[2] "People smuggling has its roots in the border control measures of our countries, inasmuch as alcohol smuggling stemmed out of the prohibition policies." – François Crépeau, *The Fight Against Migrant Smuggling: Migration Containment over Refugee Protection*, *in* The Refugee Convention at Fifty: A View from Forced Migration Studies 173, 181 (Joanne Van Selm et al. eds., 2003).

[3] If a migrant in possession of a legal visa lets it expire for a few days and then renews it, their irregular situation will only acquire the negative consequences deriving from it if it is treated as such by the authorities responsible for the visa's renewal, as clearly exemplified by Sergio Carrera & Elspeth Guild, *Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's Approach, in* Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU 1, 3 (Sergio Carrera & Elspeth Guild eds., 2016) (Belg.).

analysed from the state's or individual's point of view. Thirdly, concerning the answer to this phenomenon, one can advocate the criminalisation of the conduct as such or persist in a consistent approach through other vectors and practices. The aforementioned dichotomies will be addressed, even though the focus of this article will remain on the interests that are meant to be protected by criminalising migrant smuggling, allowing for a criminally relevant (and legitimate) definition of migrant smuggling to be reached.

There are a few concepts that must be differentiated beforehand in order to conceptualise and later define, such as migrant smuggling. First, *migration* itself: the act of migrating implies the movement of a person from one territory to another, be it a national or international movement, a temporary or permanent one, but without it being intrinsically regular or irregular. The *irregular migration* will, in turn, be the entry or stay in a state's territory without authorisation or in violation of the rules established by it.[4] It is important to differentiate between these two moments in time – the entry and stay – since they are not necessarily linked: one can enter a territory irregularly and then regulate their situation (e.g. because an asylum request is granted), or one can enter a territory lawfully, and then become irregular due to the operation of internal rules (e.g. if someone stays in the territory after the expiry date of a visa).

The last two concepts are the most similar: human trafficking and migrant smuggling. The Palermo Protocols, two Additional Protocols to the United Nations Convention against Transnational Organised Crime, are usually the source for distinguishing these two criminal behaviours. Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, establishes that trafficking in persons includes, among other conduct, "transportation . . . harbouring or receipt of persons, using the threat or use of force or other forms of coercion . . . for exploitation." This phenomenon differs from migrant smuggling in five aspects.[5]

First, the *consent* – a trafficking victim never expresses their consent, or if they do in an initial phase, it is then nullified by the use of coercion, fraud, abuse and exploitation; the migrant, in turn, consents to their smuggling. The second aspect is *intent*: the intent of the trafficker is always to exploit the victim in the final destination, whereas the smuggler's intervention ends when the migrant reaches the agreed destination. The *status* of the person is also different: the trafficked person is always a

[4] *See* Ilse van Liempt, *A Critical Insight into Europe's Criminalisation of Human Smuggling*, Sieps Eur. Pol'y Analysis, Jan. 2016, at 1, 2.

[5] *See* Human Rights First, *Human Trafficking and Migrant Smuggling: How They Differ, Fact Sheet*, Human Rights First (June 12, 2014) <https://www.humanrightsfirst.org/resource/human-trafficking-and-migrant-smuggling-how-they-differ> (last accessed Mar 3, 2023).

victim of the crime, whereas the migrant can also be seen as an object of the crime. As to the *transnationality* component, trafficking does not imply a transnational element, as it is sufficient for the victim to be transported or kept in a different location, regardless of being in the same region or country; migrant smuggling, by its very nature, has a transnational element. Lastly, regarding *profit*, the profit or advantage gained by the trafficker stems from the exploitation of the person. In contrast, the smuggler agrees to a fee paid for by the migrant for the services provided by the smuggler.

Even though the difference between these two practices is theoretically clear, it can be quite difficult to ascertain whether a given situation is trafficking or smuggling. The skewed perspective existing in these matters is worsened by the fact that the entities that usually intervene in such situations tend to consider the issue either at the point of departure of the migrant to determine whether the migrant consented or not (this is usually the stance adopted by states); or at the point of arrival of the migrant, to evaluate the elements of trafficking that exist at that point in time (this is usually the stance adopted by human rights advocates).[6] In reality, because of the typical lengthiness of the trip, the situation of a migrant may vary between trafficking and smuggling, depending on the choices they are confronted with.

[6] *See* Minetti, *supra* note 1, at 31.

1. CRIMINALISING MIGRANT SMUGGLING: THE RELATIONSHIP WITH THE FUNCTIONS OF EUROPEAN CRIMINAL LAW

When confronted with certain behaviour, criminal law must have clear guidance from criminal policy since it is simultaneously demanded that criminal law acts as a *limit* to the powers of the state (protecting the citizen from the state) and as the *foundation* of the powers of the state (protecting the citizen from others)[7] – in each incriminating norm, it must be weighed which dimension will prevail and to what extent, taking into consideration the interest behind criminalisation.

When it comes to migrant smuggling, that guidance seems to exist at the international level: Article 3 (a) of the Protocol Against the Smuggling of Migrants by Land, Sea and Air defines migrant smuggling as "the procurement, to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."[8] The criminalisation of the migrant is also clearly denied in Article 5, as is the action of anyone acting within the humanitarian clause (Article 19). Though this Protocol presents some challenges,[9] the intention appears to be protecting irregular migrants[10] by punishing all who, acting in the context of organised crime (since it is a supplement to the United Nations Convention against Transnational Organised Crime), gain illicit profit by exploiting the migrants' situation of necessity. The conclusion will be forcefully different in the European sphere, given how the EU opted to criminalise the conduct, revealing a security-oriented and mainly preventive perspective,[11] with the clear intention to stop migration flows from reaching European territory. This perspective perceives migrant smuggling as a threat to the security of the EU, thus furthering the adoption of measures with an anticipatory character. This stance slowly transforms

[7] Put in a different way, see Jeroen H. Blomsma & Christina Peristeridou, *The Way Forward: A General Part of European Criminal Law*, *in* Approximation of Substantive Criminal Law in the EU: The Way Forward 117, 134 (Francesca Galli & Anne Weyembergh eds., 2013) (Belg.): "[M]ost debate on the content of the general principles of European criminal law is the result of a different focus on the *instrumental* or *protective* finality of criminal law" (emphasis added).

[8] Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations convention against trasnational organised crime, 2000 [hereinafter Smuggling Protocol].

[9] For a more detailed account, see, e.g., Raquel Cardoso, As Funções do Direito Penal Europeu e a Legitimidade da Criminalização: Entre o Harm Principle e a Protecção de Bens Jurídicos [The Functions of European Criminal Law and the Legitimacy of Criminalization: Between the Harm Principle and the Protection of Legal Interests] 503-04 (2023) (Braz.).

[10] Emphasising the importance of that direction, see, e.g., Valsamis Mitsilegas, *The Normative Foundations of the Criminalization of Human Smuggling: Exploring the Fault Lines Between European and International Law*, 10 New J. Eur. Crim. L. 68, 72 (2019) (U.K.).

[11] *Id.* at 84; and expounding on this characteristic, most recently, see, e.g., Valsamis Mitsilegas, *The EU External Border as a Site of Preventive (In)justice*, 28 Eur. L.J. 263, 264-65 (2022) (U.K.).

criminal law into security law, dissociating criminalisation from both criminal action and from a concrete act on the part of the agent of the crime.

The existing law (known as the Facilitators Package) criminalises the conduct in the following manner:

> 1. Each Member State shall adopt appropriate sanctions on:
>
> a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
>
> b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.
>
> 2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the behaviour aims to provide humanitarian assistance to the person concerned.[12]

Unlike the United Nations Protocol, there is no mandatory need for financial gain when assisting a person to enter or transit across the territory of a Member State in order for the conduct to be a crime (unlike the assistance to the residence).[13] This immediately raises the possibility of criminally punishing people who act without any criminal intent, whether they act out of humanitarian concern or because they are legitimately pursuing their business.[14] This is aggravated by the fact that the European legislation does not possess a general safeguard clause, such as the one in Article 19 of the Protocol: it mentions only the *possibility* for Member States to choose not to criminalise

[12] Directive 2002/90, of the European Parliament and of the Council of 20 Novembre 2002 defininig the facilitation of unauthorised entry, transit and residence, 1.

[13] Even though Art. 1(1)(b) mentions the motivation to obtain financial gain when assisting a person to reside irregularly in a territory, some Member States have not transposed this requirement, making it possible for people who act with the intention to shelter friends or family (or motivated by humanitarian reasons) to be criminalised – for a list, see Sergio Carrera et al., Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update, Study requested by the PETI committee, at 11, https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf (Dec. 2018).

[14] For example, taxi drivers or operators in the housing sector (be it a rental situation, hotels or AirBnB) can unconsciously commit migrant smuggling as defined in the Directive: the first ones, because they must not control documents when transporting people within the EU; the latter, because they profit (even unknowingly, and legally) from the migrant's stay in the country – *see* Sergio Carrera, *supra* note 12.

humanitarian aid regarding entry and transit (not residence), as defined in Article 1(2) of the Directive.[15]

Specialised literature underscores the fact that the definition provided by the Directive is in clear breach of the international obligations existing for the EU and Member States for the protection of human rights, as well as in contradiction to the fundamental values of the EU (Article 2 Treaty on European Union [hereinafter T.E.U.]) and the humanitarian aid it is committed to providing (Article 214 Treaty on the Functioning of the European Union [hereinafter T.F.E.U.]).[16]

The corresponding Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence establishes some circumstances that will increase the maximum sanction (in Article 1(3)):

> 3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:
>
> — the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA (1),
>
> — the offence was committed while endangering the lives of the persons who are the subject of the offence.[17]

Regarding the first exception, it must be noted that what is used in the Protocol as a requirement for criminalisation appears in the Framework Decision [hereinafter F.D.] as an aggravating factor, which means the European norm will be applied to a much

[15] France has already been tried by the European Court of Human Rights for convicting a regular resident of migrant smuggling, simply because he continued to house his son-in-law after his visa expired – *see* case of *Mallah c. France* App no 29681/08 (ECtHR, 10 November 2011). This case involved Art. 8 of the European Convention on Human Rights [hereinafter E.C.H.R.], so France was not found to have breached the Convention.

[16] It is not only the legislation of the EU that is found to be misaligned with its own values, but also its actions: "Engaging with regimes in source and transit countries in exchange for emigration control has been very costly, and I do not refer it to money but leverage and credibility. What is the cost of migration control when the [EU] legitimizes regimes in Libya and Sudan?" – *see* Virginie Guiraudon, *20 Years After Tampere's Agenda on 'Illegal Migration': Policy Continuity in Spite of Unintended Consequences*, *in* 20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice 147, 155 (Sergio Carrera et al. eds., 2020) (It.). Recent examples include Turkey and Belarus, who leveraged their strategic geographical positioning (regarding transit routes) against unwanted actions by the EU Relating the migration to the democratic crises in Europe, see Francesco L. Gatta, *Migration and the Rule of (Human Rights) Law: Two 'Crises' Looking in the Same Mirror*, Croatian Y.B. Eur. L. & Pol'y, Dec. 2019, at 99 (Croat.).

[17] Council Decision 2002/946, 2002, O.J. (L 328) 1(3).

broader set of conducts. As for the second exception, only the endangerment of the migrant's life is mentioned (and not other relevant interests), which is also worthy of criticism.[18] Concerning the possible criminalisation of the migrant himself, there is no mention whatsoever in the Directive or F.D.[19]

There is no doubt that in the case of migration, the European policy has been defined throughout the EU's history with a specific perspective of "reaction to crisis"[20] and their potential effects, so it is no wonder that the ultimate goal of the European policies remains *avoiding* such crisis by stopping migration flows whenever possible. This narrative, as well as the generalised feeling of a lack of control at the borders, is usually aided by the stigmatisation to which migrant smugglers are subject: they are often portrayed as male, carrying out their activities as part of vast criminal organisations (therefore connected with other serious crimes, such as terrorism or drug trafficking), whose only intent is to profit, thereby jeopardising migrants' lives and in the process committing several other violent crimes against them.[21]

A certain idea of the problem is consequently formed, one that is not only hard to overcome but also favours an approach through punishment to appeal to public opinion,[22]

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[18] Alessandro Spena, *Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?*, *in* Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU, *supra* note 3, at 33, 36.

[19] The Court of Justice of the European Union [hereinafter C.J.E.U.] has, however, taken some steps to limit such a consequence: see *infra* note 86. There is now a Proposal (Proposal for a directive of the european parliament and of the council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM (2023) 755 final (Nov. 28, 2003) for a new Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, which is meant to replace the Facilitator's Package. Although this Proposal introduces profit as an element of the criminal conduct, as well as harm to migrants (Art 3 (a)(b)), it also lays down a new offence, which is the public instigation to third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State (Art 3(2)). The mandatory exemption of humanitarian assistance, as well as the non-criminalisation of the migrant, is still missing from the articles of the proposed Directive.

[20] Andrew Geddes, *Tampere and the Politics of Migration and Asylum in the EU: Looking Back to Look Forwards*, *in* 20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice, *supra* note 16, at 8-9.

[21] Gabriella Sanchez, *Who Is a Smuggler?*, *in* 20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice, *supra* note 16, at 183-84. Reality, however, tends to look differently, as the author notes:

> While many migrant journeys can indeed be characterized by abuse and violence, the practices articulated as smuggling by law enforcement and other state actors are quite often void of criminal intention, and aim instead at preserving and improving the lives and dignity of those whose only options to travel are irregular, unsafe and undignifying.

[22] Geddes, *supra* note 20, at 14. See also Sirlene N. Arêdes, *O conceito material de bem jurídico penal* [*The Material Concept of the Criminal Legal Interest*], 6 PHRONESIS - Revista do Curso de Direito da FEAD 101, 114 (2010) (Braz.) – where the author concludes (with Zaffaroni) that the use of criminal law only to assuage public opinion is illegitimate.

even though criminal law may be ineffective in this situation or even prove to worsen precisely that which is intended to prevent.

Let's take the idea that criminal law must be legitimate seriously (besides formal legitimacy). Its *content* must be able to respect the axiological and legal foundations of the community in which it is to be applied. The material legitimacy[23] of European criminal law should hinge upon the identification of interest behind criminalisation, which would then point the European legislator towards the most appropriate criminalisation principle in that particular situation: if the interest identified is a proper interest of the EU or a common interest already subject to preemption, the parameters of the principle of protection of legal goods (*Rechtsgüter*) should be followed; if the interest is common (to the EU and Member States), then the harm principle should be respected.[24] There is also the possibility that the interest belongs solely to a certain Member State, which would then deem any intervention on the part of the EU unnecessary (and even illegitimate due to the principle of subsidiarity).

With respect to migrant smuggling, it is fairly simple to exclude the possibility that there are exclusive national interests at stake since this is a conduct that affects more than just one Member State – it is *global* in its relevance.[25] Since an exclusive responsibility on the part of a Member State to regulate migrant smuggling is excluded, an analysis of which interest lies at the heart of this criminal prohibition must be performed in order to identify it either as a common interest (pre-empted or not), or a proper interest of the EU

Before following the criminalisation process to see if a criminal law norm is indeed needed and in what terms it would be materially legitimate, it is necessary to assess the understanding of the European institutions on this subject. What is meant to be protected by incriminating migrant smuggling?

[23] As defined in a previous study, Cardoso, *supra* note 9. Raquel Cardoso, *Navigating troubled waters: evaluating the function and material legitimacy of European criminal law*, XLIII Polish Yearbook of International Law (2023).

[24] The different categories of interests are divided according to the responsibility for their protection, a criterion that combines both the holdership of the interest and the attribution of competence to the Union – see Cardoso, *supra* note 23, building upon the multiple works of Pedro Caeiro, the most recent of which is Pedro Caeiro, *Constitution and Development of the European Union's Penal Jurisdiction: Responsibility, Self-reference and Attribution*, 27 Eur. L.J. 441 (2022) (U.K.).

[25] That migration is a global problem is also acknowledged in the European sphere – see Opinion of the European Economic and Social Committee on 'Implementation of the Global Compact for safe, orderly and regular migration based on EU values', 2020 O.J. (C 14/02) (Jan. 15, 2020). Even historically, it was quickly evident that concerns regarding migration could not be satisfactorily addressed by each State acting alone: agreements with third countries have been used since the abolition of internal borders and the existence of migratory crises in some Member States – analysing this, Geddes, *supra* note 20, at 8-10. The growing tendency to supranationalise immigration control has also become apparent with Tampere: as Guiraudon, *supra* note 16, at 149-50 writes, "The Tampere summit consecrated the particular vision of [Justice and Home Affairs] personnel in charge of immigration policy: shifting policy elaboration upwards to the supranational level and outwards to non-[EU] states".

In the Directive, there is a dual motivation – on the one hand, to combat illegal immigration, and on the other, *through that*, to combat the exploitation of human beings.[26] In the F.D., there is a much more evident concern with the security of the EU while also repeating the same considerations that are made in the Directive regarding immigration and human exploitation.[27]

This approach seems to have been adopted by the Commission as well: be it in the evaluation of both legislative instruments[28] or in the guidance it provided for their application,[29] the primary interest seems to be the irregular immigration itself (crossing the borders or residing in the EU illegally) and the state's interest in controlling their borders, and only in a secondary plane the risk such conduct may represent to migrants' lives.

The question that must be posed is: what is the real interest behind the criminalisation of migrant smuggling?[30] Is it to protect the territory of the EU, to ensure an effective execution of the Union's immigration policy, general security concerns, or is it to protect the migrants? This is what will be analysed in the following Subsections of this article.

[26] Council Directive 2002/90/EC, recitals 1 and 2, 2002 O.J. (L 328). This connection becomes even more apparent in other legislative instruments mentioned in recital 5. The order in which these objectives are mentioned must also be noted: there is a *first* concern, which is the fact that people are crossing the external border of the EU without authorisation; and *secondly,* there is also a concern that those people may be the object of exploitation.

[27] Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence 2002/946/JHA [2002] OJ L 328/1, recitals 1 and 2.

[28] Refit evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD(2017) 117 final, at 11 (Mar. 22, 2017): "[A]ffecting States' legitimate interest to control borders and regulate migration flows".

[29] Communication from the Commission Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01, 2020 O.J. 323/1, at 3 (Oct. 1, 2020): "The general objective of the Facilitators Package is to help fight against both irregular migration, by penalising facilitation in connection with unauthorised crossing of the border, and organised crime networks that endanger migrants' lives".

[30] The aim of the following Subsections is, more than analysing what *is* behind criminalisation in this instance, to conclude what *should* be behind the criminally relevant conduct of migrant smuggling, through the optics of the material legitimacy of European criminal law. It is moreover fairly evident that the existing European legislation seeks to regulate immigration through criminal law means.

2. THE CRIMINALISATION PROCESS

To assess the material legitimacy of any criminalising norm, a three-step process is proposed[31]: the first phase would be dedicated to identifying the interest that is meant to be protected through criminalisation (or the prevailing interest) in order to know if it is a proper interest of the EU or a common one, and the level of harmonisation it already presents or requires. The second phase would be devoted to analysing that interest through the lens of one of the principles of criminalisation connected with material legitimacy: the legal good (*Rechtsgut*) if the interest is proper or a preempted common interest; the harm principle for simply common interests, the ones whose protection cannot be solely ascribed to either the EU or the Member States. Finally, the third phase would focus on other criminalisation principles that must be respected in such a process: the legality principle, proportionality, subsidiarity, *ultima ratio*, effectiveness, and respect for fundamental rights.

2.1. THE FIRST PHASE: THE NATURE OF THE (REAL) INTEREST AT STAKE

In the first phase, all potential interests behind the criminal approach to migrant smuggling shall be analysed to determine their suitability to underpin the criminalisation of such behaviour. If it is concluded that multiple interests are susceptible to supporting that criminalisation, the preponderant one must be chosen to allow for a precise definition of the type of intervention needed and permitted.[32]

The potential interests that will be mentioned are the territory of the Union, the common market, immigration policy, security, and the protection of migrants' rights.

[31] Cardoso, *supra* note 9, at 450f and Cardoso, *supra* note 23.

[32] The preponderant interest would be determined through two vectors: either it is possible to establish a more thorough link between what is intended to be regulated and a given interest – much in the sense of what the C.J.E.U. evaluates when more than one legislative base is possible (see, illustratively, cases: Case 45/85, Commission of the European Communities v. Council of the European Communities, 1987 E.C.R. 01493, ¶ 11; Case C-200/89, Commission of the European Communities v. Council of the European Communities, 1991 E.C.R. I-2867, ¶¶ 11 and 18-25; Case C-209/97 Commission of the European Communities v. Council of the European Union, 1999 E.C.R. I-08067, ¶ 13; Case C-338/01, Commission of the European Communities v. Council of the European Communities, 2004 E.C.R. I-04829, ¶58; Case C-411/06, Commission of the European Communities v. European Parliament and Council of the European Union, 2009 E.C.R. I-07585, ¶ 47; and Case C-155/07, European Parliament v. Council of the European Union, 2008 E.C.R. I-8103, ¶¶ 35, 72, 75-79); or a more functional stance can be adopted by looking at the concrete harmonisation needs in that case, which could lead to the option that allows for the most harmonisation or, conversely, the one that leaves the most discretionary margin to the Member States.

2.1.1. THE TERRITORY OF THE EU

Even though the EU is not a state, it is still possible to conclude that it has a territory that is susceptible to delimitation.[33]

As an interest, the territory of the EU should be considered a common interest not subject to preemption: the EU indeed has an interest in its territory, one that is different from the interest each Member State has since it encompasses the totality of Member States. But it is equally true that those territories existed before the EU, and they belong primarily to the sphere of competence of each State, which is demonstrated by the ample powers that remain within it when it comes to their territories – such as the power to conform them (thus adding or subtracting parcels of territory from the EU without its interference); or the power to decide *who* they wish to keep in their respective territories as citizens, along with the requirements needed to become one, without the Union being able to supersede them in that.[34]

It would not be entirely correct, however, to conclude that the territory would hence correspond solely to a national interest, which should consequently feel no interference from the EU: given the existence of the Schengen Area and the multiple freedoms within it, European norms configure the applicable rules in that area in a relevant way, so that Member States effectively share the responsibility for its protection with the EU, at least in those dimensions that transcend the internal borders of each Member State. On the other hand, the EU shapes some aspects related to the territory that go beyond the simple delimitation of a space where its rules are applicable.[35] This prompts the conclusion that the territory must be considered a common interest, one

[33] In a more immediate reading, the territory of the E.U. is identified by reference to the territory of the multiple Member States (Art. 52 of the T.E.U. and Art. 349 and 355 of the T.F.U.E.). Given the specificities of the EU, however, the physical territory will not always overlap with the territory where EU law is applied: regarding criminal law, the space where it is applied results from the principle of mutual recognition, the harmonisation of criminal norms, judicial and police cooperation, but especially, from the intricate landscape generated by the opt-outs (and opt-ins) enabled by the Treaties. When it comes to the territory of the Union, the question will not be *whether* it possesses one, but rather *which one* is being referred to.

[34] See e.g., the recent case Case C-689/21, Udlændinge- og Integrationsministeriet, ECLI:EU:C:2023:626 (Sept. 5, 2023).

[35] E.g., it grants some visas; uniformises a set of common rules to be applied in the Schengen Area; celebrates agreements with third countries, which will be applied to people that are in European territory (such as extradition agreements); supports the Member States when it comes to their action at the external borders of the Union (the paradigmatic example here being FRONTEX). With regard to migrant smuggling specifically, Art. 27 of the Convention Implementing the Schengen Agreement establishes the need to "impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens". This provision does not impose the need to criminalise such behaviour, and it does restrict its relevance to conduct motivated by the obtainment of financial gain, which is much narrower than what is defined in the Facilitator's Package.

whose multiple dimensions of protection are attributed to the EU or the Member States, depending on which one is at stake (the national or the supranational one).

Regarding migrant smuggling, is it truly the territory that is meant to be protected? It is submitted that, even if linked with the territory, what would be at stake would rather be the *security* of it – in which case the interest will be security, and not the integrity of the territory – or the cohesion of the European territory and respective population, in which case the interest would be the *immigration policy*, through which not only this is ensured, but also the attempt to respond to some concerns of the population (such as the distribution of the existing resources – employment, social support, etc.) when confronted with a potentially exponential and uncontrolled increase of the number of people in a given territory.

2.1.2. COMMON MARKET

The criminalisation of migrant smuggling may also have the ultimate objective of protecting the common market of the EU, particularly concerning employment: the presence of a significant number of immigrants in an irregular situation in one or multiple Member States could lead to a distortion of the common market.[36]

In terms of responsibility for its protection (and even holdership), this interest is markedly European – European rules regulate the common market; it is a highly harmonised area that does not tolerate regulatory autonomy in the Member States. Therefore, the only possible conclusion is that the responsibility for its protection is primarily (if not exclusively) attributed to the EU

Even though the regulation of immigration (and hence of irregular immigration and its facilitation) affects the common market since it prevents some of its unwanted effects, it does not seem to be entirely accurate to argue that this is the most salient connection within the criminalisation of migrant smuggling: its impact is not only distant (with regard to the conduct that is criminalised), but its dimension is also uncertain.[37] The effect that the normative response in criminal matters may have on other sectors of the Union's intervention is also secondary. Therefore, the common market cannot be the real interest at stake when pondering the criminalisation of migrant smuggling.

2.1.3. IMMIGRATION POLICY

At present, European legislation emphasises the importance of criminal measures when it comes to controlling illegal immigration – it is expected that the penal threat will

[36] See e.g., André Klip, European Criminal Law: An Integrative Approach 197-98 (1st ed., 2009) (U.K.), noting the connection of the criminalisation of migrant smuggling with the (then only proposal) Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[37] Even though it appears as one of the legal goods protected *as a consequence* of the protection of regular migration: see the recent request for a preliminary ruling made by Italy (Tribunale di Bologna [Trib.] [Court of First Instance of Bologna] 17 luglio 2023, n. 10034/2019 (It.)) regarding the compatibility of the Facilitator's Package with the Charter of Fundamental Rights of the EU, particularly the cited position of Italy's Constitutional Court at page 9. This case is pending before the C.J.E.U., having had the first hearing on the 18th June 2024 (Case C-460/23, Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 – Criminal proceedings against OB (Aug. 25, 2023). Commenting the case, Lorenzo Bernardini, *Il* delit de solidarité *davanti alla corte di giustizia: il caso* Kinshasa *come* game changer *per le politiche migratorie europee* [*The Crime of Solidarity Before the Court of Justice: The Kinshasa Case as Game Changer for European Migration Policies*], Diritto, Immigrazione e Cittadinanza, Mar. 2024, at 1, 1-2. (It.).

discourage migrants from entering or staying in European territory without the respective authorisation.[38]

This policy is ultimately directed at protecting the sovereignty of States,[39] since migration is a purely social phenomenon that will only acquire some legally relevant quality once evaluated through the rules in the legal order at stake. When broken down into its elemental features, the act of migrating is neutral conduct (not in *itself* worthy or unworthy), and even when it can be classified as illegal, this negative aspect relates to the disrespect of rules that were put in place to regulate migration.[40]

As an interest, the immigration policy must inevitably be classified as a common interest: Member States retain a significant part of their sovereignty regarding immigration, with the EU being attributed only some aspects of it, such as granting some short-stay Schengen visas. States decide over the status of non-nationals, deportation and expulsion (with the exception of some limitations deriving from, for instance, the case law of the European Court of Human Rights) and, therefore, a large part of what is "illegal migration" will be dependent on the practices of the state.[41] The EU has some competencies attributed in this regard, such as those mentioned in Articles 77 and 79 T.F.U.E. (mainly Article 79(2)(c), which allows for the adoption of common rules regarding "illegal immigration and unauthorised residence").

The European approach is, in this case, proactive because it seeks to prevent the *potential* acts of illegal entry, stay or residence, thus pushing back unwanted migrants from its territory.[42] But this stance is also questionable from the point of view of the temporal sequence of events: how can migrants already be deemed "illegal" before they enter, stay or reside in the territory of a Member State in violation of its rules?

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[38] See the request for a preliminary ruling n. 10034/2019 ¶¶ 31-34. This becomes clear with the criminalisation of the migrant's conduct itself: even though it is not directly criminalised in European legislation, its criminalisation is also not limited by it – in this sense, Mitsilegas, *supra* note 10, at 81-82.

[39] The prerogative of deciding, regarding their non-nationals, their statute and requirements for entering, staying, or residing in the country – Guiraudon, *supra* note 16, at 150. The argument could be made that it was rather the sovereignty of the state itself that was at stake here – see, questioning it, Mitsilegas, *supra* note 10, at 83-84. Sovereignty, as an interest to be protected by criminal law, is however much more questionable and problematic than even the immigration policy, since any disrespect for any norm could trigger disrespect for that interest and, consequently, criminal liability – which is not at all considered legitimate in a state governed by the rule of law.

[40] This is a textbook description of behaviour that should fall under the remit of the administrative branch of the law – see e.g. Jorge de Figueiredo Dias, Direito Penal - Parte Geral - Tomo I [Criminal Law - General Part - Book I] 186-87 (3rd ed., 2019) (Port.).

[41] Guiraudon, *supra* note 16, at 150-51.

[42] The prevention of these acts will also involve the cooperation of third countries, who are responsible for stopping migrants from coming to the EU These *pushback* practices (see Mitsilegas, *supra* note 11, at 26 f.) seek to prevent the migrants from accessing a territory where the Member State/ EU would become responsible for them, even though it could be temporary. See also on the subject, Parliamentary Assembly, Pushback policies and practice in Council of Europe member States, Resolution 2299 (June 28, 2019).

It is legitimate for States to have an immigration policy aimed at preventing their territory from being suddenly confronted with an exponential increase in population coming from other countries, seeking employment or social benefits;[43] what is illegitimate is to pursue that objective at any cost, namely by disregarding fundamental principles of their legal order[44] and international obligations they assumed.[45] The legitimacy of this interest as the one to which protection is granted through the criminalisation of migrant smuggling will be evaluated in the next section.

2.1.4. SECURITY

Security may have multiple meanings, which makes it a malleable and easily influenced[46] ambiguous concept. It can have a *negative* meaning as a motive for adopting more restrictive measures. Within this meaning, security is an objective in itself, and it is necessary to preserve the state both as an institution and as a collective of subjects. It can also have a *positive* meaning, in which it configures a right to security, be it individual or collective – this right exists regarding the state and other individuals, acting as a counterweight to the first (negative) dimension.[47] The *internal* security of the EU comprises a *horizontal* dimension (the judicial and police cooperation, with the support of all relevant sectors) and a *vertical* dimension, which corresponds to international cooperation, the Union's policies regarding security, and the Member States' regional cooperation.[48] Lastly, there is correspondingly an *external* dimension of the EU's security, which regards cooperation with third countries (be it of the EU itself or Member States).[49]

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[43] Letizia Paoli, *How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm*, 22 Eur. J. Crime, Crim. L. & Crim. Just. 1, 8 (2014) (Neth.).

[44] Criminal law must not be used to sanction disrespect for what are essentially administrative norms, nor should it be used to dissuade individuals or organisations from providing humanitarian aid – in this sense, Mitsilegas, *supra* note 10, at 78.

[45] E. g., the duty to grant asylum to migrants who might need it (since many times they have no option but to enter the territory irregularly) – in reference to the *right to receive asylum* (as a right of the individual, and not a prerogative of the state), Koen Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, 59 Int'l & Compar. L. Q. 255, 289 (2010) (U.K.).

[46] Alessandro Bernardi, *Seguridad y Derecho Penal en Italia y en la Unión Europea* [*Security and Criminal Law in Italy and in the European Union*], 5 Politica Criminal 68, 81 (2010) (Chile).

[47] *Id.* at 76 f. Some examples can be found in the E.c.h.r., namely Art. 8, right to respect for private life, Art. 9, freedom of thought, conscience and religion, Art. 10, freedom of expression, Art. 11, freedom of assembly and association (number 2 of each Art.) for the negative dimension, and Art. 5, right to liberty and security, and Art. 6, right to a fair trial, for the positive dimension.

[48] Justice and Home Affairs Council, Internal security strategy for the European Union - Towards a European security model, at 21 (Mar. 2010).

[49] *Id.* at 29.

The dimension that is usually relevant for criminal law is the *negative* one, furthering the adoption of restrictive measures with the ultimate goal of protecting security as a state and collective interest.[50] When evaluated about the EU, this interest cannot be considered a proper interest of the EU: European security (from a supranational point of view) encompasses the security of every Member State, and it is therefore a true "common security".[51] On the other hand, there are multiple dimensions of security that coexist within the European space: the internal security of each Member State and the internal and external security of the EU; these dimensions are not always easy to distinguish.[52]

This interest being common, it seems safe to conclude that it is not harmonised in a way that determines its preemption yet, thus precluding an autonomous action on the part of Member States (especially because a great part of the responsibility for the protection of a community belongs to the state, not the EU). For that reason, security would also lead to its analysis through the lens of the harm principle, just as the immigration policy.

2.1.5. MIGRANTS' RIGHTS

Finally, there is the possibility that what motivates the criminalisation of migrant smuggling is the violation of the rights of the people involved in it (the migrants).[53] In this case, the conduct of facilitating the irregular entry, stay or residence in the territory

[50] The security focus comes across quite clearly in several legal instruments regarding migrants: e.g., the Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM (2020) 610 final, p. 7 (Sept. 23, 2020). Also the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM (2020) 612 final (Sept. 23, 2020) and the Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM (2016) 272 final (May 4, 2016).

[51] The common nature of some of the identified risks to European security is also obvious: some of those are terrorism, organised crime, drug, human and gun trafficking, etc. – Justice and Home affairs Council, *supra* note 48, at 7.

[52] *See* Ester Herlin-Karnell, *Waiting for Lisbon ... Constitutional Reflections on the Embryonic General Part of EU Criminal Law*, 17 Eur. J. Crime, Crim. L. & Crim. Just. 227, 239 (2009) (Neth.).

[53] The evaluation of the harms migrants can suffer through smuggling was already performed by Europol, who mentions the severe physical, psychological and social harms that can result, whether from some type of violence they suffer throughout their voyage, or even because they lose their lives trying to reach the European territory through dangerous means – Paoli, *supra* note 43, at 7-8.

of a Member State would only be a crime when its perpetrator exploits the migrant's situation, or violates their rights in any other way. The option for this perspective would allow consideration of the person "simultaneously as recipient and fundament of the criminal norm", preventing them from being "considered as object of the norm or the public policy of the State"[54] – which is particularly important in this case, due to the ambiguity of the current legal status of the migrant (as author, object and/ or victim of the smuggling).

Evidently, the protection of the people involved in a crime is not a proper or exclusive interest of the Union; it is also not highly harmonised, so as to subtract it from the sphere of responsibility of the state – it is, once again, a common interest.

2.1.6. INTERIM CONCLUSION

After considering the potential interests behind the criminalisation of migrant smuggling, it becomes necessary to choose the legitimacy criterion to be applied. The only interest susceptible to lead to an analysis according to the principle of protection of legal goods would be the common market, as the only one that is not just a common interest; however, this does not seem to be the violated interest (or at least the predominant one).

The rest of the interests mentioned cannot be qualified as proper interests of the EU, nor highly harmonised interests, so as to preclude an autonomous state action; therefore, this analysis will proceed with the application of the harm principle[55] to the conduct, in order to limit the European criminal competence to behaviours that do, in fact and in an actual way, harm its citizens (thus excluding a criminalisation that greatly anticipates the actual harm). The harm principle will allow for a more flexible approach in the Member States (because they can, within their margin of discretion, define a legal good internally and frame the incrimination accordingly, as long as it does not run counter the Directive), also with regard to sanctions, since they will be able to determine a sanction that harmonises with other crimes that jeopardise the same legal interest. It finally prevents a paternalistic approach to the subject.[56]

[54] Ana E. Liberatore Silva Bechara, Bem Jurídico-Penal [Legal-Criminal Interest] 67 (2014) (Braz.). The migrant (and respective rights) emerges as the object of protection by the criminal norm only in certain circumstances: see the position of the Italian Constitutional Court cited at the request for a preliminary ruling (n 34), 10.

[55] *See generally* John S. Mill, On Liberty (Batoche Books, 2001) (1859); Joel Feinberg, The Moral Limits of the Criminal Law. Volume 1: Harm to Others (1984) (U.K.); Nina Peršak, Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts (2007).

[56] With regard to the specific advantages, see Cardoso, *supra* note 9, at 413.

2.2. THE SECOND PHASE: EVALUATING MIGRANT SMUGGLING THROUGH THE OPTICS OF THE HARM PRINCIPLE

The EU's current measures regarding migrant smuggling are centred around immigration control, focusing on prevention, expulsion, and criminalisation. In order to increase the legitimacy of its approach, at least the criminal one, and since all potential interests involved are deemed to be common, the four elements of the harm principle[57] will be evaluated: (1) a conduct (2) that causes or is likely to cause harm (3) to others, (4) demanding an adequate intervention from the State in its prevention and repression.

The conduct at stake – namely, the introduction into the territory of a Member State of a foreigner without respecting the legal preconditions for their entry – allows for two opposite points of view, if criminally defined: either it is seen as a crime against the state (e.g., its sovereignty); or as a crime that jeopardises the migrants and their interests. Both points of view will be examined so as to conclude which (if any, or both) is susceptible to legitimate criminalisation and in what terms.

2.2.1. CONDUCT THAT CAUSES OR IS LIKELY TO CAUSE HARM

The causation (or probability) of harm will not be too problematic: if harm exists, whether towards the state or migrants, it should be actual, or at least prospective, in the sense of posing an immediate risk to the interests meant to be protected. From the perspective of the state, this conduct either violates or endangers (when the introduction of the migrant into the territory is unsuccessful) the security of its borders and sovereignty, as well as disrespecting its rules on regular immigration. In the case of migrants, this conduct endangers or harms their life, health, and human rights. Both perspectives allow for some form of harm to be found.

As for harm itself, the first analysis will focus on the state's interests, in order to determine if they are legitimate according to the harm principle. This perspective will evaluate sovereignty and security, which entails the decision over who should be granted or denied entry into the country (immigration policy).

"Security" as a criminally relevant interest is susceptible to many criticisms: first of all, it is not possible to narrow down the conduct that would harm such an interest, since it has an all-encompassing nature that eventually leads to the option to criminally sanction unlawful acts of an administrative nature, as well as the preventive

[57] These four elements can be gleaned from the general literature on the harm principle. For a theoretical approach, *supra* note 55.

protection of legal goods, which is not easily compatible with the *ultima ratio* principle of criminal law.[58] Secondly, "security" as a feeling must not be accepted, as it is extremely difficult to demonstrate its empirical existence and it encourages the adoption of increasingly harsher measures in order to appease general feelings of insecurity.[59] Furthermore, there is the risk of an authoritarian evolution of the state every time it invokes national security as a reason to criminalise certain behaviour,[60] in addition to the erosion of the symbolic function of criminal law.[61]

Consequently, if security is itself an interest to be protected through criminal law, the evaluation of the legislator will never duly consider the freedom of the citizens, since the pursuit of ways to diminish the feeling of insecurity will always outweigh freedom. This leads to the conclusion that security cannot be considered a legitimate, autonomous interest to be protected by criminal law,[62] at least when not in conjunction with another, legitimate interest.[63]

With regard to the immigration policy, in the case of migrant smuggling it seems fairly evident that the illegal character of the conduct stems from the crossing of a state's border without the authorisation to do so (hence, the migrants being part of the problem). Thus, the *unlawfulness* of migrant smuggling relies not on the author's *own* conduct, but rather on the help they provide to others to commit an illegal act, namely the irregular entry or stay of the migrant. In fact, the "crime" would be more properly committed by the migrant, who affects the state's interests with their conduct, since the facilitation of such behaviour has an ancillary nature in relation to the real conduct that bears the criminal unworthiness: that of the migrant.[64]

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[58] *See* Antonio Cavaliere, *Può la 'sicurezza' costituire un bene giuridico o una funzione del diritto penale?* [*Can 'Security' Constitute a Legal Interest or a Function of Criminal Law?*], *in* In dubio pro libertate. Festschrift für Klaus Volk zum 65. Geburtstag [In doubt, in Favor of Freedom. Commemorative Document for Klaus Volk on his 65th Birthday] 111, 116-17 (Winfried Hassemer et al. eds., 2009) (Ger.). As the author points out, security as a criminally relevant interest has already been used to reintroduce problematic incriminations, such as the criminalisation of irregular immigration.

[59] *Id.* at 124.

[60] Bernardi, *supra* note 46, at 75.

[61] Gerhard Fiolka, Das Rechtsgut. Strafgesetz versus Kriminalpolitik, dargestellt am Beispiel des allgemeinen Teil des schweizerischen Strafgesetzbuches, des Strassenverkehrsgesetzes (SVG) und des Betäubungsmittelgesetzes (BetmG) [The Legal Interest. Criminal Law Versus Criminal Policy, Illustrated with the Example of the General Part of the Swiss Criminal Code, the Road Traffic Act (SVG) and the Narcotics Act (BetmG)] 125 (2006) (Switz.).

[62] Expressively, Ester Herlin-Karnell, The Constitutional Dimension of European Criminal Law 85 (2012) (U.K.): "[A] blind focus on security risks not only rendering the Union's proclamation of humanist values meaningless, but also risks undermining the legitimacy of any action taken.".

[63] Persak, *supra* note 55, at 115 – besides the fact that there is not enough criminological data to determine what is susceptible to causing fear, it is also highly doubtful that criminalising a conduct should be based on the fear of another, subsequent crime occurring.

[64] That is, according to Spena, *supra* note 18, at 34, the adopted stance of the European legislation, given the use of the wording of the Directive ("facilitation of unauthorised entry, transit and residence"), which implies that there is a previous action that is already illicit (even though the migrant is not directly criminalised).

Still on the subject of the illicit nature of the conduct, it must be pointed out that, regarding the state's perspective, it would be sufficient for the migrant to regulate their situation for there to be no crime,[65] which means that there is no existential harm[66] in the conduct under analysis[67]: it is purely the non-compliance with norms that is at stake.[68] In the context of a state governed by the rule of law, this is not sufficient motivation for criminalising a certain behaviour; there must be a relevant interest worthy of protection for the use of criminal law to be legitimate.

Since the conduct itself has no specific unworthiness that corresponds to the specific sanctions of criminal law, is the right to determine how and who enters the territory such a fundamental interest of the state that it justifies the use of criminal law for its regulation? It is rather thought that it is not: in this case, the interest at stake lacks penal dignity, aside from the fact that the use of criminal law in this situation is also ineffective.[69]

If, however, we adopt the point of view of the migrant, their smuggling can in fact endanger or extinguish some undeniably relevant interests of the person concerned, namely physical and/or moral integrity, the interest not to be exploited (by any means), their welfare in general, and even their life. All of these interests are sociologically recognised and have unquestionable constitutional support.[70] The illicit nature of the conduct now stems from the act of smuggling itself, and not in an ancillary form: the author (smuggler) behaves in an inappropriate way towards those interests, and it is this

[65] If the right of the migrant to be in that territory is established, their conduct will not be unlawful; consequently, the behaviour of anyone who facilitates their conduct will not be unlawful either. In the repressive logic of some states, however, that second behaviour will still be reprehensible, although it may sometimes not be effectively punished for some other reason (see, for instance, the case of *Mallah c. France* App no 29681/08 (ECtHR, Nov. 10, 2011), ¶¶ 13-15.

[66] "[I]rregularity of entry and residence is exclusively co-constituted by individuals and border and immigration authorities entering into very specific kinds of exchanges which result into the application of the designations." – Carrera & Guild, *supra* note 3, at 3.

[67] That conduct being the movement of a person from one territory to another, where their irregularity results from norms designed to keep them out of said territory – David S. FitzGerald, *Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence*, 46 J. Ethnic & Migration Stud. 4, 4 (2020) (U.K.).

[68] See the request for a preliminary ruling Tribunale di Bologna [Trib.] [Court of First Instance of Bologna] 17 luglio 2023, n. 10034/2019 ¶ 38 (It.): "La generalizzata minaccia della sanzione penale per chi favorisca i contravventori alla normativa in materia di permessi all'ingresso, infatti, può dirsi funzionale al rafforzamento dei relativi precetti amministrativi". ["The widespread threat of criminal sanctions for those who encourage offenders to the legislation on entry permits, in fact, can be said to be functional to the strengthening of its administrative precepts"].

[69] It is ineffective in two ways: first, migrant smuggling is not responsive to risk fluctuations (which includes the risk of being criminally prosecuted) – European Commission, DG Migration and Home Affairs, A study on smuggling of migrants, Characteristics, responses and cooperation with third countries (Sept., 2015), at 111. On the other hand, it is also ineffective because, if the intention of states is to keep migrants *out* of their territory, that is hardly compatible with keeping them *in* the territory (however limited it may be) for the purpose of being subject to criminal prosecution.

[70] Which includes the constitutional support of the EU – see, in general, Charter of Fundamental Rights of the European Union, artt. 1-6.

behaviour that causes the violation or endangerment of a given right of the migrant, which will be criminally relevant if that act is indefensible (e.g., if the smuggler intends to profit from the exploitation of the migrant's fragile situation).

Hence, contrary to what happens in the perspective of the state, if the unworthiness and illegal nature of migrant smuggling stems from risking the migrant's interests through the exploitation of their situation, it cannot be affirmed that there is some ulterior action that is capable of erasing that unworthiness: all exploitation is, by definition, unfair.[71]

By changing the perspective, it can be concluded that any humanitarian action would be excluded from the criminalisation norm, since the intention is not to put the migrants at risk, but rather to act in order to protect their interests.[72] The same can be said with regard to people who act on behalf of friends or family. Likewise, people who work in the transports and housing sectors would not be at risk of prosecution if the incriminating norm had the migrants' interests as its focal point: as long as they obtained their normal profit, they would not be exploiting the migrant.[73] Finally, the migrants themselves would also be excluded from being potential perpetrators of such a crime, thereby clarifying their situation.

Concerning this first aspect of the harm principle, it is now possible to conclude that there is no sufficient harm vis-à-vis the state to justify a legitimate criminalisation; the regulation of such an unwanted conduct should be redirected towards branches of the law other than the criminal law.

When it comes to the migrant, there are still some important harms that must be avoided, therefore this analysis will proceed to the other aspects of the harm principle.

[71] Eamon Aloyo & Eugenio Cusumano, *Morally Evaluating Human Smuggling: The Case of Migration to Europe*, 24 Critical Rev. Int'l Soc. & Pol. Phil. 133, 140 (2021) (U.K.).

[72] This would be especially relevant for the pending *Kinsa* case (Case C-460/23, Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 – Criminal proceedings against OB (Aug. 25, 2023)).

[73] The same can be said regarding the acquisition of illicit profit, as long as such conduct does not put the migrant at risk, or exploits him/ her – for instance, charging a cost for providing illegal documents, without it being an "abnormal" or exploitative fee; or charging the normal cost of a comparable legal transport, without endangering the migrant's fundamental interests. The real problem here would be the definition of the threshold of a (still) fair profit, and the "abnormal" profit that could already constitute exploitation of the situation of the migrant, given the illegal nature of such profit. This is not an issue when it comes to regulated professionals, since it is possible to compare what they profited with the migrant and with a regular citizen. It must also be underlined that the eventual responsibility of these agents – be it criminal or administrative – could be established regarding these people (e.g., for counterfeiting documents), just not under migrant smuggling as it results from a legitimate criminalisation of it.

2.2.2. HARM TO OTHERS

Since it has already been established that no interest of the state has the necessary legitimacy to permit criminalisation of migrant smuggling, an analysis of this element from the perspective of the state would not be needed. However, even if it were concluded that some interest would be capable of triggering the use of criminal law (whether it be sovereignty, security, or immigration policy), there would be a new obstacle at this point, in the form of the subject to which those interests belong. Because the state cannot be considered a victim from the point of view of the harm principle,[74] only "security" would potentially lead to the criminalisation of migrant smuggling, given that it is also an interest of the citizens (they benefit from the protection of the territory where they are, mainly against external threats). However, security has been deemed to be an illegitimate interest when autonomously considered in an incriminating norm.

It could be argued that the *community*, and not the state, is the holder of the interests at stake, *via* the determination of the immigration policy: the right of association entails the right to exclude those we do not want to be a part of that community.[75] But here too, the legitimacy of this criminalisation must be denied, be it because the migrants would not be able to sufficiently influence the community if they were denied political rights; or because a conflict between the right to exclude and the right to migrate in search of a better life would then ensue.[76] Either way, the community cannot be considered a victim *per se*, thus a relevant interest of the individuals would be needed to anchor a legitimate criminalisation of migrant smuggling.

With regard to the victim, all that remains is the migrants themselves. As already mentioned, the biggest obstacle to considering the migrant as a victim is the initial consent to be smuggled into another territory. By consenting to the risky behaviour, one cannot be considered as a victim, otherwise criminal law would be used in a paternalistic way, which is also problematic. The consideration of the victim in light of the harm principle would lead to the exclusion of a wide range of conduct currently encompassed by the criminalisation of migrant smuggling, as long as[77]: there would be an agreement between both parties, whereby the smuggler would be under a duty of explaining the real risks that would follow, since any informed consent would

[74] Regarding the possibility of a state being considered the victim (therefore sustaining a harm), see e.g. Persak, *supra* note 55, at 55.
[75] Aloyo & Cusumano, *supra* note 71, at 148.
[76] *Id.* at 148-49. It seems clear that the right to migrate should prevail in such a conflict, since it has the objective of immediately improving someone's life; the right to exclude someone from a community is based on a hypothetical benefit regarding its non-alteration, or security.
[77] *Id.* at 134.

presuppose the knowledge of the situation; there was no violation of human rights; and the smuggler did not unnecessarily endanger the migrant's interests.

In this case, the migrants would only be considered victims – indeed, there would only *exist* victims – if any of these factors were disregarded,[78] or if they were exploited by the perpetrator of the crime (the smuggler) in order to obtain an illicit profit due to their fragile situation. According to this perspective, migrants who are victims of smuggling would have access to every right that would normally be attributed in such a situation.[79]

Lastly, the legitimate intervention of the state in the regulation of these matters will be assessed, bearing in mind the previous conclusions.

[78] Among these factors, consent is of particular importance, since it is normally the element that prevents migrants from being considered victims of this crime, as they act practically as accomplices – International Organisation for Migration [IOM], *Whatever Happened to the Migrant Smuggling Protocol?*, at 4 (2017), https://publications.iom.int/system/files/pdf/migrant_smuggling_protocol.pdf.

[79] Such as the right to residence in Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, 2004 O.J. L (261/19) (notwithstanding the express mention to their cooperation).

2.2.3. THE INTERVENTION OF THE STATE

Since the only legitimate interests to consider in this case would be those of the migrants, a crime would be committed when: their consent is defective, in the sense that it was not informed (deliberately, by the author of the crime); there is a violation of human rights in the process of migrant smuggling; the author unnecessarily risks the migrants' interests (for instance, by providing a boat that they know will not be able to withstand the journey instead of a better one just so the profit could be bigger);[80] or if the migrant is exploited by the smuggler.

Subjacent to all of these situations is an intrinsic wrongfulness of the conduct, which stems precisely from the fact that the author of the crime is taking advantage of the fragility of the migrant's situation in order to gain profit or an advantage of any kind.

According to the harm principle, the simple fact of introducing someone into a given territory (thus violating immigration laws) should not be considered a crime. Similarly, the conduct of someone that aids the migrant that intentionally takes the risks inherent to the decision they *freely* opt for should not be criminalised. At best, these behaviours should be subject to an administrative sanction,[81] given the disrespect for the immigration laws of the state. The acquisition of illicit (unfair) profit with the introduction of migrants on said territory, on the other hand, should be criminally punished, as well as cases that involve violation of human rights.

The only conduct that should be criminally censured is the introduction, facilitation of transit or residence of a foreign person in a Member State's territory of which he is not a national, nor of which he possesses an authorisation to do so, in order to obtain a financial or material illicit advantage, or violating the migrant's human rights in the process. Any other variation of this behaviour should be decriminalised (at least at the European level).[82]

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[80] Example in Aloyo & Cusumano, *supra* note 71, at 141.

[81] Thus justifying the non-existence of an irregularity once the migrant acquires the right to stay in that territory. A crime cannot be dependent on the regularisation of an administrative situation: this is both dogmatically and factually problematic; but it seems to be exactly the field of action of the administrative sanctions ("misdemeanours"), that allow the state to sanction someone for disrespecting any legal norms, without having the inherent censure and gravity of criminal sanctions. A very practical example may help clarify this: at the present moment, helping a Ukrainian national enter the territory of a Member State is not considered migrant smuggling because the Ukrainian people have a special authorisation to enter and reside in the EU; if the smuggled person bears any other nationality, the agent of this conduct is committing a crime. How can it be, for instance in a situation where the agent helps two people (one Ukrainian, one non-Ukrainian), that they are simultaneously doing something valuable *and* committing a crime? But it would make sense in terms of administrative sanctions, as explained.

[82] See also the interesting formulation of migrant smuggling by Arroyo, *Wirtschaftsstrafrecht in der Europäischen Union. Rechtsdogmatik, Rechtsvergleich, Rechtspolitik: Freiburg-Symposium* [*Economic Criminal Law in the European Union. Legal Doctrine, Comparative Law, Legal Policy: Freiburg Symposium*] 465 (Klaus Tiedemann ed., 2002).

2.3. THE THIRD PHASE: CONSIDERING OTHER RELEVANT PRINCIPLES

When it is concluded that there is a conduct that could legitimately be criminalised (axiologically speaking), it is then necessary to assess, in light of other fundamental principles of EU and criminal law, whether that criminalisation should in fact occur.

The principle of legality would be reinforced, also in the European sphere[83]: since directives, by their own nature, cannot abide by all of the subprinciples of legality, it is only the national law that must fulfil all of its requirements. Still, a more limited and clear definition of migrant smuggling in the EU would likewise lead to a more restricted and clear understanding of the phenomenon at the national level.

The principle of subsidiarity is respected as well, given the transnational potential of the conduct: it is indeed more effectively regulated on the supranational level than through multiple legislative solutions that are dependent on the individual will of each State. It would also restrict certain illegitimate actions of States that use criminal law against the migrants themselves (given the criteria of the harm principle), thus reinforcing the constitutional dimension of the EU and realigning Member States with their obligations under the smuggling Protocol.[84]

The proportionality of the criminal law would also be ensured, since the only relevant conduct would now be that which entails the exploitation of the migrant or which jeopardises their interests. This would be paramount in order to restrict the criminal responsibility of legitimate operators in the housing and transport sectors, given the fact that the normal exercise of their profession would not correspond to a crime (even if the person was in that territory irregularly). With regard to the migrants, they would only be liable to commit an administrative offence, and not a criminal one.

When it comes to evaluating the effectiveness of such a norm, criminalisation alone does not diminish the demand and supply of such services, so its effectiveness in

[83] Critically on the existing legislation with regard to the principle of legality, *see* Valsamis Mitsilegas, *Reforming the EU 'Facilitators' Package': The new Commission proposal in the light of the Kinshasa litigation*, EU Migration Law Blog, (Feb. 13, 2024), https://eumigrationlawblog.eu/reforming-the-eu-facilitators-package-the-new-commission-proposal-in-the-light-of-the-kinshasa-litigation/.

[84] In spite of Art. 83 T.F.U.E. allowing Member States to legislate more severely than the *minimums* established in EU law. The material legitimacy criteria intend to rationalise European criminal law and restrict the freedom of the European legislator, and thereby avoid the pernicious effects of European legislation in the multiple Member States: if the Directive is not drafted erroneously, we can avoid, in a first instance, a defective piece of national legislation as well. In this case, there would be an added benefit: if the Directive mentioned "profit" as one of the elements of migrant smuggling, it would be impossible for Member States to consider humanitarian help a criminal offence, because the obtainment of profit would already constitute one of the elements of the "minimums" established in European law, therefore it would have to be transposed, otherwise the Member State would be in breach of EU law. In conclusion, the criteria for evaluating the material legitimacy of European criminal law will not always have the side effect of rationalising the national transposition as well, but there are situations where such an effect will occur.

eliminating this phenomenon would remain practically unchanged.[85] On the one hand, the precarious situation of many irregular migrants[86] stems from the lack of legal means to reach the territory – and protection – of another country;[87] on the other hand, the hostile immigration policy seems to bear no impact upon the decision to try to reach that territory.[88] However, these new legislative measures would be more adequate and would be properly directed at conduct that is essentially an administrative offence – in this regard, such a norm would indeed be more effective, in the sense that it would not preclude the application of a sanction (a fine) to the irregular migrant.[89]

A criminalisation delimited in these terms would no doubt comply with the principle of respect for fundamental rights (the present one being in flagrant opposition to it) and also the *ultima ratio* principle, since the behaviour that is criminalised is not manageable through other, less grievous means.

It would seem, therefore, that such a norm would be feasible in the European sphere and would be more in line with fundamental principles of criminal law.

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[85] This can be easily concluded when one observes the statistical data regarding criminal proceedings for the crime of "facilitation of illegal immigration" – in Portugal, there has been an exponential increase of proceedings opened (in 2023), which amount to an increase of 298% (statistical data available at Gabinete do Secretário-Geral [Office of the Secretary General], Relatório Anual de Segurança Interna 2023 [Annual Internal Security Report 2023], at 53, https://www.portugal.gov.pt/pt/gc24/comunicacao/documento?i=relatorio-anual-de-seguranca-interna-2023 (Port.). If one takes into account the fact that the law criminalising this conduct dates from 2007, and the data regarding the increasing numbers of criminal proceedings for this crime, it becomes simple to infer that the criminalisation alone has not been effective in preventing illegal immigration (and the facilitation thereof).

[86] The methods for counting the irregular migrants that reach the territory of the EU are also subject to harsh criticism – see Carrera & Guild, *supra* note 3, at 2-3.

[87] Gabriella Sanchez, *Five Misconceptions About Migrant Smuggling*, RSCAS Policy Briefs, May 2018, at 1, 3 (It.).

[88] Michael Collyer, *Cross-Border Cottage Industries and Fragmented Migration*, *in* Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU, *supra* note 3, at 17, 21.

[89] The criminalisation of the migrant is not explicitly prohibited by the Directive, but the jurisprudence of the European Court of Justice has made some progress in that regard, stating that there are some penalties that are incompatible with the objectives of Directive 2008/115/CE on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 – for instance, any penalty that delays the return of the migrant in question (Case C-61/11 PPU, Criminal proceedings against Hassen El Dridi alias Karim Soufi (June 26, 2011); Case C-329/11, Alexandre Achughbabian v. Préfet du Val-de-Marne (Feb. 4, 2012); Case C-47/15 Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai, ECLI:EU:C:2016:408 (June 7, 2016); Case C-430/11 Criminal proceedings against Md Sagor, ECLI:EU:C:2012:777 (Dec. 6 2012). On the other hand, in case of a reentry, the imposition of a penalty that entails deprivation of liberty for a period of time was not deemed incompatible with the directive, even though there is still not a relevant interest worthy of criminal protection that can be envisaged in such situations – see case Case. C-290/14, Criminal proceedings against Skerdjan Celaj, ECLI:EU:C:2015:640, ¶¶ 26-30 (Oct. 1, 2015) and the criticism that followed it, namely by Mitsilegas, *supra* note 10, at 83-84: "[T]he distinctiveness in the interests protected by national law criminalising re-entry or the harm in re-entry are difficult to pin down unless re-entry is viewed as an additional affront to state sovereignty as translated in its capacity to guard the border effectively." On the limits of EU to the criminalisation in the Member States, Valsamis Mitsilegas, The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law 57-58 (2014) (Switz.).

3. IS SUCH A CRIMINALISATION ADEQUATE?

With migrant smuggling thus delimited, would the criticism now voiced against the European rules persist, or would it finally be "fit for purpose"?

The criticism regarding the lack of mention of profit in the conduct of migrant smuggling would automatically be resolved, since it would now be one of the essential elements of criminalisation.[90]

Likewise, the obtaining of profit through the assistance provided to migrants, or the violation of their human rights in the process (whether for entry, transit or residence in a territory) would automatically exclude acts displaying a humanitarian motivation from criminalisation, as well as assistance between friends or family, or even the criminalisation of the migrants themselves.

Commercial operatives in the sectors of transport or housing would similarly be excluded from this incrimination, as long as the profit they obtained was not considered "unfair" or "illicit" – in other words, that profit could not be different or disproportionate when compared with other clients just because of the fragility of the migrant's situation.

Lastly, the permitted discretion with regard to each legal order would not be so ample as it now is, thus curbing that particular criticism and, at the same time, making it possible to know exactly what constitutes migrant smuggling across the EU[91]

In any case, even though it results from the incriminating norm thus defined, there should be no doubt in the legislative instrument that the migrant, humanitarian assistance, and commercial operators were not to be criminalised. Humanitarian assistance, as well as the help one provides family or friends should also be excluded from a possible administrative sanction if the irregular migrant is given the right to legally reside in that territory (e.g., because they are granted asylum, or because of family reunification rules): it must be taken into consideration that the initial irregularity may well have been the only possibility of that person ever reaching the

[90] *See e.g.*, Stefano Zirulia, *Non c'è smuggling senza ingiusto profitto: Profili di illegittimità della normativa penale italiana ed europea in materia di favoreggiamento dell'immigrazione irregolare* [*There is No Smuggling Without Unjust Profit: Challenging the Legitimacy of the Italian and European Rules on Facilitating Irregular Migration*], Diritto Penale Contemporaneo Rivista Trimestrale, 2020, at 143, 143-44 (It.). It is also one of the envisioned changes in the new Proposal for a directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, *supra* note 19.

[91] At present, the flexibility allowed in Member States concerns only the possibility of criminalising more conduct than those already predicted in the Directive, not the adjustment of the European norms to the national legal order – that is because, even if the Member State in question wanted to include the obtaining of profit as a necessary element of the incrimination, that would likely not be in accordance with the Directive, since in practice that Member State would punish a narrower scope of conduct than intended by the EU.

territory which now grants them protection, given the lack of legal alternatives of obtaining it.

CONCLUSION

The aim of this article was to demonstrate that the application of a dogmatic criterion to assess the material legitimacy of European criminal law would go a long way towards rationalising it, as well as reinforcing its constitutional dimension and respect for fundamental principles that are the true common ground upon which to build a harmonised criminal law for all Member States.

As any legitimate power, the European criminal legislator must have an axiologically-driven approach to criminalisation and respect limits that are deemed essential in modern societies: there is no absolute legislative freedom, and the need for an incriminating norm must be substantiated.

Despite the stark criticism migrant smuggling is under, there is a legitimate version of the crime that would comply with the fundamental principles of criminal law – just not the one that has been adopted. Migrant smuggling should be considered a European criminal offence when directed at the protection of the migrants; other possibilities would be open for the Member States, as long as they would not run counter to the established norm at the European level. This would not only rationalise European criminal law, it would also lessen its impact on national legal orders, avoid unnecessary criticism of the EU and align its norms with its own values and international standards.

Whether this is a norm that is necessary, given the existence of other legal instruments that already criminally punish the relevant behaviours (namely those pertaining to human trafficking), is a whole new question. Indeed, it appears that it may not be needed at all. However, given that there is no possibility to remove it entirely from the legal orders of the Member States or of the European Union – due to the lack of an actual power to decriminalise on the part of the EU, and the consequent lack of power of the Member States to remove a criminal law provision that originated in the EU from their respective legal orders without disrespecting European constitutional principles – this would at least be a way to make migrant smuggling as legitimate as can be, while there is no decriminalisation competence in the EU.

It is also true that this phenomenon – in truth, both irregular migration and migrant smuggling – will not be significantly reduced if the only answer given is by

criminal law. This is a social fact that requires an interdisciplinary approach and solutions given by immigration policy. Nonetheless, it would be extremely important for the EU to stand true to its values and provide a better example when it comes to the exercise of its criminal power.

VOLUME 9 ISSUE 2 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/19219

Received: 11 March 2024 | Accepted: 09 June 2024 | Published: 24 Feb. 2025

The Quest for Timely Civil Justice Dispensation: A Discussion of Case Management System Applied in the High Court of Tanzania

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ABSTRACT

This research examines the systemic deficiencies in Tanzania's High Court Civil Justice Case Management System (CMS), with particular emphasis on its three foundational components: case scrutinisation, event scheduling, and procedural control. The study employs a comprehensive analysis of current legal frameworks and procedural mechanisms to evaluate the system's effectiveness in facilitating timely justice delivery. The investigation reveals significant structural weaknesses across multiple phases of civil proceedings. At the admission stage, inadequate initial case scrutinisation allows flawed cases to progress through the system, necessitating subsequent judicial intervention during judgment writing. The research identifies critical gaps in statutory time management, particularly in pre-trial proceedings where temporal constraints remain undefined. The hearing phase demonstrates similar systemic shortcomings, lacking prescribed commencement timeframes and allowing indefinite extensions of speed tracks. Furthermore, the study uncovers substantial deficiencies in appellate proceedings, specifically in the scrutinisation and scheduling of appeals, revisions, and auxiliary applications. While the system implements a ninety-day rule for judgment delivery and implies scrutinisation duties, it lacks robust enforcement mechanisms, ultimately compromising judicial efficiency. This analysis contributes to the scholarly discourse on judicial reform by highlighting how structural inadequacies in case management systems can impede civil justice administration. The research concludes by proposing targeted reforms to enhance the existing CMS framework, potentially offering insights for similar jurisdictions grappling with case management challenges.

KEYWORDS

Case Management System; Timely Justice Dispensation; Scrutinisation; Scheduling of Time and Events; Control

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INTRODUCTION

Generally, civil justice connotes means of redress against civil wrongs.[1] It forms part of the justice system responsible for the protection, enforcement, and restoration of individual or organisational rights, except those which are reserved for the criminal justice system.[2] Civil cases involve a plaintiff alleging injury on account of the defendant's act or omission. Such injury can be contractual, commercial, tortious, constitutional, political, administrative, or labour-related. Courts are enjoined to consider the allegations, defence, and evidence for either, examine them under the microscope of the law and delineate the rights and liabilities of each party. The process through which a case is brought to court, considered when the same is resolved thus achieving justice dispensation is referred to as the Case Management System [hereinafter C.M.S.].[3]

1. THE CONCEPT AND TYPES OF CASE MANAGEMENT SYSTEM

What is meant by C.M.S. is subjective and can be defined by an array of words and phrases. Be that as it may, in essence, C.M.S. is used to afford the Court control over the proceedings before it and enhance the chances of timely and frugal justice dispensation.[4] Adoption of C.M.S. came as a response to the litigation practice of the time where litigants and advocates were left to set the pace of litigation and the judge was a mere umpire, a trend which was observed to cause delayed disposition of cases and growing litigation expenses.[5] The various possible ways of defining C.M.S., the essence for its adoption and the pivotal nature of control in C.M.S. allude to the possibility of having a C.M.S. which gives absolute control over proceedings to the judge or the parties, or one which is a hybrid of the two. Depending on who has control over proceedings, the C.M.S

[1] *See* Black's Law Dictionary 741 (Bryan A. Garner ed., 11th ed. 2019). Rebecca L. Sandefur, *Fulcrum Point of Equal Access to Justice: Legal & Nonlegal Institutions of Remedy,* 42 Loy. L.A. L. Rev. 949, 952–53 (2009).

[2] Business Environment Strengthening for Tanzania (BEST), *Law Reform Commission of Tanzania*, Rev. Civ. Just. Sys. Tanz., 2010, at 2.

[3] Courts Administration Division [hereinafter C.A.D.], Case Flow Management: An Assessment of the Ontario Pilot Projects in the Ontario Courts of Justice 4 (1993) (Can.).

[4] Remme R. Verkerk, *What is Judicial Case Management? A Transnational & European Perspective, in* 70 David A. Ipp, *Case Management*, 10 Consultus, May 1997, at 35, 36.

[5] *See* Law Council of Austl. & Fed. Ct. of Austl., Case Management Handbook 16 (2014) (Austl.); A.A.S. Zuckerman, *Lord Woolf's Access to Justice: Plus ça Change...*, 59 Mod. L. Rev. 773, 773-74 (1996); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306, 309 (1986).

can accordingly be active, passive, or selective, respectively.[6]

1.1. THEORIES OF CASE MANAGEMENT SYSTEM

The adoption of C.M.S. was done in response to the growing case delays and litigation costs.[7] The issue of case delays is indicative of an inexpedient management process. For purposes of assessing and improving management efficiency, several theories have been proposed by literature but three theories guide the discussion of this article. Such theories are the Theory of Constraints [hereinafter T.O.C.], the Scientific Management Theory [hereinafter S.M.T.], and the Role Theory [hereinafter R.T.].

1.1.1. THEORY OF CONSTRAINTS

The T.O.C.'s premise holds that constraints determine the performance of a system.[8] It focuses on identifying bottlenecks which hinder optimum performance of a system in attaining its goals and ways to improve it.[9] Its application requires the identification of constraint, decision on how to address constraint, comprehensive alignment with the decision, elimination of the constraint and a repeat of this cycle at every stage or with every process inhibitor.[10] The T.O.C. has been applied to judicial settings and has been observed to have potency in addressing *inter alia* the congestion of cases in court and the time cases take.[11] Being that the High Court and the judiciary of Tanzania at large have been mandated to dispense justice timely, bottlenecks include any act or omission which has the effect of inhibiting the dispensation of fair, speedy, and affordable justice.[12] Such acts or omissions may be participants' incompetence, adjournments, technicalities, unscrupulous litigants, unnecessary procedures, ineffective case management and the

[6] *See* Álvaro Pérez Ragone, *An Approach to Case Management from the Horizontal and Vertical Structure of Court Systems,* 23 Zeitschrift für Zivilprozess International 345, 356 (2018) (discussing active C.M.S. and how it affords control over proceedings to the Court); Carolynn L. Markram C, Case Management in the context of identifying and reforming undue delay in South African Civil Procedural Law (Jan., 2016) (L.L.M.. dissertation, Univ. of Pretoria) 36-37, 41 https://repository.up.ac.za/bitstream/handle/2263/56978/Markram_Case_2016.pdf?sequence=1&isAllowed=y) (S.Afr.); Anna Olijnyk, Justice and Efficiency in Mega-litigation, (Oct. 2014) (Ph.D. thesis, Univ. of Adelaide) 240 (https://digital.library.adelaide.edu.au/dspace/bitstream/2440/91442/3/02whole.pdf) (Austl.).

[7] Ipp, *supra* note 4, at 36.

[8] *See* John Blackstone, *Theory of Constraints*, 5 Scholarpedia (2010) http://dx.doi.org/10.4249/scholarpedia.10451 (last accessed July 22, 2024).

[9] *See* Zeynep T. Şimşit et al., *Theory of Constraints: A Literature Review*, 150 Procedia – Soc. & Behav. Sci. 930 (2014); Shany Azaria et al., *Justice in time: A Theory of Constraints Approach*, 69 J. Operations Mgmt. 1202, 1205 (2023).

[10] Şimşit et al., *supra* note 9, at 932.

[11] Azaria et al., *supra* note 9, at 1203.

[12] Constitution of the United Republic of Tanzania, Article 107A(2) (b, d and e).

list could go on. The T.O.C. requires there be an intervention to identify and address those impediments to the delivery of fair, speedy, and affordable justice.

1.1.2. SCIENTIFIC MANAGEMENT THEORY

Alternatively known as Taylorism, the S.M.T. proposes the existence and pursuit of the best way of undertaking tasks for the desired efficiency and output.[13] The theory posits systematic or scientific management as the cure for inefficiency.[14] This requires rough methods of procedure to be replaced by precise scheduling and methods of performing each step of work; those expected to perform the work should be trained in such a method; work should be divided equally between workers and managers; and the two should cooperate.[15] The S.M.T., with its focus on enhancing efficiency in the performance of duties, presents an approach for the C.M.S. to adopt in facilitating timely justice dispensation. Like the active type of C.M.S., S.M.T. places on the judge a duty to manage the case, cooperate with the parties, plan, and advocate for the ideal means for dispute resolution and enforce the plan. In this way, the S.M.T., and its proposition, can be applied in the High Court's use of active C.M.S.

1.1.3. ROLE THEORY

This theory is premised on the societal expectations of a person owing to a position or stature, the conformity to which facilitates societal harmony.[16] It has five central suggestions: that patterns of behaviour create contextual roles, that such roles are associated with social position, class and or function, that with roles come expectations of behaviour and actions, roles are perpetual due to being woven into the social system and that roles are taught or inherited.[17] Judges, lawyers, and parties appearing in court occupy and play out roles which have tied thereto, expectations of conduct. The R.T. has it that each such individual has to fulfil the expected role for the sound conduct of the court's business. Judges are expected to competently and expeditiously adjudicate matters before them according to law.[18] As officers of the court, lawyers are, *inter alia,*

[13] *See* Abdullahi M. Ibrahim, *Improving Performances in the Public Sector: The Scientific Management Theory of F W Taylor and Its Implications for Library and Information Services,* 7 The Info. Manager 40, 41 (2007).
[14] *Ses* Nathan H. Gunter, *Gaines S. Dobbins and Scientific Management Theory In 20th Century Church Education*, 12 Christian Educ. J. 355, 358 (2015).
[15] *Id.* at 356-60.
[16] *See* Jeffrey A. Miles, Management and Organization Theory: A Jossey-Bass Reader 225 (2012).
[17] *Id.*
[18] *See* Tomas A. Guimarães et al., *Role Conflict and Role Ambiguity in the Work of Judges: The Perceptions of Portuguese Judges*, 51 Braz. J. of Pub. Admin. 927, 932 (2017).

expected to assist the court in the conduct of its business.[19] Like the T.O.C. and the S.M.T., the R.T. speaks to the active role of judges in controlling court proceedings.

For the discussion hereinafter, the collective thesis of the guiding theories is that the identification of impediments (T.O.C.), the use of methodical or systematic procedures (S.M.T.) and the effective execution of designated roles (R.T.) produce efficiency. Criticisms against each guiding theory, like adding to the duties of the judge, ignoring the prevailing circumstance and extraneous factors affecting efficiency, confining the actions to expectations, and not accounting for possible innovativeness, are acknowledged.[20] However, their collective use is for their complementary effect to counter respective limitations.

1.2. THE PROBLEM

In Tanzania, legislative and administrative measures have been taken, by the legislature and judiciary alike, to establish and apply a C.M.S. in the High Court of Tanzania [hereinafter the High Court / the Court]. Such measures include the establishment of case-flow management and bench-bar monitoring committees, adoption of the 'First-In-First-Out' policy, same-day admission and assignment policy, Alternative Dispute Resolution [hereinafter A.D.R.], individual calendar, zero case-backlog policy, overriding objectives, scheduling conferences, adjournment control, specialised courts, case disposal quotas and the wider use of Information Communication Technology (I.C.T.) in adjudication.[21] Despite the adoption of such measures, case delays persist and performance statistics of the High Court indicate the continued existence of backlog cases (cases pending in court for more than two years) between 2020 and 2023,[22] which is symptomatic of an ineffective C.M.S.

[19] *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39, 40, 42-43 (1989).

[20] *See* Olu Awofeso, *Managing Formal Organizations in the 21st Century: A Critique of Fredrick Taylor's Scientific Management Theory*, 5 J. Pub. Mgmt. Rsch. 1, 9 (2019).

[21] *See* Sufian H. Bukurura, Judiciary and Good Government in Contemporary Tanzania 20-21, 43 (1995).

[22] Chief Registrar, 2020 Comprehensive Performance Report of the Judicial Functions 14 (2021) https://tanzlii.org/akn/tz/doc/jot-documents-and-guidelines/2021-04-01/comprehensive-performance-report-of-the-judicial-functions-2020/eng@2021-04-01/source (Tanz.); Chief Registrar, 2021 Comprehensive Performance Report of the Judicial Functions 19 (2022) (Tanz.); Chief Registrar, 2022 Comprehensive Performance Report of the Judicial Functions Chapter II – 5 and 6 (2023) https://tanzlii.org/akn/tz/doc/jot-documents-and-guidelines/2023-02-01/comprehensive-performance-report-of-the-judicial-functions-2022/eng@2023-02-01 (Tanz.); Chief Registrar, 2023 Comprehensive Performance Report of the Judicial Functions 25 (2024) (Tanz.).

1.3. LITERATURE REVIEW

Failure of the adopted legislative and administrative measures to ensure timely justice dispensation and curing case delays is not unique to Tanzania and its High Court. An empirical study done in the Dhaka District Judge Court – Bangladesh, revealed that such a measure alone did not solve the case delay issue.[23] Wherefrom, the implementation of a proper C.M.S. and court modernisation were recommended.[24] Another study done by comparing the situation in Bangladesh, North-South Wales, and Australia echoed such findings with similar recommendations.[25]

Resoundingly, studies exploring the timely justice dispensation situation in various jurisdictions acknowledge the insufficiency of legal initiatives, exclusive of administrative measures and facilitative culture, in ensuring justice and expediency. A comparative discussion of the position in Australia and the United States of America [hereinafter U.S.], and the success story of the Singapore judiciary, hail the efficacy of a C.M.S. made up of legal, administrative, and cultural attributes which enhance expedience.[26] Such empirical studies offer the current discussion, a literature basis for assessment of the C.M.S. applied in the High Court for civil justice dispensation. They provide insight into the potential challenges likely to arise as part of the C.M.S. implementation and strategies which can be adopted. Unanimously, such studies posit the need for a C.M.S. for just and expedient adjudication. However, in as much as Tanzania has adopted measures which depict a C.M.S., the same has not been efficacious and case delays remain commonplace. This article, therefore, examines the steps civil cases go through before the High Court and assesses the applied C.M.S.'s stature in ensuring timely justice dispensation.

[23] *See* A.B.M. Asrafuzzaman and Golam M. Hasan, *Causes and Redresses of Delays in Disposal of Civil Suits in Dhaka District Judge Court: An Empirical Study*, 32 Dhaka Univ. L. J. 135, 141-55 (2021) (discussing causes of delay in different steps of civil cases and recommendations to improve efficiency).

[24] *Id.* at 155-59.

[25] *See* Ummey S. Tahura, Case Management in Reducing Case Backlogs: Potential Adaption from the New South Wales District Court to Bangladesh Civil Trial Court (Feb. 24, 2015) (M.Phil. thesis, Univ. of Macquire) 157 (https://doi.org/10.25949/19441841.v1) (Austl.).

[26] *See* Waleed H. Malik (WBG), Judiciary-Led Reforms in Singapore: Framework, Strategies and Lessons, Doc. N.38779, at 16–17, 34–55, 66 (2007), https://openknowledge.worldbank.org/server/api/core/bitstreams/289719af-3f32-5c6f-96bf-ed55683c16bb/content; Steven S. Gensler, *Judicial Case Management: Court in the Crossfire, Special Symposium Issue: 2010 Civil Litigation Review Conference*, 60 Duke L. J. 669, 700, 726-27, 743 (2010) (discussing role of the case management in the U.S. legal system).

The pursuit for timely justice dispensation and the challenge of case delays traverses common and civil law jurisdictions.[27] While comparing the French and the U.S. civil justice dispensation systems, Emerson indicates the possible adoption of the *constat* technique to address the discovery step delays in the U.S. civil justice dispensation system.[28] The *constat* technique presents a mechanism used in the French civil justice dispensation system to reduce the time taken during the discovery step of civil litigation, by reducing the number of documents which need to be reviewed.[29] Tanzania being a common law jurisdiction like the U.S. and having discovery as a possible step in civil justice, the *constat* technique presents another C.M.S. technique which can be adapted to the Tanzania context.

An examination of the legal position in Finland, Norway, and Brazil depicts the existence of an active type of C.M.S. in those jurisdictions with the scrutinization, scheduling of time and events and the control element of C.M.S. clearly provided for by their respective procedural law.[30] Such elements are exhibited by the existence of case management or preparatory judges, case management hearings, active screening of cases for competence and issues, promotion of A.D.R. and control of pace by judges, and abridged time spans between case steps and limitation of hearing lengths by judges to mention a few, as provided by respective legal framework.[31] Such legal positions, though hailing from civil law jurisdictions, offer a blueprint of how an active C.M.S. type can be used to facilitate timely justice dispensation in the context of the High Court and Tanzania at large.

1.4. ELEMENTS OF CASE MANAGEMENT SYSTEM

The effectiveness of C.M.S. is predicated on it having the essential elements, which facilitate the systematic, predictable, and consistent management of cases. To this end, the essential elements of C.M.S. are early and continued scrutinization or screening of filed cases, the scheduling of time and events of the case, and the court's supervision or

[27] *See* Robert W. Emerson, *The French Constat: Discovering More Efficient Discovery,* 36 Bos. Univ. Int'l. L. J. 1, 25-28 (2018) (comparing the efficiency of the French and U.S. civil justice systems); Anna Nylund, *Case Management in a Comparative Perspective: Regulation, Principles and Practice,* 292 Revista de Processo 377, 378 (2019) (discussing the use of C.M.S. to enhance the efficiency and quality of civil litigation, and how legal cultures affect C.M.S.).
[28] Emerson, *supra* note 27, at 25-28.
[29] *Id.* at 30-32.
[30] Nylund, *supra* note 27, at 381-87.
[31] *Id.*

control over the proceedings.[32] These essential elements are necessary building blocks of an efficacious C.M.S. Such elements have to be provided for and exist systemically in the legal regime and must be applied and have practical means to ensure compliance. The existence, part existence or non-existence of the essential elements is consequential to the applied system's ability to ensure a timely and cost-conscious justice dispensation process.

1.5. HYPOTHESIS

Informed by comparable practice, type, elements and theories of C.M.S., this article hypothesises that the system lacks essential elements and faces legal and practical challenges to its efficacy. To address the intention and hypothesis of the article given the procedures provided by law, the article examines the amalgamated civil case steps, and tests the existence or sufficiency of the essential elements of C.M.S. and their compliance in the civil justice dispensation before the High Court.

1.6. METHODOLOGY AND LIMITATION

This article is a revised version of a part of the author's Ph.D. thesis and makes use of the data collected for that study. The study and this article take a combined, doctrinal, and empirical, research approach after which the produced data is triangulated to inform its discussion.

Doctrinal research review of the civil justice dispensation C.M.S. is limited to the procedures for redress covered under the laws discussed subsequently in this article.

Primary data was collected from consented semi-structured interviews with 226 respondents, ninety-four questionnaire respondents, the review of legislation, circulars and original case files accessed from the Arusha, Mwanza, Dodoma, and Dar es Salaam High Court Registries. The 226 interview respondents included the Chief Justice of Tanzania, eighteen Justices of the Court of Appeal, sixty-nine Judges (including one retired Principal Judge), fifty Registrars of the High Court, fifty-two State Attorneys,

[32] *See* Victorian Law Reform Commission, Civil Justice Review: Report 291, 355 (Report No. 14, 2008), https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRCCivilJusticeReview-Report.pdf; County Court of Victoria, Civil Trial Process 1 (Fact Sheet No. 7) [hereinafter C.C.V.], https://www.countycourt.vic.gov.au/files/documents/2020-07/factsheet-7-civil-trial-processes_1.pdf; C.A.D., *supra* note 3; Evan Bell, *Judicial Case Management*, 2 Jud. Stud. Inst. J. 76, 97 (2009). Dennis Byron, President of the Caribbean Court of Justice, Case Management for the African Court on Human & Peoples' Rights, Remarks on the occasion of the Judicial Education and Training Programme for Judges of the African Court of Human & Peoples' Rights 5 (Mar. 5-7, 2014) , https://ccj.org/wp-content/uploads/2021/03/Remarks-at-the-Judicial-Education-&-Training-Programme-for-African-Judges-of-Human-&-Peoples-Rights-on-Case-Management-_Sir-Dennis-Byron_20140305.pdf (Tanz).

including the Attorney General [hereinafter A.G.], Solicitor General and the Director of Public Prosecution, twenty-one senior advocates with over ten years of practice experience and fifteen court brokers. The ninety-four questionnaire respondents included twenty-six judges law assistants, twenty-six Records Management Assistants and forty-two litigants with cases before the High Court which have been pending for more than forty-eight months.

To select the participating respondents, the authors used purposive sampling to select the Chief Justice, the A.G., S.G., D.P.P., the Chairperson of the Chief Justices Rules Committee from among the participating Justices of Appeal, Hon. John Kahyoza who is a High Court Judge, the Chief Registrar of the Judiciary, the Directors of Case Management of the Judiciary, the President of the Tanganyika Law Society from among the participating senior advocate and the Legal and Human Rights Centre Director of Advocacy and Reforms. These participants were purposively selected on the basis of their in depth, privileged and specialised knowledge about the subject under study by virtue of their roles. Thereafter, the authors employed convenience sampling to select 45 Judges and 11 Deputy Registrars of the High Court from Arusha, Dar es Salaam, Dodoma, and Mwanza High Court sub-registries when the sub-registries were visited for data collection. Convenience sampling was also used to include 1 retired Principal Judge who was selected based on his availability. The authors used simple random sampling to select 17 Justices of Appeal, 22 Judges and 35 Deputy Registrars of the High Court not purposively or conveniently selected. The authors used the excel RAND function to randomise the names of potential participants from each group and pick from the top to the bottom. Lastly, the authors used restricted random sampling to select participating state attorneys, senior advocates, Judges' Law Assistants, record management assistants, litigants and court brokers. This technique allowed the researcher to restrict the number and type of respondents from these groups in the ways described above.

To avoid potential conflict of interests or bias, which the first author may have owing to his position, the authors enlisted the assistance of two research assistants for data collection purposes. Both research assistants were resident magistrates, holding a bachelor of laws and post graduate diploma in legal practice, and one holding a masters of law on top of those two qualifications. The selection of the research assistants was done at the convenience and judgment of the authors after satisfying themselves that the research assistants meet the necessary qualifications to conduct legal research, are able to understand the problem under study and comply with the necessary ethical requirements.

In data collection, primary consent was sought for the participation of each respondent and they were informed that the information they give would be used for

academic purposes only. Thereafter, the research assistants and the first author, as applicable, conducted interviews with and administered questionnaires to respondents who were officers of the High Court and other respondents against whom the first author has influence over their employment, case, or licensing status, that is, Judges, registrars and deputy registrars, judges' legal assistants, record management assistants, litigants, and court brokers. Data from those respondents was collected by the research assistants without the first author's participation. On the other hand, the first author participated in the collection of data from the remaining respondents against whom he has no influence over their employment, case, or licensing status, that is, Justices of Appeal, state attorneys and senior advocates.

During this exercise, the respondents were also informed that their identities would be anonymised, unless their secondary consent for disclosure of their identities is specifically sought. The interviews were recorded using a digital audio voice recorder and the participants were not required to disclose their identities on record. In areas where the authors thought it necessary to disclose the informing respondents' identity, they sought secondary consent for such disclosure from the respective respondent, showing the exact information which, the authors intended to quote or attribute to each particular respondent.

Interviews were conducted between February and May, 2023. The data collection process involved semi-structured interviews with 224 respondents in-person and with two respondents via teleconference. Being semi-structured and curated for each group, the interviews had between seven and 15 questions while the questionnaires had between 6 and 11 standardised questions subject to the group of respondents. For interviews, the questions were presented in a fixed order except for times when follow up questions were considered necessary and on average the interviews ran for 30 minutes.

The interviews and questionnaires offered real-life insights into the civil justice practice and various challenges borne thereof. They gave this work in depth perspective on different issues relevant to addressing the hypothesis. While some interview responses are cited in the work as relevant, questionnaire survey responses were combined with the interview responses, coded, and analysed to quantify the responses. The quantitative findings were used to support the article's qualitative findings.

Further, data from interviews and questionnaires was thereafter coded into numerical responses. Using IBM SPSS Statistics 26, data sets for every respondent group were created. From such individual data sets, a comprehensive data set for all respondents, as and where relevant, was created. The data sets were thereafter analysed to extract the frequencies for each response and inform this article's quantitative

arguments and conclusions. The data collected from interviews and through questionnaires was not case-type sensitive for the most part and it was analysed as such. Consequently, though the data provides a general picture of the case management practice, it cannot be used to draw definitive differences in the practice of civil justice against criminal justice or vice versa.

Secondary data was collected from books, journals, theses, dissertations, conference papers and authoritative reports. The researcher's experience as the Principal Judge of the High Court was essential in informing this article. There are a few limitations of this article. It is worth noting that the essence of this article takes a novel look at the issue of C.M.S. As such, local literature on the topic is scant. This has caused great reliance on literature from other jurisdictions and their relation and inference to the High Court's context.

1.7. STEPS *VIS-À-VIS* ELEMENTS IN CIVIL JUSTICE CASE MANAGEMENT SYSTEM

The steps under review are categorised into seven groups which are the presentation of pleadings, pre-trial events, alternative dispute resolution, final pre-trial conference, original case hearings, hearing of appeals, revisions and other applications, and judgement. Admittedly, some of the steps covered, result from the amalgamation of individual steps. Such a review style is adopted with cognizance of such combined steps' close relation, their connected execution in practice and for better discussion contextualisation. Again, not every civil case goes through all the discussed steps in the outlined manner and the steps which a case will go through are subject to the type of case in question.

2. PRESENTATION OF PLEADINGS

Civil suits in the High Court commence with the presentation of pleadings, a stage which entails the filing of a plaint, statement of complaint, an application by way of a chamber or originating summons, a petition, notice and memorandum or petition of appeal and or a prescribed form to that effect by the person seeking redress.[33] Generally, the pleadings stage also includes the presentation of a reply from the party against whom redress is sought in the form of *inter alia* a Written Statement of Defence [hereinafter W.S.D.], a reply to a petition, a counter affidavit.[34] This pedestal stage marks the beginning of a suit before the High Court and puts into gear the mechanisms for its management.[35] From the garbage in garbage out principle, it cannot be overemphasized that an effective C.M.S. must take effect at the earliest stage possible, in this case, the presentation of pleadings stage, for sorting the competent and from the incompetent.[36]

Pleadings are creatures of law and are intended to establish the jurisdiction of the Court, form the basis of the Court's decision, set out the issues in dispute between the parties and notify each party of the other party's assertions.[37] To achieve these purposes, respective laws prescribe the format and content to be complied with and provided by every pleading.[38] Such a prescription can be used to identify non-compliant or defective pleadings, which the law penalises by way of their rejection or return for amendment.[39]

This prescription of format and content, and the rejection or return on non-compliant pleadings, underscores the scrutinization and control elements of C.M.S. It necessarily means that such a pleading has been measured against the required standards and found to fall short and the Court has used its mandate to control its

[33] Civil Procedure Code [CAP. 33 R.E. 2019], s 22, Order XXXIX r. 1(1), Order XLIII r. 2; Magistrates Court Act [CAP. 11 R.E. 2019], 1984, Act No 2 of 1984, s 25(3); National Elections Act [R.E. 2015] Cap. 343, s 108(2); High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, s 10(1); Labour Court Rules G.N. No. 106 of 2007, s 6 (1), 24 (1), 26(1), 28 (1), 29, 31 (1); Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, G.N. No. 324 of 2014, Cap. 310, s 8(1) (a); The Basic Rights and Duties Enforcement Act, Act No 5 of 2019, Cap. 3, s 5.

[34] Civil Procedure Code, Order VIII r. 1(1); Basic Rights and Duties Enforcement (Practice and Procedure) Rules, G.N. No. 304 of 2014, Cap. 3, r. 6(1); National Elections (Election Petitions) Rules, G.N. 782 of 2020, Cap.343, r. 10(4); Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, r. 13; Labour Court Rules, r. 24 (4).

[35] *See* Ian J. Wilson & William L. Payne, *The Specificity of Pleading in Modern Civil Practice: Addressing Common Misconceptions*, 25 U. Rich. L. Rev. 135 (1990).

[36] *See* Monique F. Kilkenny & Kerin M. Robinson, *Data Quality: "Garbage in – garbage out"*, 47 Health Info. Mgmt. J. 103 (2018).

[37] *See* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 Va. L. Rev. 517, 518 (1925). James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, A Day in Court and a Decision According to Law*, 114 Penn St. L. Rev. 1257, 1266 (2010).

[38] Clark, *supra* note 37.

[39] Civil Procedure Code, Order VI r. 16 – 18, Order VII r. 10 – 12 and Order XXXIX r. 3(1); National Elections (Election Petitions) Rules, r. 9; High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 19 (2).

workload. At presentation, it is the practice that the registrar responsible for the respective registry of the High Court can either admit, reject, or return the pleading. The discretion to admit, reject or return pleadings speaks to the duty to scrutinize pleadings.

In the collection of primary data, interviews with fifty registrars were conducted. When queried about their role and responsibility, forty-four out of the fifty responding registrars, equivalent to eighty-eight per cent, held the view that a registrar has the responsibility to scrutinize cases before their presentation to judges.[40]

Scrutinization Before Presentation to Judge

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	44	88.0	100.0	100.0
Missing	System	6	12.0		
Total		50	100.0		

Table 1: Response of Registrars to an Interview Question About Their Role and Responsibility.

This majority view presupposes the existence of a duty to scrutinise pleadings at their presentation. Notwithstanding the support for scrutinization by registrars, its inference from the law and its practice, this duty is largely missing among the duties or responsibilities of a registrar under the law. The scrutinization of pleadings at their presentation or at any further stage is also generally not one of the envisaged duties of a registrar under the Judiciary Administration Act.[41] Commercial cases are the exception to this lack of duty, where the registrar is expressly empowered to scrutinise and reject an affidavit or counter affidavit which violates Order IX of the C.P.C., Section 8 of the Notaries Public and Commissioners for Oaths Act, Cap.12 [R.E. 2019] or some other prescribed requirement.[42] The law's use of the word "may" when affording registrars the power to reject defective affidavits, indicates that the registrar is at liberty to either reject the same or admit it notwithstanding its defects.[43] The discretionary nature of this power can have the inadvertent effect of defeating the intention of vesting registrars with such power.

Similarly, so, scrutinisation of pleadings is generally not among the powers of registrars under the C.P.C. save for when the pleadings concern an execution application.[44] The

[40] *See infra Table 1.*
[41] Judiciary Administration Act, No. 4 of 2011, s 28(6), (8) (Tanz.).
[42] High Court (Commercial Division) Procedure Rules, r. 74(1), (2).
[43] *Id.* r. 74(1).
[44] Civil Procedure Code, Order XLIII r. 1.

C.P.C. provides for the striking out or amendment of pleadings which are unnecessary, scandalous or prejudicial, embarrassing and or delay timely justice dispensation.[45] It also provides for the returning of a plaint for its presentation to a competent court or its rejection for want of cause of action, undervaluation of the claimed relief or being barred by law.[46] A defectively drawn memorandum of appeal can be rejected or returned for amendment under the C.P.C.[47] Notably, however, all these provisions empower the Court, meaning the judge, to reject or return the pleadings and not the registrar.[48] This invariably means that, in all four instances where rejection or return of pleadings can be done under the C.P.C., a registrar is legally empowered to reject or return pleadings in only one instance during execution applications.

Notwithstanding these apparent provisions, Order XLIII clothes registrars with the power to do all things which can be done by a judge.[49] Since judges can scrutinise pleadings, by this provision then, a registrar is impliedly empowered to scrutinise pleadings and reject or returnthem just as how a judge can do. While it can be used as a saving clause, the provision has the potential inadvertent effect of casting a wide net as to the mandate of registrars to the extent of being vague and up to the interpretation of each individual registrar. This subjective approach as to the powers and roles of a registrar is exemplified by the interviewed registrars' responses. While forty-four out of fifty registrars thought scrutinization was part of their duties, six. did not.[50] As a category of respondents holding the same office across High Court Registries, they were expected to have the same understanding of their roles. The difference, though small, can be attributed to the possible subjective interpretation of Order XLIII Rule 1(m) of the C.P.C. [51]

Order XLIII Rule 1(m) of the C.P.C. is also subject to further interpretation. If the judge is only able to scrutinise pleadings at the secondary stage of the commencement of a case, it means then that the registrar is also only clothed with such power at that stage and not prior. However, after assignment to a judge, it is impractical for a registrar to have conduct of a case file to be able to scrutinise and thereafter reject or return pleadings. If the powers of the judge include those of a judge in-charge, who is empowered to admit, reject or return pleadings before assignment as per the Chief Justice's Circular on admission and assignment of cases, then the registrars would also be

[45] *See id.* Order VI r. 16.
[46] *See id.* Order VII r. 10 and 11.
[47] *See id.* Order XXXIX r. 3(1).
[48] *See id.* Order VI r. 16, VII r. 12, XXXIX r. 3(2).
[49] *See id.* Order XLIII r. 1(m).
[50] *See supra Table 1.*
[51] *See*, Civil Procedure Code, *supra*,note 44, at Table 1; *id* at Order XLIII Rule 1 (m).

able to scrutinise pleadings during the first stage of commencement of a suit at the presentation of pleadings.[52] This potential for subjective and inconsistent interpretation is at odds with the S.M.T. which links efficiency with a systematic and predictable business process.

The fact that the judge's power to scrutinise and consequently reject or return pleadings kicks in at a secondary stage following assignment and the C.P.C. does not clearly and decisively cater for admission of pleadings and their scrutinization in the first stage of the presentation of pleadings step, heightens the possibility of having defective pleadings go unnoticed until advanced stages of the case or until appeal. Such a possibility has resulted in the pendency of cases in court for an unnecessarily long period only for the same to be found defective in their pleadings and struck out. For instance, *Ramadhani Pazi & Wambura Malima v. Tanzania Civil Aviation Authority* is a case in point.[53] In this case, the Applicants' affidavit was defective in its jurat contrary to Section 10 of the Oaths and Statutory Declarations Act, Cap.34 [R.E. 2002]. [54] Though this defect was present from its filing, the matter proceeded to assignment and was later determined through a ruling of the raised preliminary objection which struck it out.[55] This case was filed in 2013 and was determined in May 2014 on grounds which existed and could have been addressed on the day it was filed.[56]

Another more recent example is from the case of *Avecenna International Academy v. African Foundation for Education and Development (AFEDEV) Tanzania*.[57] This case was filed in 2021 and struck out in May 2023. The filed case had a defective plaint which offended Order VI Rules 3, 5 and 14 and Order VII Rules 1(b, f & i) of the C.P.C. The defect was raised as a preliminary objection, was conceded by the Plaintiff and the matter was struck out. Though this case ended in the preliminary stage, two years had lapsed up to the point when it was struck out.[58] The admission and continued existence of a suit with a patently defective plaint for that period, is evidence of the absence or at best an insufficient mandate or level of scrutiny. When there is no legal requirement on a person to carry out a task, the efficiency of the conduct of such a task based on practice and or personal attributes, cannot be of the same effect.

[52] C.J. Circular, Admission & Assignment of Cases to J. & Mag., No. 3 of 2018 (Issued on Apr. 16, 2018), para 4 (Tanz.).
[53] Ramadhani Pazi & Wambura Malima v. Tanzania Civil Aviation Authority, Labour Revision No. 325 of 2013 (HC) (unreported).
[54] *See id.* at 2, 11.
[55] *See id.*
[56] *See Id.*
[57] Avecenna International Academy v. African Foundation for Education and Development (afedev) Tanzania Civil Case 61 of 2021, [2023] TZHC 16977 (May 3, 2023).
[58] *See id.* at 5, 10.

With judicial review, where applications for leave are to be filed within six months from the cause of action accrued, applications which are out of time for as little as a day, though they may not be rejected at their presentation, succumb to being dismissed following a challenge through preliminary objections or the Court *suo moto*.[59] The secondary means of scrutinization by judges facilitates timely justice dispensation by enforcing time limitations.

Apart from scrutinization by way of checking pleadings and rejecting or returning them on form and content grounds, another means of scrutinization at the presentation of pleadings step is by the requirement of leave to file such pleadings, to begin with.[60] Particular to judicial review proceedings, this method of scrutinization is a necessary prerequisite where the Court has to satisfy itself that the potential applicant for prerogative orders has sufficient interest in the matter to be applied, displays an arguable *prima facie* case and is generally without alternative remedy.[61] In this way, the Court can limit the number of judicial review applications filed and only deal with those which are worth the Court's attention to the effect of controlling the Court's workload.

Scheduling of time for events as another element of C.M.S., is provided for in this step. With judicial review, the application for leave is to be determined within fourteen days.[62] This timeline is based on the understanding that applications for leave to apply for judicial review are heard *ex-parte*.[63] As such, the law does not provide for the time within which an application is to be served on the respondent and when the respondent is to file a counter affidavit, if any. *Ex-parte* hearing of leave applications does not include cases to which the A.G. is a party.[64] In such cases, the Court is given discretion to schedule the time within which the A.G. is to be served and is to file a counter affidavit.

The law does not schedule a time and events, where leave applications proceed inter-party. As a result, regarding the fourteen-day determination timeline, it was found that out of the fifty-three applications for leave to apply for judicial review which were processed by the High Court – Main Registry at Dar es Salaam, only five applications

[59] Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, G.N. No. 324 of 2014, Cap. 310, r. 6; Chris George Kasalile v. Tanzania Institute of Education and Another, Misc. Cause 26 of 2022, [2022] TZHC 11389 (Aug. 9, 2022).

[60] Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, r. 5(1) (Tanz.).

[61] Emma Bayo vs The Minister for Labour and Youths Development & Others, Civil Appeal 79 of 2012, at 8, [2013] TZCA 190 (March 23, 2013); Legal and Human Rights Centre v. Minister for Finance and Planning and Others (Misc. Cause 42 of 2022) [2022] TZHC 14055 (Oct. 18, 2022).

[62] Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, r. 5(4) (Tanz.).

[63] *See id.* r. 5(2).

[64] Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [R.E. 2019], Act No. 6/1955 s 18, Cap.310 (Tanz.).

equivalent to 9.4% were completed within fourteen days.[65] Out of the five, only one was decided on merit, however, it was not tried rather the respondent conceded the application.[66] Two out of the five were withdrawn by the applicant and the remaining two succumbed to the preliminary objections raised against them. These statistics point to there being minimal compliance if all cases are considered regardless of the import of their decision. Otherwise, they point to there being no compliance with the fourteen-day rule for all forty-eight applications for leave which were determined on merit.

With other civil cases, W.S.D.'s which reply to a plaint, are to be filed in twenty-one days from service of a summons to that effect, a period extendable by ten days.[67] Replies to election or constitutional petitions and counter affidavits in judicial review proceedings applications are to be filed within fourteen days, while a reply to a labour case is to be filed within fifteen days from service of the action commencing document and summons.[68] While the scheduling of events element is provided for, the allowance for extension of time, though subject to reasonable or sufficient cause, works to negate the essence of scheduling time and events in a case.[69] Some extensions appear to be allowed without any such cause being recorded, others allowed even on default caused by a party's negligence and others at advanced stages of suits.[70]

For instance, in *Monarch Investment Ltd. v. CRDB Bank PLC & MEM Auctioneers and General Brokers Ltd*., initial orders were issued on 10th August 2018 for W.S.D. to be filed and the case be called again on 19th September 2018.[71] It is surmisable that the initial order, which adjourned the case for forty days, reasonably afforded twenty-one days for the filing of the W.S.D., five for its service and fourteen for the filing and service of a reply to the W.S.D. However, on 19th September 2018, the W.S.D. had not been filed and the Defendant successfully prayed for a fourteen days extension to that effect.[72] Not only does the record bear any reasons for the default in filing the W.S.D. but also the granted extension was of

[65] Judiciary of Tanz. - Main Registry of the High Court, Case Register for Judicial Review Miscellaneous Civil Applications (last visited Dec. 18, 2023).
[66] *See id.*
[67] Civil Procedure Code [CAP. 33 R.E. 2019], s 22, Order VIII r. 1(1), (3); High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 20(1), (2) (Tanz.).
[68] National Elections (Election Petitions) Rules, G.N. 782 of 2020, Cap. 343, r. 10(4); Basic Rights and Duties Enforcement (Practice and Procedure) Rules, G.N. No. 304 of 2014, Cap. 3, r. 6(1); Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, G.N. No. 324 of 2014, Cap. 310, r. 13; Labour Court Rules G.N. No. 106 of 2007, r. 6(3), (5), 24(2) (e) (Tanz.).
[69] Civil procedure Code, Order VIII r. 1(3), (4); High Court (Commercial Division) Procedure Rules, r. 20(2), (3) (Tanz.).
[70] Meet Singh Gurbax Singh v Tanz. Ry. Corp., Land Case No. 68 of 2017 (Arusha HC sub-registry, struck out Aug 13, 2021) (Unreported) (Tanz.).
[71] Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd., Land Case No. 23 of 2018 (Mwanza HC sub-registry, settled Feb 09, 2021) (Unreported) (Tanz.).
[72] *See id.*

greater length than that allowed by law.[73] Again, for failure to comply with the original scheduling order, the pleadings exchange phase stood pending until 12th February 2019 when they were marked complete.[74]

Further, in the case of *Meet Singh Gurbax Singh v. Tanzania Railways Corporation,* though the W.S.D. was originally filed within the twenty-one allowed days, amendments ordered thereafter did not comply with the ordered filing date which was accordingly extended two times.[75] When the case was called for its first Pre-Trial Conference [hereinafter P.T.C.] on 27th August 2019 the Defendant successfully prayed to file an amended W.S.D. on 03rd September 2019.[76] However, when the matter was called on 11th September 2019 the amended W.S.D. had not been filed due to miscommunication in the Defendant's office as such time for filing was extended to that same day.[77] On 16th October 2019 first P.T.C. was conducted and speed track two for twelve months was ordered.[78] When the matter finally came for hearing on 18th May 2020 the Defendant successfully prayed for leave to file an amended W.S.D. but when the matter came before the presiding Judge on 07th December 2020 for hearing the Defendant had not filed the second amended W.S.D. and time for filing was again extended to that same day.[79] As a result, a 2017 case matured for hearing on 11th December 2020 having already run past its ordered speed track due to *inter alia* the recurring allowance of amendments and extensions of time to file W.S.D. for reasons which were not necessarily exigent.[80] These cases present a two-fold cause of non-compliance with the legally scheduled timelines. On the one part, it's the law's permittance for deferment of the scheduled time and on the other is the issue of laxity in control of the proceedings by the Court. It demonstrates how the ordered schedule of time and events can be changed repeatedly. While such changes may be grounded in the pursuit of justice, they can inadvertently or otherwise, delay the justice sought and diminish the essence of the scheduled time and events.

[73] *See id.*; Civil Procedure Code, Order VIII r. 1(3).
[74] Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd.
[75] Meet Singh Gurbax Singh v. Tanz. Ry. Corp., Land Case No. 68 of 2017 (Arusha HC Registry) (Tanz.).
[76] *See id.*
[77] *See id.*
[78] *See id.*
[79] *See id.*
[80] *See id.*

Evidently, court control over proceedings complements the scrutinization and scheduling elements of C.M.S. in pursuit of timely justice dispensation. In the presentation of pleadings step, the power of the Court to reject or return defective pleadings, speaks to the Court's control over the commencement of civil cases.[81] Further, the requirement for and the ability to grant or deny leave to apply for judicial review speaks to the control of the Court over the cases it gets to hear.[82]

Again, the law allows the Court to entertain an *ex-parte* application for leave to apply for judicial review and grant the same without necessarily hearing the applicant.[83] This allowed manner of control is geared towards expedience, mindful of the fourteen day time limit within which to determine a leave application from when it is filed. However, the practice shows that such applications are seldom if at all, determined *ex-parte* or without hearing the applicant and only 9.4% out of the fifty-three reviewed case files were finalised within fourteen days.[84] This points to there being challenges on compliance.

The law further allows the Court to proceed *ex-parte,* receive proof from the plaintiff and enter an *ex-parte* judgement when a defendant defaults in filing W.S.D.[85] The effect of this manner of control in timely justice dispensation is generally undermined by the sixty-days or thirty-one-days (for commercial cases) bar against execution of an *ex-parte* decision.[86] A decree from an *ex-parte* judgement in a commercial case cannot be executed unless first the decree holder publishes a copy of the decree in a country wide circulating newspaper within ten days from the date of the judgement and second twenty-one days lapse after the lapse of the publication period.[87] While this buffer period may be aimed at ensuring that the defendant is aptly informed, it has the effect of delaying realisation of the proclaimed right and affecting timely justice dispensation. Again, the possibility to have the *ex-parte* proceedings and judgement set aside, would

[81] National Elections (Election Petitions) Rules, G.N. 782 of 2020, Cap.343, r. 9(1), (2); Civil Procedure Code [CAP. 33 R.E. 2019], s 22, Order VI r. 16- 17, Order VII r. 10 and 11 (Tanz.).
[82] Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, G.N. No. 324 of 2014, Cap. 310, r. 5(1) (Tanz.).
[83] *See id.* r. 5(2) and 7(1).
[84] Judiciary of Tanz., *supra* note 63; *see* the findings discussion on Presentation of Pleadings p ; Chris George Kasalile v. Tanzania Institute of Education and Another, Misc. Cause 26 of 2022, [2022] TZHC 11389 (Aug. 9, 2022); Joshua Samwel Nassari v. The Speaker of the National Assembly of the United Republic of Tanzania and Another (Misc. Civil Cause 22 of 2019) [2019] TZHC 15782, at 3 (Mar. 29, 2019).
[85] Civil Procedure Code, Order VIII r. 14(1); High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 22(1); High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, Cap. 358,, r. 13 (Tanz.).
[86] Civil Procedure Code, Order VIII r. 14(3); High Court (Commercial Division) Procedure Rules, r. 22(2) (Tanz.).
[87] High Court (Commercial Division) Procedure Rules, r. 22(2) (a and b) (Tanz.).

warrant the use of more time in disposition of the matter, in defeating the essence of the court's issuance of an *ex-parte* judgement.[88]

In these ways, it is observed that the law does provide for the scrutinization, scheduling of time and events and control elements of C.M.S. for the presentation of pleadings step of civil cases. However, the law also has self-sabotaging provisions or ones capable of defeating interpretations or applications, a fact which points to the deficiencies in the essential elements of C.M.S. As such, there exists a critical need for a more systematic and predictable C.M.S. process in the High Court, underlining the importance of efficient, consistent scrutinization of pleadings, more stringent adherence to scheduled timelines and enhanced court control. These improvements are essential for ensuring competent, timely, and fair justice dispensation.

3. PRE-TRIAL EVENTS

When the pleadings are complete, the pre-trial events step follows.[89] The discussion of this step is divided into two Subsections. The subdivision is necessary to sufficiently capture the procedure of cases falling under each part. The first Subsection covers the procedure for ordinary civil, procedurally administered under the C.P.C., and commercial cases. Though such cases may range between those done under the general registries and those under specialised registries, their procedure is more alike than not. The second Subsection covers procedures for election and basic rights petitions. These two types of cases have specialised procedures under their respective legislation which set them apart, such that they cannot be discussed together with cases under the first part with the necessary clarity.

3.1. ORDINARY CIVIL AND COMMERCIAL CASES PRE-TRIAL EVENTS AND CONFERENCES

The C.P.C. points to this step being divided into four parts.[90] The first part of this step intends to address interim issue, such as applications or objections, the second explores

[88] *Id.* r. 15 (1 and 3), 23(1); High Court (Commercial Division) Procedure (Amendment) Rules, r. 14(a).
[89] Civil Procedure Code, Order VIII r. 17(1); High Court (Commercial Division) Procedure Rules, r. 22(1), r. 13; National Elections (Election Petitions) Rules, G.N. 782 of 2020, Cap.343, r. 15(1), 20(1), 21(1); Basic Rights and Duties Enforcement (Practice and Procedure) Rules, G.N. No. 304 of 2014, Cap. 3, r. 9(1).
[90] Civil Procedure Code, Order VIII r. 17(1 and 2), 18(1), 22(1) and 40(1).

the possibility of settlement, the third schedules the speed track of the case and the fourth frames the issues for determination and the events to follow.[91] The use of the phrases "pleadings are complete" and "conclusion of pleadings" before and after preliminary matters are addressed for the commencement of the first and third part respectively, supports their legally distinct existence.[92] Nevertheless, the first three parts can, in practice, be fused into the first P.T.C. while the fourth part forms the final P.T.C. For purposes of illustration of civil case steps in a linear manner, the final P.T.C. part shall be discussed as a separate step.

On the first part of the step where interim issues are to be determined, the Court determines applications or preliminary objections born by the pleadings on the outset.[93] The Court considers the pleadings and satisfy itself that there is no issue which needs attention at the earliest stage possible, an inference which embodies the scrutinization element of C.M.S.[94] By such scrutinization, the path towards justice can be abridged if the matter is concluded in the preliminaries.

This first part of the pre-trial events and conferences is scheduled to occur within eighteen days following the completion of pleadings.[95] The difference with commercial cases is that such a period includes working days only.[96] With a fourteen working day schedule it means that the first part of this step should take place within a minimum of eighteen calendar days.[97] Civil commercial justice and the establishment of the specialised division to that effect was and remains intended to provide a faster means for resolution of commercial disputes.[98] In areas such as this, where the timelines for commercial cases are longer than normal civil cases, the legal shortcoming in addressing the intention of having a specialised stream for commercial cases is exemplified.

During the conduct of this part under the C.P.C., if any preliminary matters arise, the Court has to hear the parties, for an unprescribed amount of time and thereafter issue a ruling within fourteen days.[99] By not prescribing the hearing duration, the determination

[91] *Id.*
[92] *Id.* Order VIII r. 17(1), 22(1).
[93] *Id.* r. 17(1 and 2); High Court (Commercial Division) Procedure Rules, r. 28(1).
[94] C.C.V., *supra* note 32.
[95] *See* Civil Procedure Code, Order VIII r. 17(1).
[96] *See* High Court (Commercial Division) Procedure Rules, r. 28(1).
[97] *Id.*
[98] Judiciary of Tanz., High Court of Tanz. Commercial Division (2010) 5, https://tanzlii.org/akn/tz/doc/jot-documents-and-guidelines/2010-10-31/historical-background-of-the-high-court-commercial-division-of-tanzania/eng@2010-10-31/source (Tanz); Robert V. Makaramba, *Administering Commercial Justice,* First Report Tanz. 36 (2010). *See also* Venance L. Ndalichako, Two Generations of Tanz. Financial Sector Reforms from 1991: From Washington Consensus to Institutional Economics 96-97 (Oct. 20, 2014) (Ph.D. dissertation, University of Bayreuth) (https://epub.uni-bayreuth.de/2913/1/PhD-Dissertation-Publication-2.pdf) (Ger.).
[99] Civil Procedure Code, Order VIII r. 17 (2).

of the preliminaries such as applications and objections, has the potential of consuming a lengthy period of time and ultimately delaying justice.

Again, it is not always the case that a ruling on preliminary matters is issued fourteen days after the conclusion of the hearing to that effect and in some case it runs over ninety days.[100] In the case of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanzania Ltd. & SUMA JKT Auction Mart,* a preliminary objection was fully heard by 11th April, 2019 but instead of its ruling being delivered fourteen days from the date of last hearing, the matter was adjourned to 18th June, 2019 for ruling.[101] Notwithstanding the fact that the scheduled date of ruling on the preliminary objection was already fifty-four days beyond the timeline provided by law, the ruling was again adjourned to 09th July, 2019 and further to 29th August, 2019 when it was delivered, the date of delivery being 116 days after the lapse of the fourteen days window for ruling issuance.[102] This points to a gap in the law's ability to enforce its timelines and laxity in control of proceedings.

The court control in the first part of the pre-trial events step is provided in the Court's ability to dismiss the suit on account of the Plaintiff's absence or strike out the defence by the Defendant's non-appearance.[103] The effect of such court control on this part of the proceedings is however limited by the possibility of any such order of dismissal or striking out being set aside or varied if a party so applies within thirty days or beyond, in the case of commercial cases, following the order.[104] While the law allows room for the Court's discretion on granting such an application, it is not precise on what would be a just cause for such setting aside or variation.[105]

After the conclusion of the first part with a ruling, the law would have it that the Court can either adjourn the matter to a future date or proceed immediately with a P.T.C. with the parties to explore settlement possibilities.[106] The exploration of possibilities for settlement envisages a review of the pleadings and a discussion between the Court and the parties to see areas where they can agree, concede or compromise to the effect of settling the case in part or in whole.[107] Doing so embodies the scrutinization element

[100] *See* Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction Mart, Land Case No. 10 of 2018 (HC Land Div.) (unreported) (Tanz.).
[101] Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. SUMA JKT Auction Mart, Land Case No. 10 of 2018 (Dodoma HC sub-registry, adjourned April 03, 2023) (Tanz.).
[102] *See id*.
[103] *See* Civil Procedure Code, Order VIII r. 17(3); High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 28(2 and 3).
[104] *See* Civil Procedure Code, Order VIII r. 17(4); High Court (Commercial Division) Procedure Rules, r. 28 (4).
[105] *See* Civil Procedure Code, Order VIII r. 17(3); High Court (Commercial Division) Procedure Rules, r. 28 (2 and 3).
[106] *See* Civil Procedure Code, Order VIII r. 18(1 and 2); High Court (Commercial Division) Procedure Rules, r. 29 (1 and 2).
[107] *See* Civil Procedure Code, Order VIII r. 18(3); High Court (Commercial Division) Procedure Rules, r. 29 (5).

of C.M.S., in that the real issues in dispute are examined, crystalized and, in principal, measured whether they are worth any further consideration. Achieving partial settlement and only going forward with fewer issues to determine, is a way of reducing things which would consume the court's time unnecessarily, as proposed by the thesis of the T.O.C., and enhancing the chances of timely justice dispensation.[108]

Though the parties are to be notified on the date and time when this second part of the pre-trial events step will take place, the law does not provide a schedule of time as to when this part of the step should be conducted.[109] Further, the law does not provide for how long its conduct should take. These two facts can work against the pursuit of timely justice dispensation especially if this part of the step is conducted independently of the others.

Court control over this part of the pre-trial events step features in the power to compel parties' attendance and punish non-appearance. At the time when the pre-trial conference is to convene, the case can be dismissed or the defence can be struck out if the non-appearing party is the plaintiff or defendant respectively, have a judgement entered or any other order issued.[110] Default in appearance subsequent to an adjournment or non-compliance with any order issued attracts a dismissal, striking out of the defence or costs.[111] In this way, attendance of the parties can be ensured so as not to unduly delay the conduct of this part of the step.

The third part of the pre-trial events step is the first pre-trial settlement and scheduling conference.[112] This presents the parties with an avenue for further exploration of settlement opportunities through A.D.R. mechanisms such as negotiations, conciliation, mediation, arbitration or others not involving trial and the determination of the speed track the case would take.[113] What is covered in this part, though not expressly provided for, also requires a review of the pleadings and a consultation with the parties so as to ascertain the potential complexity of the case so as to schedule sufficient time and start off the pursuit of A.D.R. By such inherent review, the scrutinization element of C.M.S. is covered.

With the scheduling of time and events element of C.M.S., the C.P.C. provides that the first pre-trial settlement and scheduling conference is to be conducted within twenty-one days following the conclusion of pleadings.[114] Though the duration of this conference

[108] *See* Şimşit et al., *supra* note 9; Azaria et al., *supra* note 9.
[109] *See* Civil Procedure Code, Order VIII r. 19(1); High Court (Commercial Division) Procedure Rules, r. 30(1).
[110] *See* Civil Procedure Code, Order VIII r. 20(1) (a, b, c and d); High Court (Commercial Division) Procedure Rules, rr. 29(3), 31(1).
[111] *See* Civil Procedure Code, Order VIII r. 20(3), 21(a, b and c).
[112] *See id.* Order VIII r. 22(1).
[113] *See id*.
[114] *Id.* r. 21(1).

is not provided by law, practice shows that it usually takes one appearance before a judge and that the real problem is the compliance with this twenty-one-day timeline within which to conduct the first P.T.C.[115]

In the case of *Baraka Imanyi Tyenyi v. TANESCO,* the pleadings were marked complete on 18th August, 2011 and the first P.T.C. was originally scheduled for 03rd November, 2011 but was adjourned sixteen times for different reasons until 18th February, 2014 when it was conducted.[116] In the case of *Meet Singh Gurbax Singh v. Tanzania Railways Corporation,* pleadings were marked complete on 09th November, 2018 and the first P.T.C. was originally scheduled on 04th December, 2018 but was adjourned ten times to 16th October, 2019 when it was conducted.[117] In the case of *Monarch Investment Ltd v. CRDB Bank PLC & MEM Auctioneers and General Brokers Ltd* the pleadings were marked complete on 12th February, 2019 and the first P.T.C. was originally scheduled for 09th April, 2019 but was adjourned seven times for different reasons until 01st August, 2019 when it was conducted.[118]

In all of these cases not only were the original scheduled dates for first P.T.C. beyond the legislated twenty-one days period but also five months and twenty days after completion of pleadings was the shortest period of time within which first P.T.C. was conducted.[119] The cases exemplifies the interdependence between the law and practice in the efficacy of a C.M.S.

The first pre-trial settlement and scheduling conference presents an avenue for the scheduling of the events to follow in the case and the time such events would take. This is done by the determination of a speed track which would be adopted for the case between speed track I, II, III or IV for ten, twelve, fourteen and twenty-four months respectively.[120] However, commercial cases are to be determined within ten to twelve months from their commencement.[121] At this point, the law mandates the scheduling of the dates and time for each event to follow until the case is concluded.[122] It further

[115] Original case file records of *Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd.*, Land Case No. 23 of 2018 (Accessed from the Mwanza High Court Registry - Tanz., Mar. 10, 2023); Original case file records of *Meet Singh Gurbax Singh v. Tanz. Ry. Corp.*, Land Case No. 68 of 2017 (Accessed from the Arusha High Court Registry - Tanz., Feb. 25, 2023); Original case file records of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction* Mart, Land Case No. 10 of 2018 (Accessed from the Dodoma High Court Registry - Tanz. Mar. 24, 2023).

[116] Baraka Imanyi Tyenyi v. TANESCO, Land Case No. 10 of 2008 (Mwanza HC sub-registry, dismissed Mar 24, 2022) (Unreported) (Tanz.).

[117] Original case file records of *Meet Singh Gurbax Singh v. Tanz. Ry. Corp.*

[118] Original case file records of *Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd.*

[119] *Id.*

[120] *See* Civil Procedure Code [CAP. 33 R.E. 2019], s 22, Order VIII r. 22(3) (a, b, c and d).

[121] *See* High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 32(2).

[122] *See* Civil Procedure Code, Order VIII r. 22(2).

prohibits departure or amendment of the scheduling order save for what the Court may consider to be the interest of justice.[123]

However, the article found that cases which exceed their ordered speed track is common phenomena.[124] For instance, in the case of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanzania Ltd. & SUMA JKT Auction Mart,* speed track four for twenty-four months was selected on 08th June, 2020.[125] It expired on 07th June, 2022 and at that time hearing of the case had not started.[126] For unrecorded reasons, on 09th November, 2022 when the matter came for hearing, the speed track was extended by twelve months from 08th June, 2022 but up to 23rd March, 2023 when a review of the original case file in the Dodoma High Court Registry was conducted, the case was yet to be heard.[127]

In the case of *Meet Singh Gurbax Singh v. Tanzania Railways Corporation,* on 16th October, 2019 during the first P.T.C. speed track two for twelve months was selected, if mediation failed it was to revert to the trial Judge by 11th February, 2020 and judgement was to be delivered on or by 15th October, 2020.[128] Following failure of mediation, the case reverted back to the trial Judge and hearing was scheduled on 25th and 26th March, 2020. However, due to a successful prayer for amendment of the W.S.D. and non-appearance of the parties at different instances, hearing began on 14th December, 2020 which was beyond the twelve months mark of the selected speed track.[129] On 26th January, 2021 the speed track was enlarged by six months from 15th October, 2020 and the hearing continued.[130] The six months enlarged speed track expired on 14th April, 2021 at which time the Defendant's case was not closed.[131] The judgement, striking out the case for non-joinder of a necessary party, was delivered on 13th August, 2021 being ten months and four months beyond the original and enlarged speed track respectively.[132]

[123] *See id.* r. 23; High Court (Commercial Division) Procedure Rules, r. 32(2); High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, Cap. 358, r. 18.
[124] *See* Original case file records of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction* Mart, Land Case No. 10 of 2018 (Accessed from the Dodoma High Court Registry - Tanz. Mar. 24, 2023).
[125] *Id.*
[126] *See id.*
[127] *See id.*
[128] Original case file records of *Meet Singh Gurbax Singh v. Tanz. Ry. Corp.*, Land Case No. 68 of 2017 (Accessed from the Arusha High Court Registry - Tanz., Feb. 25, 2023).
[129] *See id.*
[130] *See id.*
[131] *See id.*
[132] *See id.*

On 18th February, 2014 in the case of *Baraka Imanyi Tyenyi v. TANESCO*, speed track two for twelve months was selected, for the case to be decided on or by 17th February, 2015.[133] By 19th February, 2015 hearing of the Plaintiff's case was onto the second Plaintiff's witness and on 20th April, 2015 the original speed track was enlarged by three months therefrom.[134] Though the defence case was closed and judgement was scheduled to be delivered before the lapse on such enlarged time, for reasons unclear in the records found in the Mwanza High Court Registry, the judgement was delivered on 28th June, 2016 being sixteen months eleven days and eleven months nine days beyond the original and enlarged speed track respectively.[135]

In the pursuit of timely justice dispensation, the article found that Judges of the Commercial Division, through internal administrative arrangements, cap the lifespan of commercial cases at eight months, that being four months before the maximum lifespan under the Commercial Division Rules.[136] The legally mandated and the self-imposed lifespan notwithstanding, at the close of 2022, the Commercial Division had 337 pending case, seventy-two of which had been pending for more than twelve months, forty-one being unfettered from adjudication and thirty-one being stayed by notices of appeal against interlocutory orders.[137] Again, thirty-six cases were pending for more than twenty-four months, being both backlogs as per the Commercial Division Rules and the judiciary's backlog policy.[138] At the close of 2023 the Commercial Division had 252 pending cases, forty-three of which had been pending for more than twelve months.[139] Out of the forty-three cases, nineteen stood pending as a result of there being a notice of appeal on interlocutory orders and twenty-four were unfettered for adjudication.[140] By 30th November, 2023, eleven out of the twenty-four cases were pending for judgement and thirteen were yet to be heard.[141]

These findings evidence the prevalent lapse of speed tracks before cases are determined. They show the interplay between law and practice, such that neither of the two is sufficient in ensuring timely justice dispensation without the other. Though the law provides for sanctions when a speed track lapses by the dismissal of a case or striking out of defence when the plaintiff or defendant is culpable for the lapse respectively, or

[133] Original case file records of *Baraka Imanyi Tyenyi v. TANESCO,* Land Case No. 10 of 2008 (Accessed from the Mwanza High Court Registry - Tanz., Mar. 10, 2023).
[134] *See id*.
[135] *See id*.
[136] *See* Interview by Rashid A. Pima & Mutandzi A. Matovelo with Cyprian P. Mkeha, J. in Charge, in High Court (Commercial Division), Dar es Salaam, Tanz. (Apr. 24, 2023) (Tanz.).
[137] Interview with Cyprian P. Mkeha, *supra* note 134.
[138] Chief Registrar (2023), *supra* note 22, at Chapter II – 6.
[139] Interview with Cyprian P. Mkeha, *supra* note 134.
[140] *Id*.
[141] *Id*.

costs for enlargement of the speed track, such sanctions are not always issued.[142] Again, enlargement of the speed track has consistently been more than half of the original speed track as allowed by law.[143] This points to the applied C.M.S. not being stringent enough to inhibit its abrogation or that it is vulnerable to human follies.

Court control element of C.M.S. over the pre-trial events and conferences step appears in the form of the Court's power to compel parties' attendance and penalise their abscondment.[144] The element is further exhibited by the precept generally prohibiting enlargement of the speed track, sanctioning parties conduct which leads to the lapse of the speed track before the case is determined and capping the allowable extension to only half the original speed track.[145]

Such provision of the element notwithstanding, court control over proceedings during and post this step has been found lacking in practice. The fact that commencement of the interim issues addressing part of this step and the first P.T.C. is usually past the legally scheduled fourteen or twenty-one days from completion and conclusion of pleadings respectively, indicate the possible insufficiency in control over proceedings exerted by the Court. This is confirmed by the often lapse of selected speed tracks and their respective enlargement period before case are determined.[146]

Such a lapse of time is due to a number of reasons but the highest-ranking reason across the example cases is the number and length of adjournments. In the case of *Baraka Imanyi Tyenyi v. TANESCO*, it was found in all the number of times it was called up to when judgement was delivered, it was adjourned fifty-six times.[147] Such adjournments were due to the absence of the both parties in four instances, absence of the Plaintiff thrice, absence of the Defendant four times, absence of the presiding Judge in nine instances, absence of

[142] Civil Procedure Code [CAP. 33 R.E. 2019], s 22, Order VIII r. 41 (a and b); Original case file records of *Meet Singh Gurbax Singh v. Tanz. Ry. Corp.*, Land Case No. 68 of 2017 (Accessed from the Arusha High Court Registry - Tanz., Feb. 25, 2023); Original case file records of *Baraka Imanyi Tyenyi v. TANESCO,* Land Case No. 10 of 2008 (Accessed from the Mwanza High Court Registry - Tanz., Mar. 10, 2023); Original case file records of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction* Mart, Land Case No. 10 of 2018 (Accessed from the Dodoma High Court Registry - Tanz. Mar. 24, 2023).

[143] Civil Procedure Code, Order VIII r. 41(c); Original case file records of *Meet Singh Gurbax Singh v. Tanz. Ry. Corp.*; Original case file records of *Baraka Imanyi Tyenyi v. TANESCO*; Original case file records of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction* Mart.

[144] Civil Procedure Code, Order VIII rr. 17(3), 20- 21; High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, rr. 28(2), 29(3), 31(1).

[145] Civil Procedure Code, Order VIII rr. 23, 41; High Court (Commercial Division) Procedure Rules, r. 32(2); High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, Cap. 358, r. 18.

[146] Kondo Jumabungo v. Issa Ally Mangungu, Returning Officer Mbagala Constituency and Attorney General, Miscellaneous Civil Cause No. 1 of 2015 (HC) (unreported) (Tanz.); Original case file records of *Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd.*, Land Case No. 23 of 2018 (Accessed from the Mwanza High Court Registry - Tanz., Mar. 10, 2023); Original case file records of *Meet Singh Gurbax Singh v. Tanz. Ry. Corp.*; Original case file records of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction* Mart; Original case file records of *Baraka Imanyi Tyenyi v. TANESCO*.

[147] Original case file records of *Baraka Imanyi Tyenyi v. TANESCO*.

both parties and the trial Judge or the Defendant and the Judge once respectively and absence of the Plaintiff and the Judge twice.[148] The number of adjournments in the case are further painted in a bad light when it is considered that the period between when the Plaintiff closed his case to when the Defendant closed its case took three appearances across three months between February and May, 2015.[149]

Cases discussed under this step show that an effective C.M.S. requires both sturdy self-executing laws which are elaborate in their provisions for the essential elements of C.M.S. and a robust adjudication practice which actively controls and sets the pace of case in line with the pursuit of timely justice. The C.M.S. applied in the High Court is observed to be lacking in the former prerequisite by partly providing for the elements and plagued with challenges which inhibit the latter prerequisite.

3.2. ELECTION AND BASIC RIGHTS PETITIONS PRE-TRIAL EVENTS

After the completion of pleadings, election and basic rights petitions do not follow the normal route under Order VIII of the C.P.C., instead they each adopt a distinct procedure during the pre-trial events. With election petitions, after completion of the pleadings exchange, the case is to be scheduled for hearing preceded by a Preliminary Hearing [hereinafter P.H.].[150] In conducting P.H., the Court queries the parties and examines the pleadings to ascertain disputed and undisputed matters of fact and law.[151] This exercise produces a memorandum of agreed facts, signed by the parties, their advocates and the judge, deemed to sufficiently prove such a fact.[152] Such a memorandum allows the court to ascertain matters in dispute and frame the issues for its determination.[153] The P.H. and framing of issues, in what is done and produced, embodies the scrutinization element of C.M.S. which allows the court to synthesise the convergence and divergence position between the parties and facilitate the conduct of a focused trial, necessary for timely justice dispensation.

With basic rights petitions, once the pleadings are complete, the matter is to be assigned to a single judge who would determine the competence of the petition by determining any preliminary objections raised and ensuring that it is neither frivolous nor vexatious.[154] Such a determination of competence, ideally ensures that petitions

[148] *Id.*
[149] *Id.*
[150] National Elections (Election Petitions) Rules, G.N. 782 of 2020, Cap .343, rr. 15(1) and 20(1).
[151] *Id.* r. 20 (1 and 2).
[152] *Id.* r. 20 (3, 4 and 5).
[153] *Id.* r. 21 (1).
[154] The Basic Rights and Duties Enforcement Act, Act No 5 of 2019, rr. 7(2) and 9(1).

which proceed to a three-judge bench meritoriously call for the Court's attention.[155] In effect, the three judges would never attend to the petition in any way before it is declare competent. Owing to the public interest nature of basic rights petitions, logic of this dual assignment of the petition -first to a single judge and on a finding of its competence, to a panel- can be found in the need to ensure their impartiality and insulate them against actual or perceived bias. Impartiality and freedom from perceived bias are key ingredients for justice.[156]

However, practice differs from the legally provided procedure, in that a petition is assigned to a three-judge panel from its inception and one of the judges is tasked to determine the competence or otherwise of the petition. While this practice does unify the two stages such that assignment would only be done once, it does mean that on a determination of competence, the judge who decided on competence would also be presiding over the main adjudication, a fact which can breed perceived biases and potential failure of justice. In this way, the practice may affect the gains that the competence scrutinization mechanism could have had of insulating the panel against such perceptions.

Practice further shows that some panels deliberate and have a collective input on the decision to be made by the single judge who is entertaining the competence question.[157] This can equally impute bias, albeit a perception of the same, on the panel if it also proceeds to hear the main petition once declared competent. Another example is from the case of *Omary Shabani Nyambu v. Permanent Secretary Ministry of Defence & Others.*[158] In this case the Appellant filed a basic rights petition in the High Court and following a preliminary objection, it was struck out for being incompetent. In that case, the preliminary objection was, in *coram*, heard by the panel but the ruling was written and signed by only one of the Judges. On appeal the Court of Appeal raised this discrepancy *suo moto,* the advocates representing the parties conceded that the High Court ruling was incompetent, however, the Court of Appeal did not determine it.[159] Though the appeal failed on another ground of objection, it does show the effect the practice can have on justice. Because the practice is not in alignment with the law, it

[155] *Id.* rr. 9(1) and 15.

[156] *See* Shaila Arora, *Independence of Judiciary in India*, 4 Int'l J. L. Mgmt. & Humanities 714 (2021); Vaishali Yadav, *Independence of Judiciary,* 30 Supremo Amicus 17 (2022) https://supremoamicus.org/wp-content/uploads/2022/06/Vaishali-Yadav.pdf (India); S*P Gupta v. Union of India & Anr* AIR 1982 SC 149 (1981) (India).

[157] Interview by Rashid A. Pima with Anonymised J. of the High Court, in Tunza Road, Ilemela, Mwanza, Tanz. (Apr. 18, 2023) (Tanz.).

[158] Omary Shabani Nyambu v. Permanent Secretary Ministry of Defence and Others, Civil Appeal No. 105 of 2015 (CA) (unreported) (Tanz.).

[159] *Id.* at 4.

takes a different shape subject to interpretation or discretion, leading to inconsistencies in the dispensation of justice.

The scheduling of time and events element is not clearly put in so far as election petition are concerned. Such cases are to be determined within a period of between twelve and up to eighteen months from their filing.[160] Other than this lifespan limit, the law does not specify the time period within which P.H. and the framing of issue is to be done. The provision that P.H. and the framing of issues are to be done "as soon as ..." and "after the conclusion of..." is not as precise a schedule of time and events not to allow the employ of discretion or, otherwise, inconsistencies in practice, both being unconstructive towards timely justice dispensation.

With basic rights petitions, the law is more precise and schedules the determination of competence to be within thirty days from when the pleadings are completed.[161] However, this timeline faces compliance challenges. In the case of *Ado Shaibu v. Honourable John Pombe Magufuli (President of the United Republic of Tanzania) & Others*, the petition was filed in 2018, pleadings were completed by 19th February, 2019 but the determination of competence, or in this case incompetence, was done on 20th September, 2019 being seven or six months and two days after completion of pleadings or the time limit within which to determine competence respectively.[162]

The power vested in the Court to inquire of the parties matters which are and are not in dispute and the power to frame issues to be determined have the effect of vesting control of election petition proceedings in the Court.[163] The control is extended by the power of the Court to proceed with such pre-trial events through virtual presence of any or all of the parties.[164] The law is however silent on the power of the Court to sanction the non-attendance of all or any other party at this step of the petition. Though the C.P.C. is applicable in election petitions, the wording of the relevant provision suggests its application during the hearing step and subsequent steps, not during the P.H. step.[165] An argument for the application of the C.P.C. to issue such sanctions can be made, but it would be up to interpretations which renders such application potentially subjective and inconsistent, possibilities which makes the power of the Court to control the proceedings with sanctions for non-attendance at this stage questionable.

[160] National Elections Act [R.E. 2015] Cap. 343, s 115 (2 and 5).
[161] The Basic Rights and Duties Enforcement Act, Act No 5 of 2019, r. 9(1).
[162] Ado Shaibu v. Honourable John Pombe Magufuli (President United Republic Tanz.) & Others, Misc. Civil Cause No. 29 of 2018 (HC), at 2, 33, 37 (unreported) (Tanz.).
[163] National Elections (Election Petitions) Rules, G.N. 782 of 2020, Cap. 343, rr. 20 and 21.
[164] *Id.* r. 15(3).
[165] *Id.* r. 25.

Court control over basic rights petitions proceedings, otherwise than under the C.P.C., is in the power of the Court to determine a petition's competence.[166] This power is tied to the Court's power to scrutinise the petition and it is the striking out of an incompetent petition which realises the essence of the scrutinization and control elements of C.M.S. which, in this case, have the effect of limiting the court workload. However, the power to determine competence has been observed to face challenges in being compliant to the timeline within which it is to be made.[167]

4. ALTERNATIVE DISPUTE RESOLUTION

A.D.R. is said to reduce discontentment and animosity between the parties and the overall time taken to determine or resolve disputes.[168] To harness such potential, the law references original civil cases to A.D.R. by way of negotiation, conciliation, mediation, arbitration or other mechanisms to that end a prerequisite for trial.[169] Any such mechanism which is a result of or flows from a case filed in court is referred to as court annexed A.D.R.[170] The parties are at liberty to choose any of those A.D.R. mechanisms to subject themselves to.[171] Choosing negotiation and conciliation or arbitration would mean that the parties would bear the costs of the procedure and make their own rules or abide by those in the second schedule of the C.P.C. in the case of arbitration.[172] On the other hand, choosing mediation or defaulting in choosing any mechanism, subjects the case to Court Annexed Mediation [hereinafter C.A.M.]. However, for commercial cases, C.A.M. is the only available and provided option.[173] While A.D.R., in itself, is viewed as a

[166] The Basic Rights and Duties Enforcement Act, Act No 5 of 2019, r. 9(1).
[167] *Ado Shaibu v. Honourable John Pombe Magufuli (President United Republic Tanz.)*.
[168] *See* Samia S. Hassan, President of the United Republic of Tanz., *Keynote Address at the 2024 National Law Day Celebrations*, YOUTUBE (Feb. 1, 2024), https://www.youtube.com/live/tHQlIk0n710?si=Wmu1R1pFtui4OWdD.
[169] Civil Procedure Code [CAP. 33 R.E. 2019], s 22, Order VIII r. 24(1); High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 33.
[170] *See* Rodney S. Webb, *Court-Annexed ADR – A Dissent*, 70 N.D. L. REV. 229, 230-231 (1994); Stephen M. Bundy, *Court-Annexed Alternative Dispute Resolution in the United States & Korea: A Comparative Analysis*, 42 SEOUL NAT'L U. L. 137, 144-147 (2001); Robert French, Chief Justice of the High Court of Australia, Perspectives on Court Annexed Alternative Dispute Resolution, Address during the Law Council of Australia — Multi-Door Symposium, 6, 10 - 11 (July 27, 2009) (transcript available at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf) (Austl.); Zakayo N. Lukumay, *A Reflection on Court - Annexed Mediation in Tanz.*, 1 LST L. REV. 51 (2016) https://lstjournal.lst.ac.tz/index.php/files/article/download/4/4/12 (Tanz.); Kariuki Muigua, *Court Annexed ADR in the Kenyan Context* 1 (2022), http://kmco.co.ke/wp-content/uploads/2018/08/Court-Annexed-ADR.pdf (last accessed July 24, 2024) (Kenya).
[171] Civil Procedure Code, Order VIII rr. 25, 35, 36.
[172] *Id.* at rr. 25(8), 35, 36.
[173] High Court (Commercial Division) Procedure Rules, r. 33.

plausible way to ensure timely and affordable justice dispensation by way of settlement,[174] this Section explores how the elements of C.M.S. are reflected in and assist the effectiveness of this compulsory form of A.D.R. practice.

Scrutinization as an element is not expressly provided by law in this step. However, the duties of a mediator imply a responsibility to acquaint oneself with the case to be mediated, its salient issues and areas of divergence and convergence between the parties.[175] The perusal of the statement of issues, pleadings and any other documents identifying issues in dispute and the parties' positions, delivered to the mediator informs the mediator of the real dispute and enables one to participate in constructive discussions with the parties on options for resolution of the dispute.[176] This duty, though impliedly, embodies the scrutinization element of C.M.S. Arguably, an express provision of the duty to scrutinise documents in C.A.M. and other court-annexed A.D.R. would crystalize this duty, ensure its non-discretionary application and enhance the potential for their efficacy.

The scheduling of time and events element of C.M.S. is reflected in the timelines set by the law which are elaborate. When a case is to go for court-annexed A.D.R. and C.A.M. is the mechanism preferred, the parties have a fourteen-day window to appoint a mediator or otherwise have one appointed by the Court.[177] These fourteen days run from when the pleadings are complete. However, the point at which pleadings can be considered complete, in this context, is subject to interpretation as to whether it refers to the completion of pleadings under Order VIII Rule 17(1) or Rule 22(1) of the C.P.C. Again, the period within which appointment of a mediator by the Court should be done if the parties so choose or default in appointing one is not indicated. This leaves a period of time unaccounted for to the potential detriment of timely justice dispensation.

[174] Buxton D. Chipeta, *Civil Procedure in Tanz.: A Students Manual* 2 (LawAfrica 2014); Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 Pepp. Disp. Resol. L. J. 351, 361-62 (2006); Fernando V. Luiz, *Designing a Court-Annexed Mediation Program for Civil Cases in Brazil: Challenges & Opportunities Brazil: Challenges & Opportunities*, 15 Pepp. Disp. Resol. L. J. 1, 3 (2015).

[175] Civil Procedure Code, Order VIII rr. 26(1) (b) and (2) (d and f); High Court (Commercial Division) Procedure Rules, r. 38(1) (b) and (2) (d); *see also* Kenny Aina, *The Judge as Mediator: Not for the Faint Hearted*, Kluwer Mediation Blog (Nov. 22, 2011), http://mediationblog.kluwerarbitration.com/2011/11/22/the-judge-as-mediator-not-for-the-faint-hearted/.

[176] Civil Procedure Code, Order VIII r. 25(4); Hamis T. Hamisi, *Court-Annexed Mediation in Tanz.: Successes, Challenges & Prospects*, 9 Int'l J. Innovative Rsch. Advanced Stud. 5, 9 (2022) https://www.ijiras.com/2022/Vol_9-Issue_11/paper_2.pdf (India).

[177] Civil Procedure Code, Order VIII r. 25(1 and 2).

In the event the Court appoints a mediator, it is to notify the parties of such appointment within seven days following the appointment.[178] Within seven days from appointment, the mediator is to schedule and notify the parties of the first mediation session which must be within twenty-one days of the mediator's appointment.[179] While the mediation can take different shapes and have as many sessions as may be required, the whole mediation process is not to exceed thirty days from the date of the first mediation session and for commercial cases the length is fourteen days.[180] After the conclusion of C.A.M., be it by the execution of a settlement agreement, failure of the mediation or lapse of the thirty days, the mediator is to remit the records to the trial court within forty-eight hours of such conclusion.[181]

The drafting of the fourteen and thirty-days respective limits for C.A.M. length does not suggest the intention that it should be extendable because such discretion for extension is not specifically provided therein as compared to the provision for the length of conciliation or negotiation.[182] Further, the lapse of the fourteen or thirty-days period is one way through which C.A.M. comes to a natural end.[183] This stern position on the time period for C.A.M. confirms the scheduling of time and events element of C.M.S. in the A.D.R. step. However, this intention can be defeated by the departure from or amendment of the scheduling order and invocation of the enlargement of time or inherent powers section of the law.[184] The use of any such provisions has the potential of increasing the length of C.A.M. period, beyond thirty days, a possibility which can affect timely justice dispensation.

The case of *Monarch Investment Ltd. v. CRDB Bank PLC & MEM Auctioneers and General Brokers Ltd.* is an example of how use of such discretion to extend the C.A.M. length adds the total length of a case's lifespan.[185] In this case the first mediation session was on 07th August, 2019 and it was adjourned ten times before it was marked to have failed.[186] Out of the ten adjournments, four were by consent of the parties, two due to the trial Judge's absence when extension of time was applied, one by the parties' and mediator Judge's absence.[187] Notwithstanding such adjournment by consent of the parties or that by 06th September, 2019 the original thirty-day period had lapsed, on 04th November, 2019 the

[178] *Id.* r. 25(3).
[179] *Id.* r. 25(5); High Court (Commercial Division) Procedure Rules, r. 33.
[180] Civil Procedure Code, Order VIII r. 32; High Court (Commercial Division) Procedure Rules, r. 40.
[181] Civil Procedure Code, Order VIII rr. 33 and 34; High Court (Commercial Division) Procedure Rules, r. 41.
[182] Civil Procedure Code, Order VIII r. 37.
[183] *Id.* r. 33 (c); High Court (Commercial Division) Procedure Rules, r. 41 (d).
[184] Civil Procedure Code, rr. 93 and 95, Order VIII r. 23.
[185] Original case file records of *Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd.*, Land Case No. 23 of 2018 (Accessed from the Mwanza High Court Registry - Tanz., Mar. 10, 2023).
[186] *Id.*
[187] *Id.*

Plaintiff applied and was granted a forty-day extension period to 13th December, 2019.[188] The mediation was finally marked failed on 26th February, 2020 being beyond five months and twenty days or 173 days from the first mediation session.[189] Non-compliance with the thirty-day rule and the forty-day extension added 173 days in the total lifespan of the case.

Another example of the lapse of inordinate lengths of time during C.A.M. can be drawn from the case of *Stephen Ndaro Mbeba & 2 Others,* where though the pleadings were complete on 19th November, 2019 the first appearance to the mediator Judge was on 10th December, 2019 at which date it was adjourned to 11th February, 2020.[190] Other than the 11th of February, 2020 being over sixty days from the first appearance before the mediator, on that date the mediation was adjourned six more times before it was marked to have failed on 23rd July, 2020.[191] In the first four adjournments, the matter was not called before the mediator Judge but rather the Deputy Registrar and at times and Acting Deputy Registrar who could not proceed with mediation. The period between when the pleadings were marked complete on 19th November, 2019 to the finalisation of C.A.M. on 23rd July, 2020 is eight months and five days or 248 days.[192]

If 10th December, 2019 is taken to be the first mediation session because the matter came before the mediator Judge, then the time between that date to when C.A.M. was concluded in seven months and fourteen days or 227 days. If the appearance on 10th December, 2019 is not taken to be the first appearance for mediation, any such future mediation date was not supposed to be beyond twenty-one days from the date of the mediator Judge's appointment date.[193] At any rate, this case exemplifies the non-compliance with legal time schedules on account of administrative challenges, such as the non-availability of the mediator Judge for unknown reasons.

In so far as other court-annexed A.D.R. mechanisms are concerned, the law is not elaborate in scheduling their events and timelines. It does not provide the time within which an award should be issued in a court-annexed arbitration but does indicate the Court's discretion to prescribe such time and extend it as deemed fit.[194] Again, the law provides for a thirty-day timeline for the completion of negotiation or conciliation counted from the date the case is so referred to either.[195]

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[188] *Id.*
[189] *Id.*
[190] Stephen Ndaro Mbeba & 2 Others, Probate and Administration of Estate Cause No. 1 of 2019 (Unreported) (Tanz.).
[191] *Id.*
[192] *Id.*
[193] Civil Procedure Code, Order VIII r. 25(5).
[194] *Id.* at r. 37, Second Schedule r. 8.
[195] *Id.* at r. 37.

In the event the parties choose any other court-annexed A.D.R. other than C.A.M., the risk of delay can be greater owing to the deficiencies in the scheduling of time and events element and open discretion for extension of time, whose effects can be inferred from those observed with C.A.M.[196]

Court control in court-annexed A.D.R. is mostly wanting in negotiation, conciliation and arbitration save for when the Court has to extend or deny the extension of the timeline within which to conclude settlement efforts or issue an award.[197] With C.A.M., control by the Court is embodied in the mediator' duty to facilitate communication between the parties in pursuit of an amicable solution, conduct joint and or separate sessions and propose possible settlement terms.[198] Further, court control features in the way a party's non-attendance of C.A.M. is penalised.[199] If attendance of the parties in mediation is by representation, the representative is to have the requisite authority to settle the matter.[200] When non-attendance is without good cause, the mediator is to remit the case file to the trial judge who can dismiss the plaint, strike out the defence if the defaulting party is the plaintiff or defendant respectively, or make an order for costs or any other order as deemed fit.[201]

Though provided for, this power for control over C.A.M. is not always exercised by the Court for reasons which are not always availed in the records.[202] Further, in as much as the law requires the parties attending C.A.M. have authority to settle, it does not sanction those who attend without such authority or means to communicate with persons with such authority.[203] This was found to be one reason behind the failure of C.A.M.[204] Again, though the possibility of dismissal of the case, striking out of the defence or costs can arguably have a deterrence effect against non-appearance, the possibility to have such orders vacated can dilute the purpose for which the orders were made.[205]

[196] Monarch Inv. Ltd. v. CRDB Bank PLC MEM Auctioneers Gen. Brokers Ltd., Land Case No. 23 of 2018 (Mwanza HC sub-registry, settled Feb 09, 2021) (Unreported) (Tanz.).
[197] Civil Procedure Code, Order VIII r. 37, Second Schedule r. 8.
[198] *Id.*at Order VIII r. 26(1) (b) and (2) (a, b, e and f); High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 38 (1) (b) and (2) (a, b, e and f).
[199] Civil Procedure Code, Order VIII r. 29; High Court (Commercial Division) Procedure Rules, r. 36; High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, Cap. 358, r. 20.
[200] Civil Procedure Code, Order VIII rr. 27 and 28; High Court (Commercial Division) Procedure Rules, r. 35.
[201] Civil Procedure Code, Order VIII r. 29; High Court (Commercial Division) Procedure Rules, r. 36; High Court (Commercial Division) Procedure (Amendment) Rules, r. 20.
[202] Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd., Land Case No. 23 of 2018 (Mwanza HC Registry) (Tanz.); Meet Singh Gurbax Singh v. Tanz. Ry. Corp., Land Case No. 68 of 2017 (Arusha HC Registry) (Tanz.).
[203] Civil Procedure Code, Order VIII r. 28; High Court (Commercial Division) Procedure Rules, r. 35.
[204] Interview by Matovelo MA with Anonymised J. of the High Court in Kivukoni Front, Ilala CBD, Dar es Salaam, Tanz. (Dec. 21, 2023) (Tanz.).
[205] Civil Procedure Code, Order VIII r. 30; High Court (Commercial Division) Procedure Rules, r. 37; High Court (Commercial Division) Procedure (Amendment) Rules, r. 21.

5. FINAL PRE-TRIAL CONFERENCE

The failure of court-annexed A.D.R. to produce a settlement, moves the case further into the final P.T.C. step.[206] In this step the Court frames issues and schedules future events of the case including date or dates for hearing.[207] Though the law does not expressly require the Court to scrutinise the case at this stage of its life, the Court's duty to frame issues, schedule future events and dates for hearing implies sufficient comprehension of the dispute enabling the judge to determine what is to be decided, the number of days required for examination of witnesses and what possible intervening circumstances may occur. In this way, the C.M.S. applied in the High Court embodies the scrutinization element.

Apart from the final P.T.C. being used to schedule time and future events of the case, the law also provides for the conduct of final P.T.C. within fourteen days from the failure of court-annexed A.D.R.[208] In practice however, compliance is wanting. In *Meet Singh Gurbax Singh v. Tanzania Railways Corporation*, C.A.M. was marked to have failed on 26th November, 2019 but final P.T.C. was conducted on 11th February, 2020 being seventy-six days later.[209] In the case of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanzania Ltd. & SUMA JKT Auction Mart,* C.A.M. was marked to have failed on 26th October, 2020 but final P.T.C. was conducted on 19th April, 2021 being 174 days after the failure of court-annexed A.D.R.[210]

In the case of *Rashid Ally Mamu v. National Microfinance Bank PLC*, C.A.M. was marked to have failed on 19th August, 2021 and final P.T.C. was to be conducted on 25th August, 2021 being within the fourteen-days period.[211] However, the same was adjourned on that scheduled date and further on subsequent dates until 09th May, 2022, when the Plaintiff was granted leave to file an amended plaint, dragging the case back to the pleadings exchange stage and a second C.A.M. attempt.[212] The amendment of the plaint, the redo of the pleadings exchange and mediation steps, together with a slew of other reasons like absence and transfer of presiding Judge, made it such that, at the time of review of the original case file on 24th March, 2023, the final P.T.C. was yet to be conducted.[213] In the case of *Monarch Investment Ltd. v. CRDB Bank PLC & MEM Auctioneers*

[206] Civil Procedure Code, Order VIII r. 40(1).
[207] *Id.*
[208] *Id.* r. 40(3).
[209] Meet Singh Gurbax Singh v Tanz. Ry. Corp., Land Case No. 68 of 2017 (Arusha HC sub-registry, struck out Aug 13, 2021) (Unreported) (Tanz.).
[210] Original case file records of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction* Mart, Land Case No. 10 of 2018 (Accessed from the Dodoma High Court Registry - Tanz. Mar. 24, 2023).
[211] Rashid Ally Mamu v. National Microfinance Bank PLC, Land Case No. 4 of 2019 (Dodoma HC sub-registry, adjourned Mar 10, 2023) (Tanz.).
[212] *Id.*
[213] *Id.*

and General Brokers Ltd., C.A.M. was marked to have failed on 26th February, 2020, while it was presented to the trial Judge on the same day and with no reasons indicated in the records, final P.T.C. was adjourned to and conducted on 02nd April, 2020 being thirty-five days after the failure of court annexed A.D.R.[214]

This non-compliance with the fourteen-days timeline within which to conduct final P.T.C., for reasonable or unreasonable grounds as the case may be, can be attributed to there being no sanctions to the parties or the judges for the same. Again, it further exemplifies the co-dependence between the law and the practice in ensuring the efficacy of the applied C.M.S.

The control element of C.M.S. during the final P.T.C. step is covered in the Court's power to schedule future events of the case, frame issues to be decided and setting dates for trial.[215] In this way, the Court has the power to set and control the pace of the case, something which is considered vital in achieving timely justice dispensation.[216] Such provision notwithstanding, the applied C.M.S. faces compliance challenges, in that the judges do not appear active in minimising the number of adjournments or other circumstances which defeat the purpose of clothing them with powers to control proceedings during this step.[217]

6. HEARING

Hearing of civil cases is an important milestone in the pendency of a case when the rubber meets the road. It is at this step where the parties present their evidence and arguments on the merit of the case in efforts of securing a favourable verdict.[218] Hearings feature the presentation of opening statements, examination of witnesses, tendering of evidence,

[214] Original case file records of *Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd.*, Land Case No. 23 of 2018 (Accessed from the Mwanza High Court Registry - Tanz., Mar. 10, 2023).

[215] Civil Procedure Code [CAP. 33 R.E. 2019], s 22, Order VIII r. 40(1).

[216] David C. Steelman et al., Caseflow Management: The Heart of Court Management in the New Millennium (National Center for State Courts, 2004) 3, 12 & 25 http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/1498/rec/2, Accessed 22 February 2024.

[217] Original case file records of *Rashid Ally Mamu v. Nat'l Microfinance Bank PLC*, Land Case No. 4 of 2019 (Accessed from the Dodoma High Court Registry – Tanz., Mar. 24, 2023); Original case file records of *Monarch Inv. Ltd. v. CRDB Bank PLC & MEM Auctioneers & Gen. Brokers Ltd.*; Original case file records of *Meet Singh Gurbax Singh v. Tanz. Ry. Corp.*, Land Case No. 68 of 2017 (Accessed from the Arusha High Court Registry - Tanz., Feb. 25, 2023); Original case file records of *Ibrahim Bakaki Nyakubiha v. Diamond Trust Bank Tanz. Ltd. & SUMA JKT Auction* Mart, Land Case No. 10 of 2018 (Accessed from the Dodoma High Court Registry - Tanz. Mar. 24, 2023).

[218] Black's Law Dictionary, *supra* note 1, at 2108.

arguments and closing submissions.[219] With civil suits, most of the procedure for hearings is covered and provided for under the C.P.C. As such, the discussion is based on the position thereunder. However, relevant special procedures, provided for particular types of civil cases are highlighted for a more wholesome discussion. Contextualised by actual practice, this Section again discusses the hearing of civil suits and how the elements of C.M.S. are covered by law.

The scrutinization element of C.M.S. during the hearing step features in the Court's power to examine the pleadings, documents presented, the parties, their advocates and even other witnesses so as to comprehend the real issue in dispute and frame or amend issue for its determination.[220] Admittedly, the framing of issues can be covered during the final P.T.C. step but the framing of issues during the hearing step presents a secondary opportunity to do just that, in the event issues were not framed during the final P.T.C. or where it was reserved to be done with the hearing step.[221]

Other than this manner of scrutinization which is secondary and potentially incidental, the element is not otherwise provided for. Though the law provides for the use of witness statements and provides for their requisite form and content, scrutinization for their conformity and sanctions for inconformity at filing is not provided for by law.[222] Without scrutinization at filing, it necessarily means that any defects would be dealt with by way of objection to the tendering of such witness statement on an issue which could have been addressed at filing. An exception, by way of necessary implication can be construed for witness statement in commercial cases.[223] The use of the words "or any other documents" provides a blanket covering for all documents under the Commercial Division Rules, to the extension of including witness statements filed there under.[224] Read together with Rule 19(2) of the Commercial Division Rules, such witness statements are to be scrutinised at filing and rejected if not in conformity with the requirements of the law.

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[219] Civil Procedure Code, Order VIII r. 30; High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 45(1).

[220] Civil Procedure Code, Order XIV rr. 1(5), 3, 4 and 5.

[221] *Id.* Order VIII r. 40(1); High Court (Commercial Division) Procedure Rules, r. 48(a) (amended by High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, r. 24); Original case file records of *Baraka Imanyi Tyenyi v. TANESCO,* Land Case No. 10 of 2008 (Accessed from the Mwanza High Court Registry - Tanz., Mar. 10, 2023) (in this case framing of issue was not done during the final P.T.C. Instead an order for the parties to file proposals of the issues was made and when the matter came for hearing, four issues were framed).

[222] Civil Procedure Code, at Order XVIII r. 2, 3 & 4 amended by Civil Procedure Code (Amendment of the First Schedule) Rules GN No. 761 of 2021, r. 3 (Tanz.); High Court (Commercial Division) Procedure Rules, r. 50 amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 26.

[223] High Court (Commercial Division) Procedure Rules, rr. 19(1 and 2), 66 (2) amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 35.

[224] High Court (Commercial Division) Procedure Rules, r. 66(2).

As for the scheduling of time and events element of C.M.S., the laws governing the procedure for various civil cases are silent on when the hearing should start after the completion of final P.T.C. or pre-trial events. Such laws generally also do not provide for how long the hearing should take. The scheduling of when the hearing should start or how long it should take has been left in the discretion of the registrar in some circumstances and the court in others.[225] It is arguable that any such discretion would be mindful of the respective speed track within which the matter is to be decided. However, the use of discretion to determine timelines breeds inconsistency which threatens the chances for timely justice dispensation. Generally, in this step, the applied C.M.S. lacks the scheduling of time and events elements.

As an exception and by convenient or purposive interpretation, it can be argued that the law schedules the time within which basic rights petitions are to be determined, that being ninety days from when a panel of three judges is assigned.[226] The use of a convenient or purposive interpretation is necessary to argue for the provision of the scheduling of time and events element in this way because, in practice, the panel of three judges is assigned the case before the determination of competence is done.[227] By such practice, the point from which the ninety-day period accrues is unclear. If the ninety-day period runs from the date of assignment of the petition to a panel, which in practice happens before determination of competence, the thirty days within which to determine competence form part of the ninety days.[228] As a result, following a determination of competence, the panel will have sixty days to determine the petition on merit.

Another interpretation would be that, the ninety-day period accrues after the determination of competence. If so and if the determination complies with the time period, being that the petition was assigned to the panel from the start, then the determination would have been done 120 days from the date of assignment. The described timeline uncertainty results from the gulf between law and practice. Though the assignment of the panel from the outset does do away with the need for a second assignment after the determination of competence, it inadvertently births the law *vis-à-vis* practice gulf. The disparity notwithstanding, the law does provide for a ninety-day period within which to determine the petition. Because the determination of competence is aimed to address all preliminary matters, the ninety-day determination period can be argued to be the time within which the petition ought to be heard and

[225] Civil Procedure Code, Order VIII rr. 22(2), 40(1); National Elections (Election Petitions) Rules, G.N. 782 of 2020, Cap.343, at r. 15(1), 15(1 and 2).
[226] Basic Rights and Duties Enforcement (Practice and Procedure) Rules, G.N. No. 304 of 2014, Cap. 3, r. 15(2).
[227] *See discussion on Election & Basic Rights Petitions Pre-Trial Events at page 98.*
[228] Basic Rights and Duties Enforcement (Practice and Procedure) Rules, r. 9(1).

decided. Through this exception, the law provides for the scheduling of time and events element of C.M.S.

Court control of proceedings at the hearing stage features in a number of ways. The use of witness statements or affidavit proof in basic rights petitions in lieu of examination in chief at the Court's option allows it to abridge the length of the hearing as such examination would not take the time it would have had it been *viva voce*.[229] At hearing, the Court has the power to dismiss the case for the plaintiff's non-appearance or hear the suit in the absence of the defendant or respondent.[230] The power of the Court to summon and consequently issue a warrant for the arrest of a defaulting witness, speaks to the Court's power to ensure that witnesses do not become a cause of delay by their reluctance to appear as summoned.[231]

Another mechanism of control is the limitations against adjournments. The law requires that once hearing commences it should continue consecutively until it is complete.[232] However, the law allows adjournments beyond one day from the day the adjournment is allowed on exceptional reasons to be recorded.[233] Such reasons do not include circumstances considered to be in the control of the party(ies), engagement of an advocate in any other court than the Court of Appeal or illness or any other inability of an advocate unless the party can prove their inability to procure another advocate in time.[234] With commercial cases, any such adjournment can attract court fees and costs.[235] In the event where the adjournment is on the Court's accord, it ought not to exceed thirty days.[236]

The limitations on adjournments appear to be geared towards enhancing swift determination of matters. However, this intention is undercut by the fact that the law neither limits how long adjournments on account of the parties should be, as compared

[229] Civil Procedure Code, Order XVIII rr. 2, 3 and 4 as amended by Civil Procedure Code First Schedule Amendment Rules, *supra* note 220, r. 3; National Elections (Election Petitions) Rules, r. 22(1); High Court (Commercial Division) Procedure Rules, r. 48(b) amended by High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, Cap. 358, r. 24; Basic Rights and Duties Enforcement (Practice and Procedure) Rules, r. 15(3).

[230] Civil Procedure Code, Order IX rr. 2, 5 – 8; National Elections (Election Petitions) Rules, rr. 30(1), 31.

[231] Civil Procedure Code, Order XVI r. 10(3).

[232] Civil Procedure Code, Order XVII r. 1(3) (a); National Elections (Election Petitions) Rules, r. 28; High Court (Commercial Division) Procedure Rules, r. 46 (1).

[233] Civil Procedure Code, Order XVII r. 1(3) (a); National Elections (Election Petitions) Rules, r. 28; High Court (Commercial Division) Procedure Rules, r. 46(2) amended by High Court (Commercial Division) Procedure (Amendment) Rules, worr. 24.

[234] Civil Procedure Code, Order XVII r. 1(3) (b, c and d); High Court (Commercial Division) Procedure Rules, rr. 46 (2) (b, c and d) amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 23.

[235] High Court (Commercial Division) Procedure Rules, r. 46(2) (a) amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 23.

[236] Civil Procedure Code, Order XVII r. 1(3) (f); High Court (Commercial Division) Procedure Rules, r. 46(2) (e) amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 23.

to the thirty days cap for adjournments on the Court's accord, nor does it limit the number of adjournments per case.[237] Further, the power to adjourn cases generally, without indicating the following appearance date otherwise referred to as *sine die*, reduce the efficacy of the limitations against adjournments such that cases may remain pending indefinitely unless they are dismissed after having been pending for six or twelve months, for commercial and other civil cases respectively, or otherwise struck out after having been pending for two years.[238]

These two facts work to make adjournments, for any reason, a notorious cause of delay. This article found that adjournments are considered to be one of the leading causes of delay among litigants.[239] Out of forty-two litigant respondents who had cases pending before the High Court during the data collection period, twenty-one being fifty percent of such respondents identified adjournments as the cause of delay of their cases.

Adjournments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	21	50.0	100.0	100.0
Missing	System	21	50.0		
Total		42	100.0		

Table 2: Response of Litigants to a Questionnaire Question on the Main Cause of Delay.

The limitation against adjournments during the hearing stage and the whole case at large is wanting in its implementation. For instance, in the case of *Meet Singh Gurbax Singh v. Tanzania Railways Corporation*, which was filed in 2017 and determined in 2021, there were a total of forty-three adjournments through that period of time, seven of which were during the hearing step.[240] Each adjournment had a varying length and the total length of all adjournments was 1,401 days.[241] On average then, each adjournment added 32.59 days to the total length of the case. During the hearing step, the seven adjournments added up to a total length of 155 days, such that each adjournment during the hearing step added 22.1 days to the total length of the hearing step.[242] Up to when

[237] Civil Procedure Code, Order XVII r. 1(3) (f); High Court (Commercial Division) Procedure Rules, r. 46(2) (e) amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 23.
[238] Civil Procedure Code, Order XVII rr. 2, 4 and 5; High Court (Commercial Division) Procedure Rules, r. 47(2) (e) amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 23.
[239] *See infra Table 2.*
[240] Meet Singh Gurbax Singh v Tanz. Ry. Corp., Land Case No. 68 of 2017 (Arusha HC sub-registry, struck out Aug 13, 2021) (Unreported) (Tanz.).
[241] *Id.*
[242] *Id.*

the original case file was reviewed for purposes of this article, the case of *Rashid Ally Mamu v. National Microfinance Bank PLC*, which was filed in 2019 was still pending and had not reached the hearing stage.[243] Through its pendency to 24th March, 2023, the date of review, it had been adjourned fifty-one times for a total length of 1,488 days which is on average equivalent to 29.18 days per each adjournment.[244] These cases are by no means the only ones with such numbers and lengths of adjournments, they are merely indicative of the perils of adjournments to timely justice dispensation, perils attributable to the laws permissiveness with and passive management of adjournments.

With commercial cases, court control is further exhibited in the power to limit written and oral submission. While written submissions ought not to exceed ten typed pages, oral submissions are to last for twenty minutes save for when prior leave for an extended length is granted.[245] This caps the lengths of documents and submissions judges would be required to read or listen to, an outcome which reduces their workload.

7. CIVIL APPEALS, REVISIONS, AND OTHER APPLICATIONS

Appeals and revisions give the High Court the opportunity to confirm the legal and factual propriety of the findings of a subordinate court.[246] While appeals have to be prompted by a discontented party, a revision proceeding can be a result of an application by a party or commenced on the Court's own motion.[247] In this Section, revisions shall be taken to include labour revision and applications shall be taken to include all applications which can be made or managed under the C.P.C., Commercial Division Rules, Labour Court Rules and the Judicial Review Procedure Rules. After the exchange of necessary pleadings and documents, appeals, revisions and application go forward to hearing on preliminary points of objection if any, or otherwise on merit.

[243] Rashid Ally Mamu v. National Microfinance Bank PLC, Land Case No. 4 of 2019 (Dodoma HC sub-registry, adjourned Mar 10, 2023) (Tanz.).
[244] *Id.*
[245] High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, rr. 19(1), 65(3), 66(1 and 2) amended by High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, Cap. 358, r. 35.
[246] Civil Procedure Code [CAP. 33 R.E. 2019], s 70(1), 74(1), 79(1), Order XXXIX r. 1(1); Magistrates Court Act [CAP. 11 R.E. 2019], 1984, Act No 2 of 1984, s 25(1) (b), 31(1), 43(3), 44(1) (b); High Court (Commercial Division) Procedure Rules, r. 69 amended by High Court (Commercial Division) Procedure (Amendment) Rules, r. 37.
[247] Civil Procedure Code, s 70 (1), 74 (1), 79 (1), Order XXXIX r. 1 (1); Magistrates Courts Act, s 25 (1) (b), 31 (1), 43 (3), 44 (1) (b); High Court (Commercial Division) Procedure Rules r. 69 as amended by High Court (Commercial Division) Procedure (Amendment) Rules r. 37.

Like the hearing of original cases, the High Court during this step is called upon to entertain the arguments of the parties on the grounds of appeal, revision, or subject of the application. In this step, the law does not mandate the presiding Judge to scrutinize the case presented for hearing for propriety, but it does afford the Judge power to scrutinize the sufficiency of evidence taken by the trial or first appellate court before determining the appeal and if deemed insufficient proceed to remand it for the further collection of evidence by the trial or first appellate court.[248] This manner of scrutinization can have the effect of leaving the appeal pending while additional evidence is being taken, something which can add to the time taken to determine the appeal.

By extrapolation, the practice and precedents that a preliminary objection can be raised and adjudicated at any time, can be argued to afford the Court the power to consider a *suo moto* or party raised objection at the hearing step and thus covering the scrutinization element of C.M.S.[249] In as much as, through preliminary objections, the Court can confirm the propriety of the case without dealing with it on merit, the presiding Judge is not duty bound to initiate such a scrutinization mechanism *suo moto* but rather as a matter of discretion. As such, this manner of scrutinization is discretionary and potentially subject to inconsistent application on the part of the Court and dependent upon the parties to the case, all which feed the conclusion of insufficiency of the law in providing for the scrutinization element during this step.

The coverage of the scheduling of time and events element is lacking on this step. As much as the law provides for the scheduling for the date of hearing of appeals, revision, and other applications, it neither provides for the time period within which such hearing ought to commence nor the duration it is to take.[250] This is arguably contributory to the existence of backlog appeals, those which have been pending for more than twenty-four months.[251]

The control element of C.M.S. during this step features in the power of the Court to dismiss appeals without hearing the respondent where, after hearing the appellant, the appeal is wholly unmeritorious.[252] This power allows the Court to control

[248] Civil Procedure Code, Order XXXIX rr. 24, 25.

[249] Alex Chuma Kapama v. Registered Trustees of Jumuiya ya Maendeleo KIJICO and Others, Miscellaneous Civil Application No. 38 of 2023, at 11 (HC) (unreported) (Tanz.); Zaidi Baraka and Others v Exim Bank Tanz. Ltd., Civil Appeal No. 194 of 2016, at 11 (CA) (unreported) (Tanz.).

[250] Civil Procedure Code, Order XXXIX rr. 12 (1 and 2), 14(1), 16(1 and 2); Labour Court Rules G.N. No. 106 of 2007, rr. 20(4), 32(1, 2 and 3).

[251] *See examples* D.B Shapriya & Co. v. Mek One Gen. Trader & Another, Civil. Appeal No. 197 of 2016 (CA) (unreported) (Tanz.); William Godfrey Urassa v. TANAPA Arusha, Miscellaneous Civil Appeal No. 12 of 2000 (HC) (unreported) (Tanz.) (which was decided in 2009, approximately nine years after it was filed); Muro Inv. Co. Ltd. v. Alice Andrew Mlela, Civ. Appeal No. 72 of 2015 (HC) (unreported) (Tanz.) (which was decided in 2018, approximately three years after it was filed); Tanz. Breweries Ltd. v. Jonathan Karaze, Civ. Appeal No. 13 of 2012 (Mwanza HC sub-registry, decided Oct 09, 2015) (Unreported) (Tanz.).

[252] Civil Procedure Code, Order XXXIX r. 16(1 and 2); Labour Court Rules, r. 32(3 and 4).

proceedings before it and abridge the time taken to determine appeals. Notwithstanding the law's provision of the control element in this manner, the article found that judges do not control proceedings in this way even when they see no merit in the appeal and often hear the respondent regardless.[253]

It was argued that judges normally proceed to hear the respondents, even when the appeal appears unmeritorious after hearing the appellant, so as to afford each party the right to be heard.[254] Though this reason may appear valid and without harm to any party, it does diminish the essence of the law's provision of such means of control by using the Court and the parties' time to hear a response which would not change anything in the unmeritorious appeal. As a result, the length of the hearing can be elongated unnecessarily to the detriment of the pursuit of timely justice dispensation.

Other means of control features in the power of the Court to hear appeals *ex-parte* when the respondent fails to appear or dismiss the appeal when the appellant fails to appear when the matter is called for hearing.[255] Though a dismissal or an *ex-parte* proceeding or decision in this instance can be set aside on good cause, the power to control proceedings in this way can deter laxity in the parties' conduct of their cases.[256] The mandate to take additional evidence as necessary during the appeal stage, instead of remanding the appeal to the trial court for the collection of further evidence, does afford the Court another means of control of the proceedings before it in efforts to reduce reasons for delay.[257]

8. JUDGMENT

Having survived all preliminary hurdles of the case and completed the hearing step, cases proceed to the judgement step where the Court deliberates on the pleadings, arguments and evidence and against the applicable law so as to produce a reasoned decision on the rights and liabilities of the parties involved.[258] In this article, this step includes judgments

[253] Interview by Mutandzi A. Matovelo with Salma Maghimbi, J. in Charge, High Court Dar es Salaam Sub-Registry, in Kivukoni Front, Ilala CBD, Dar es Salaam, Tanz. (Apr. 25, 2023) (Tanz.); Interview by Rashid A. Pima & Mutandzi A. Matovelo with Julian L. Masabo, J. in Charge, High Court Dodoma Sub-Registry, in Tunza Road, Ilemela, Mwanza, Tanz. (Apr. 18, 2023) (Tanz.).

[254] Interview by Rashid A. Pima Mutandzi A. Matovelo with John R. Kahyoza, J. in Charge, High Court Manyara Sub Registry, in Bagara, Babati CBD, Manyara, Tanz. (Mar. 01, 2023) (Tanz.).

[255] Civil Procedure Code, Order XXXIX r. 17(1 and 2); Labour Court Rules, r. 32 (5 and 6).

[256] Civil Procedure Code, Order XXXIX rr. 19, 21; Labour Court Rules, r. 32 (7 and 9).

[257] Civil Procedure Code, Order XXXIX rr. 23, 25, 27, 28.

[258] Civil Procedure Code, Order XX rr. 1, 3A, 4; Order XXXIX r. 30, 31.

which are a result of a case having been heard on merit on original or appellate jurisdiction and rulings which follow the hearing of revisions, applications or preliminary objections.

Nothing in the law places a duty on the Court to scrutinise the propriety of the case before it at this stage when the Court is called to issue its decision. However, by virtue of what the Court is expected to produce, that is, a reasoned decision which measures the facts by the yardstick of the law, the Court inevitably scrutinises the case, its propriety in form and content, the relevant evidence and confine itself to the issue to be decided.[259] This implicit expectation for scrutinization tallies with the R.T. of C.M.S. However, it is mostly linked with dispensing justice than it is to reducing the time taken to complete the judgement stage.[260] Be that as it may, in this way, the scrutinization element of C.M.S. features in the judgement step.

The timing for issuance of the Court's decision covers the scheduling of time and events element of C.M.S. With this step, the law generally requires that all decisions of the Court be issued within ninety days from closure of the hearing.[261] With commercial cases, this time period is reduced to sixty days for judgments and thirty days for rulings.[262] By such provisions, the law clearly provides for the scheduling of time elements. However, compliance with these timelines is not absolute and though there have been instances where judges are summoned before the Judge's Disciplinary Committee on account of judgments which have been pending for over ninety days, no disciplinary sanction has ever been meted out against any judge.[263] Further, this article found that, fifty-three judgments out of 1,000 judgments of the High Court submitted to the Tanzania Law Report Board for review before publication in 2023, were delivered beyond ninety days.[264] The presence of such judgments again exemplifies the non-absolute compliance with the ninety-days rule.

[259] Rutanjaga Mathias and Another v. Elias Emmanuel, Criminal Appeal No. 5 of 2016 (HC), at 11 (unreported) (Tanz.); Nimbo Yusufu @ Kebumba v. Ngusa Sambai, Miscellaneous Land Appeal No. 20 of 2020 (HC), at 9 (unreported) (Tanz.); Gipson S. Kisanga v. Atrisiana Karisia, Land Appeal No. 36 of 2019 (HC), at 7 (unreported) (Tanz.); Lenatus Mageko @ Mageko v. Samwel George, PC. Criminal Appeal No. 26 of 2020 (HC), at 4 (unreported) (Tanz.); Yesse Mrisho v. Sania Abdul, Civil Appeal No. 147 of 2016 (CA), at 11 (unreported) (Tanz.); Tanz. Petrol. Dev. Corp. v. Mussa Yusuph Namwao and 23 Others, Miscellaneous Land Application No. 4 of 2023 (HC Land Div.) at 10 (unreported) (Tanz.); Kaiza Katamba Mwalugaja v. Obby Sikuanguka Mwampaja & Another, Civ. Appeal No. 7 of 2022 (HC), at 9 (unreported) (Tanz.).

[260] Yesse Mrisho v. Sania Abdul; Kaiza Katamba Mwalugaja v. Obby Sikuanguka Mwampaja & Another.

[261] Civil Procedure Code, r. 28.

[262] High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 2012, Cap. 358, r. 67(1) amended by High Court (Commercial Division) Procedure (Amendment) Rules, 2019, G.N. No. 107 of 2019, Cap. 358, r. 36.

[263] Interview by Rashid A. Pima & Mutandzi A. Matovelo with Wilbert M. Chuma, Chief Registrar of the Judiciary of Tanz., in Kivukoni Road, Ilala CBD, Dar es Salaam, Tanz. (May 03, 2023) (Tanz.).

[264] E-mail from Kifungu Kariho Mrisho, Head, Libr. Serv. Judiciary Tanz., to Mustapher M. Siyani, Principal J. High Court (Feb. 22, 2024, 17:05 EAT) (on file with principal author).

Potential contributing factors behind the delay in delivering decisions include laxity on the part of the Court and the lack of effective sanctions for the non-compliance. Such potential contributing factors are reflected in the findings on the causes of case delays where, improper case management by judges was identified by 218 (68.1%) and weakness of the law, was identified to be the third main cause of delay by fifty-nine (18.4%), all out of 320 respondents.[265]

Improper CMS by Judges

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	218	68.1	100.0	100.0
Missing	System	102	31.9		
Total		320	100.0		

Table 3: Table 3. Response of all Interviewees and Questionnaire Respondents to the Question on the Main Cause of Delay.

Weakness of the Law

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	59	18.4	100.0	100.0
Missing	System	261	81.6		
Total		320	100.0		

Table 4: Table 4. Response of all Interviewees and Questionnaire Respondents to the Question on the Main Cause of Delay.

After the coming of the code of conduct and ethics for judicial officers, the delay in issuing decisions, beyond ninety, sixty or thirty days, is a misconduct warranting disciplinary measure.[266] Though there exist cases whose decisions have exceeded that allocated time, the article found the means to compel judges to comply with the timeline before its lapse are lacking and the means to sanction such non-compliance is not as effective in preventing it.[267] It was found that, while being summoned to appear before the disciplinary committee prompted some summoned judges to complete their pending

[265] *See infra Table 3 and 4.*
[266] Code of Conduct & Ethics for Judicial Officers, 2020, G.N. No. 1001 of 2020, Cap. 237, r. 4(5) (Tanz.).
[267] Interview Wilbert M. Chuma, *supra* note 261.

decisions before the allocated appearance date and in as much as the summoning led to the issuance of the decision, such summoning or consequent issuance did not change the fact the decision had already been pending for more than the allowed time.[268] From this situation, a void in the applied C.M.S.'s ability to prevent delayed issuance of decisions is observed.

Usually during this step, the Court deliberates on the case in the absence of the parties. As such, it has absolute control over the step save in rare instances where the Court, during deliberations deems fit to recall the parties to address it on a particular issue or the parties request the Court's audience on account of compelling circumstances.[269] In both possibilities, the Court exercises full discretion. The described nature of this step affords the Court the necessary control over it and provides for that element of C.M.S.

Instances where the Court has to recall the parties to address it on issue observed during the composition of the judgement, show the insufficiency in the provision and execution of the scrutinization element of case management at all steps preceding the judgement step.[270] Nevertheless, taking cognizance of such issues does exemplify the scrutinization element in the judgement step. However, unlike in the preceding steps where such scrutinization would have facilitated timely justice dispensation, at the judgement step, it only facilitates justice dispensation. Because the case had to be heard to finality before scrutinization was done, it cannot change the time spent entertaining the case. This is to say, the scrutinization of cases at the judgement step, does not expedite the case as much as it may lead to a just decision.

CONCLUSION

With civil justice, the C.M.S. applied in the High Court does not provide for the scrutinization element in most scenarios. Registrars, as the admitting officers, are under no explicit duty to carry out scrutinization of documents at their admission and judges can only discretionarily, secondarily, and incidentally carry out such scrutiny. This has been observed to allow the existence and administration of defective cases which go up

[268] *Id.*

[269] Bagamoyo District Council v. Koiya Gen. Supply, Civil Appeal No. 346 of 2021(HC), at 4 (unreported) (Tanz.); Barclays Bank Tanz. Ltd. v. Adam Mhagama & 4 Others, Application for Lab. Revision No. 07 of 2023 (HC Lab. Div.) at 7, 9 (unreported) (Tanz.); Damas Nyakia (administrator of the Estate of Late Maningi Magesa) v. Athony Joseph Mugeta, Land Appeal No. 11 of 2019 (HC), at 2 (unreported) (Tanz.).

[270] Frank Masangya v. Adventina Valentine Msonyi (Administratrix of estate of late Buhacha Baltazar Kichinda), PC. Civil Appeal 10 of 2022 (HC), at 4, 7 (unreported) (Tanz.); Shukuru Mohamed Saidi and Others v. Athumani Mohamed Manyanga, PC. Civil Appeal No. 149 of 2019 (HC), at 3 (unreported) (Tanz).

to the judgement writing stage unnoticed. It further consumes the Court's time unnecessarily consequently delaying the dispensation of justice. Overarchingly, this element is incidental in its execution, done at secondary or advanced steps of a case and mostly done subject to the discretion of the officer at hand.

In areas where the scheduling of time and events is provided, the possibility for endless extensions defeat the essence of its existence and contribute to delayed justice dispensation. Again, where the timeline for the conduct of a particular case step is covered by law, the applied C.M.S. is incapable of preventing non-compliance by judges nor sufficiently sanctioning the same. By not providing for the commencement and duration period for various steps, the law does not encourage proactiveness of the associated actors but fosters the discretionary conduct of such steps and the potential delay as they are subjected to the officer's calendar.

The control of cases by the dismissal for non-appearance or issuance of *ex-parte* orders is watered down by the potential for future reversals which would make such means of control ineffectual and increase the total time consumed to determine the case. The delayed disposition of cases has been linked to improper management of cases appears permissive or at least passive with the control over adjournments. The law is culpable for the effects of adjournments by not limiting the number and length of adjournments. On account of reasonable or flimsy grounds, adjournments have been demonstrated to significantly add to the time cases consume to their final determination. In areas where the Court is afforded absolute control over proceedings, deliberate, inadvertent, or ignorant abdication of such control has been observed.

The captured findings illustrate the system's lack or at the very least insufficiency in the inclusion of the essential elements necessary for C.M.S.' efficacy. Further, situations where the law does not provide means to prevent or sanction its abrogation and the prevalence of advertent or inadvertent non-compliance with the law exemplify legal and practical challenges facing C.M.S. Together, these findings prove the article's hypotheses and offer an explanation behind the persistence of case delays in the High Court despite the adoption of legal and administrative case management framework, that the C.M.S. applied in the High Court lacks essential elements for and faces legal and practical challenges impeding timely civil justice dispensation.

To address this, amendments of the C.P.C., M.C.A., Commercial Division Rules, Labour Court Rules, Election Petition Rules, Judicial Review Procedure Rules and B.R.A.D.E. Rules are recommended so as to fully capture the essential elements of C.M.S. on every step the respective civil cases administered thereunder go through. The amendments should focus on curbing any and all unnecessary adjournments, curing any

delay caused by misuse of discretion and address as many circumstances as possible so that each scenario that presents itself in the pendency of a civil case, novel or otherwise, can be remedied by the law. The possibility of extension of provided or ordered timelines should be reviewed to see the best way to identify and accommodate apt circumstance for extension while inhibiting abuse of such extensions.

Apart from legal reform, the findings make improvement of civil justice adjudication practice necessary. Training of judges, state attorneys, advocates, other stakeholders of the civil justice and the public at large on the essence of C.M.S. and their respective roles can work to enhance the overall efficacy of the applied system. Further, the increase in the number of judges together with systematic and consistent enforcement of the law can assist in ensuring timely civil justice dispensation.

Bottlenecks to its effective performance notwithstanding, C.M.S. remains a tool capable of ensuring or at the very least enhancing the possibility of timely civil justice dispensation. Its potential is promising and is worth the necessary investment if the vision for timely and accessible justice for all is to be achieved. In line with the collective thesis of the guiding theories, the efficacy of the applied C.M.S. is greatly dependent on the comprehensive inclusion of the essential elements in the law and the adoption of conforming practices.

DATA AVAILABILITY

The research datasets underlying the results presented in this manuscript have been deposited in Zenodo at https://doi.org/10.5281/zenodo.14892944.

APPENDICES

APPENDIX I: MIXED QUESTIONNAIRE FOR JLAS

RESEARCH QUESTIONNAIRE FOR JUDGES LAW ASSISANTS

I am Mustapher Mohamed Siyani, a PhD (Law) Researcher from the University of Dodoma, School of Law. I am currently undertaking a study titled; 'Examining Legal and Practical Challenges Affecting Case Management System on Timely Justice Dispensation in the High Court of Tanzania.' I kindly request your participation by responding to this questionnaire. The information obtained will be used for academic purposes only. High degree of confidentiality will be ensured. Feel free to add information you think might be useful to this study.

1. How long have you been a Judge's Law Assistant? (Tick where appropriate)

   One year

   Two years

   Three years

   More than three years

2. Have you attended any training on case management?

   .....

   .....

   .....

3. What do you understand by case management system and what do you think is the purpose of case management in the High Court of Tanzania?

   .....

   .....

   .....

4. What do you consider to be the roles of a Judge's Law Assistants in case management in the High Court of Tanzania?

   .....

   .....

   .....

5. According to your understanding of case management system, can you please name elements of case management?

   .....
   .....
   .....

6. Do you think all important elements of case management are observed during trial of cases by the High Court of Tanzania? Kindly Explain.

   .....
   .....
   .....

7. In your opinion, has case management system in the High Court of Tanzania ensured timely dispensation of justice?

   .....
   .....
   .....

8. What do you consider to be legal challenges facing the case management system applied in the High Court of Tanzania

   .....
   .....
   .....

9. Are there any practical challenges facing the case management system applied in the High Court of Tanzania? Please mention them.

   .....
   .....
   .....

10. If you have listed challenges in question 8 and 9, do you think the challenges affect timely dispensation of justice in the High Court of Tanzania? Please explain.
    .....
    .....
    .....

11. What do you consider to be the main cause of case delays among the following? Tick only one reason of your choice.

a) Adjournment of the case without valid reasons

b) Insufficient number of Judges

c) Complexity of cases

d) Ignorance of the law

e) Improper management of cases.

f) Weakness of the law

g) Any other reason (mention)

.....

APPENDIX II: MIXED QUESTIONNAIRE FOR RMAS (DODOSO LA UTAFITI KWA WASAIDIZI WA KUMBUKUMBU)

DODOSO LA UTAFITI KWAAJILI YA WASAIDIZI WA KUMBUKUMBU

Mimi ni Mustapher Mohamed Siyani, Mtafiti wa Shahada ya Uzamivu (PhD) kutoka Chuo Kikuu cha Dodoma, Shule ya Sheria. Ninafanya utafiti unaoitwa; 'Uchunguzi wa Changamoto za Kisheria na Kiutekelezaji Zinazoathiri Mfumo wa Uratibu na Usimamizi wa Mashauri Katika Utoaji Haki kwa Wakati Kwenye Mahakama Kuu ya Tanzania.' Ninaomba kwa heshima ushiriki wako katika dodoso hili. Taarifa zitakazopatikana zitatumika kwa madhumuni ya kitaaluma tu. Kiwango cha juu cha usiri kitahakikishwa. Jisikie huru kuongeza maelezo ambayo unafikiri yanaweza kuwa muhimu kwa utafiti huu.

1. Je, umekuwa Msaidizi wa Kumbukumbu Mahakama Kuu kwa muda gani? (Weka alama ya tiki unapoona inapofaa)

   Mwaka mmoja

   Miaka miwili

   Miaka mitatu

   Zaidi ya miaka mitatu

2. Je, unaelewa nini kuhusu mfumo wa uratibu na usimamizi wa mashauri na unafikiri ni nini madhumuni ya mfumo husika?

   .....
   .....
   .....

3. Nini majukumu ya Msaidizi wa kumbukumbu katika mfumo huo?

   .....
   .....
   .....

4. Kwa uzoefu wa kazi yako, nani ana jukumu la kupanga tarehe ya kesi na anazingatia nini katika kutimiza jukumu hilo?

   .....
   .....
   .....

5. Kati ya yafuatayo, nini unafikiri ni chanzo kikubwa cha ucheleweshaji wa kesi katika Mahakama Kuu ya Tanzania? Tiki moja wapo.

    a) Uhairishwaji wa kesi wa mara kwa mara bila sababu za msingi
    b) Uchache wa majaji
    c) Wingi wa mashahidi
    d) Uelewa mdogo wa elimu wa sheria
    e) Usimamizi hafifu wa mashauri
    f) Udhaifu wa sheria
    g) Sababu nyingine (itaje)

    .....

6. Je, umewahi kupata mafunzo yoyote kuhusu mfumo wa uratibu na usimamizi wa mashauri mahakamani?

    .....
    .....
    .....

7. Ikiwa jibu lako kwenye swali No. 6 ni "NDIO" Je unadhani ni kwa kiasi gani mfumo wa uratibu na usimamizi wa mashauri, kama unavyotumiwa na Mahakama Kuu ya Tanzania, umesaidia katika utoaji wa haki kwa wakati?

    .....
    .....
    .....

APPENDIX III: MIXED QUESTIONNAIRE FOR LITIGANTS (DODOSO LA UTAFITI KWA WADAAWA NA WASHTAKIWA WENYE MASHAURI YENYE UMRI MREFU MAHAKAMANI)

DODOSO LA UTAFITI KWA WADAAWA NA WASHTAKIWA WENYE MASHAURI YENYE UMRI MREFU MAHAKAMANI

Mimi ni Mustapher Mohamed Siyani, Mtafiti wa Shahada ya Uzamivu (PhD) kutoka Chuo Kikuu cha Dodoma, Shule ya Sheria. Ninafanya utafiti unaoitwa; 'Uchunguzi wa Changamoto za Kisheria na Kiutekelezaji Zinazoathiri Mfumo wa Uratibu na Usimamizi wa Mashauri Katika Utoaji Haki kwa Wakati Kwenye Mahakama Kuu ya Tanzania.' Ninaomba kwa heshima ushiriki wako katika dodoso hili. Taarifa zitakazopatikana zitatumika kwa madhumuni ya kitaaluma tu. Kiwango cha juu cha usiri kitahakikishwa. Jisikie huru kuongeza maelezo ambayo unafikiri yanaweza kuwa muhimu kwa utafiti huu.

1. Je, shauri lako liko Mahakamani kwa muda gani tangu lilipofunguliwa (Weka alama ya tiki unapoona inapofaa)

   Baina ya Miaka mitano na Kumi

   Zaidi ya Miaka Kumi

2. Kesi yako ni ya aina gani?

   .....
   .....
   .....

3. Kama umewahi kujaribu njia mbadala za kutatua mgogoro wako kimahakama, nini unafikiri kilisababisha njia hizo kushindikana?

   .....
   .....
   .....

4. Unadhani nini kimepelekea shauri lako kuchelewa kusikilizwa au kumalizika?

   .....
   .....
   .....

5. Je unaelewa nini kuhusu mfumo wa uratibu na usimamizi wa mashauri mahakamani?

   .....
   .....
   .....

6. Kati ya yafuatayo, nini unafikiri ni chanzo kikubwa cha ucheleweshaji wa shauri lako? (Chagua mojawapo kwa kuweka alama ya tiki)

   a) Uhairishwaji wa kesi wa mara kwa mara bila sababu za msingi
   b) Uchache wa majaji
   c) Uzito wa shauri
   d) Uelewa mdogo wa elimu wa sheria
   e) Usimamizi hafifu wa mashauri
   f) Mapungufu ya kisheria
   g) Sababu nyingine (itaje)

      .....

7. Je, huwa unapewa sababu za kuhairishwa kwa shauri lako?

   .....
   .....
   .....

VOLUME 9 ISSUE 2 CONFERENCE PAPERS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/20217

Received: 28 Feb. 2024 | Accepted: 2 Aug. 2024 | Published: 26 Feb. 2025

The Rule of Law in a Multi-State Dimension: The Rule of Law and Private International Law

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ABSTRACT

In the legal literature, the rule of law has been often considered a public law phenomenon and little attention has been paid to the relationship between the rule of law and private international law. This article outlines how the rule of law has unfolded in private international law and how it influences the creation and application of private international law rules. Savigny's private law theory detached law from state power which led to the recognition of the equality of the legal systems from the point of view of the designation of the applicable law. The classic conflict of laws method focused on legal certainty in determining the governing law that corresponds to a formal conception of the rule of law of the eighteenth and nineteenth century. Today's private international law, however, also enables the infiltration of the material values of the rule of law into private international law, in particular through the public policy clause or as overriding mandatory norms. The development of European Union (EU) private international law illustrates this well. The public policy exception is suitable to prevent the application of the otherwise governing foreign law or the recognition and enforcement of a foreign decision that is contrary to the fundamental principles of the domestic legal order of the state of the forum, including human rights. Moreover, the lack of judicial independence in an EU Member State where a decision was rendered can result in the denial of recognition and enforcement of that decision in another Member State not only in criminal but also in civil matters. The requirements of the rule of law, and in particular the respect for human rights also influence the methodology of private international law. As the legal literature points out, the method of recognition, requiring the recognition of legal status acquired abroad irrespective of the law designated by the conflict of laws rules of the forum, coexists with the traditional conflict of laws method.

KEYWORDS

Private International Law; Rule of Law; Legal Certainty; Human Rights; Judicial Independence

EDITORIAL NOTE

This is a translated, revised and amended version of Tamás Szabados, L'État de droit dans une dimension multiétatique: L'État de droit et le droit international privé, 61 ANNALES UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS DE ROLANDO EÖTVÖS NOMINATAE SECTIO IURIDICA 81 (2022). Doi: https://doi.org/10.56749/annales.elteajk.2022.lxi.7.81; Translation from French to English provided by the Author.

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INTRODUCTION

Albert Venn Dicey, who was Vinerian Professor of English Law at Oxford University and who revived the concept of the rule of law in England, also wrote a monograph on private international law which – with subsequent revisions – is still one of the most significant English publications in this field.[1] But it is rare for a professor of public law to deal also with private international law, and even Dicey's volume did not touch on the relationship between what is now called the rule of law and private international law. Indeed, at first sight, the concept of the rule of law and private international law seem far apart. In the first place, the concept of the rule of law has traditionally been linked to sovereign states and their organs exercising public power. Most often, the question is whether a state's institutions comply with the requirements of the rule of law. In this sense, the rule of law appears to be an internal problem. Less attention is paid to the implementation of the rule of law at the international level. Representatives of public international law have sometimes examined the existence and operation of the international rule of law.[2] However, these investigations remain relevant to private international law to the extent that the international rule of law is construed not only in the relationships of subjects of public international law (states and international organisations) but also in terms of the impact of the rules of public international law, in particular human rights, on private persons. Secondly, private international law deals with private legal relations whereas the rule of law expresses the protection of citizens vertically against public power. The concept of the rule of law is more often conceived as a public law phenomenon.[3] It has been noted that there is a presumption that the rule of law is a doctrine of public law.[4] Even the works dealing with the relationship between private law and the rule of law pay little attention to private international law.

[1] Albert Venn Dicey, A Digest of the Law of England with Reference to the Conflict of Laws (1896).

[2] Stéphane Beaulac, *The Rule of Law in International Law Today*, in Relocating the Rule of Law 197 (Gianluigi Palombella & Neil Walker eds., 2009); Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?* 65 Int'l & Compar. L. Q. 277 (2016); Societe Française pour le Droit International [French Society for International Law], L'Etat de Droit en Droit International: Colloque de Bruxelles [The Rule of Law in International Law: Brussels Symposium] (2009); André Moine, *L'État de Droit, un Instrument International au Service de la Paix [The Rule of Law, an International Instrument in the Service of Peace]*, 37 Civitas Europa, no. 2, 2016, at 65.

[3] Lisa M. Austin & Dennis Klimchuk, *Introduction, in* Private Law and the Rule of Law 1, 1 (Lisa M. Austin & Dennis Klimchuk eds., 2014); William Lucy, *The Rule of Law and Private Law, in* Private Law and the Rule of Law 41, 41-42 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

[4] *See* Austin & Klimchuk, *supra* note 3, at 1.

In this way, it is not surprising that even private international law literature has hardly addressed the relationship between the concept of rule of law and private international law.[5] Despite the absence of a more comprehensive analysis of the concept of the rule of law in the context of private international law, it cannot be denied that the rule of law also plays a role in the operation of private international law rules. Moreover, legal scholarship has discussed in depth specific private international instruments (for example, the public policy exception) which can convey various aspects of the rule of law.

The rule of law has been defined in various ways. Dicey highlighted three meanings of the rule of law in England: no penalty without a legal court procedure establishing a breach of the law; equality before the law; and the emergence of constitutional principles from judicial practice protecting individual rights.[6] Subsequent definitions of the rule of law specified further characteristics. Two aspects of the rule of law are often distinguished: formal and substantive.[7] The formal concept of the rule of law emphasises the way of adoption and application of rules (accessibility, clarity, consistency, no retroactivity, etc.).[8] The substantive aspect of the rule of law concerns the content of the rules and fills the concept of the rule of law with certain material values, including first of all human rights.[9] The two aspects of the rule of law – formal and substantive – are in fact complementary.[10] This is also demonstrated by our analysis of private international law. In private international law, the ideal of conflicts justice has always recognised demands for legal certainty. To not lose sight entirely of substantive justice, at the same time, private international law admits the infiltration of substantive values of the rule of law.

[5] Monique Hazelhorst, *Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law*, 65 Neth. Int'l L. Rev. 103 (2018) I; Vincent Heuzé, *D'Amsterdam à Lisbonne, l'État de droit à l'épreuve des compétences communautaires en matière de conflits de lois [From Amsterdam to Lisbon, the Rule of Law Put to the Test by the Community's Powers in the Area of Conflict of Laws]*, 30 La Semaine juridique – Édition générale 20 (2008); Vincent Heuzé, *Construction européenne, État de droit et droit international privé [European Integration, the Rule of Law and Private International Law], in* Construction europeenne et État de droit [European Integration and the Rule of Law] 123-134 (Vincent Heuzé & Jérôme Huet eds., 2012); David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 Vill. L. Rev. 607 (2011).

[6] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution 183-205 (10th ed., 1979).

[7] Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 3 Pub. L. 467 (1997).

[8] Joseph Raz, *The Rule of Law and its Virtue, in*, The Authority of Law: Essays on Law and Morality 210 (1979).

[9] Thomas Bingham, The Rule of Law (2010).

[10] Naiade El-Khoury & Rüdiger Wolfrum, *Rule of Law, in* Max Planck Encyclopedia of Comparative Constitutional Law (Rainer Grote et al. eds., 2021).

In particular, the enforcement of human rights increasingly influences not only the outcome of private international law cases but also its methodology.[11]

With regard to an international private law situation, the assessment of the respect of the values of the rule of law may emerge in an international dimension. The assessment of jurisdiction, the content of the designated foreign law and the recognition and enforcement of a foreign decision may raise the evaluation of the situation of the rule of law in another country.[12] In deciding which is the proper forum, rule of law considerations may be crucial. The application of a foreign law may be ruled out if its application in the concrete case violated human rights, a component of the rule of law. The question also arises as to whether it is possible to recognise a foreign decision rendered in a country where judicial independence, an important element of the rule of law, is not observed. In such situations, the need to respect the rule of law undoubtedly influences the application of the rules of private international law.

The aim of this contribution is to examine how the elements of the rule of law have unfolded during the development of private international law and how the rule of law influences the application of private international law rules.

[11] Louwrens R. Kiestra, The Impact of the European Convention on Human Rights on Private International Law (2014); Pietro Franzina, *L'incidenza dei diritti umani sul diritto internazionale privato: il caso della protezione degli adulti vulnerabili [The Impact of Human Rights on Private International Law: The Case of the Protection of Vulnerable Adults]*, Federalismi.it, Dec. 2013, at 1; Silvia Marino, *Brevi considerazioni sulle interazioni fra diritto internazionale privato e diritti umani [Brief Considerations on the Interactions Between Private International Law and Human Rights]*, Cuadernos de Derecho Transnacional, Mar. 2015, at 112; Angelika Nußberger, *Internationales Privatrecht und die Europäische Menschenrechtskonvention [Private International Law and the European Convention on Human Rights]*, in IPR für eine bessere Welt [IPR for a Better World] 1 (Konrad Duden ed., 2022); Susanne Lilian Gössl, *Grundrechte und IPR [Fundamental Rights and IPR]*, 87 Rabels Zeitschrift fur auslandisches und internationales Privatrecht 728 (2023).

[12] King Fung Tsang, *China's Rule of Law from a Private International Law Perspective*, 47 Ga. J. Int'l & Compar. L. 93, 98 (2018).

The principle of the rule of law not only applies to the application of the private international law provisions, but also to their adoption. As to the creation of private international law rules, as they constitute part of the domestic legal order, they have to comply with domestic constitutional requirements, which include the principle of the rule of law.[13] In this respect, it may arise the question whether the regulatory approach (e.g., using unilateral conflict of laws rules)[14] or a given connecting factor is in accordance with the requirements of the rule of law, and in particular fundamental rights.[15]

Our analysis will focus in particular on the private international law of the European Union [hereinafter EU]. This is justified because the multi-state structure of the EU is based on a community of values that also includes the rule of law. As Article 2 of the Treaty on European Union [hereinafter T.E.U.] lays down:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[16]

The enforcement of the rule of law in private international law relationship does not remain only a theoretical issue. The insolvency case can be recalled in which a Bulgarian court referred questions to the Court of Justice of the European Union [hereinafter C.J.E.U.] for a preliminary ruling which, among other things, directly concerned the interpretation of the principle of the rule of law in the context of the area of freedom, security and justice by referring directly to Article 2 of the T.E.U.[17] The preliminary question was, however, not answered because the C.J.E.U. considered the reference manifestly inadmissible. Other cases exposed, perhaps less directly, the relationship between the rule of law and private international law. Such cases still demonstrate that

[13] Friedrich Becker, *Zur Geltung der Grundrechte im Internationalen Privatrecht [On the Validity of Fundamental Rights in Private International Law]*, 24 Neue Juristische Wochenschrift [NJW] 1491, 1491 (1971) (Ger.).

[14] In German literature, it was debated whether unilateral conflict of laws rules comply with the principle of rule of law having regard to the commitment of the *Grundgesetz* [Basic Law] in international cooperation. *See* Becker, *supra* note 13, at 1492.

[15] Günther Beitzke, Grundgesetz und Internationalprivatrecht [Basic Law and Private International Law] 11 (1961); Murad Ferid, *Wechselbeziehungen zwischen Verfassungsrecht und Kollisionsnormen, [Interrelationships Between Constitutional Law and Conflict-of-Law Rules] in* Vom deutschen zum europaischen Recht – Festschrift fur Hans Dolle [From German to European Law: Commemorative Publication for Hans Dolle] 121 (Ernst von Caemmerer et al. eds., 1963).

[16] Consolidated versions of the Treaty of the European Union and the Treaty on the Functioning of the European Union, June 7, 2016, 2016 O.J. (C 202/01).

[17] Case C-647/18, Corporate Commercial Bank v. Elit Petrol AD., ECLI:EU:C:2020:13 (Jan. 15, 2020).

the requirements of rule of law have not left intact the method and practice of private international law.

1. THE FORMAL CONCEPT OF THE RULE OF LAW AND PRIVATE INTERNATIONAL LAW

The impact of the rule of law on private international law is rarely examined in the literature. This is despite the fact that the classic method of modern private international law can be seen as a vivid manifestation of the formal concept of the rule of law of the eighteenth and nineteenth centuries. As is well known, Savigny, who is reputed to be the creator of modern private international law, in criticising the idea of natural law, took the position that the development of law rests on the spirit of the people (*Volksgeist*) and that jurists become the bearers of the legal conscience of the people.[18] In this way, Savigny detached the law from the power of the state, giving it an authority independent of the state. In this way, the idea of the rule of law emerged in Savigny's general conception of law.

In private international law, the emancipation of the law from the state also implies that the *comitas* doctrine based on territorial sovereignty and the exceptional application of foreign laws have been discarded and replaced by the equality of legal systems and the determination of the applicable law in such a way that the generosity and will of the public power play no role and where it makes no difference which law is applicable.[19] Savigny's private international law is deeply imbued with a specific element of the rule of law: legal certainty. Savigny departed from the legal relationship and examined its spatial placement by looking for the seat of the legal relationship in order to determine the applicable law.[20] For typical legal relationships, Savigny even determined the place of the seat by facilitating the designation of the applicable law: the domicile for questions of personal status; the location of a thing for questions related to rights *in rem*; and the place of performance for contracts, etc. In this way, a mechanical solution has been devised which at the same time guarantees predictability. What is more, Savigny sought to elevate these principles to the international level. He wanted

[18] Gábor Hamza & András Sajó, *Savigny a jogtudomány fejlődésének keresztútján [Savigny at the Crossroads of the Development of Jurisprudence]*, 23 Állam- es Jogtudomany 79, 85-86 (1980).

[19] Ulrike Seif, *Savigny und das Internationale Privatrecht des 19. Jahrhunderts [Savigny and the Private International Law of the 19th Century]*, 65 Rabels Zeitschrift fur auslandisches und internationales Privatrecht 492, 508-10 (2001).

[20] 8 Friedrich C. von Savigny, System des heutigen Römischen Rechts [System of the Modern Roman Law] 108 (1849).

every state to adopt and apply the same conflict of laws rules. In such a community of law, the international harmony of solutions can be achieved.

Legal certainty is important for the protection of private parties. Regarding private law relationships, the predictability of the applicable rules is necessary to plan transactions between the parties. This is even more true in an international dimension, and in particular in international trade. In this dimension, additional questions arise: which country's courts have jurisdiction to hear the case and what is the law applicable to the parties' legal relationship? Predictability must be ensured here, too. The approach of a legal system to legal certainty also has an impact on the methods of applying the law.[21] This also applies to private international law.

The mechanical nature of the conflict of laws rules undoubtedly ensured this predictability. Later, objective conflict of laws rules were supplemented by the recognition of party autonomy, which implied the possibility of prorogation of jurisdiction and choice of law. These changes increased legal certainty for the parties even before the emergence of the legal dispute. As Heuzé puts it, in private international law the parties' expectations and thus legal certainty, as a component of the rule of law, are safeguarded on the condition that the parties' expectations are legitimate, which is required by the authority of law, another component of private international law.[22]

Although we discussed above the issue of the determination of the governing law, it is to be noted that rule of law concerns can also arise in relation to jurisdictional rules.[23] The *forum non conveniens* doctrine was criticised as interfering with the principle of the rule of law due to the discretion enjoyed by the court.[24] In Case C-281/02, the C.J.E.U. lined up beside this opinion. It underlined that while potential defendants should be able to foresee at which states they can be sued, the wide discretion of the court undermines predictability and legal certainty, one of the objectives of the Brussels Convention.[25] The motivation was the same here: the rule of law presupposes predictability also in terms of the application of jurisdictional rules.

This traditional approach in fact corresponds to the formal conception of the rule of law and in particular to legal certainty. Thus, the idea of international harmony of solutions envisaged by Savigny and several generations of academics in private international law can well coexist with the concept of the rule of law. The goal of legal

[21] James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law,* 31 Hous. J. Int'l L. 27, 38 (2008).
[22] *See* Heuzé, *Construction européenne, supra* note 5, at 130.
[23] Andrew Bell, Forum Shopping and Venue in Transnational Litigation 121-23 (2003).
[24] *Id.* at 121.
[25] See Case C-281/02, Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, ECLI:EU:C:2005:120, ¶¶ 38, 40-41 (Mar. 1, 2005).

certainty has not even disappeared. Today, it is hoped that the international harmony of solutions and legal certainty will be achieved through the unification of private international law at both regional and global level. At regional level, the role of the EU should be highlighted, while at global level the Hague Conference on Private International Law is contributing to the creation of uniform conflict and procedural rules. In particular, the recitals of EU private international regulations often refer to the realisation of legal certainty as one of their objectives.[26]

Because of its mechanical nature, private international law is often described as neutral, or less euphemistically blind, as regards the content of the designated law and the outcome of the case. For this reason, the neutrality or, in other words, the insensitivity of private international law towards material values was criticised.

2. INFILTRATION OF MATERIAL VALUES INTO PRIVATE INTERNATIONAL LAW: THE EXAMPLE OF HUMAN RIGHTS

Nevertheless, it cannot be ignored that even the classic method of private international law has developed means that allow the infiltration of material values into private international law. These means, which will be discussed below, admit the material aspects of the rule of law despite the neutrality of the conflict of laws rules. This can be illustrated by the influence of human rights on the application of private international law rules.

Human rights are an important component of the substantive rule of law. Human rights can have an effect on the application of conflict of laws rules through the public policy exception or as overriding mandatory norms. These means of private international law represent a departure from the neutrality of private international law.[27] The public policy exception can prevent the application of foreign law or the recognition and enforcement of a foreign decision that is contrary to the fundamental

[26] *See* Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 276/6), recital (16). Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199/40), recital (14). Johannes Scheller, *Einleitung [Introduction]*, *in* Europaisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band III [European Civil Procedure and Conflict of Laws EuZPR/EuIPR, Volume III] 591, 591-592 (Thomas Rauscher, ed., 2023).

[27] Friederike Pförtner, *Internationales Privatrecht und Menschenrechte: kollisionsrechtliche Fragen zur zivilrechtlichen Haftung für "Menschenrechtsverletzungen" [Private International Law and Human Rights: Conflict of Laws Issues on Civil Liability for "Human Rights Violations"]*, *in* Politik und Internationales Privatrecht [Politics and Private International Law] 93, 97 and 99 (Susanne L. Gössl ed., 2017).

principles of the domestic legal order of the state of the forum.[28] There is no doubt that the rule of law and, in particular, human rights can be included among these principles. Thus, the protection of human rights may justify obstructing the application of foreign law or the recognition and enforcement of a foreign decision.[29] Certain sources of private international law highlight the relationship between the protection of human rights and the public policy exception. Regulation (EU) 2015/848 (Insolvency Regulation) states that:

> Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.[30]

Nevertheless, recourse to public policy remains exceptional.[31] It is also referred to as a safety valve.[32] The Court of Justice of the European Union seemed to accept a limited possibility of invoking public policy to protect human rights. With regard to the recognition of a foreign decision, the C.J.E.U. required the existence of a manifest breach of an essential rule of the legal order of the Member State addressed or of a fundamental right.[33] This presupposes that the recognition or enforcement of the decision is at variance to an unacceptable degree with the legal order of the state addressed.[34] Violation of the right of defence may have justified a refusal to recognise a foreign judgment where the court in the state of origin denied the defendant the right to defend himself without appearing in person.[35] The restrictive approach of the C.J.E.U. has been criticised in the literature for not allowing human rights to be fully enhanced. As Oster put it, private international law must operate within the framework of human rights, not

[28] Jan Oster, *Public Policy and Human Rights,* 11 J. Priv. Int'l L. 542 (2015). Mark Hirschboeck, *Conceptualizing the Relationship Between International Human Rights Law and Private International Law*, 60 Harv. Int'l L. J. 181 (2019).

[29] Gabriella Carella, Fondamenti di diritto internazionale privato [Fundamentals of Private International Law] 173 (2018).

[30] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141/19), at 19-72, art. 33; Gerald Mäsch, *Artikel 33: Öffentliche Ordnung [Article 33: Public Order], in* Europaisches Zivilprozess – und Kollisionsrecht EuZPR / EuIPR, Band 2/1 [European Civil Procedure and Conflict of Laws EuZPR / EuIPR, Volume 2/1] 1091 (Thomas Rauscher ed., 2022).

[31] See Case C-7/98, Dieter Krombach v. André Bamberski, ECLI:EU:C:2000:164, ¶ 44 (Mar. 28, 2000).

[32] Franco Mosconi, *Exceptions to the Operation of Choice of Law Rules*, 217 Collected Courses of the Hague Acad. of Int'l L. 9, 20 (1989).

[33] *Dieter Krombach*, C-7/98, ¶ 37; Case C-38/98, Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento, ECLI:EU:C:2000:225, ¶ 30 (May 11, 2000).

[34] *See* Renault SA v. Maxicar SpA and Orazio Formento, *supra* note 32, at para 30.

[35] *Dieter Krombach*, C-7/98.

the other way round.[36] It is argued that any violation of human rights recognised in the legal order of the forum should be sanctioned, not just qualified violations.[37]

At the same time, we cannot ignore the fact that the application of the public policy exception must be consistent with the respect of human rights. The application or non-application of the public policy exception in Europe is subject to review by the C.J.E.U. and the European Court of Human Rights [hereinafter E.Ct.H.R.].[38] This is why, as one author has put it, this control constitutes a safety valve for the safety valve.[39] This can be illustrated by the Negrepontis-Giannisis decision of the E.Ct.H.R.[40] In this case, the Greek courts refused to recognise an American decision that had allowed the adoption of a nephew by his uncle, a monk. The refusal was justified by the protection of Greek public policy, which also included the ecclesiastical prohibition on adoption by monks. The E.Ct.H.R. did not accept the invocation of public policy in this case and found, among other things, a violation of the right to respect for private and family life, noting that the refusal had not responded to a pressing social need.

Private international law offers another way of safeguarding human rights, namely the application of overriding mandatory rules. In EU law, Article 9(1) of Regulation (EU) No 593/2008 (Rome I Regulation) defines the concept of overriding mandatory rules. Under this provision:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. [41]

Fundamental rights may fall under this definition, which can be relied on well beyond contract law.[42] However, more often fundamental rights are taken into account through the public policy exception and not as overriding mandatory norms.

The public policy exception and the applicability of overriding mandatory norms are means of private international law which contribute to mediating the values of the

[36] Oster, *supra* note 28, at 552-53.
[37] *See id.* at 553.
[38] *See* Carella, *supra* note 29, at 174-76.
[39] *See* Hirschboeck, *supra* note 28, at 194.
[40] Negrepontis-Giannisis v. Greece, App. no. 56759/08 (May 3, 2011), https://hudoc.echr.coe.int/eng?i=001-104680
[41] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Jul. 4, 2008, 2008 O.J. (L 177/6), art. 9 (1).
[42] *See* Case C-149/18, Agostinho da Silva Martins v. Dekra Claims Services Portugal SA, ECLI:EU:C:2019:84, ¶ 28 (Jan. 31, 2019).

rule of law in international private law disputes. This holds not only for the EU private international law regulations, but also for autonomous private international law which typically provides for these two safeguards.[43] The application of public policy clauses to protect human rights can motivate the global harmonisation of the protection of human rights.[44] The use of public policy clauses to protect human rights can lead to the creation of a common public policy on human rights. We might add that the protection of human rights as overriding mandatory norms has virtually the same effect. In this sense, the systematic protection of human rights through the public policy exception or as overriding mandatory rules can strengthen the rule of law in its international dimension.

3. JUDICIAL INDEPENDENCE AND THE JUDICIAL COOPERATION IN CIVIL MATTERS

Another component of the rule of law, the requirement of judicial independence, may also have an influence on the application of private international law rules through the public policy exception, particularly in relation to the recognition and enforcement of foreign judgments. This is important also because a court in an EU Member State cannot enjoin a party to bring or continue proceedings before the courts of another Member State even if it has concerns about the situation of the rule of law in that Member State.[45] According to Article 81(1) of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.]: "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases".[46] Mutual recognition of foreign decisions is therefore the cornerstone of judicial cooperation in civil matters. In the EU, mutual recognition of decisions can be linked to mutual trust between the Member

[43] For example, in Italian private international law Act No. 218/1995 (31 May 1995) provides for the public policy exception in its Article 16 and overriding mandatory provisions in Article 17. Legge 31 maggio 1995, n. 218, G.U. Giu. 03 1995, n.128 (It.) *See* concerning the public policy exception Bruno Barel & Stefano Armellini, Diritto internazionale privato [Private International Law] 84-90 (2018); Pietro Franzina, Introduzione al diritto internazionale privato [Introduction to Private International Law], 201-08 (2nd ed. 2023); Carella, *supra* note 29, at 169-72; concerning overriding mandatory norms Barel-Armellini, *supra*, at 90-95; Franzina, *supra*, at 207-11. For a comparative overview of the use of the public policy exception, Public policy and private international law (Olaf Meyer ed., 2022).

[44] *See* Oster, *supra* note 28, at 567.

[45] Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, ECLI:EU:C:2004:228 (Apr. 27, 2004); Case C-590/21, Charles Taylor Adjusting Limited and FD v Starlight Shipping Company and Overseas Marine Enterprises INC, ECLI:EU:C:2023:633 (Sept. 7, 2023).

[46] Consolidated version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326), 47-390.

States.[47] Recognition means trust in another legal order. This trust also extends to the quality of the rule of law in the country where the decision was handed down.

Within the EU, from the perspective of judicial cooperation in civil and criminal matters, judicial independence as a constituting element of the rule of law has significance not only for individual states, but also for the implementation of the entire system of judicial cooperation based on mutual trust.[48] The C.J.E.U. has confirmed on several occasions that the lack of judicial independence may justify a refusal to recognise or enforce a judicial decision rendered in another Member State.[49] Although these rulings were made in relation to judicial cooperation in criminal matters, and in particular the execution of the European Arrest Warrant, the requirement of respect for judicial independence undoubtedly applies equally to judicial cooperation in civil matters.

In cases relating to the possibility of issuing a writ of execution by notaries in Croatia under the Regulation (EU) No 1215/2012 (Brussels I Regulation)[50] and Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims,[51] the C.J.E.U. noted that in order to qualify as a 'court' within the meaning of these regulations, the decisions to be enforced had to be given in a judicial procedure that provided guarantees of independence and impartiality as well as respect for the principle of *audi alteram partem*.[52] Such a requirement derives from the principle of mutual trust.

With regard to the execution of the European Arrest Warrant, the C.J.E.U. has found that execution may be refused where it is proved, firstly, that in the issuing Member State there is a real risk that the essential content of the fundamental right to a fair trial will be infringed as a result of systemic or generalised deficiencies concerning judicial independence and, secondly, that in the case in question there are serious and proven grounds for believing that the person concerned will run such a risk if surrendered to the issuing Member State.[53] It may be assumed that similarly the

[47] Matthias Weller, *"Mutual Trust": A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?*, 423 Collected Courses Hague Acad. Int'l L., no. 1, 2022, at 37, 280-83.

[48] Hazelhorst, *supra* note 5, at 104.

[49] Case C-819/21, Staatsanwaltschaft Aachen v. M.D, ECLI:EU:C:2023:841, ¶¶ 23, 26-27 (Nov. 9, 2023); Joined Cases C-562/22 PPU and C-563/21 PPU, Openbaar Ministerie, ¶ 46; Case C-216/18, LM, ECLI:EU:C:2018:586, ¶ 59 (July 25, 2018); Joined cases C-354/20 PPU and C-412/20 PPU L and P, EU:C:2020:1033, ¶ 39.

[50] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Dec. 20, 2012, 2012 O.J. (L 351/1), recitals (1)-(32).

[51] *See* Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Apr. 30, 2004, 2004 O.J. (L 143), recitals (15)-(39).

[52] *See* Case C-551/15, Pula Parking d.o.o. v. Sven Klaus Tederahn, ECLI:EU:C:2017:193, ¶ 54 (Mar. 9, 2017). Case C-484/15, Ibrica Zulfikarpašić v. Slaven Gajer, ECLI:EU:C:2017:199,¶ 43 (Mar. 9, 2017).

[53] *See* Case C-216/18 PPU, LM, ECLI:EU:C:2018:586 (July 25, 2018); Joined cases C-354/20 PPU and C-412/20 PPU L and P, EU:C:2020:1033.

recognition and enforcement of decisions rendered in the EU in civil matters can be denied[54] and the same factors, i.e., general and concrete concerns, must be in place for the refusal of a foreign decision. Such a situation is conceivable when, generally speaking, there are serious concerns with regard to the Member State where the judgment was rendered as to respect for judicial independence and, in the specific case, the defendant's rights, including his right to be heard, have been violated. The public policy exception of the regulations on the recognition and enforcement of judgments in civil matters can be used to justify the refusal.[55] In the literature, the opinion has also emerged that the requirement relating to systemic or generalised deficiencies should be set aside in civil matters, because in contrast to criminal matters there is no need to assess prospectively the risk of violations of fundamental rights (as in the case of the surrender of a person to another Member State for the purpose of criminal prosecution or for the enforcement of a custodial sentence), but the court may establish retrospectively on the basis of evidence already available whether the decision whose recognition and enforcement is sought infringed fundamental rights.[56] However, it should be noted that no such distinction between criminal and civil matters has been made by the C.J.E.U.

4. METHODOLOGICAL CHANGE IN PRIVATE INTERNATIONAL LAW

We have seen how the substantive components of the rule of law appear in private international law, and above all how human rights are admitted into the system of private international law through the public policy exception or as overriding mandatory provisions. More generally, however, because of the impact of human rights on the application of the rules of private international law, several authors speak of a change in methodology in private international law. The Savignian model coexists with another method, the recognition method, which is based directly on an element of the rule of law, namely the respect for the human rights of the persons concerned.

[54] Armin von Bogdandy et al., *A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines*, in Defending Checks and Balances in EU Member States 385, 397-98 (Armin von Bogdandy et al. eds., 2021).

[55] *See* Brussels I Regulation, Dec. 12, 2012, 2012 O.J. (L 351), art. 45, ¶ 1 (a); Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), July 2, 2019, 2019 O.J. (L 178), at 1-115, artt. 38 (a), 39 ¶ 1 (a). *See* also Hazelhorst, *supra* note 5, at 109.

[56] *See* Hazelhorst, *supra* note 5, at 122-23.

What is not new is that private international law governs the recognition of personal status by determining the conditions and circumstances under which a status or right acquired abroad can be recognised or, on the contrary, may be refused. Indeed, private international law codes have contained provisions on the recognition of foreign decisions for a long time. Recognition of a foreign decision makes it possible to recognise the right or status established by the decision.

However, the more recent trend resulting from the judicial practice of the two major European courts, the C.J.E.U. and the E.Ct.H.R., requires recognition of legal status established abroad to a greater extent. In any event, this developing judicial practice does not leave private international law untouched. In EU law, the principle of mutual recognition has become firmly established in the law of the internal market, above all in relation to the free movement of goods, starting with the famous *Cassis de Dijon* ruling.[57] However, the requirement on recognition emerged later concerning the recognition of names acquired by Union citizens abroad[58] and the recognition of companies established in other Member States.[59] The E.Ct.H.R. confirmed in a number of decisions, particularly in relation to foreign adoption,[60] surrogate motherhood and the establishment of parental status,[61] that the recognition of foreign status is justified in order to protect, above all, the right to respect for private and family life.

For the well-known parallelity between the practices of the C.J.E.U. and the E.Ct.H.R., evidence can be found not only in the practice of the C.J.E.U., but even more so in the provisions of the Charter of Fundamental Rights of the European Union. Article 52(3) of the Charter states that: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".[62] The Charter refers explicitly to the right to respect for private and family life and to the freedom of movement and residence, whereas in the case of legal persons it is the freedom of enterprise provided for in Article 16 that prevails. This makes it easy to exchange between the practices of the two Courts in areas that are also relevant for private international law.

[57] *See* Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42 (Feb. 20, 1979).
[58] *See* Case C-353/06, Stefan Grunkin and Dorothee Regina Paul, ECLI:EU:C:2008:559 (Oct. 14, 2008).
[59] *See* Case C-208/00, Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), 2002 E.C.R. I-09919.
[60] *See* Wagner and J.M.W.L v. Luxembourg, App. no. 76240/01 (June 28, 2007), https://hudoc.echr.coe.int/eng?i=002-2645; Negrepontis-Giannisis v. Greece, App. no. 56759/08 (May 3, 2011), https://hudoc.echr.coe.int/eng?i=001-104680.
[61] *See* Mennesson v. France, App. no. 65192/11 (June 26, 2014), https://hudoc.echr.coe.int/fre?i=001-145389.
[62] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326/391), art. 52 (3).

The requirement of recognition is intended to guarantee the continuity of a legal status created in accordance with the law of a foreign state, as well as the exercise of related rights in another state to ensure the fundamental freedoms derived from EU law and the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter E.C.H.R. or Convention]. Such recognition is, of course, subject to certain conditions and limits. First and foremost, a certain connection is generally required between the person concerned and the state under whose law the status had been created. In addition, the recognition of a status established abroad may be refused for certain reasons, including the protection of public policy[63] and the prohibition of abuse of rights.[64]

As a result of the decisions of the C.J.E.U. and the E.Ct.H.R., the question has arisen as to whether the obligation of recognition, enshrined in the judgments, replaces the traditional method of private international law. This is because the principle of recognition does not depart from the question of whether the legal status was validly created under the substantive law designated by the conflict of laws rules of the forum, but rather whether this happened according to the rules of law (including the conflict of laws rules) of the foreign state. If so, the legal status validly created abroad must be recognised.[65] We can agree with the position that the C.J.E.U. and the E.Ct.H.R. require that a legal status created abroad be recognised in accordance with the provisions of the T.F.E.U. as well as the E.C.H.R. However, it is not essential how recognition is achieved and it is not determined either by EU law or the E.C.H.R.[66] This means that the traditional methods, including the conflict of laws method and the procedural recognition of foreign decisions remain applicable. What matters is the result, i.e., whether domestic law, including the conflict of laws rules and substantive rules in their interaction, renders recognition possible or not. Thus, the two approaches exist in parallel: the private international law technique based on conflict of laws rules and the recognition of foreign decisions, and the result-oriented practice of the C.J.E.U. and the E.Ct.H.R., which requires the recognition of status created abroad in order to safeguard

[63] *See* Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, ECLI:EU:C:2010:806 (Dec. 22, 2010).

[64] *See* Case C-438/14, Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, ECLI:EU:C:2016:401, ¶ 57 (June 2, 2016).

[65] Paul Lagarde, *Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures [Future Developments of Private International Law in a Unifying Europe: Some Conjectures]*, 68 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 225, 233 (2004).

[66] Christian Kohler, *Towards the Recognition of Civil Status in the European Union, in* VOLUME XV YEARBOOK OF PRIVATE INTERNATIONAL LAW 13, 21 (Petar Šarčevič et al. eds., 2014); Matthias Lehmann, *Recognition as a Substitute for Conflict of Laws?*, *in* GENERAL PRINCIPLES OF EUROPEAN PRIVATE INTERNATIONAL LAW (Stefan Leible ed., 2016); Heinz-Peter Mansel, *Anerkennung als Grundprinzip des Europäischen Rechtsraums [Recognition as a Fundamental Principle of the European Legal Space]*, 70 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 651, 678 (2006).

the fundamental freedoms of the EU, as well as the fundamental rights enshrined in the E.C.H.R. The requirement of recognition resulting from EU law and the Convention gives rise to a framework within which Member States and States Parties can shape their rules of private international law. In this way, the obligation to recognise can be fulfilled in various ways. It is a result-oriented concept.

Some of the literature considers the progressive development of the judicial practice based on the principle of recognition[67] or the establishment of a general rule of recognition in EU law[68] to be desirable, while other authors are critical of the broader application of the principle of recognition, primarily because of the lack of precise contours of the recognition.[69] In particular, it should be added that the opinion has emerged in the literature that criticises the country of origin principle, and therefore the method of recognition from the point of view of the rule of law, as undermining legal certainty.[70] From this point of view, the requirement of the rule of law related to legal certainty comes into conflict with the recognition method which sometimes derogates the traditional mechanical conflict of laws method, even if the requirement of recognition is envisaged just for the protection of fundamental rights, an essential element of the rule of law.

CONCLUSION

Although the legal literature does not pay much attention to the relationship between private international law and the rule of law, it is clear that the requirements of the rule of law have a significant impact on the method and application of private international law rules. At first glance, the mechanical approach of the classic conflict of laws method largely corresponds to the formal conception of the rule of law insofar as it emphasises legal certainty and predictability in the designation of the applicable law. However, even within the classic method, elements of the substantive rule of law can be asserted, especially through the public policy exception or overriding mandatory rules. Moreover, the requirements of the rule of law, and in particular respect for fundamental rights, also

[67] Lagarde, *supra* note 65, at 242.
[68] Lehmann, *supra* note 66, at 43.
[69] Dieter Heinrich, *Anerkennung statt IPR: Eine Grundsatzfrage [Recognition Instead of IPR: A Question of Principle]*, 25 Praxis des Internationalen Privat- und Verfahrensrechts 422 (2005).
[70] Heuzé, *Construction européenne, supra* note 5, at 130; Vincent Heuzé, *De la compétence de la loi du pays d'origine en matière contractuelle ou l'anti-droit européen [The Jurisdiction of the Law of the Country of Origin in Contractual Matters or the Anti-European Law], in* Le droit international prive: esprit et methodes [Private International Law: Spirit and Methods] 393 (2005).

influence the methodology of private international law. In addition to the classic conflict of laws method, thanks to the case law of the C.J.E.U. and the E.Ct.H.R. the method of recognition is gaining greater admission in private international law. It is not inconceivable that in the future more and more cases will arise where national courts or the C.J.E.U. will have to assess whether the application of private international law rules corresponds to the requirements of the rule of law.


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