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The Charter of Fundamental Rights of the European Union

The First Ten Years - New Challenges and Perspectives

Edited by
Vasileios G. Tzemos and Konstantinos Margaritis

Printed Edition of the Special Issue Published in *Laws*

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This is a reprint of articles from the Special Issue published online in the open access journal *Laws* (ISSN 2075-471X) (available at: www.mdpi.com/journal/laws/special_issues/european_union).

For citation purposes, cite each article independently as indicated on the article page online and as indicated below:

LastName, A.A.; LastName, B.B.; LastName, C.C. Article Title. *Journal Name* **Year**, *Volume Number*, Page Range.

ISBN 978-3-0365-2232-6 (Hbk)
ISBN 978-3-0365-2231-9 (PDF)

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Editorial

The Charter of Fundamental Rights of the European Union: The First Ten Years-New Challenges and Perspectives

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1. Introduction

Since 1 December 2009, the time when the Treaty of Lisbon came into force, the Charter of Fundamental Rights of the European Union (hereinafter: the EU Charter, the Charter) has been formally included in the EU legal order as primary EU law. In particular, article 6, para. 1 TEU reads:

> "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.".

The aforementioned provisions set the constitutional framework for the recognition and application of the Charter as a legally binding catalogue of fundamental rights. However, the history of the Charter goes back to 2000 when it was first proclaimed at the political level by the EU institutions, at Nice, on December 7, without any formal legal recognition. The incorporation of the Charter in the Treaty establishing a Constitution for Europe in 2004 proved to be unsuccessful since the French and Dutch electorate, in the respective referenda, rejected the Treaty (Margaritis 2016).

As a result, in 2019, the EU Charter of Fundamental Rights celebrated 10 years from its formal recognition as primary EU law. The aim of this Special Issue is to stimulate discussion on the past, present, and future of the Charter of Fundamental Rights of the European Union from a variety of perspectives. In particular, topics of interest included:

- The proclamation and formal recognition of the Charter: historical aspects;
- The substantive law of the Charter: Theoretical and doctrinal approaches on the rights;
- The scope of the Charter;
- The formulation of the rights of the Charter through the CJEU case law;
- Judicial dialogue between the CJEU and the ECtHR;
- The principle of proportionality and limitation of the rights of the Charter;
- The role of the Charter in the composite constitutionalism in Europe;
- The future of the Charter;
- Interdisciplinary approaches to human rights in Europe.

Citation: Tzemos, Vasileios G., and Konstantinos Margaritis. 2021. The Charter of Fundamental Rights of the European Union: The First Ten Years-New Challenges and Perspectives. *Laws* 10: 76. https://doi.org/10.3390/laws10040076

Received: 27 September 2021
Accepted: 28 September 2021
Published: 30 September 2021

2. The Content of the Charter

The rights included in the Charter have been categorised into six different thematic titles, each reflecting a core value of the European Union; these are Dignity (art. 1–5), Freedoms (art. 6–19), Equality (art. 20–26), Solidarity (art. 27–38), Citizens' rights (art. 39–46) and Justice (art. 47–50). Apart from the substantive part, the final title VI contains general provisions governing the interpretation and the application of the Charter (Tzemos 2019; Kellerbauer et al. 2019; Peers et al. 2021).

It is worth briefly mentioning article 52 on the scope and interpretation of rights and principles. According to that provision:

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. 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. This provision shall not prevent Union law from providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

From the grammatical interpretation of the provision, the reference to all main fundamental rights protection elements in Europe, at the national, EU and ECHR levels can be observed. Indeed, paragraph 2 refers to the rights included in the Treaties, paragraph 3 underlines the relations with the rights of the ECHR, paragraph 4 includes the concept of constitutional traditions common to the member states and paragraph 6 refers to national laws and practices. In that sense, the Charter becomes the center of fundamental rights protection in EU, which substantially and creatively interacts with all other fundamental rights protection elements in Europe to form a composite European legal order (Besselink 2007).

3. The Content of the Special Issue

The Special Issue is composed of seven very intriguing articles written by leading scholars from different scientific backgrounds. The articles are the following:

- Avtonomov, A. Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance. Laws 2021, 10, 51. https://doi.org/10.3390/laws10030051.
- Pillay, N. The Promise of the EU Charter of Fundamental Rights (and Brexit) on the Implementation of Economic and Social Rights among EU Member States. Laws 2021, 10, 31. https://doi.org/10.3390/laws10020031.

- Kyriakopoulos, G.L. Environmental Legislation in European and International Contexts: Legal Practices and Social Planning toward the Circular Economy. Laws 2021, 10, 3. https://doi.org/10.3390/laws10010003.
- Eksteen, R. Diplomatic and Consular Protection with Special Reference to Article 46 of the EU Charter of Fundamental Rights. Laws 2020, 9, 32. https://doi.org/10.3390/laws9040032.
- Campbell, J.R. Interrogating the Role and Value of Cultural Expertise in Law. Laws 2020, 9, 29. https://doi.org/10.3390/laws9040029.
- Glover-Thomas, N. A 'Wellbeing' Paradigm: A Concept-Based Study of Body Art and Regulatory Challenges. Laws 2020, 9, 22. https://doi.org/10.3390/laws9040022.
- Baros, M. The UK Government's Covid-19 Response and Article 2 of the ECHR (Title I Dignity; Right to Life, Charter of Fundamental Rights of the EU). Laws 2020, 9, 19. https://doi.org/10.3390/laws9030019.

The articles reflect an interdisciplinary approach to fundamental rights from a doctrinal and practical perspective. This Special Issue is oriented towards the academic community and practitioners with a broad interest in human rights from a variety of disciplines. Scholars interested in institutional and substantive human rights law and general legal audience having an interest in human rights, academics, researchers and students will find this Special Issue useful in furthering their research exposure to pertinent topics in human rights and assisting in furthering their own research efforts in this field.

At this point, we would like to warmly thank all authors for submitting their valuable contributions to our Special Issue, the Editorial Office of the Journal *Laws* for believing in our proposal, especially the Managing Editor of the Journal Ms. Farrah Sun, for her continuous support throughout the whole process of publication.

Author Contributions: Conceptualization, V.G.T. and K.M.; methodology, V.G.T. and K.M.; software, V.G.T. and K.M.; validation, V.G.T. and K.M.; formal analysis, V.G.T. and K.M.; investigation, V.G.T. and K.M.; resources, V.G.T. and K.M.; data curation, V.G.T. and K.M.; writing—original draft preparation, V.G.T. and K.M.; writing—review and editing, V.G.T. and K.M.; visualization, V.G.T. and K.M.; supervision, V.G.T. and K.M.; project administration, V.G.T. and K.M.; funding acquisition, V.G.T. and K.M. All authors have read and agreed to the published version of the manuscript.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The authors declare no conflict of interest.

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Article

Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance

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Abstract: The adoption of the Charter of Fundamental Rights has strengthened the position of the European Ombudsman, since the Charter contains an article specifically dedicated to the Ombudsman. At the same time, the Ombudsman, through her/his practice, contributes to the implementation in the everyday life of the provisions of the Charter and their further development. The consolidation and development of the provisions of the Charter by the European Ombudsman have proceeded especially rapidly since the Charter of Fundamental Rights received the status of a binding act. Due to the fact that the right to "good administration" contained in the Charter of Fundamental Rights has become one of the basic human rights in the EU since the Charter became legally binding, the competence of the European Ombudsman has acquired a new substantive and factual (functional) content, expanding her/his ability to positively influence the EU administration in the field of governance and respect for fundamental rights. This article examines, based on legal acts, statistical and other factual data, the interrelated issues (such as institutional and human dimensions of European integration) of ensuring the effectiveness of the Charter of Fundamental Rights through the activities of the European Ombudsman.

Keywords: the Charter of Fundamental Rights; the European Ombudsman; good administration; the right to good administration; maladministration; the European Union; human rights; a complaint to the European Ombudsman; an inquiry of the European Ombudsman

Citation: Avtonomov, Alexei. 2021. Activities of the European Ombudsman under the Charter of Fundamental Rights: Promoting Good Administration through Human Rights Compliance. *Laws* 10: 51. https://doi.org/10.3390/laws10030051

Received: 15 March 2021
Accepted: 14 June 2021
Published: 22 June 2021

1. Introduction

The Charter of Fundamental Rights needs an institutional mechanism for its adequate implementation. The European Ombudsman is one of the institutions that contributes to putting the Charter into practice. As it is stated in the Principles on the Protection and Promotion of the Ombudsman Institution (the Venice Principles), adopted by the Venice Commission (the Commission for Democracy through Law) on the 15–16 March 2019 and endorsed by the Council of Europe's Committee of Ministers on the 2 May 2019, "Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms" (Principle 1)[1]. Some scholars contrast the work of human rights protection with the work of improving public administration in the work of the Ombudsman. For example, Najmul Abedin distinguishes between a so-called classical/original ombudsman, who focuses the efforts on good governance promoting and on administration (in its citizens treatment) improving, and a so-called human rights ombudsman (as well as hybrid and deviant models of ombudsman)[2]. Najmul Abedin shares, and to an extent follows, the

[1] The Principles on the Protection and Promotion of the Ombudsman Institution (the Venice Principles). Opinion No. 897/2017. CDL-AD(2019)005. Or. Eng. Strasbourg, 2019, p. 3. Digital format: https://www.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e (accessed on 20 February 2021).

[2] (Abedin 2011)

classification of an ombudsman institution offered by Linda Reif, who clusters those institutions into classical ombudsmen and human rights (and other hybrid or specialized) ombudsmen and explores their role in good governance and human rights protection at the domestic and international levels (the European Ombudsman case also covered by this study)[3]. According to these classifications in principle, human rights ombudsmen, set up in new democracies and post-conflict peace-building processes, are opposed to classical ombudsmen working in old and stable democracies, though the methods by which both human rights and classical ombudsmen can use international and domestic human rights law and act to promote and protect human rights are shown. Meanwhile, some authors consider a notion of a "hybrid ombudsman" differently. Mala Sharma, for instance, sees a hybrid ombudsman as a transitional institution combining the features of a classical and organizational (i.e., created by a private or public organization for mediation purposes) ombudsmen[4]. Certain experts describe a dichotomy of maladministration redress and human rights protection in the ombudsman's activities as a development of the institution: "The scope of an ombudsman's mandate has expanded from purely redressing maladministration by government institutions to also considering whether human rights violations have taken place, with the purpose of remedying relevant power imbalances and enabling individuals to effectively enjoy economic and social rights"[5]. Therefore, as a matter of fact, executive ombudsmen (working as a part of an administration) and ombudsmen appointed by organizations to resolve internal disputes are just quasi-ombudsmen. Any real ombudsman exercises control over the activities of the public administration but does this primarily through the prism of considering individual complaints of individuals and legal entities against the actions or omissions of administrative bodies and civil servants, while complaints arise as a result of violations of the rights and/or legitimate interests of a particular person or specific persons by the actions or omissions of an authority or civil servant. Therefore, promoting good administration/repairing maladministration, on the one hand, and protecting human rights, on the other hand, are, to my mind, two sides of the same coin and that is why they are inseparable in the work of an ombudsman since the very beginning till now. Just as we look at one or the other side of the coin at a particular moment, so we can attach more importance to one or another aspect of the ombudsman's work at a certain period or under certain circumstances, but this does not mean that any of the aspects do not exist or are less important in principle.

Thus, a fusion of good administration promotion and human rights protection backed by the Parliament is a characteristic feature of any real (not quasi) ombudsman. However, I am supposed to refrain myself from developing this thesis because it is outside of the scope of the topic designated in the title of the present article, it is only a related issue. Meanwhile, this characteristic feature is relevant for the European Ombudsman (as for any other ombudsman in general). Additionally, it is not by chance that the European Ombudsman has been instituted by the Maastricht Treaty, in which "citizenship of the Union is hereby established" (Article 8(1))[6] and the aim "to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union" was proclaimed (Article B)[7]. Nevertheless, only the following few rights were fixed fragmentary and lapidary in the Maastricht Treaty itself: the right to move and reside within the territory of the Member States (Article 8a), the right to vote and stand as a candidate at municipal elections and in elections to the European Parliament (Article 8b) and the right to petition to the European Parliament (Article 8d)[8]. The European Ombudsman is mentioned twice in the Maastricht Treaty: in Article 138e[9]

[3] (Reif 2004)
[4] (Sharma 2020)
[5] (Beqiraj et al. 2018)
[6] Treaty of European Union. Brussels-Luxembourg, 1992, p. 15.
[7] Ibid., p. 8.
[8] Ibid., pp. 15–16.
[9] Ibid., p. 63.

(the Part Five "Institutions of the Community"), dealing with complaints and self-initiated inquiries in case of maladministration and in Article 8d[10] (the Part Two "Citizenship of the Union"). While the role of the European Ombudsman in the mechanism of overcoming maladministration is quite clear within the provisions of the Maastricht Treaty, the human rights of European citizens are predominantly implied and might be only derived from the provisions dedicated to labor, social, educational, cultural policies and the reference to the European Convention for the Protection of Human Rights and Fundamental Freedom (Article F(2))[11], but they are not stipulated directly except a few of them, as mentioned earlier. The European Ombudsman, as an office combining the function of improving the quality of administration and the function of protecting human rights for effective activity, needs to have institutional opportunities and competence fixed and to have an unambiguous catalog of human rights enshrined. Such circumstance helps to understand the reason why the European Ombudsman has been interested in adopting the Charter of Fundamental Rights and in making it a binding act, as well as has contributed to its drafting. Additionally, it helps to understand the reason why the institution of the European Ombudsman was set up by the Maastricht Treaty (being mentioned in its two different parts) and why the European Ombudsman, since being founded, acquired the competence to react to individual complaints, as well as how the institution of the European Ombudsman evolved along with the development of European integration in general, including its institutional framework and citizenship. However, these issues are merely related to the subject of this article reflected in its title and cannot be studied thoroughly.

Therefore, since its inception in the beginning of the 19th century, an Ombudsman as an institution has been aimed at performing the following two functions: promoting the improvement of public administration and protecting the human rights violated as a result of actions or omissions of public authorities and civil servants. In the work of any ombudsman, both of these functions are tightly linked, one to the other, intertwined and manifested, although in specific conditions either one or the other may come to the fore. Despite a fairly large number of publications devoted separately to the problems of the implementation of the Charter of Fundamental Rights and the activities of the European Ombudsman, nevertheless, there is not enough research focused specifically on ensuring the effectiveness of the Charter's provisions thanks to the work of the European Ombudsman. This article is aimed at filling this gap.

A wide range of studies are dedicated to the understanding of good administration, its promotion and maladministration redressing, as well as to the role of ombudspersons both at the national[12] and supranational[13] levels. Some scholars study international law standards in this sphere[14]. Certain experts link maladministration to corruption; for instance, Francesco Merloni made an interesting exploration in this field with in-depth suggestions, but primarily addressed them to the Anti-Corruption Authority rather than to the Ombudsman[15]. Meanwhile, the European Ombudsman takes a broader approach to maladministration than just corruption (by the way, Francesco Merloni does not equate in his monograph maladministration and corruption). Certain neighboring countries borrow the European experience in the field of administration and the ombudsman's activities, adapting them to a specific country, as it is shown, for instance, by Elvettin Akman and Ahmed Özaslan for Turkey ("In particular, Western countries create different areas of complaint under the umbrella of the Ombudsman so that employees and citizens are not harmed by failures in public institutions ... The establishment of an ombudsman institution determined in principle in the plans was decided by popular vote in 2010. The main characteristic of the Ombudsman is to adopt citizen-oriented work and to make

[10] Ibid., p. 16.
[11] Ibid., p. 9.
[12] For instance: (Addink 2015a); (Stanton and Prescott 2018).
[13] For example: (Börzel et al. 2008)
[14] For example: (Addink 2015b)
[15] (Merloni 2019)

advisory decisions on complaint issues")[16] or by Alireza Dadashzadeh, Ali Babaei Mehr and Maryam Afshari for Islamic Law countries[17]. However, issues of good administration and maladministration are not the main issues within the theme reflected in the title of the present article, although they are related to this theme. That is why I will not explore good administration and maladministration as they are and even will not cite the European Ombudsman's soft law instruments dealing with good administration; I will focus my efforts on studying the implementation of the Charter of Fundamental Rights, including the right to good administration, to the extent necessary to learn the application of the Charter.

2. The European Ombudsman Institution and the Charter of Fundamental Rights

The European Ombudsman institution was set up by the Maastricht Treaty and the first Ombudsman was elected by the European Parliament in 1995. Initially, the European Ombudsman was able to promote overcoming maladministration within the system of bodies and institutions of the European Communities and the European Union. Meanwhile, in the 1990s only a few human rights were directly provided for at the supranational level and having been under the European Ombudsman's jurisdiction; however, individuals believed in the human rights defending mission of the European Ombudsman, lodging complaints before she/her assumed office and even before the election of the first Ombudsman (12 July 1995). By the day of the solemn undertaking before the Court of Justice of the European Communities in Luxembourg (27 September 1995), "53 complaints had already been registered, the first dating back to 8 April 1994"[18]. One of those rights within the European Ombudsman's competence, for instance, is devoted to public access to documents of European Communities and Union institutions and bodies and was investigated in a special report from the European Ombudsman to the European Parliament following an own-initiative inquiry[19] in 1996–1997[20]. However, in general, in the early period of the European Ombudsman's history, human rights were regulated predominantly at a national level. The adoption of the Charter of Fundamental Rights has strengthened the position of the European Ombudsman, as the Charter deals directly with human rights and the role of the Ombudsman. At the same time, the European Ombudsman has the tools to ensure compliance with and the implementation of the Charter's provisions. The first European Ombudsman himself took part in the Convention, which prepared and approved the Charter of Fundamental Rights, and contributed to its editing[21]. Jacob Söderman impacted the further promotion of the Charter after its proclamation in Nice in 2000: "My main goal at the Convention on the question of fundamental rights was to see to it that the Charter of Fundamental Rights become legally binding within the scope of European law"[22]. His successors in the office of the European Ombudsman continued his work, and this goal was achieved. The second European Ombudsman, Paraskevas Nikiforos Diamandouros, in his speech, pronounced on 23 May 2011, stressed that the Lisbon Treaty with the Charter of Fundamental Rights, incorporated as a legally binding act, broadened the Ombudsman's mandate in two main ways[23]. These were, according to Nikiforos Diamandouros, "firstly, before the Lisbon Treaty, the Ombudsman's mandate was limited to the first, 'Community',

16 (Akman and Özaslan 2019)

17 (Dadashzadeh et al. 2019)

18 (Söderman 2005)

19 "The Statute—Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties" contains the terms "enquiry" (for example, in Articles 3 and 5) and "inquiry" (for instance, in Article 4) while "the Implementing Provisions—Decision of the European Ombudsman adopting Implementing Provisions" and all other documentation issued by the European Ombudsman use the term "inquiry" (the acts cited are posted on the official website of the European Ombudsman). Despite the semantic proximity of these words, there are nuances in the meaning of each of them, which can lead to their different understanding. Numerically, the word "inquiry" prevails in the documentation of the European Ombudsman and in relation to the European Ombudsman; that is why I use it in the present article without any reservation and even when I refer to the content of the mentioned "Statute".

20 Special report of the European Ombudsman to the European Parliament following the own-initiative inquiry into public access to documents (616/PUBAC/F/IJH). In *Official Journal of the European Union*. C 044, 10.02.1998, pp. 0009—0014.

21 (Söderman 2005)

22 Ibid., p. 102.

23 https://www.ombudsman.europa.eu/en/speech/en/10496 (accessed on 24 February 2021).

pillar and the third pillar, that is, police and judicial cooperation in criminal matters. The Ombudsman was not empowered to open inquiries in relation to actions in the field of Common Foreign and Security Policy. However, after the Treaty of Lisbon abolished the so-called 'pillar' structure of the EU, the former second pillar—the Common Foreign and Security Policy—now also falls within the Ombudsman's mandate"[24], and "secondly, the European Council is now explicitly included in the Union's institutions. As a result, its actions or omissions now also fall within the Ombudsman's mandate"[25]. His statement was made a year after the Charter became enforceable; over ten years much more data has been accumulated for research and generalization.

Thus, the third European Ombudsperson, Emily O'Reilly, issued, in 2018, a Special Report in Strategic Inquiry on the Transparency of the Council Legislative Process[26], in which maladministration was found; therefore, the right to good administration, stipulated in Article 41 of the Charter of Fundamental Rights, was violated. The Council did not implement a number of the Ombudsman's recommendations, including eliminating the widespread practice of restricting access to legislative documents during the decision-making process; therefore, the report was sent to the European Parliament in search of support, as the Ombudsman considers transparency important for the democratic rule of law of the European Union (EU). The European Parliament overwhelmingly supported the Ombudsman's proposals in early 2019, and ten Member States took the lead, backing an inter-institutional legislative database, and suggesting that the guidelines on marking documents as restricted from public access be updated, and that the outcome of negotiations on draft laws be proactively published[27]. Therefore, the right to good administration plays an important role in the activities of the European Ombudsman.

The right to good administration was incorporatedat one time into the Charter of Fundamental Rights by the efforts of the European Ombudsman. Klara Kańska argues that the right to good administration is a new fundamental right that emerged at the turn of the 20th and 21st centuries. She gives a high assessment of this fundamental right, shows its doctrinal basis and more immediate origins. Analyzing and commenting on Article 41 of the Charter, she comes to the conclusion that, although Article 41 is a significant development in terms of individual administrative rights, it offers a one-sided vision of the function of administrative law[28]. Since Klara Kańska wrote this article (2004), the right to good administration has been developed at a doctrinal and practical level.

Actually, the protection of the right to good administration, which is, in fact, the reverse side of the fight against maladministration, serves as the basis for the consideration of complaints, as well as for conducting an inquiry on the own initiative of the European Ombudsman. In the words of Koen Lenaerts, "Just like certain Treaty provisions and general principles of EU law, the CJEU (the Court of Justice of the European Union—A.A.) has held that a fundamental right enshrined in a provision of the Charter may produce horizontal direct effect, provided that such a Charter provision is sufficient in itself and does not need to be made more specific by other provisions of EU or national law to confer on individuals a right on which they may rely as such"[29]. Nevertheless, there are correlations between the provisions of the acts that ensure their mutual complementarity and harmonious application.

3. Initiation of Ombudsman's Proceedings

Article 43 of the Charter of Fundamental Rights provides for the lodging of a complaint with the European Ombudsman: "Any citizen of the Union and any natural or legal person

[24] Ibid.

[25] Ibid.

[26] Case OI/2/2017/TE, opened on 10 March 2017, decision on 15 May 2018, https://www.ombudsman.europa.eu/en/special-report/en/94921 (accessed on 24 February 2021).

[27] European Ombudsman. Annual Report 2019, https://www.ombudsman.europa.eu/en/annual/en/127393 (accessed on 24 February 2021).

[28] (Kanska 2004)

[29] (Lenaerts 2019)

residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role"[30]. Some details are added by Article 228 (ex-Article 195 TEC) of the Treaty on the Functioning of the European Union[31]. The first subparagraph of paragraph onein this article has almost the same formula as Article 43 of the Charter: "A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them". Meanwhile, the second subparagraph of the mentioned paragraph prescribes further actions: "In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries". Therefore, the general basis for starting an inquiry is the assumption that there may be an instance of maladministration in the activities of an institution, body, office or agency of the EU. This can be either the assumption of the applicant filing the complaint, or the assumption of the European Ombudsperson himself/herself, due to the fact that she/he has the right to initiate investigations on his/her own initiative.

Maladministration, which serves as the ground for an Ombudsman's inquiry, is quite a broad notion. Significantly, for the subject of the present article, the European Ombudsman, since the very beginning (i.e., since 1995), has linked maladministration inter alia with a lack of respect for fundamental rights as a duty of community institutions, though it is not limited to a lack of such respect[32]. It is obvious that "maladministration" is a phenomenon opposite to "good administration". However, what is "good administration", the violation of the right to which causes the Ombudsman's action? The answer to this question can be found primarily in Article 41 of the Charter of Fundamental Rights, which deals with the right to good administration. Thus, Article 41(2) reads that the right to good administration includes "(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions". However, this list of elements of the right to good administration cannot be considered exhaustive.

The Statute—Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties (as amended—adopted in 1994, amended in 2002 and 2008)[33] and the Implementing Provisions—Decision of the European Ombudsman adopting Implementing Provisions of 2016[34] cannot help, because these acts have neither definitions nor features describing "good administration" or "maladministration". Nevertheless, the notion of good administration (as well as mal-

[30] The Charter of Fundamental Rights is cited from: *Official Journal of the European Union*. C 326/391, 26 October 2012, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012P/TXT (accessed on 25 February 2021).

[31] The Treaty on the Functioning of the European Union is quoted from: *Official Journal of the European Union*. C 326/47, 26October 2012, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN (accessed on 25 February 2021).

[32] See: European Union. The European Ombudsman. Report for the Year 1995. Strasbourg, 1996, p. 8.

[33] Cited from: https://www.ombudsman.europa.eu/en/legal-basis/statute/en (accessed on 25 February 2021).

[34] Quoted from: https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en (accessed on 25 February 2021).

administration) has a certain volume, the limits of which should not be set arbitrarily. It is through the limitation of rights permitted by the Charter itself that the scope of each right and, therefore, the volume of the mentioned notion can be perceived. The Charter contains a category of the essence of a right, which gives a clue to setting the scope of each fundamental right: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms" (Article 52(1)). Koen Lenaerts, analyzing Article 52 of the Charter and the practice of its application by the Court of Justice of the European Union, has come to a conclusion: "As an absolute limit on limitations, the essence of a fundamental right defines a sphere of liberty that must always remain free from interference"[35]. Bearing all this in mind, let us turn to the practice of the European Ombudsman.

The subject matters of the inquiries conducted by the European Ombudsman gives everyone an understanding of the elements constituting maladministration. The 2019 Annual Report of the European Ombudsman enumerates the following subject matters: transparency and accountability (e.g., access to information and documents); culture of service (e.g., citizen-friendliness, languages and timeliness); proper use of discretion (including in infringement procedures); respect for procedural rights (e.g., the right to be heard); good management of EU personnel issues; recruitment; respect for fundamental rights; sound financial management (e.g., concerning EU tenders, grants and contracts); ethics; public participation in EU decision-making; and other[36]. The same classification of the elements of maladministration, which served as the subject matters for the Ombudsman's inquiries, was used previously, including, for example, in 2018[37]. By the way, even this list of subject matters is not exhaustive, and yet it provides an insight into the understanding of the signs of maladministration versus good administration in the context of the Charter of Fundamental Rights and the practices of the European Ombudsman. The signs and content of good administration (as well as maladministration) are still discussible and are considered and construed in courts' rulings, the decisions of sundry bodies and institutions, scientific monographs and articles; but, as mentioned earlier, the detailed analysis of good administration (and maladministration) is beyond the scope of this article as it follows from its title, and it is studied in so far as it is necessary to understand the peculiarities of the application of the Charter of Fundamental Rights by the European Ombudsman.

Consistent with Article 3 of the Implementing Provisions, the European Ombudsman determines the admissibility of a complaint from the point of view of her/his mandate and a complaint's subject matter. The Secretariat may request the complainant to provide further information or documents to enable the Ombudsman to make that determination. A complaint recognized as admissible is assessed by the Ombudsman to decide whether there are grounds to inquire into it (Table 1).

[35] (Lenaerts 2019)

[36] European Ombudsman. Annual Report 2019, https://www.ombudsman.europa.eu/en/annual/en/127393 (accessed on 24 February 2021).

[37] European Ombudsman. Annual Report 2018, https://www.ombudsman.europa.eu/en/annual/en/113728 (accessed on 24 February 2021).

[38] The European Ombudsman. Annual Report for 1996. Luxembourg, 1997, p. 102.

[39] The European Ombudsman. Annual Report for 1997. Luxembourg, 1998, p. 311.

[40] The European Ombudsman. Annual Report for 1998. Luxembourg, 1999, p. 295.

[41] The European Ombudsman. Annual Report for 1999. Luxembourg, 2000, p. 289.

[42] The European Ombudsman. Annual Report 2000. Luxembourg, 2001, p. 245.

[43] The European Ombudsman. Annual Report 2001. Luxembourg, 2002, p. 269.

[44] The European Ombudsman. Annual Report 2002. Strasbourg, 2003, p. 261.

[45] European Ombudsman. Annual Report 2017, https://www.ombudsman.europa.eu/en/annual/en/94827 (accessed on 24 February 2021).

[46] European Ombudsman. Annual Report 2018, https://www.ombudsman.europa.eu/en/annual/en/113728 (accessed on 24 February 2021).

[47] European Ombudsman. Annual Report 2019, https://www.ombudsman.europa.eu/en/annual/en/127393 (accessed on 24 February 2021).

Table 1. Number of complaints outside and within the European Ombudsman's mandate.

Year	Number of Complaints Outside the European Ombudsman's Mandate	Number of Complaints within the European Ombudsman's Mandate
1996	598	323
1997	998	368
1998	911	411
1999	1140	414
2000	1241	482
2001	1306	524
2002	1663	653
2003	1767	603
2004	2729	930
2005	2673	811
2006	2768	849
2007	2401	870
2008	2544	802
2009	2392	727
2010	1983	744
2011	1846	698
2012	1720	740
2013	1665	750
2014	1427	736
2015	1239	707
2016	1169	711
2017	1430	751
2018	1300	880
2019	1330	871

Sources: European Ombudsman. Annual Report for 1996[38], European Ombudsman. Annual Report for 1997[39], European Ombudsman. Annual Report for 1998[40], European Ombudsman. Annual Report for 1999[41], European Ombudsman. Annual Report 2000[42], European Ombudsman. Annual Report 2001[43], European Ombudsman. Annual Report 2002[44], European Ombudsman. Annual Report 2017[45], European Ombudsman. Annual Report 2018[46], European Ombudsman. Annual Report 2019[47].

Thus, a steady, long-term trend consists in a significant excess of the number of complaints outside the scope of the Ombudsman's mandate over those within her/his mandate. In 2011, the European Ombudsman adopted a new procedure for dealing with complaints falling outside the mandate. The Ombudsman Office's Registry treats those complaints with a view to explain to applicants the reasons they considered each specific complaint as falling outside the European Ombudsman's mandate and the possibility, if it is the case, of handing a complaint in to another competent body or consulting the applicant on where to turn. Meanwhile, applicants have the right to make a justified request for the European Ombudsman to reconsider the decision on recognizing a complaint as falling outside the mandate. According to the Ombudsman, this procedure, introduced in 2011, for handling such complaints has significantly reduced the amount of time needed to respond to complainants in cases falling outside the Ombudsman's mandate[48]. This 2011 change of procedure for handling complaints that are outside the European Ombudsman's

[48] European Ombudsman. Annual Report 2012. Luxembourg, 2013, p. 16.

mandate has special importance due to the fact that the majority of complaints received by the Ombudsman have been and are outside her/his mandate.

One can notice another trend: the overall quantity of complaints lodged with the European Ombudsman increased after the adoption of the Charter of Fundamental Rights by the European Parliament in December 2000. Obviously, it was the result of the appearance of the catalog of the rights of a citizen of the European Union. In spite ofthe uncertain legal status of the Charter of Fundamental Rights and the absence of its binding force at that time, this document oriented the European Ombudsman in the efforts to protect human rights in connection with maladministration redress, taking into account the peculiarities of the Ombudsman's work, such as providing mediation and giving recommendations to bodies and institutions. It is noteworthy that, on the contrary, the entry of the Charter of Fundamental Rights into legal force in December 2009 led to a reduced number of complaints filed with the European Ombudsman. The full legal effect of the Charter of Fundamental Rights, on the one hand, has consolidated the official capacities of the European Ombudsman, while, on the other hand, it has given EU citizens access to other human rights protection mechanisms, including judicial ones, and complaints are scattered across different mechanisms.

The time limit prescription for filing a complaint with the European Ombudsman is two years from the moment when the person became aware of the facts that served as its basis. The lodging of a complaint must be preceded by an appeal to the institution or body concerned. The filing of a complaint with the European Ombudsman does not affect the statute of limitations for administrative or judicial remedies. The complaint must allow the person lodging the complaint and the object of the complaint to be identified; the person lodging the complaint may request that her/his complaint remain confidential.

The European Ombudsman is competent to conduct own-initiative inquiries for which the Ombudsman finds grounds. The procedures applicable to inquiries opened following a complaint can be applied by the Ombudsman, to the extent that they are relevant, to own-initiative inquiries. The number of inquiries conducted by the Ombudsman on her/his own initiative is significantly less than the number of inquiries carried out on the basis of complaints. For example, in 2019 the European Ombudsman opened 456 inquiries on the basis of complaints and only 2 own-initiative inquiries and closed 552 complaint-based inquiries and 8 own-initiative inquiries[49]. Nevertheless, inquiries conducted on the Ombudsman's own initiative look into issues of significant public interest. They enable the European Ombudsman to investigate what appear to be systemic problems in the EU bodies, offices, institutions and agencies and promote positive developments in key areas of activity. For instance, case OI/3/2017/NF was opened by the European Ombudsman on 27 March 2017 with the adoption of her decision on 28 February 2019[50] on How the European Commission Manages "Revolving Doors" Situations of Its Staff Members, and this case deals with a conflict of interest and lobbying in the EU at the Union level.

4. Inquiry Procedure

Upon receiving a complaint and finding it admissible, the European Ombudsman must immediately inform the institution, office, agency or body concerned. The Ombudsman must also inform the person who filed the complaint as soon as possible about the actions that she/he has taken on it, as it is provided for in Article 2 (paragraphs 2 and 9) of the Statute—Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties. The Ombudsman may, aimed at conducting an inquiry, prompt the petitioner or any third party to supply the Ombudsman with information or documents, or to give explanations regarding the information or documents already delivered to the Ombudsman. The Ombudsman may also invite an applicant to meet with him/her to spell out questions concerning the inquiry.

[49] European Ombudsman. Annual Report 2019, https://www.ombudsman.europa.eu/en/annual/en/127393 (accessed on 24 February 2021).

[50] https://www.ombudsman.europa.eu/en/decision/en/110608#_ftn64 (accessed on 25 February 2021).

The European Ombudsman has the right to request the relevant institution, body, office or agency to provide a response to the applicant's allegations and to express its opinion on concrete elements of the allegations and on questions linked to the complaint.

The European Union institutions, offices, agencies and bodies are obliged to supply the Ombudsman with any information she/he has requested from them and give her/him access to the files concerned. Officials and other servants of EU institutions, offices, agencies and bodies must testify at the request of the Ombudsman.

Access to classified information or documents, in particular to sensitive documents within the scope of Article 9 of Regulation (EC) No 1049/2001[51], shall be subject to compliance with the rules on security of the community institution, office, agency or body concerned. The institutions, offices, agencies or bodies supplying classified information or documents, as mentioned in the previous subparagraph, shall inform the Ombudsman of such classification. The European Ombudsman is to negotiate, preliminarily with relevant agencies, bodies, offices or institutions, the conditions for handling secret information or documents and other information subject to the requirement of professional privacy. The pertinent institution, agency, office or body has to grant access to sundry documents emanating from a Member State and proclaimed to be confidential in consistency with law or regulation only if that Member State has given its foregoing consent. They are to grant the right to use other documents originating in a Member State after having informed the relevant Member State. The Ombudsman has no right to make public the content of such documents. The Ombudsman may, for the protection of the legitimate interests of the complainant or of a third party, classify information in any documents, including those submitted by an applicant, as privy to the Ombudsman's own initiative.

It is not only the institutions, bodies, offices and agencies of the EU, but also the bodies of the EU Member States, that are obliged to provide the European Ombudsman with any information that may contribute to the identification of violations of good administration. The exceptions are cases where such information is subject to laws and regulations on secrecy or provisions that do not allow its transfer. However, even in this case, the EU Member State concerned may allow the European Ombudsman to obtain this information, provided that she/he guarantees its non-disclosure.

The Ombudsman is entitled to hold possession of the documents gained from an institution or a Member State in the course of an inquiry and declared to be secret by that institution or Member State, only for the period of the inquiry. The Ombudsman may ask an institution or Member State to keep such documents for a duration of at least five years, notifying them after this time frame that the Ombudsman no longer holds the documents.

Responses to the questions of the European Ombudsman and requests for documents and information must be made by the institutions, bodies, offices and agencies within the time limits specified by the Ombudsman, which under normal conditions should not exceed three months. The exact time frame for providing a response should be reasonable, taking into account the complexity and urgency of the inquiry. If the European Ombudsman considers that the inquiry is of public interest, the time frame for a response should be as short as possible. If the institution, body, office or agency concerned cannot provide a response to the Ombudsman within the established time frame, it must submit a reasonable request for an extension. If the Ombudsman considers it appropriate to do so, the Ombudsman may take steps to ensure that a complaint is dealt with as a matter of priority, taking into account strategic objectives.

The Ombudsman may make public non-confidential information about the progress of an inquiry. In particular, in inquiries of public interest, the Ombudsman may publish the letters the Ombudsman sends to the institutions or Member States, and the replies thereto (Article 9.3 of the Implementing Provisions[52]).

[51] *Official Journal of the European Communities*. L 145/45, 31 May 2001, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN (accessed on 25 February 2021).

[52] Implementing Provisions—Decision of the European Ombudsman Adopting Implementing Provisions, https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en (accessed on 28 February 2021).

If the assistance that she/he requests is not forthcoming, the Ombudsman should inform the European Parliament, which is supposed to make appropriate representations (Article 3(4)of the Statute—Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties). According to Article 4(4.9)[53] of the Implementing Provisions, if an institution or a Member State does not provide the Ombudsman with assistance, the Ombudsman shall remind the institution or Member State concerned why that assistance is necessary. If, after discussion with the institution or Member State concerned, the matter cannot be resolved to the satisfaction of the Ombudsman, the Ombudsman has the competence to inform the European Parliament and request it to take whatever action it considers appropriate.

The Ombudsman should inform the applicant of the advancement of the inquiry, as appropriate. If the Ombudsman believes it necessary to explain to the applicant any component of the institution's answer to the Ombudsman, the Ombudsman may choose to supply the applicant with the relevant institution's response. If the Ombudsman makes such a decision, she/he may also hand in to the applicant a duplicate of the Ombudsman's message to the institution asking for an answer.

The Ombudsman may commission any studies or expert reports that he or she considers relevant to the inquiry. For example, the Decision of the European Ombudsman closing her own-initiative inquiry, OI/8/2014/AN, opened on 19 May 2014, with the adoption of the decision on 11 May 2015, regarding the extent of the compliance of the European Commission EU cohesion policy with the fundamental rights enshrined in the Charter of Fundamental Rights[54] is based on a profound study of the replies and reports received from the European Commission, the national ombudspersons of EU States Members and a range of civil society organizations concerned. The "European Ombudsman Strategy: 'Towards 2024'—Sustaining Impact" (document adopted on 07 December 2020[55]) provides for conducting research in at least the following two paragraphs: priority four in objective one ("Develop a more systematic and substantive follow-up of our work. Revise how we assess the medium to longer-term impact of our recommendations, suggestions and every other tool we use in order to influence positive change") and priority two of objective two ("Increase our awareness of the changing dynamics of the EU and the political, social, economic and legal context in which we operate, and where appropriate, to engage in, and contribute to, relevant debates and developments on European democracy"), although the achievement of other priority objectives also seems to involve research, albeit in a less explicit form.

Thus, the rules of inquiry procedure manifest the discretionary powers of the European Ombudsman, supported by the corresponding duties of the institutions, bodies, offices and agencies subject to her/his inspections, combined with ensuring the transparency of her/his activities and the right to participation of the parties affected by her/his decision in the inquiry process (the democracy aspect of the principle of "good administration"). The search for agreement and the balance of the interests of the parties are aimed at ensuring the principle of efficiency. The need for compliance with the law (the rule of law aspect of the concept of "good administration") is derived from the content of all the instruments regulating the activities of the European Ombudsman. Irena Cuculoska refers to "the term 'right to good administration' as a narrower term than the term 'right to good governance', which" she considers "more appropriate when talking about this right guaranteed at the European Union level"[56], and rightly notes that, "the principle of good administration (or more broadly: good governance) despite its significance, still remains imprecisely defined" [57]. Without going into a discussion about the ratio of the volumes of the concepts of "good

[53] Implementing Provisions—Decision of the European Ombudsman Adopting Implementing Provisions, https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en (accessed on 28 February 2021).

[54] https://ombudsman.europa.eu/en/decision/en/59836 (accessed on 26 February 2021).

[55] https://ombudsman.europa.eu/en/strategy/our-strategy/en#_ftn2 (accessed on 26 February 2021).

[56] (Cuculoska 2014)

[57] Ibid., p. 19.

governance" and "good administration", since this is not part of the objectives of this study, I draw attention to the fact that "good administration" has not only substantive, but also procedural, content.

The Ombudsman may decide to discontinue an inquiry at the request of the complainant. This does not prevent the Ombudsman from opening an own-initiative inquiry into the subject matter of the complaint.

The applicant has the right to apply to the European Ombudsman with a request to reconsider the decision made by the Ombudsman, as well as any conclusion in the decision closing the inquiry, with the exception of the conclusion about maladministration. At the same time, when submitting a request for the reconsideration of the decision of the European Ombudsman, the applicant has the right to familiarize themselves with the materials of the case.

5. Consequences of the European Ombudsman's Actions

The Ombudsman may make suggestions for improvement regarding issues related to the inquiry in the course of an inquiry. If the European Ombudsman considers that a situation exposed in a communication can be fixed, the Ombudsman encourages the relevant institution to find a solution. The respective institution, body, office or agency is to answer the Ombudsman's proposal for a solution within a particular timeframe, which usually should not exceed three months. The exact timeframe of a response should be reasonable, given the complexity and urgency of the inquiry. If the Ombudsman comes to a conclusion that the inquiry has public interest, the reply from the institution is asked for as soon as reasonably possible. If the institution, body, office or agency concerned is not in a position to provide a reply to the Ombudsman within the set timeframe, it is supposed to make a reasoned request for an extension. The Ombudsman supplies the applicant with a duplicate of the proposal for a solution and the institution's (body's, office's, or agency's) response to the mentioned proposal after receiving the reply from the relevant institution. The applicant may surrender observations to the Ombudsman within one month.

Where the Ombudsman finds no maladministration, that a solution has been found or that no further inquiries are justified, the inquiry is to be closed with a decision setting out the findings; and the Ombudsman sends the decision to the complainant and to the institution concerned (Article 6.2 of the Implementing Provisions[58]). In 2017, no maladministration was found in 164 cases that were closed; 166 cases were settled by the institution (body, office, or agency) with solutions achieved or partly achieved; it was decided that no further inquiry was justified in 27 cases; maladministration was found in 24 cases that were closed; and 11 other cases were closed[59]. In 2018, no maladministration was found in 254 cases that were closed; 221 cases were settled by the institution (body, office, agency) with the suggestions accepted and the solutions achieved; it was decided that no further inquiry was justified in 56 cases; maladministration was found in 29 cases that were closed; and 10 other cases were closed[60]. In 2019, no maladministration was found in 316 cases that were closed; 187 cases were settled by the institution (body, office, or agency) with the solutions achieved or partly achieved; it was decided that no further inquiry was justified in 30 cases; maladministration was found, and recommendations were agreed or partly agreed in 29 cases that were closed; and 5 other cases were closed[61]. Therefore, a great, sometimes the major, portion of inquiries are and have been terminated by the European Ombudsman with no maladministration recognized. A significant number of cases have been settled by a relevant institution (body, office, or agency) due to mediation of the European Ombudsman.

[58] Implementing Provisions—Decision of the European Ombudsman Adopting Implementing Provisions, https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en (accessed on 28 February 2021).

[59] European Ombudsman. Annual Report 2017, https://www.ombudsman.europa.eu/en/annual/en/94827 (accessed on 24 February 2021).

[60] European Ombudsman. Annual Report 2018, https://www.ombudsman.europa.eu/en/annual/en/113728 (accessed on 24 February 2021).

[61] European Ombudsman. Annual Report 2019, https://www.ombudsman.europa.eu/en/annual/en/127393 (accessed on 24 February 2021).

An example of a decision of no maladministration found is one adopted on 13 September 2018 in the case 969/2018/MMO, opened on 18 June 2018[62], on the European Commission's alleged failure to send an acknowledgement of receipt concerning an infringement complaint against Lithuania as regards to the implementation of Article 17 of the Charter of Fundamental Rights. The European Commission received a complaint with allegations of non-compliance by Lithuania with Article 17 (1)—right to private property. The European Commission explained that all actions were taken by the authorities of Lithuania in accordance with Lithuanian law, which meant that there was no Union institution, body, office or agency involved, and no EU norms applied, therefore, there was no legal base for the European Commission interference. The complainant insisted and the European Commission answered that everything had been already explained. The European Ombudsman, having considered the situation, came to a conclusion that the European Commission correctly and timely responded to the complainant, which is why no maladministration found.

Where the Ombudsman finds maladministration, the European Ombudsman makes any appropriate recommendation(s) to the institution (body, office, or agency) concerned in accordance with Article 3(6) of the Statute—Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties[63] and asks the institution (body, office, or agency) concerned to provide an opinion on the recommendation(s) within three months. The opinion shall state whether and, if so, how, the institution (body, office, or agency) has implemented or intends to implement the recommendation(s). The Ombudsman shall forward the opinion to the complainant, who may submit comments on it within one month.

Let us look at the statistics of compliance by EU institutions, bodies, offices and agencies with the European Ombudsman's decisions that revealed maladministration. In 2013, 50 critical remarks were made in 40 decisions, while 83 further remarks were made in 53 decisions. A single decision may contain more than one remark, and both kinds of remarks may be included in the same decision. Taking critical and further remarks together, the rate of satisfactory follow-up was 81%. The follow-up to further remarks was satisfactory in 83% of cases, whilst the rate of satisfactory follow-up of critical remarks was 78%. These results are slightly lower than those achieved in the previous year when the rate of satisfactory follow-up to critical and further remarks was 83%. The follow-up to further remarks was satisfactory in 90% of cases in the 2012 report, whilst the rate of satisfactory follow-up to critical remarks was the same, at 78%. Finally, it is noteworthy that the Commission provided a satisfactory follow-up in only 72% of cases, compared to 88% in the 2012 report[64]. In 2014, the EU institutions complied with the Ombudsman's proposals at a rate of 90%. This is by far the highest figure achieved to date. Since the office started recording compliance statistics in 2011, the institutions have on average been complying at a rate of 80%. As the report shows, the rate of compliance can vary significantly from one institution to another—from 100% in some cases, to 0% in the worst case. The Commission, for instance, complied at a rate of 86% (up from 73% in 2013)[65]. The European Ombudsman's Report reveals that, in 2015, the EU institutions complied with the Ombudsman's proposals in 85% of instances, a slight increase from 83%. Of the 14 institutions examined, 11 scored 100%, while the Commission—which accounts for the largest portion of the inquiries that the Ombudsman conducts—scored 77%. As the report shows, in 2016 the rate of compliance can vary significantly from one institution to another—from 100% in some cases, to 77% in the worst case (up from 33% in 2015). The European External Action Service (EEAS), the Council of the European Union and

[62] https://www.ombudsman.europa.eu/en/decision/en/103439 (accessed on 27 February 2021).

[63] The Statute—Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, https://www.ombudsman.europa.eu/en/legal-basis/statute/en (accessed on 28 February 2021).

[64] Putting it Right? How the EU Institutions Responded to the Ombudsman in 2013, https://www.ombudsman.europa.eu/en/annual/en/58401 (accessed on 27 February 2021).

[65] Putting it Right? How the EU Institutions Responded to the Ombudsman in 2014, https://www.ombudsmsn.europa.eu/en/annual/en/61644 (accessed on 27 February 2021).

the European Medicines Agency (EMA), for instance, had a 100% compliance rate[66]. In 2017, the EU institutions complied with the Ombudsman's proposals in 81% of instances (a slight decrease from 85% in 2016). The institutions reacted positively to 80 out of the 99 proposals for improvement made by the Ombudsman. There were 148 other cases in which the Ombudsman considered that the institutions had taken steps to improve how they work. Eight out of the 14 institutions had a 100% compliance rate, while the European Commission—which accounts for most cases—had a 76% compliance rate[67]. In 2018, the EU institutions complied with the Ombudsman's proposals in 77% of instances, a slight decrease from the 81% in 2017. The institutions reacted positively to 90 out of the 117 proposals for improvement made by the Ombudsman. The proposals were made in 69 cases, with 52 of these cases leading to the institutions taking steps to improve how they work. Eleven institutions had a 100% compliance rate, while the European Commission—which accounts for most cases—had a compliance rate of 70.9%[68]. In 2019, the EU institutions cooperated satisfactorily in 79% of instances, which represents an improvement on the previous year. The institutions reacted positively to 93 out of the 118 proposals the European Ombudsman made to correct or improve their administrative practices. Out of the 17 institutions to which the Ombudsman made proposals, 10 responded satisfactorily to all of the solutions, suggestions and recommendations that the Ombudsman proposed. EU institutions accepted 6 out of 10 solutions proposed by the Ombudsman in cases that were closed in 2019. A total of 83 suggestions were made in cases that were closed in 2019. The follow-up to suggestions was satisfactory in 93% of cases, which is higher than previous year's rate of 82%[69]. Therefore, as the given statistical data testify, trends in the area of compliance with the suggestions and proposals of the European Ombudsman are unstable and ambiguous.

The Ombudsman, after analyzing the opinion of the institution concerned and any comments submitted by the complainant, may close the inquiry setting out definitive findings. The Ombudsman reports to the European Parliament on his or her inquiries on a regular basis, including by way of an annual report. The Ombudsman may submit a Special Report to the European Parliament on any inquiry in which the Ombudsman finds maladministration and that the Ombudsman considers to be of significant public interest.

Where the Ombudsman becomes aware that the matter under investigation by the Ombudsman has become the subject of legal proceedings, the Ombudsman must close the inquiry and inform the complainant and the institution.

6. Conclusions

Acquiring the status of a binding legal act after the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights has become one of the basic instruments of the EU legal system. The European Ombudsman participated in the preparation of the draft Charter, and at the same time, after the entry into force of the Charter, strengthened the position of the Ombudsman, becoming one of the legal pillars of his/her activities.

One of the elements linking different aspects of the European Ombudsman's activities—monitoring activities against EU bodies, institutions, offices and agencies in order to avoid and repair maladministration, on the one hand, and the promotion and protection of human rights, on the other hand—is the right to good administration, which is enshrined in Article 41 of the Charter. It is widely known that in the case law of the European Court of Justice "good administration" is seemed to refer to the public interest sphere, which may

[66] Putting it Right? How the EU Institutions Responded to the Ombudsman in 2016, https://www.omudsman.europa.eu/en/annual/en/87679 (accessed on 27 February 2021).

[67] Putting it Right? How the EU Institutions Responded to the Ombudsman in 2017, https://www.ombudsman.europa.eu/en/annual/en/110768 (accessed on 27 February 2021).

[68] Putting it Right? How the EU Institutions Responded to the Ombudsman in 2018, https://www.ombudsman.europa.eu/en/annual/en/123473 (accessed on 27 February 2021).

[69] Putting it Right? How the EU Institutions Responded to the Ombudsman in 2019, https://www.ombudsman.europa.eu/en/annual/en/135909 (accessed on 27 February 2021).

sometimes, but not always, generate individual legal rights[70]. Then, the European Court of Justice developed this attitude by explaining that the principle of sound administration does not, in itself, confer rights upon individuals, except where it constitutes the expression of specific rights for the purposes of Article 41 of the Charter[71]. "Good administration" as a fundamental public law concept has its origins in various aspects of the historical development of European society. Among such aspects, the principle of the rule of law, democracy and state institutional development are distinguished. As a result of this approach, the principle of respect for human rights, along with democracy and the rule of law, are beginning to be seen as the cornerstones of a more general concept of "good administration".

Based on the Charter's notion of maladministration and the Charter's human rights principles of "good administration", the task of detecting violations of governance, including through a breach of fundamental rights provided for by the Charter, is broader than just a check for legality. An important role in fulfilling this task is assigned to ensuring the adequacy, efficiency and integrity of government and meeting the legitimate expectations of citizens, including in cases where the administration lacks obligations, which might be enforced by legal coercion.

The competence to initiate an inquiry on its own initiative gives a proactive character to the activities of the European Ombudsman in the process of improving administration in the EU, allowing it to be considered not only as a body for reviewing complaints, but also as a body that promotes the democratization of the dialogue between a citizen and the government, ensuring the transparency of this government andthe participation of citizens in making power decisions and improving the mechanism for protecting rights and freedoms. Examples of strategic inquiries conducted by the European Ombudsman demonstrate the scale of its activities and its focus on the implementation of the principles of "good administration"—compliance, transparency, participation, efficiency, accountability and human rights.

The substantive legal basis used by the European Ombudsman in carrying out inquiries in the field of fundamental human rights compliance is the legal norms of the sources of law of the European Union, regulating relations connected to the right to "good administration". Such norms are contained in the sources of the primary EU law—the founding treaties of the European Union (with the Charter of Fundamental Rights incorporated), as well as in a number of sources of secondary EU law, including the decisions of the Court of Justice of the European Union and the soft law acts of the European Ombudsman.

The main areas of activities of the European Ombudsman are as follows: control (complaint based and own-initiative inquiries); mediation (seeking a settlement by the institution, body, office or agency in the course of the inquiry); human rights protection (making decisions on specific cases opened on complaints); regulation (soft law rules in decisions on strategic inquiries and strategic initiatives); prediction (suggestions and proposals to prevent maladministration and to promote good administration). The systemic nature of the development of the institution of the European Ombudsman is ensured by the following two consecutive documents adopted by the current European Ombudsman, Emily O'Reilly: Strategy of the European Ombudsman "Towards 2019"[72] (approved on 17 November 2014) and European Ombudsman Strategy: "Towards 2024"—Sustaining Impact[73] (issued on 7 December 2020).

The following main features of the impact of the Lisbon Treaty on the legal status of the European Ombudsman can be distinguished as follows: firstly, giving the Charter of Fundamental Rights of the European Union legal force along with the founding treaties of the European Union normatively enshrined the right of EU citizens and legal entities to "good administration" in the source of EU law of supreme legal force and allowed the

[70] Case T196/99 Area Cova and Others v Council and Commission [2001] ECR II-3597, para. 43.

[71] See: Case T-193/04, Hans-Martin Tillack v Commission [2006] ECR II-03995.

[72] https://www.ombudsman.europa.eu/en/document/en/58332 (accessed on 28 February 2021)

[73] https://www.ombudsman.europa.eu/en/strategy/our-strategy/en (accessed on 28 February 2021)

European Ombudsman, based on the provisions of European Union law, to operate with the principles of "good administration", developed by judicial case law and legal academic doctrine; secondly, the entry into force of the Lisbon Treaty contributed to the expansion of the competence of the European Ombudsman, both in terms of the composition of the persons involved, the scope of jurisdiction and the breadth of powers; thirdly, changes in the activities of the European Ombudsman were caused both by general changes that the Lisbon Treaty introduced into the legal framework for the activities and the institutional system of the European Union, and by changes made to the norms of the EU legal acts directly regulating the rights, duties and responsibilities of the European Ombudsman.

Bearing in mind that a legally binding nature is absent from the decisions of the European Ombudsman, including those relating to the fundamental rights enshrined in the Charter, they, judging by the statistical data, are executed by the bodies, offices, agencies, and institutions of the EU in the overwhelming majority of cases. At the same time, the decisions of the Ombudsman are incarnated in the acts of the EU bodies, offices, agencies, and institutions, establishing the corresponding rules as already mandatory. This is one of the ways to develop the provisions of the Charter of Fundamental Rights.

Funding: This research did not receive any external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

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Article

The Promise of the EU Charter of Fundamental Rights (and Brexit) on the Implementation of Economic and Social Rights among EU Member States

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Abstract: This article examines the extent to which the inclusion of the European Union (EU) Charter of Fundamental Rights in the Treaty of Lisbon, which gives legal force to socio-economic rights as well as civil and political rights, will succeed in helping EU member states meet international treaty obligations to implement socio-economic rights. Will the EU's renewed commitment to de-veloping the social sphere, post-Brexit, be more successful and will British citizens lose out on so-cio-economic rights in the long term if the EU succeeds in creating a better social or public dimension? Member states of the EU that have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) have obligations to progressively realise economic, social and cultural (ESC) rights. Progress on this has been slow and potentially made more difficult by the economic direction adopted by the EU since the 1980s. Although the EU, from the beginning, saw itself as a "social market" it struggled to embed the "social" to the same extent that it embedded the "market". Critics argue that the economic policies of the EU and key judgements of the European Court of Justice (ECJ) successfully dis-embedded the market from its social context. Additionally, the regulatory regime of the EU developed in a direction that limited the capacity of nation states to ameliorate the consequences of market-led policies for the least advantaged. However, the Charter of Rights, which places socio-economic rights on an equal footing with civil and political rights, is a novel and bold initiative. It has stimulated debate on whether the Charter could rebalance the EU's economic agenda by paying attention to the social consequences of predominantly market-led policies. This paper examines the potential impact of the EU Charter, in the context of member states international human rights obligations, to create an environment where member states of the EU have fewer obstacles to the "progressive realization" of ESC rights.

Keywords: EU Charter of Fundamental Rights; Treaty of Lisbon; economic; social and cultural rights; international human rights

Citation: Pillay, Nirmala. 2021. The Promise of the EU Charter of Fundamental Rights (and Brexit) on the Implementation of Economic and Social Rights among EU Member States. *Laws* 10: 31. https://doi.org/10.3390/laws10020031

Received: 1 March 2021
Accepted: 23 March 2021
Published: 24 April 2021

1. Introduction

In 2009 the European Union (EU) incorporated the Charter of Fundamental Rights (Charter of Rights) into the Treaty of Lisbon, giving equal legal status to civil and political (CP) and economic and social rights.[1] This was a unique and bold initiative as no other regional treaty gives equal legal protection to both CP and socio-economic rights. This article addresses the potential long-term impact of this on the EU's ability to create a more enabling environment for EU member states to meet their international treaty commitments to realise socio-economic and cultural (ESC) rights.

The Treaty of Lisbon does not resolve the tensions inherent in the EU project such as the gulf between north and south or the political elite and EU citizens, however, the inclusion of the EU Charter signalled a reorientation of the EU towards the neglected

[1] (Charter of Fundamental Rights of the European Union 2012/C 326/02): Available online: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed on 10 October 2020).

social sphere of the EU.[2] The social or public dimension refers to the mutual responsibility members of a society assume for each other. This is expressed politically in determinations about how society is structured, and resources distributed—the welfare state is an example of this.[3]

By adopting policies that promoted the economic at the expense of the social, EU institutions strained the capacity of member states to develop the domestic social sphere. It is not clear how political engagement can be enhanced at the EU level to reverse this situation. de Witte points out that "[w]hile distributive justice remains the bread and butter of political conflict, the capacity of the political [at the EU level] to implement the answer to the social question has increasingly vanished."[4] The shrinking public or social sphere has become an urgent political issue since EU citizens have signaled their disaffection with the economic direction of travel of the EU—the most serious rejection of the EU occurring with Brexit.

The EU is made up of states that have responsibilities outside of and independent of the EU such as obligations arising out of multilateral international and regional human rights instruments.[5] Universal rights, founded in human dignity, are enunciated in international treaties but individual legal entitlements are protected and guaranteed within the legal framework and jurisdictions of nation states. The EU is not a state, so is not directly responsible for the human rights of EU citizens—this responsibility rests with each member state. EU member states do not afford the same protection to all the categories of human rights. They mostly guarantee the core civil and political (CP) rights of their citizens, however, ESC rights, involving states' obligations to ensure adequate standards of living, work, health and education, if included in states' constitutions, are usually in the form of directive principles. The distinction reflects the dichotomy that developed in international human rights law between CP and ESC rights, exacerbated by cold war politics, which cast the free world as champions of liberties and freedom and the Soviet Union as favouring equality and social rights.[6] This distinction blurred after the fall of communism and it is now generally recognised that denial of ESC rights could give rise to "serious human rights violations."[7] So even though ESC rights are not implemented in the same way as CP rights, EU member states have treaty obligations to realise ESC rights.

The slow and uneven progress on the implementation of ESC rights among western states, including member states of the EU, has been blamed on the fact that western democracies undervalue ESC rights. This perception was challenged by Donnelly and Whelan who point out that post-WWII western states included "the universal provision of economic and social rights to all citizens as a matter of legal rights or political guarantee."[8] This article does not dispute the claim that the welfare state was a creation of the West. Instead, it argues that the public or social sphere is distinguishable from legally guaranteed ESC rights but crucial for the implementation of them.[9] ESC rights are contestable in court through judicial review procedures and the state is held judicially accountable for its

[2] Anderson (2012) "After the Event." *New Left Review*, 1 February.

[3] (de Witte 2013) "EU Law, Politics, and the Social Question." *German Law Journal* 14: 582. See also (Streeck 2011) "The Crisis of Democratic Capitalism." *New Left Review* 71: 1. "The structure of the post-war settlement between labour and capital was fundamentally the same across otherwise widely different countries where democratic capitalism had come to be instituted. It included an expanding welfare state, the right of workers to free collective bargaining and a political guarantee of full employment, underwritten by governments making extensive use of the Keynesian economic toolkit."

[4] de Witte (n 3) p. 582.

[5] See Maastrict Guidelines on Violations of Economic, Social and Cultural Rights (1997). Available at http://www1.Umn.edu/humanrts/instree/Maastrictguidelines_.html (accessed 10 October 2020).

[6] See Alston (1994) "Denial and Neglect" in R. Roech (Ed) Human Rights: The New Consensus (London: Regency Press 1994). For an in-depth discussion of the attitudes of the West to ESC rights, see (Kirkup and Evans 2009) "The Myth of Western Opposition to Economic, Social and Cultural Rights. A reply to Whelan and Donnelly." *Human Rights Quarterly*, 31 (1) pp. 221–38.

[7] (Ssesyonjo 2009), *Economic, Social and Cultural Rights in International Law* (Oxford: Hart Publishing 2009) p. 112.

[8] (Whelan and Donnelly 2007) "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight." *Human Rights Quarterly*, vol. 29, 908–49, p. 94.

[9] A Kirkup and T Evans (n 5). See also (Lang 2009) "The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly." *Human Rights Quarterly* 31 1.006-1029, p. 1023.

failure to deliver on these rights. States would find it difficult to meet ESC benchmarks if they labour under or adopt policies that diminish the public dimension. The incorporation of legally enforceable social rights into the EU treaty could potentially help the EU sustain the public dimension, creating scope for EU member states to meet international ESC benchmarks.

This analysis focuses first on international and regional socio-economic obligations of EU member states and the significance of the inclusion of the Charter of Rights and Fundamental Freedoms in the Treaty of Lisbon; this is followed by an examination of the impact of EU economic policies on the social dimension of the EU; last, the spotlight falls on the impact of Brexit on the EU's determination to address the social dimension and the implications of this for ESC rights in EU member states (and the recently departed UK).

2. EU Member States Commitment to ESC Rights and the EU Charter

Since the 1950s several member states of the EU have had obligations to implement both CP and ESC rights. After WWII, an intergovernmental organisation, the Council of Europe was established. The Council, dominated by a liberal-socialist coalition, attempted to guarantee both CP and ESC rights[10] in the European Convention for the Protection of Fundamental Rights and Freedoms (ECHR)[11] and the European Social Charter 1960, revised in 1996.[12] The ECHR protects individual CP entitlements, implemented on a non-discrimination basis and adjudicated through the European Court of Human Rights (ECtHR). Most European countries included Convention rights into their domestic law. The UK achieved this with the Human Rights Act of 1998.[13]

Socio-economic rights were included in the European Social Charter. The Social Charter, supervised by the European Committee of Social Rights, generates obligations among European states including member states of the EU to implement socio-economic rights. However, there are fundamental differences between Convention and Social Charter rights and in the machinery for their implementation. The universal enjoyment of basic rights to food, water, health care, education, and labour rights inevitably involves a commitment to invest and redistribute resources to ensure their realisation.[14] There is, therefore, a qualitative difference in the obligations imposed on state parties to implement socio-economic rights as compared to CP rights. The socio-economic rights in the European Social Charter are not legally enforceable.[15]

The separation of the CP rights from ESC rights was largely political as CP rights were considered essential for democracy while ESC rights were, according to the British representative to the Charter negotiations, "controversial and difficult to enforce."[16] The protection of the rights of the Social Charter is also weaker in several respects when compared to Convention rights. The ECHR, unlike other Council Treaties whose implementation is overseen politically by a Committee of Ministers, is the "only Convention that judicially guarantees the effectiveness of the rights it protects."[17] The rights of the European Social Charter are non-binding and cannot be adjudicated in court as individual entitlements. They require

[10] (Weston et al. 1987) "Regional Human Rights Regimes: a Comparison and Appraisal." *Vanderbilt Journal of Transnational Law* Vol 20, No 4, p. 593.

[11] (Council of Europe 1950, Council of Europe Convention for the Protection of Fundamental Rights and Freedoms 1950), Europ. T.S. No. 5 (entered into force Sept 3, 1953). Available online: http://conventions.coe.int/treaty/en/treaties/html/5.htm (accessed on 10 October 2020).

[12] (Council of Europe 1961), Council of Europe, European Social Charter, Turin Oct.18, 1961, Europ. T.S. No 35 (entered into force, Feb.26.1965) and (Council of Europe 1996) Council of Europe, European Social Charter (revised), Strasbourg, 3 May 1996, in force 1 July 1999, http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm (accessed on 11 November 2020).

[13] (Human Rights Act 1998). *UK Public Generals Act, 1998* available at https://www.legislation.gov.uk/ukpga/1998/42/contents (accessed on 21 March 2020).

[14] Article 2(1) (International Covenant on Economic, Social and Cultural Rights (ICESCR) UN Doc. A/RES/2200 (1967)). (entered into force January 3, 1976) (accessed 2 April 2020).

[15] The European Social Charter does not protect the same range of social rights included in the ICESCR. It is fairly restricted and appears to emphasise only those provisions of the ICESCR that states are required to implement immediately such as the right to work (art 1), just working conditions (arts 2,3,4), union rights (5 and 6), vocational training (arts 9 and 10), social security, medical and social welfare rights (arts 14,15,16). The Charter also protects mothers, the rights of migrant workers (art 19) and the right to education (Protocol 1 art 2) European Social Charter (n 12).

[16] (Lang 2009) (n 9).

[17] (Benoit-Rohmer and Klebes 2005), *Council of Europe Law: Towards a pan- European legal area* (Strasbourg: Council of Europe Publishing 2005) p. 103.

only a declaration on the part of state parties to pursue these aims "by all appropriate means." This wording highlights the lower status of social and economic rights (compared to CP rights) which are protected and promoted "primarily through reportorial means."[18] The European Social Charter established a two-tier system for monitoring compliance. States submit biennial reports detailing their progress to a Committee of Social Rights made up of 13 independent experts. The Committee of Ministers then evaluates states' progress to meet their treaty obligations and adopt conclusions and recommendations.[19]

The differential treatment of CP and ESC rights at the regional level was, according to some scholars, the reason for the development of two separate international Covenants protecting CP and ESC rights, respectively.[20] The International Covenant on Civil and Political Rights (ICCPR)[21] also required that CP rights would be immediately implemented, however, implementation of ICESCR rights (except those designated for immediate implementation) [22] are constrained by "the limits of available resources" and were to be "progressively implemented."

By separating the legal regime of civil and political rights from socio-economic rights, where the former enjoys adjudicative protection while the latter political or reportorial obligations, it is contended that ESC rights were made less effective than they might otherwise have been.[23] Riedel et al. point out that without "a minimum existence protection standard," the human rights picture is incomplete, and a crucial purpose of human rights will be missed, namely protection for the most needy, marginalised and disadvantaged.[24] This is why the Committee on Economic, Social and Cultural Rights (CESCR) accepts that for ESC rights to be justiciable the courts will have to become involved in adjudicating some level of resource allocation. At the Vienna World Conference on Human Rights in 1993, the Vienna Declaration and Plan of Action declared that human rights are "universal, interdependent and inter-related" and enjoined states not to differentiate between different types of rights but to place the same emphasis on all.[25]

However, while all rights are regarded as equally important the problem of determining the "minimum existence protection standard" and the enforceability of this standard remains.

Legally it is difficult to create an enforceable entitlement in law to a positive ESC right. The minimum threshold a state must reach in the implementation of ESC rights has to be decided to determine a breach of the right. A popular argument against the justiciability of ESC rights is that distribution of resources and policy priorities properly belongs to the sphere of political contest where electorates have a role, through the franchise, in determining the social obligations and priorities of a government. ESC rights blur the distinction between the legitimate spheres of law and politics. Sensitivity to these issues meant that CP rights, in international and regional treaties and in national constitutions,

[18] Weston et al. (n 10) p. 595.

[19] (Brillat 2005), "The supervisory machinery of the ESC: recent developments and their impact," in G. de Búrca and B. de Witte (eds.) *Social rights in Europe* (Oxford: Oxford University Press 2005). The European Committee of Social Rights is "supported by the Governmental Committee, a political body comprising representatives of states which have ratified the Charter, assisted by observers from workers' and employers' associations." (Benoit-Rohmer and Klebes 2005), Council of Europe Law (2005) p. 103.

[20] Ibid.

[21] Article 2 (International Covenant on Civil and Political Rights (ICCPR) UN Doc. A/6316 (1967)) (entered into force March 23, 1976) and ICESCR (n 13). (accessed 2 April 2020).

[22] These include equal economic, social and cultural rights between men and women (art 3): fair wages, equal remuneration and good working conditions especially between men and women ((art 7(a) (1); rights to join trade unions and take strike action (art 8); protecting children from, economic and social exploitation (art 10(3)); compulsory education, especially for primary education (art.13 (2)(a)); guardian and parents freedom to make educational choices for children and even to establish educational institutions (art 13); and the freedoms associated with research and creativity (art 15 (3)). (Fact Sheet No. 16 (Rev.1) The Committee on the Economic, Social and Cultural Rights 1996). https://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf (accessed 10 April 2020).

[23] Weston et al. (n 10) p. 596.

[24] (Reidel et al. 2014), *Economic, Social and Cultural Rights in International Law: Contemporary issues and Challenges.* (Oxford Scholarship Online: May 2014) p. 3.

[25] (UN General Assembly. Vienna Declaration and Programme of Action 1993), A/CONF.157/23, available at: https://www.refworld.org/docid/3ae6b39ec.html) (accessed 22 February 2021) Also, (Indivisibility of Rights (Proclamation of Tehran) Final Act of the International Conference on Human Rights 1968), Tehran 22 April to 13 May UN Doc. A/CONF 32/41 at 3 (1968) (accessed 2 April 2020) See also Reidel et al. (n 23) p. 14.

produced immediate and binding obligations but ESC rights were deferred obligations contingent on state resources.

However, the Committee on Economic, Social and Cultural Rights (CESCR) published General Comment No. 3 to encourage states' to comply with their obligations under Article 2 (1) to "progressively realise" ESC rights and to set the criteria for the justiciability of ESC rights.[26] States are enjoined to use the "maximum available of its resources" to meet the "minimum core obligation" of rights to food, primary health care, basic shelter and education.[27] The comment stated that state parties should "take steps, individually and through international assistance and co-operation" to move as "expeditiously and effectively as possible towards that goal." These steps should be "deliberate, concrete and targeted" and involve adopting "all appropriate means including particularly the adoption of legislative measures."[28] The concept of the "minimum core" serves to ensure that a justiciable ESC right is created and that there is an effective legal remedy if it is breached.[29] CESCR General Comment No. 9 states that the remedy does not have to be judicial but could be administrative, social, financial, or educational.[30] The CESCR committee placed the responsibility on states to deliver on and remedy breaches of ESC rights "because the state has the appropriate power to do so. "[31] This implies that when the matter is adjudicated by the courts the state is held to account — as was demonstrated by the South African courts when that government was challenged on its lack of adequate housing provision.[32]

The recognition of fundamental rights by EU institutions and treaties was an evolutionary process.[33] The original treaties of the European Economic Community (EEC) implicitly recognised rights as fundamental to its founding principles of freedom, democracy and rule of law but there was no specific mention of human rights.[34] There was no expectation that community law would be responsible for the protection of individual rights as these were covered by international and regional law and the constitutions of members states.[35] However, the clash of fundamental rights with EU law, as in the *Bosphorus* case, meant that the ECtHR and the European Court of Justice (ECJ) had overlapping jurisdictions when fundamental rights were involved.[36] What followed were several landmark cases where the ECJ recognised that fundamental rights are part of the general principles of the EU.[37]

[26] CESCR General Comment No 3: The Nature of States Parties' Obligations (art.2, para.1, of the Covenant) Fifth Session (1990) Contained in document E/1991/23, para. 9. (accessed 10 April 2020)

[27] Ibid., para. 10.

[28] Ibid., para. 9.

[29] See (Young 2008) "The Minimum Core of Economic and Social Rights: A Concept in Search of Content." *Yale International Law Journal* 33, 113-175 for a critical examination the concept of minimum core. The 'minimum core' is difficult to define but this is the phrase used by the CESCR. The General Comment is aimed at ensuring the justiciability of ESC rights and Young explores how states' obligations for ESC rights could be made subject to measurable indicators.

[30] CESCR General Comment No 9: The Domestic Application of the Covenant, UN Doc. E/C./12/1998/24, 3 December 1998, para. 9.

[31] (Ssesyonjo 2009) (n 7) p 49. (accessed 10 April 2020).

[32] *Government of the Republic of South Africa & Ors v Grootboom & Ors* 2000 (11) BCLR 1169. (CC), See also (Mbazira 2007) "Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies" (core.ac.uk)) (accessed 1 March 2021).

[33] The four main treaties that brought about the EU are: Treaty Establishing the European Economic Community (Treaty of Rome) 25 March 1957, 294 U.N.T.S. 17 (entered into force 1 January 1958); Single European Act, 28 February 1986, 25 I.L.M. 503 (entered into force 1 July 1987); (Treaty on European Union 2007) (Maastricht Treaty) 7 February 1992 31 I.L.M. 247 (entered into force 1 November 1993); Treaty of Amsterdam, 2 October 1997, 32 I.L.M. 56 (entered into force 1 May 1999).

[34] Art 6 (2) of The Treaty on The European Union signed in Rome on 4 November 1950.

[35] (Banaszak 2016), "Fundamental Freedoms and Rights in Contemporary Europe" in R, Arnold (ed) *Convergence of the Fundamental Rights Protection in Europe. Ius Gentium: Comparative Perspectives on Law and Justice* 52 (Netherlands: Springer 2016).

[36] C-84/95, *Bosphorus*, [1996] ECR 1-3953. The "ECJ has always held that its application of the ECHR, as a general principle of law, offered the Member States enough security in ensuring the protection of ECHR rights. However, recent decisions of the ECtHR illustrate that this security might be questionable. Recent judgments, like *Bosphorus*, show that international obligations may collide and impose a serious dilemma on Member States." Katherine Kuhnert (Kuhnert 2006) "*Bosphorus* – double Standards in EU Human Rights Protection." *Utrecht Law Review* Vol 2 Issue 2. See also Tobias Lock (Lock 2010) "Beyond *Bosphorus:* The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention of Human Rights." *Human Rights Law Review* 10:3, 529-545.

[37] Case 11/70, *International Handelsgesellschaft mbH v. Einfuhr* [1970] ECR 1125. Case 36/75. More recently Opinion 2/94 on Accession by the Community to the ECHR (1996) ECR-I-1759, para. 33. *Connolly v. Commission* [2001] ECR I-1611.

In *Nold*, the ECJ expressly stated that the ECHR and constitutional traditions of member states are the sources of fundamental rights of EU Law.[38]

When the EU adopted The Charter of Fundamental Rights of the European Union (EU Charter) in December 2000, the organisation demonstrated its commitment to both ESC and CP rights.[39] The EU Charter "recognises and respects entitlements for social security benefits and services" and includes specific references to health care, housing education and welfare.[40] The EU Charter did not introduce any new rights but included those rights recognised by the Treaty of the European Union (TEU), the ECHR, the European Social Charter and the jurisprudence of the ECJ and the ECtHR.[41]

At the time of its adoption the EU Charter was not legally binding but an agreement between institutions.[42] When the EU Charter was incorporated into the Treaty of Lisbon 10 years later, some of the rights were reformulated to better address contemporary problems. More importantly, the treaty changed the legal status of the EU Charter by making it an enforceable instrument.[43] This was a very significant development since the EU Charter is the first regional instrument to give socio-economic rights the same legal force as CP rights. The African Charter on Human and People's Rights (Banjul Charter)[44] recognises ESC as well as CP rights allowing for judicial review on all these rights, but the Banjul Charter is not legally binding.[45] The regional Inter - American Convention of Human Rights (IACHR) recognises ESC rights but employs the same hortatory language as the ICESCR with respect to implementation.[46] ESC and CP rights are both included in the League of Arab States, Arab Charter on Human Rights which declares that human rights are "universal, indivisible, interdependent and interrelated" but the Arab Charter's enforcement mechanisms are also weak.[47]

The EU inclusion of socio-economic rights and CP rights in the same document and having the same legal status also goes beyond the protection of ESC rights in constitutions of EU member states.[48] This inevitably raises questions as to whether the EU Charter will help member states meet broader international and regional treaty commitments with respect to ESC rights. The answer to this depends on the impact of the EU Charter on EU institutions and policies and the role of the ECJ.

[38] Case 44/79 *Nold v commission*, 1974 E.C.R. 419. CP rights apart from health and education which is protected in a separate Protocol of the ECHR.

[39] The Charter of Fundamental Rights of the European Union, Dec 2000/C 364/01 https://www.europarl.europa.eu/charter/pdf/text_en.pdf. (accessed 10 October 2020).

[40] Section 34 of the ECHR deals with social security.

[41] (Zetterquist 2011), "The Charter of Fundamental Rights and the European Res Publica" in Giacomo D (eds) *The EU Charter of Fundamental Rights. Ius Gentium: Comparative Perspectives on Law and Justice* 8. (Dortrecht: Springer 2011).

[42] (Kenner 2003) Kenner, Jeff. 2003. Economic and social rights in the EU legal order: The mirage of indivisibility in economic and social rights in the EU legal order. In *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*. Edited by Tamara K. Hervey and Jean Kenner (Hervey and Kenner 2003). Oxford: Hart.

[43] (Treaty of Lisbon 2007), Conference of the Representatives of the Governments of the Member States, C16 14/07, Brussels, 3 December 2007. (accessed 10 May 2020).

[44] (African Charter on Human and People's Rights 1981) African Charter on Human and People's Rights. 1981. OAU Doc. CAB/LEG/67/3/Rev.5 (1981) (Entered Into Force October 21, 1986) The Banjul Charter. June 28 (accessed 1 March 2020).

[45] (A Guide to the African Charter of Human and People's Rights 2006). AI Index: IOR 63/005/2006 www.amnesty.org. (accessed on 3 January 2020). See also (Yeshanew 2013), *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect* (Cambridge: Interscentia 2013).

[46] See Article 1. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") OAS Treaty series No 69 (1988) https://www.refworld.org/docid/3ae6b3b90.html (accessed 13 April 2020). See also (Harris eds. 1988) *The Inter-American System of Human Rights*) (Oxford: Clarendon Press 1988) and (IACHR Access to Justice as a Guarantee of Economic, Social and Cultural Rights 2007): A review of the Standards Adopted by the Inter-American System of Human Rights, Report No OEA/Ser.L/V/II.129, 7 September 2007, paras. 3 and 4. https://www.refworld.org/docid/477e3d062.html (accessed 2 April 2020).

[47] (League of Arab States 2004), Arab Charter on Human Rights, May 22, 2004 entered into force March 15, 2008 Introduction and Articles 34–39. http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035 (accessed 21 March 2020).

[48] Boguslaw Banaszak, observed that ESC rights (with the exception of property rights) do exist in individual constitutions to varying degrees, but no common patters are observable (n 35).

3. The EU Social Dimension and ESC Rights

From the outset, the EU attempted to promote "economic and social cohesion" and to strengthen social solidarity in the community.[49] The founding idea of the EU was that member states should benefit from the solidarity resulting from membership in the EU. The editorial comment in the *European Constitutional Law Review* eloquently describes this solidarity as not mere interdependence or shared understanding but a solidarity that is "primitive and inarticulate" and a solidarity also cultivated and nurtured to produce greater social cohesion.[50]

EU solidarity implies that social policy goals are an integral part of the EU's vision. From the outset, the European economic model was regarded as a "social market economy" which should be distinguished from the American model as it differs from the latter in the attention that is paid to "social cohesion."[51] The EU successfully embedded "market solidarity" namely, the mutual rights and obligations that stem from the EU single market,[52] and its social agenda included improved working conditions, pensions, gender equality, free movement and social security deriving from employment. The labour market and other work-related issues are emphasised.[53]

The EU addressed its social agenda through various social action programmes. The first, in 1974, pre-dating the Maastricht Treaty that established the EU, aimed through legalisation and funding, to achieve full and better employment, improvement to living and working conditions and "increased involvement of the social partners in the economic and social decisions of the European Community."[54] To some extent this successfully promoted a few of the core minimum ESC rights that the CESCR identified as immediately enforceable—equality between men and women in respect of work opportunities and working conditions including health and safety. Subsequent initiatives, such as the "Community Charter of Basic Social Rights for Workers" which was appended to the Maastricht Treaty as a "Protocol on Social Policy", together with a related Social Action Programme (1989),[55] and the setting up of the Structural Funds,[56] attempted to develop greater social cohesion across the EU. This initiative was unsuccessful mainly because of a lack of consensus among all EU countries (the UK declined to sign the Charter); the Charter's non-binding character, and the seemingly exclusive focus on workers' rights. Crucially, the single biggest problem with the Social Charter related to the relationship between a standardizing Community Charter and the heterogeneous employment and labour laws among the nation states of the Community.[57] Teague and Grahl, in their review of the development of the Social Charter, questioned whether "an essentially federal arrangement as a social constitution could be adopted by the Community, a pre-federal body, without it causing disruption and disorder."[58]

This problem was to dog further efforts by the EU to achieve social cohesion. EU leaders were committed to the vision of the EU becoming by 2010 "the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the envi-

[49] (Sykes 2005) "Crisis? What Crisis? EU Enlargement and the Political Economy of European Union Social Policy." *Social Policy and Society* 4:207-215 p. 207.

[50] (Eijsbouts and Nederlof 2011) *European Constitutional Law Review* Vol 7: 169–72.

[51] Ibid. See also, (Plomein 2018), "EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights." *Social Policy and Society*, 17:2, 281-296, 282 and 283.

[52] Gareth Dale and Nadine El-Enanny, (2013) "The Limits of Social Europe: EU Law and the Ordoliberal Agenda." *German Law Journal* (*Special Issue Regeneration Europe*) 14:5, p. 614.

[53] Article 3 of the Treaty of the European Union (TEU) describes the EU economy as entailing 'full employment and social progress and a high level of protection' (2007).

[54] (Daly 2007) "Whither EU Social Policy? An account and Assessment of Development in the Lisbon Social Inclusion Process." *Jnl Soc.Pol.*37:1 1-19. p. 3.

[55] Ibid.

[56] (Sykes 2005) (n 49) p. 209.

[57] (Teague and Grahl 1991) "The European Community Social Charter and Labour Market Regulation." *Jnl Publ. Pol.,* 11: 2, 207-232, p. 212.

[58] Ibid.

ronment."[59] To achieve this they adopted the Lisbon Strategy, which introduced a means for member states to arrive at a "convergence" of common social goals and to generate a "Europeanisation of problems" in the context of common global objectives.[60] The Open Method of Coordination (OMC) (already in use in EU employment policy and economic policy) was designed to arrive at an EU wide understanding of social cohesion and to better implement key ideas across nation states by performance managing non-binding common objectives.[61] Unfortunately, this initiative also failed in achieving any EU wide shared understanding of social cohesion. The Kok review of the Lisbon Strategy concluded that the failure resulted from a lack of political commitment.[62] There was "neither Europeanisation nor a (re)nationalisation of social exclusion as a policy problem/approach."[63] Following the Kok report the Lisbon Strategy was re-adjusted with an even greater focus on "growth and employment" and the aim of achieving "social inclusion" through building an "inclusive labour market."[64]

European efforts to embed social goals into its economic vision did not give rise to a "European welfare state" resembling national welfare states with social entitlements and provisions organised at the EU level.[65] This is unsurprising given that the original Lisbon Strategy attempted to do two things: to "overcome the differences in growth and productivity between the EU and its leading global competitors at the time, the USA and Japan"[66] and to harmonise and improve divergent labour arrangements among sovereign EU member states. Daly points out that the EU tendency is to "force social policy through the needle's eye of economic progress."[67] According to Daly, social policies, as envisioned by the treaties of the EU, aimed at harmonising employment and living standards among EU member states to facilitate the common market. EU social policy is market-making, not market-correcting.[68] The former aims to remove barriers to the integration of the labour market and improve its efficiency while the latter uses redistribution mechanisms to correct for undesirable market outcomes that exacerbate inequalities.[69]

Social cohesion has been difficult to achieve since the 1980s with the Community's move to create a Single Market and the beginnings of globalisation.[70] The European business community and the UK successfully negotiated a Single Market restricted only to trade in goods and services leaving employment regulation in the hands of member states. The Single European Act "qualified majority" Council voting system excluded qualified voting (unanimity required) on all employment issues except health and safety.[71] The result was that the Single European Act led to the rapid development of the Single Market at the expense of the social dimension.

59 (Facing the Challenge 2004). The Lisbon Strategy for Growth and Employment. Report from the High-Level Group chaired by Wim Kok (2004) http://Europa.eu.int/comm/lisbon_strategay/index_en.html (accessed 23 June 2020).

60 Mary Daly (n 54) p. 8.

61 Ibid. Also See (Bernard 2003), "A 'New Governance' Approach to Economic Social and Cultural Rights" in T A Hervey and J Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford, Hart 2003) p. 250 ff for a discussion of the OMC.

62 Wim Kok (n 59) p. 7.

63 Mary Daly (n 54) p. 12.

64 Wim Kok (n 59) p. 7.

65 Leibfried (2000), "National Welfare states, European Integration and globalisation: a perspective for the next century." *Social Policy and Administration*, 34,1, March, 44–63 p. 45.

66 (The Lisbon Strategy 2010). An Analysis and evaluation of the methods used, and results achieved. Final Report 2010 http://www.europarl.europa.eu/activities/committees/studies.do?/language=EX (accessed 13 June 2020).

67 Mary Daly (n 51) p. 12.

68 (Daly 2018) Analytical framework of Wolfgang Streek summarised by M Daly, *The Implications of the Departure of the UK for EU Social Policy* (CUP 2018) p 108. See details of the failure of the social project after Maastricht, (Streeck 1994) "European Social Policy after Maastricht: The 'Social Dialogue' and Subsidiarity." *Economic and Industrial Democracy* Vol 15, 151–77.

69 M Daly, Ibid.

70 The Single European Act of 1986 created the European Single Market.

71 (Dowling 1996) "From the Social Carter to the Social Action Program 1995–1997: European Union Employment Law Comes Alive." *Cornell International Law Journal*, Vol 29 Issue 1, p 41.

Globalisation, which also accelerated in the 1980s, describes the influence of financial markets on national policies and the privatisation of state functions.[72] Globalisation separates the global marketplace from the politics of nation states where the contest about the allocation of resources happens. De Witte rightly describes capital as a "fugitive power" that eludes the administrative and legal reach of nation states.[73] The EU represents a regional version of this. The Treaty of the European Union (TEU) 1992 created a new and unique entity—a largely legally integrated EU.[74] Economic supranational law subordinated the laws of the nation state to the laws of the Single Market thus diminishing the social and public sphere at the EU and the member state level. Subject to the EU regulatory framework, member states partially ceded sovereignty and autonomy to develop and implement policies that fulfil the social demands of their citizens.[75] The common market, trade and economics upon which the close co-operation of the EU is based were bound to conflict with social policies that are confined to the contested political sphere within member states.[76] The EU regulatory state is independent of and insulated from social and democratic forces—it is "depoliticised."[77]

The commitment to the four freedoms—the free circulation of goods, services, capital and labour at the expense of social rights chipped away at the social welfare arrangements that member states of the EU had developed in the post-war period, diluting their commitment to implementing ESC rights.[78] In the Millennium Declaration, the CESCR raised concerns about the impact of globalisation on ESC rights.[79] The people who lose out are the most disadvantaged. Indeed, EU fiscal reforms focusing on "balanced budgets, limited deficits and limited macro-economic imbalances,"[80] means that if there are conflicts over social issues, the system is protected from it. Dale and El-Enanny wryly comment that EU social justice is a "valuable principle so long as it does not conflict with the higher principle of free market competition."[81] It was unavoidable that the European citizenry would become increasingly conscious of the political and social deficit of the EU and its negative impact. Analysis of the Brexit result and the rise of populism in Europe point to widespread disaffection with the effects of globalisation and policies of the EU.[82]

The inclusion of the EU Charter in the Lisbon Treaty followed by the establishment of the European Fundamental Rights Agency[83] encouraged the view that the development and implementation of legally enforceable social rights will redress the imbalance created by the prioritisation of the economic over the political. The ECJ had successfully used fundamental rights to limit the application of the fundamental freedoms of the EU Treaties. Social rights now enjoy the same legal status as fundamental rights but the role the ECJ plays and could play within the EU regulatory system to consolidate the "community aquis" is the subject of much debate and little agreement among scholars.

[72] Manisulu Ssenyonjo (n 7) p. 19.

[73] Floris De Witte (n 3) p. 589.

[74] (TEU C 191 1992) (Maastricht Treaty) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11992M%2FTXT (accessed on 13 June 2020).

[75] S Liebfried (n 65) p. 45.

[76] See for example, (Schmidt and Thatcher 2013) *Theorising ideational continuity: the resilience of neo-liberal ideas in Europe's Political Economy*. (Cambridge University Press: 2014) and (Schmidt and Thatcher 2014) "Why are neoliberal ideas so resilient in Europe's political economy?" *"Critical Policy Studies* Vol 8, 2014. (Briebricher and Vogelmann 2017 *German Ordoliberalism and Contemporary Neoliberalism*). (Ranham: Rowman and Littlefield 2017).

[77] (Chalmers 2012) "The European Redistributive State and a European Law of Struggle." 18 *Eur.L.J.* 667, 693.

[78] (Cayla 2019) "The Rise of Populist Movements in Europe: A Response to European Ordoliberalism. "*Journal of Economic Issues, Newfound Press*. 53 (2), pp. 355–62. See also (Vaughan-Whitehead 2013), *EU enlargement versus Social Europe? The uncertain Future of the European Social Model*, (Cheltenham: Edward Elgar 2013).

[79] (UN General Assembly 2000) UN Millennium Declaration GA Resolution 55/2 http://undocs.org/A/RES/55/2, https://www.unescap.org/resources/ga-resolution-552-united-nations-millennium-declaration (accessed 13 June 2020).

[80] (Dale and El-Enanny 2013) (n 52) p. 641.

[81] Ibid.

[82] See David Cayla (n 78).

[83] (Multi-Annual Framework for the European Union Agency for Fundamental Rights for 2007–2012, OJ 2008 No. L63/14. Regulation 168/2007/EC) (accessed 3 April 2020).

4. The Role of the Courts—The ECJ and the Regulatory System of the EU

The inclusion of the Charter of Rights in the Treaty of Lisbon seems to have signaled a change in the self-understanding of the EU. The original treaties that set up the European institutions and governed relations among member states were part of international law. The Charter changed the status of the Treaty of Lisbon from public international law to constitutional law.[84] According to Bazzocchi, this opens the door for the Charter to become an instrument that not only clarifies fundamental rights within the EU but also "constitutional traditions common to member states."[85]

Prior to the adoption of the Lisbon Treaty, the ECJ played a crucial role in the creation of the EU regulatory regime by prioritising EU law above the law of nation states. It is seen as an activist court in its efforts to promote economic integration.[86] The ECJ gave effect to EU economic policies that ensured that member states acted as a "market facilitating authority in the interests of capital." While member states had the autonomy to determine their own particular economic arrangements, under the impact of the Single Market rules adjudicated by the ECJ, they increasingly lost control of aspects of the economy such as employment and industrial relations.[87]

De Witte offers a positive analysis of the role the ECJ can play. The ECJ has the potential to shift the social question "from the national political arena to the transnational judiciary."[88] Since it is not possible to re-appropriate the social question within the realms of politics, might it be possible to re-enfranchise the citizen at the transnational level through an activist ECJ armed with social rights?[89] Roderic O'Gormon also points out that since the 1960s vigorous activism on the part of the ECJ produced a jurisprudence on fundamental rights, despite the absence of rights in the treaties before the TEU in 1992.[90] De Witte claims that the ECJ applying "EU law in general and EU Free movement law in particular has long been the lever that lifted the social question outside the scope of political contestation at the national level."[91] The ECJ did confirm in the *Akerberg Fransson* ruling that it will take into account the EU Charter whenever EU law is applied.[92] The *Acciardi* case,[93] which involved the transferability of social entitlements of workers who move to other EU countries, is usually held up as an example of the ECJ taking into account the context of family and society in addition to the economic context. It is difficult to determine from this example if the effect of the ECJ ruling is market-making or market-correcting with some scholars arguing that the ruling did not reverse the notion of workers as a commodity. What the ECJ ruling enabled is easier movement of labour between EU countries thereby serving the single market more effectively. ECJ rulings have generally implemented the four freedoms of the EU in the interests of fundamental market freedoms with the result that health rights, labour rights and even the capacity of nation states to redistribute wealth were diluted. [94]

Despite the obvious market facilitating impact of these rulings, the case law does reveal the power of the ECJ to alter the relationship between EU law and member states. The ECJ has to consider the four freedoms of the EU together with the legally enforceable Charter of Rights whenever EU law is engaged. This raises two questions: has the EU

84 Olga Zetterquist (n 41).

85 (Bazzocchi 2011), "The European Charter of Fundamental Rights and the Courts" in G.Di Federico, (ed) *The EU Charter of Fundamental Rights. Ius Gentium: Comparative Perspectives on Law and Justice* (Dortrecht: Springer 2011) p. 60.

86 Gareth Dale and Nadine El-Enanny, (n 52) p. 614. See Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963).

87 Ibid p. 621.

88 Floris De Witte (n 3) p. 590.

89 Ibid p. 610.

90 Gorman (2011) "The ECHR, the EU and the Weakness of Social Rights Protection at the European Level." *German Law Journal,* Vol 12, No.10 pp. 1834–61, p. 1835.

91 Ibid p. 605.

92 ECJ ruling in Case C-617/10 *Aklagaren v Hans Akerberg Fransson* EU:C:2014:126 at 21. See also (Markakis 2018), *Brexit and the EU Charter of Fundamental Rights* papers.ssrn.com http://ssrn.com/abstract=3280234 accessed 10 April 2020.

93 Case C-66/92, *Acciardi v Commissie Beroepszaken Adminstratieve Geschillen in de Provincie Noord-Holland*, 1933 E.C.R. 1-4567.

94 In the key cases of *Viking* and *Laval* the ECJ ruled against labour in favour of the market. Case C-438/05, *Int'l Transp. Workers'Fed'v.Viking Line* ABP,2007 E.C.R. I-10779; Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareforbunded*, 2007 E.C.R, 1-11767 Case-C343/06.

Charter made the ECJ another forum for rights adjudication for EU member states? and does the Charter give member states more scope to strike the balance between EU economic policies and commitment to ESC rights?

The EU Charter is limited in its application because the EU does not have the power, through its institutions, to enact human rights rules nor to create binding human rights treaties.[95] Art 51(1) of the Charter requires EU institutions to have regard for the rights of the Charter when creating legislation so EU Charter rights apply only within the competency of EU institutions. In addition, the text of the Charter makes clear that the new rights included do not confer new competencies on the EU.[96] It is unlikely, therefore, that the ECJ will uphold individual entitlements against member states.[97] Rights, whether CP or socio-economic are weak at the EU level since they aid in the interpretation of EU and national legislation if EU and national law are discovered to be incompatible with EU Charter rights. Charter rights cannot be used to disapply the legislation of member states. The significance of the EU Charter is that it will have a constraining effect on EU institutions to the extent that legislation emanating from the EU cannot conflict with the rights protected in the EU Charter and member states are bound by EU Charter rights when acting within the scope of EU law.[98]

However, even this modest impact of Charter rights on the operation of EU law created concern among a few member states that the new legal status of the EU Charter could mean that individuals in the EU, with locus standi, could use the Charter to expand the scope of rights. Indeed, it still remains unclear whether the rights in the EU Charter could become grounds for judicial review of laws and decisions of EU institutions.[99] The UK (and Poland) negotiated a protocol (No 30) to limit the jurisdiction of the ECJ rulings in situations where UK and Polish law are inconsistent with Charter rights except those rights already recognised in UK and Polish national law.[100]

What was the reason behind the UK "reservation" or Protocol 30? Was the UK afraid that the Charter was in danger of expanding rights such as workers' rights or labour rights at the domestic level? In the explanatory note accompanying the European Union Withdrawal Treaty (EUWA) the UK is emphatic that UK citizens will suffer no detriment when the EU Charter no longer applies in the UK.[101] A 2017 UK Government Report claims that the rights of the EU Charter are superfluous since these rights are covered by domestic law, international human rights law and EU law that remains part of UK domestic law.[102] If this is the case then there was little need for the reservation. A more accurate reading of the reservation is the concern created about the potential implications of a Charter of Rights that includes a raft of social rights with the same legal status as CP rights. As a member of the EU, the UK would have had to accept the constraining effect of the Charter on UK law-making powers so the UK rejected the jurisdiction of the ECJ in this regard. This hints at the role the ECJ could play in implementing the EU Charter. Significantly, the

[95] Accession of the European Commission to the European Convention for the Protection of Fundamental Freedoms. Opinion 2/94, above n.59, paras. 27 and 34.

[96] (Zetterquist 2011) (n 41).

[97] (De Schutter 2007) "Fundamental Rights and the Transformation of Governance in the European Union". Cambridge Yearbook of European Legal Studies, Vol. 9.

[98] (Markakis 2018) (n 92).

[99] (Hervey 2005), 'We don't see a connection': The 'Right to Health in the EU Charter and European Social Charter" in *Social Rights in Europe* (Eds) Gráinne de Búrca, Bruno de Witte, and Larissa Ogertschnig (Oxford University Press: 2005).

[100] (Consolidated version of the Treaty on the Functioning of the European Union 2016)—PROTOCOLS—Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Doc 120086/PRO/30. Available online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F30) (accessed on 13 June 2020).
Article 1(2) of the Protocol No 7 Treaty of Lisbon provides that: 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the UK except in so far that Poland or the United Kingdom has provided for such rights in its national law.' See also (Markakis 2018) (n 92).

[101] EUWA s 5 (5); Explanatory Notes, paras. 61, 106–7.

[102] (Charter of Fundamental Rights of the EU: Right by Right Analysis 2017) (5 December 2017), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf (accessed 13 October 2020), para. 5–6.

scope of the Protocol did not allow the UK (or Poland) the freedom to implement laws or administrative regulations inconsistent with the provisions of the Charter.[103]

The Treaty limits the ECJ to applying the fundamental rights of the Charter only in the context of EU law. This hardly amounts to a radical move to impose equitable social rights across EU member states. Besides, rights protecting instruments have never been enough to achieve the legal enforcement of rights without being accompanied by vigorous social action. The history of civil and political rights is a history of collective action by excluded groups to expand the application of rights. Sex and race equality before the law, for example, required the mobilisation of local and international movements to bring about legislative change in domestic jurisdictions. Significantly, the Committees serving the ICCPR and ICESCR take into account the views of NGOs in their assessment of country reports on the progress made in implementing rights. The EU and the ECJ are immune from the sorts of political pressures and mobilisation for rights that nation states face. This highlights the social and democratic deficits of the EU which results from "the absence of . . . a constituent power—some sort of sovereign people."[104]

If the EU Treaties have assumed "a regulatory form of authority" more akin to a constitution including employment and industrial relations regime,[105] then it is unlike a traditional constitution that regulates political governance and political opposition.[106] The ECJ cannot develop social policy through its rulings except in a limited, piecemeal way. Moreover, the court's intervention is not the same as democratic representation as judicial legislation is "immunised [at the EU level] against political objections."[107] The impact of ECJ rulings is more likely to act as a constraining force if EU institutions and nation states attempt to disregard the social consequences of EU law and policy.

5. Brexit and the Charter "Effect"

If Brexit, a political and constitutional event, is also seen as a social movement against the international and regional effects of globalisation, it may explain the post-Brexit moves by the EU to address the social question more directly. Ironically, if the Brexit effect results in pressure on the EU and ECJ to create an environment that is more conducive to the fulfilment of ESC rights in member states then UK citizens will not have a share in this.

Since the Brexit vote in 2016, the EU made two separate declarations to confirm Europe's commitment to the social question and social rights. In the Rome Declaration of 2017, the EU included social rights in its statement on the future of Europe.[108] Twenty-seven EU member states (now excluding Britain) committed themselves to four key aims "a safe and secure Europe; a prosperous and sustainable Europe; a social Europe and a stronger Europe."[109] The Declaration promised that the EU would become a union "which acts against unemployment, discrimination, poverty and social exclusion."[110] In November of the same year, the European Parliament, the Council and the Commission proclaimed the European Pillar of Social Rights which is the first set of social rights proclaimed by the EU institutions since The Charter of Fundamental Rights in 2000.[111] The Pillar of social rights "is about delivering new and more effective rights for citizens" and aims to achieve

103 Case C-206/13 *Cruciano Siragusa v Regione Sicilia*.

104 Stephen Gill, (1998) "European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe", 3 *New Pol. Econ.*, 5-26 quoted in Gareth Dale and Nadine El-Enanny (n 52) p. 648.

105 Ibid.

106 Ibid p. 624.

107 (Scharpf 2010) "The Asymmetry of European Integration, or Why the EU cannot be a Social Market Economy." *Socio-Economic Review* 8: 211–250.

108 This was on the occasion of the celebration of the 60th anniversary of the Treaty of Rome.

109 Europeanmovement.ie.

110 Ibid.

111 News. The European Pillar of Social Rights has been jointly signed by the European Parliament, the Council and the Commission on 17 November 2017 at the Social Summit for Fair Jobs and Growth in Gothenburg, Sweden. The European Pillar of Social Rights in 20 Principles. *ac.europa.eu*. See also Barnard (2014) "EU employment law and the European social model: the past, the present and the future," *Current Legal Problems* 67, 1, 199–237.

a practical social agenda through legislative and policy initiatives.[112] There are 20 key principles organised in three categories, namely, equal opportunities and access to the labour market, fair working conditions and social protection and inclusion.

A year after its declaration the European Commission took concrete steps to put the 20 rights and principles into practice claiming that "[t]he European Semester is now more social than ever, with the Pillar firmly integrated into the process to monitor social progress."[113] The statement included better EU support for fair and well-functioning labour markets and welfare systems now and in the future."[114] The statement, timed for the May 2019 European elections, also announced €100 billion over the period of 2021–2027 for the European Social Fund. Jean Claude Juncker, emphasising the social dimension in the future of the European Union proclaimed that "[O]ur union has always been a social project at heart. It is more than just a single market, more than the euro. It is about our values and the way we want to live."[115] The Commission's proposals on the European Social Fund Plus (ESF plus) and the future globalisation Adjustment Fund linked to the Pillar included a process whereby the Commission would monitor progress by member states on the basis of social indicators.

The Brexit event seemed to have forced a commitment by the EU to pay attention to the social sphere. This does not mean that the efforts made are enough to address or resolve the contradictions inherent in EU policies. The enhancing of the social will not bring about a redistribution of wealth or protect people from the more egregious effects of the market. It appears to imply, instead, adjustment to the market "by way of increasing employability through the acquisition of skills. The expectation is that the labour force has to retrain and adapt to an increasingly competitive, globalised work economy."[116] These initiatives are consistent with the Social Charter which has long been criticised for protecting workers' rights and rights that favour "participation, adjustment and development" with respect to the economy, but fall short of adequately catering to "life circumstances" of dependence that might need or require support and care.[117]

The EU Charter, limited as it is, will cease to apply in the UK after 31 December 2020. The European Union Withdrawal Act (EUWA) 2018 both repealed the European Communities Act 1972 and preserved much of the pre-Brexit legal status quo—for now. A raft of laws that implement the shared obligations of member states of the EU will remain as a consequence of the EUWA. This has created an anomaly in UK domestic law since the EU Charter applies when EU law is implemented but the EU Charter ceases to apply in the UK after Brexit even though a substantial corpus of EU law has been retained in UK domestic law.[118] The confusion is made greater by s. 5 (2) of the EUWA which states that the supremacy of EU law applies to all EU provisions made before exit day.

UK citizens are facing several potential threats to the effectiveness of international treaties to protect their rights. The UK is officially no longer party to the EU Charter of Fundamental Rights. Brexit has also limited the continued application of the ECHR in UK domestic law even though this is a separate, regional human rights treaty protecting CP rights. The ECHR is entrenched in EU law and it is feared that the UK's disengagement

[112] Statement by the President of the EU Commission, Vice President for the Euro and Social dialogue and Commissioner for Employment, Social Affairs, Skills and Labour Mobility. The European Pillar of Social Rights in 20 Principles. ac.europa.eu. (accessed 10 August 2020).

[113] ac.europa.eu. (accessed 10 August 2020).

[114] (European Pillar of Social Rights: Statement by President Junker 2018), Vice-President Dombrovskis and Commissioner Thyssen one year following its proclamation. News. 13/11/2018. ac.europa.eu. (accessed 10 August 2020).

[115] European Commission President Jean-Claude Junker (2017), Statement following the proclamation of the European Pillar of Social Rights, Tripartite Social Summit, 17 November 2017. European Commission, ac.europa.eu. The president made reference to the Future of Europe Summit in 9 May 2018 in Sibiu, Romania (accessed 10 August 2020).

[116] (van Apeldoorn 2009), "The Contradictions of "Embedded Neoliberalism" and Europe's Multi-level Legitimacy Crisis: The European Projects and its Limits," in Van Apeldoorn, B, Drahokoupil, J & Horn, L (Eds) *Contradiction and Limits of Neoliberal European Governance: From Lisbon to Lisbon* (Palgave: 2009) pp. 21,31 See also (Hervey and McHale 2005) Law, Health and the European Union, *Legal Studies* 25 (2) 228–259.

[117] (Barak-Erez and Gross 2007), Exploring Social Rights Between Theory and Practice. 2007. Available online: https://www.worldcat.org/title/exploring-socail-rights-between-theory-and-practice/oclc/8164172932&referer=brief_results (accessed on 13 October 2020), p. 371.

[118] ECJ ruling in Case C-617/10 *Aklagaren v Hans Akerberg Fransson* EU:C:2014:126.

from the EU "will remove any constraints to withdrawal from the ECHR resulting from EU law".[119] The ECHR is currently under independent review.[120] The chair of the independent review insists that the UK will remain a signatory to the Convention but that one of the key points of review is the relationship between the UK courts and the ECtHR, especially the requirement that UK judges "take into account" the jurisprudence of the ECtHR.[121] The government seems determined to restrict the application of ECtHR jurisprudence in UK law and has mooted a British Bill of Rights. The UK government dismisses the idea that UK citizens or EU citizens residing in the UK suffer any loss of legal protection when the EU Charter ceases to apply. However, if the ECHR is also restricted, there will be limited regional, European-wide rights protection for UK citizens.

6. Conclusions

Post-Brexit, it would appear that the UK may be on a different path to the EU if three factors are taken into account: efforts by EU institutions to take concrete steps to address through law and funding, social issues such as social welfare; the disapplication of the EU Charter in the UK; the independent review of the scope of the application of the ECHR in UK law. For decades EU policies diluted sovereignty without creating a meaningful democracy at the EU level and pursued ambitious economic policies that diminished the scope for either institutional or member state settlement of social issues. This approach risked "political rupture" with member states of the EU, as with Brexit, and undermined the legitimacy of national governments by eroding their ability to deliver equitable social welfare policies through political means.[122] Fundamental rights, besides being the basis of individual entitlements also serve to constrain the power of the state. As mentioned previously, the EU is not a state, but its institutions, laws and policies dominate member states. Securing fundamental socio-economic rights against EU institutions and agencies may create more scope for member states to take political responsibility for social arrangements. A more enabling environment for the development of equitable social policies is vital for the protection of ESC rights as the latter's implementation depends more on states' capacity to deliver on their treaty commitments than attempts to secure justiciability for ESC entitlements on the same basis as CP rights.

The role of the ECJ in promoting legal protection of ESC rights depends on the determination of EU institutions to rebalance the economic direction of travel by paying attention to the neglected social sphere. ECJ rulings have implemented the rules of free competition in the EU and the four freedoms. If the ECJ were activist in prioritising the economic over the social a change may come with the shift in emphasis of the Lisbon Treaty and stated EU policy. It could be argued that the ECJ gave effect to the EU's economic ambitions which had the possibly unanticipated, and certainly undesirable, outcome of eviscerating the social sphere and diluting the political power of member states to legislatively correct for the damaging effects of the market. Just as the ECJ had given effect to the EU's market-orientated ambitions the same court could potentially give effect to the EU Charter in constraining the overweening power of the institutions of the EU supra-state.

The human rights approach to the social sphere highlights the obligations on states. The EU ought to find, in its structural arrangements and organization, a way to prevent the diminution of other important shared values, besides material benefits, that recognises that life includes needs and dependence (temporary and permanent) which are part of human existence.[123] The EU Charter, for all its limitations, stands out as one of the few multilateral instruments enforcing both CP and ESC rights. It could act as a bulwark against EU policies

119 (Lock 2017) *Human Rights in the UK After Brexit, Public Law*, Nov Supplement (Brexit Extra Issue) 117–134.

120 On 7 December 2020 the UK government launched an independent review of the ECHR. Ministry of Justice Press Release www.gov.uk (accessed on 13 October 2020).

121 (Cross 2021), ECHR departure is not on agenda, say rights review chair. *Law Society Gazette* 13 January 2021.

122 Floris de Witte (n 3) p. 585. See also, (Anderson 2021), (21 January 2021). "The Breakaway" *London Review of Books*, Vol. 43 No. 2 .

123 D Barak-Erez and Aeyal Gross (n 113). See also Boguslaw Banaszak (n 33).

that create a hostile environment for the implementation of ESC rights in member states. If the Charter becomes an instrument of pressure, as other human rights instruments successfully became, at the very least on the ECJ, it is likely that EU member states would find less obstruction from the EU to fulfil ICESCR treaty obligations. Whether this will translate into EU citizens enjoying greater ESC rights will, then, be more dependent on policy choices made by member states rather than by the EU.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

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Environmental Legislation in European and International Contexts: Legal Practices and Social Planning toward the Circular Economy

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Abstract: Environmental issues and relevant policy plans are steadily involving the circular economy (CE) concept into business development. Such significant approaches to achieve environmentally sustainable economic development, they are supported and reinforced by dissatisfaction with the linear traditional approach of "take-make-dispose" model. This traditional production model is bounded on large quantities of directly accessible resources and energy. Therefore, at this study the transition of the linear take-make-dispose model was investigated toward the circularity approach of cost-effectiveness over eco-efficiency. In this respect the study focused on, mainly European, environmental legislation at the industrial sector and the abiding legal practices and social planning regarding CE. The collective presentation of directives and regulations was accompanied by representing those research considerations, social reflections, and legal practices' impacting. The challenging issues and the key developmental prospects for future researches have been conclusively denoted.

Keywords: environmental legislation; circular economy; social planning; European Union Directives; regulations; social planning; public law; private law

Citation: Kyriakopoulos, Grigorios L. 2021. Environmental Legislation in European and International Contexts: Legal Practices and Social Planning toward the Circular Economy. *Laws* 10: 3. https://doi.org/10.3390/laws10010003

Received: 11 December 2020
Accepted: 12 January 2021
Published: 14 January 2021

1. Introduction

Nowadays plentiful researches have systematically approached legislation issues regarding manufacturing and industrial conditions of production. Such issues include incidents of fatalities and injuries in the industry, equipment in the workplace, personal protection, lifting systems, pressure systems, safety signs and electricity, transportation of chemicals through supply chains, first aid, as well as health protection and prevention of occupational diseases among workers at processing and recycling waste materials (Dodd 2002; Ilyassova et al. 2020).

Among legislation production of procedural interest is that of occupational health and safety (hereinafter H&S) legislation, relative to the construction industry. Such an occupational H&S legislation has been highly significant and especially appreciated among developing countries, since it must meet the current realities in the construction industry, being enforced at the local level, and enabling central governments to address corruption (Adeyemo and Smallwood 2017; Adeyemo and Smallwood 2019). It is noteworthy that the relevant legislation system does not always positively influence H&S performance in the construction industry, thus, severely affecting the implementation of H&S legislation and badly impacting on overall projects' performance (Adeyemo and Smallwood 2017; Adeyemo and Smallwood 2019). At a typical H&S legislation governing the UK industrial sector can be extended from the control of hazardous substances up to health and safety conditions about noise, handling operations, displaying screen factors, and precautionary risks of fire and explosion (Dodd 2002).

In a similar research it was investigated the effect of occupational safety and health (hereinafter OSH) legislation in reducing workplace accidents at Spanish manufacturing

throughout the period 1988–2004 (Arocena and Nunez 2009). It is critical to estimate the relationship between the number of serious injuries and the potential risk factors, by means of diverse specifications of the negative binomial regression model for panel data. Interestingly, the adoption of the new OSH regulation contributed to the reduction in injuries cases within advanced manufacturing sectors, but the accident rates in traditional manufacturing did not show any statistically significant change following such a legislative reform (Arocena and Nunez 2009).

Another critical consideration is the examination of those distinct features between private and public law, in order to determine those traditional private law regimes that may provide a sound basis to improve the law's capacity to cover the circular economy (hereinafter CE) principles (preferably) in a proactive manner. Such an anatomy on the distinction between public and private law is currently blurred, thus, necessitating legal techniques that aim to regulate the relationship among private parties. It is not surprising that most of these legal techniques are also utilized in the domain of public law, which governs relationships between private parties and central governments (Ballardini et al. 2021).

In this section the theoretical focus on the H&S and OHS legislation was selected in order to represent the legislative affection of industrial and manufacturing sectors and processes to the built environment and the human capital, while the environmental protection and wastes management are certainly fields of future legislative interest. At the following sections the research has focused on the environmental legislation in the industrial sector, as well as on describing the conditions of public and private law to foster the CE. Then, an integrated discussion on the key-findings was developed, while the concluding remarks have succinctly denoted the key-issues and the future research prospects and challenges offered.

2. Environmental Legislation in the Industrial Sector

The environmental legislation in the industrial sector is a challenging topic because of the ongoing advancements of production processes and the consumerism patterns. The critical points of consideration are the transitions from local transactional economies toward international and open markets, the new technological modes of products launching and promotion through social media influencers and e-commerce, as well as the adoption of circularity over linearity in products and services of developing and developed economies. Therefore, legislation has to be also evolved in order to support these transactional socio-economic phenomena, while special provision should be taken for all these economic activities to abide to the common legislation rules, regulations, and policy regimes.

This section consists of two subsections referring the specific paradigms/cases from the EU context, as well as the cost-effectiveness and eco-efficiency targets of linear and circular economy. The main shortcomings of the traditional linear approach over CE, are that the linear economy is related to the direct disposal of used products, thus pressing directly the manufacturing and industrial units to produce ever more to meet the high-consumerism and indirectly causing excessive depletion of natural sources, either for raw materials mining, or environmental degradation caused by the whole life cycle process of products: materials mining, production, distribution (supply chain and logistics management), consumption, decommissioning. On the other hand, the CE is approaching used products of useful raw material for a second, or more, rounds of utility, thus, adding value to those depreciated products. The prevention of products' direct disposal is also supporting lesser levels of pollutants emissions from industrial units, as well as saving of raw materials' deposits. Consequently, it is of utmost importance the legislative adaptation to those socio-economic transitions and an integrated analysis of these issues has been approached at this study.

2.1. Environmental Issues of Legislative Interest in the Industrial Sector

Industries are certainly generating pollutant emissions in water source, ground, and air that face current environmental regulations at both European Union (hereinafter EU) and

international contexts (Macovescu and Guta 2012). It is indicatively noted that endocrine-disrupting effluents from the textile industry were considered in the past as contentious waste and hence it was not covered in systematic depth, but it followed compliance methods and requirements related to general manufacturing industry (Simpson et al. 2000). The relevant literature covers many diverse practices and geographical dispersion of environmental legislation: from the offshore oil industry in China (Lu and Xia 2004) and the textile-manufacturing industry in the UK (Cooper 1992; Simpson et al. 2000), up to environmental legislation regarding the steel industry in the U.S. (Hogan 1995). Therefore, the handling and coordination of such a broad legislative production could be feasibly supported by setting-up a database, which has been recommended toward the easier control and harmonization of diversified environmental regulations followed by experts in the contexts of EU and international legislation, accordingly (Macovescu and Guta 2012). However, it has been reported a gap in consumer protection that is caused by the absence of a general EU regulatory framework for services. Such a constraint can be partially overcome through standardization (Mak and Terryn 2020).

Among today's environmental issues that are generating high legislative interest are wastes generation and disposal. Waste generation is considered as a key by-product of modern economic and social living and consumption behavior and one of the constantly worsening problems for environment, human health, and EU economy, since it is estimated that materials sent to landfill in the EU could have a commercial value of around €5.25 billion per annum, which is directly related to economic loss (Pouikli 2020). Excessive economic costs of infrastructure are also incurred for the collection, sorting, and management of waste, as well as for confronting the resource crisis due to the over-exploitation of natural capital caused by population growth, urbanization, unsustainable economic endeavors, and consumption patterns (Pouikli 2020). In this context large-scale industrial units have been built regarding mining and processing of rare earth element (hereinafter REE). This industrial process generates significant quantities of waste, while the ores contain variable amounts of non-target toxic metals, fluorine, and radionuclides. The chronologically earlier processes of REE mining and processing have led to significant environmental impacts in several countries, causing research interest to be driven on finding and identifying several viable REE resources among the EU, while it is likely that one or more of these will be predominately exploited in the near future. Subsequently, EU environmental legislation should determine whether the EU's existing environmental and radiation protection legislation is adequate to support such a sustainable REE exploitation (Keith-Roach et al. 2015).

Another critical aspect necessitating the production of a variety of environmental legislation is the strengthening of global trade forces companies for them to comply with environmental regulations and subjected to continuous modifications. The second half of the 20th century has been characterized by a dramatic increase of environmental directives and regulations, while law enforcement agencies expanded their active analysis of companies and their products (Miehe et al. 2015). A plethora of companies have been, even, accused of selling non-compliant products by both enforcement authorities and competitors ever since. Therefore, companies and products compliance are greatly linked with their internal processes and their adaptability to manage changes (Miehe et al. 2015). Such management of change entails different business types related to size, number of employees, suppliers and materials, thus, the environmental legislation development has focused on those applicable processes ensuring compliance with regulations for various hazardous substances that can be successfully tested among highly industrialized companies of developed economies. In such a study over 70 companies of different industries in Germany were tested in the light of those essential steps and standardized approaches for material, substance, and risk assessment—mainly the following standards of: ISO 31000, 14040, 14044 and EN50581—being suitably determined and selectively applied (Miehe et al. 2015).

2.2. Cost-Effectiveness over Eco-Efficiency in Linear and Circular Economy

The cost effectiveness over eco-efficiency is actually a contentious topic, having multiple impacting on almost all entrepreneurial activities of linear economy. However, two critical issues that have to be addressed are first, researchers to fully understand those critical aspects that ensure the application of eco-efficiency at the transition from linearity to circularity economic contexts and second, in what ways legislative regulations and directives could be extended to cover the new transaction routes entailing the CE compared to the well-established, but rigidly running, linear economy. In the upcoming years it is anticipated that technical advancements will go ahead legislative protection of them thus, at this study, it is noteworthy to represent typical cases of high environmental, social, and regulatory interest.

The agricultural sector and the agri-food industry are considered as prime sectors of determining optimal levels of eco-efficiency based on resource utility of social cost to consumers and financial benefits to farmers. Such a common resource, that is the excessive use of fertilizer, threatens sustainability and also causes negative externalities in the form of hidden social cost to the society (ul Haq et al. 2020). These authors estimated the social costs and benefits in alignment with excessive use of chemical fertilizers on crops and also evaluated the eco-efficiency of cultivations of local agrarian interest. Data analyses showed that the overuse of fertilizers at local cultivations could substantially reduce the per-hectare greenhouse gas emissions (hereinafter GHGs) by applying eco-efficient fertilizer target levels. Besides, the optimal level of fertilizers equals social costs to social benefits, showing that the farmers cannot only reduce their fertilizer quantities without compromising the crop yield, but can also contribute to the sustainable air environment of low GHGs levels. From a legislative point of view provision should be taken to micro-finance from banks or local large companies enabling farmers to replace the older methods of agricultural production with newer ones in order to achieve social and eco-efficient levels as well as to maintain viable yield levels (ul Haq et al. 2020).

Similarly, food production and transformation have increasing impact on the environment. Therefore, agri-food industry can improve its environmental performance by increasing the value of the processed products. In this respect it is noteworthy a new technological approach to evaluate eco-efficiency beyond the production costs, while accounting for the functional value of the foodstuff. In such a technological approach the conventional use of the monetary unit as the product value, authors proposed a value-based metrics that is closer to consumer interests, e.g., content of functional nutrients, taste and abatement of harmful substances (Chaudron et al. 2019). This technological approach evaluated the eco-efficiency of de-acidified cranberry juice by two alternative technologies in Quebec, Canada. Actually, the adoption of an approach closer to consumers' interests, enables eco-efficiency results to be more relevant for decision-making in the context of cleaner production, particularly when the monetary value is not reliable. Again the trading law can be also extended to protect producers and byers of such new routes of production and consumption.

Among the crucial sectors that support the economic growth of either developing or developed economies, are transportation and tourism sector. Since air and liquid emissions are related to economic activities of shipping and its contribution to the degradation of air quality, health, and built environment in port-cities, there is increasing attention to investigate the environmental cost by eco-efficiency performance indicators from vessel traffic, in general, and passenger sub-sectors, in particular, under diverse geographical and regulatory contexts. These research objectives are of paramount importance since sustained market growth and shipping—also deriving into pollution concentration and a steady increase over residents and visitors—necessitates the identification to internalize environmental impacts (Tovar and Tichavska 2019). Typical emission assessment involved the passenger port hubs of Las Palmas, St. Petersburg, Hong Kong over a twelve-month period where environmental cost was obtained from a top-down approach and the latest seaport-related cost patterns. Besides, eco-efficiency performance indicators were deter-

mined by the ratio of product/service impacts (externality costs) and its added value (port profiles). Supporting international and regional policy design within the selected harbors and ports under similar traffic conditions implies strategic policies to enhance abatement actions toward shipping sectors and relevant legislative reforms at the shipping law: financing, construction, insurance, transportation of goods and people by sea (Tovar and Tichavska 2019).

Another paradigm of eco-efficiency in transportation sector is that of Philippot et al. (2019). These authors denoted that GHGs emissions and the battery cost of electric vehicles (EVs) have been well studied, but coherent boundaries between environmental and economic assessment are needed to investigate the eco-efficiency of batteries. In such a research, environmental analysis and economic assessment of the manufacturing of one specific lithium-ion battery chemistry were deployed taking into consideration the key-parameters of manufacturing place, production volume, commodity prices, and energy density. Authors reported that the battery cost–commodity price association was proven much lower than that of battery cost–production volume association. Moreover, life cycle assessment unveiled that the electricity mix was used to power the battery factory and it was proven as a key parameter for the impact of the battery manufacturing on climate change. In improving the battery manufacturing eco-efficiency, a high production capacity and an electricity mix with low carbon intensity are suggested. Furthermore, the optimization process was proposed by reducing the electricity consumption during the manufacturing. In this paradigm it is also important the legislative framework to jointly ensure the technical advancements of higher pack energy density, in alignment with the impact on climate change of the pack manufacturing in regulatory thresholds of (kg CO_2 eq/kWh).

In the context of transition from the linear to the circular economy two paradigms in which the circular economy was proven highly effective are: (a) health and hygiene sector and (b) decarbonization of industrial sector through renewables use in energy production. Regarding the first one of the paradigms above, the health and hygiene conditions are related to environmental implications, while using cloth instead of disposable products, utilizing bio-materials or enabling recycling and composting. Such paradigms are that of single use disposable face masks for the COVID19 pandemic as well as the disposable baby diapers (Mendoza et al. 2019). The evaluation of economic and environmental savings that could be achieved by eco-design and cleaner production of disposable baby diapers involves the use of an optimized absorbent core and innovative bonding technologies to replace gluing systems in diaper manufacturing. A cradle-to-grave life cycle costing proved that novel design and manufacturing of "glueless" diapers can reduce costs by 11% compared to similar conventional products, equaling to €250 million saving at the EU level. Besides, the eco-efficiency analysis unveiled that the glueless diapers were 7–170% more eco-efficient (€/impact) than the standard diapers in the light of the environmental impact considered (Mendoza et al. 2019).

Regarding the second paradigm, the decarbonization of the energy sector, it is related to a high number of technical options available for energy production and among them the hydrogen production was one of the most promising ones (Valente et al. 2019). Nevertheless, the suitability of these technical options necessitate a thorough evaluation from a life-cycle perspective. In this context, the standardized concept of eco-efficiency is suitable from a life-cycle perspective, entailing the environmental performance of a product system to its value (Valente et al. 2019). Benchmarking the eco-efficiency performance of renewable hydrogen produced through biomass gasification against conventional hydrogen from the steam reforming of natural gas involves the harmonized environmental indicators of global warming, acidification, and cumulative non-renewable energy demand. Additionally, the product system value was based on the levelized cost of hydrogen with and/or without internalization of the external socio-environmental costs associated with climate change and human health. Authors stated that by combining life-cycle environmental and economic indicators under the umbrella of the eco-efficiency assessment, it is disclosed that the renewable hydrogen option outperformed the conventional one, which was further

remarked when implementing socio-environmental externalities. In this regard, a relative eco-efficiency performance can be estimated for the renewable hydrogen option when benchmarked against conventional hydrogen.

3. Environmental Legislation in the Context of Circular Economy

The legislation referring to environmental issues of economic interest is thriving. In such a systematic approach and organization of this literature production, the legislative framework was collected and organized into three general dimensions: policies, products, services. In the following section each one dimension has been further analyzed in alignment with the relevant key-aspects and specific issues of environmental priorities, mainly responding to European regulations and directives.

3.1. Legislative Tools towards Circular Economy—The "Policies" Dimension

EU has produced laws on the disposal of waste for over 30 years and laws concerning the environmental performance of products for over 20 years. However, this legislative production is not forming a cohesive whole, which is about to change (Hughes 2017). In this context the European Commission (EC, the body responsible for proposing new EU legislation) published its Circular Economy Package in December 2015 having the stated objective of "closing the loop" of lifecycles among products (Hughes 2017). The Circular Economy Package calls for further clarification of the definition of waste as well as for a better application of the waste hierarchy with emphasis being put on increasing both the quantity and the quality of recycling (Pouikli 2020). The key-aspects of this Circular Economy Package aim at demonstrating why the development of standards underpins future legislation. Such research tools of demonstration include primary developers or secondary researchers covering relevant policies, as this, out of the newly created CEN-CENELEC group, is responsible for drafting standards related to the material efficiency of products (Hughes 2017).

The ongoing generated EU Directives have to be briefly reviewed, enabling policymakers and plan designers to provide an indication of the likely requirements for industry of future EU and international legislation. The general requirements upon basic entrepreneurial, commercial, manufacturing, and industrial sectors, should be commented in alignment with suggestions for methods of compliance. In this respect, and taking into consideration that CE involves fundamental changes in production and consumption systems, a short-term research orientation can focus on the distinction between private and public law to underline the traditional private law regimes, in order to provide a sound basis to improve the law's capacity to foster the CE (Ballardini et al. 2021).

CE involves policies in holistically approaching the linkages between resource, substance, product and waste, in alignment with the interactions between waste, product, and chemical laws. In such context it is crucial for CE policymakers to consider the fact that waste, other than pollution, can be conceived of as a raw material of utility mainly in a production process (Pouikli 2020). The life-cycle thinking incorporated in the CE conceptualization is stressing out the need to consider:

(a) The environmental impacts of an entire material life-cycle in a holistic manner (Pouikli 2020). In such a context, the regulation of many types of energy-consuming products can be accomplished, providing that they meet generic or specific measures concerning their use of energy. The aim is to reduce their environmental impact, improve their energy efficiency, and cut greenhouse gas emissions (Beheshti 2020).
(b) The issue of protecting the rights of workers in the field of waste processing, regarding the creation of unified rules and standards, and as a result, the implementation of the developed norms in national legislation (Ilyassova et al. 2020).

Contemporary paths of environmental legislation are involving inter alia to acts of repairing, reusing and leasing, where selected private law fields are currently failing to provide the incentives needed for directing innovations and businesses toward more sustainable models. In the relevant literature its was denoted that this mainstream utility

approach to property has become untenable in real world situations where the impact of both tangible and intellectual property law frameworks on ecological integrity should be prioritized (Ballardini et al. 2021). Intellectual property can be approached with the following four political dimensions derived from property law theories: (a) utility theory (or utilitarianism), (b) labor theory, (c) personality theory, and (d) social planning theory. For the scope of this study the most "impersonal-liking" theories, that of utility and social planning are mostly influential (Ballardini et al. 2021).

Therefore, there is imperative need of further investigating the shortcomings of the mainstream utility economic approach to the private law pillar of "property" in fostering socially desirable developments, such as sustainability, as the utmost priority determinant of the CE context. In this research framework two prominent private law regimes, namely intellectual property and property laws, showed that legal practices that reflect more social planning types of theory might better facilitate a gradual and swifter transition toward the CE. This switch is also challenging since:

- It enables a smoother linkage between private law regimes with the foundations of public areas of law, a way of harmonizing the two frameworks in achieving a sustainable CE among EU countries. However the adaptability effectiveness to other national or continental contexts remains as a research objective example for future analysis (Ballardini et al. 2021).
- Fostering CE and abiding to its environmental sustainability traits in private law requires taking a holistic, rather than a sectoral, approach. Environmental, economic and social aspects of sustainability are interlinked, thus a better understanding of environmental sustainability predominately requires the protection and preservation of the natural capital. From an economics point of view harnessing the creative forces of the market economy is a prerequisite toward the new and sustainable routes of production and consumption (Ballardini et al. 2021).

At the following Table 1 the key-aspects regarding the "policies" orientation of the existing EU legislative framework is presented as follows:

Table 1. Key-aspects and legislative tools regarding the "policies" dimension.

Key-Aspects	Legislative Tools	Refs
Current EU policies for products; Policy instrument for addressing resource efficiency and affecting CE promotion; Harmonization of ecodesign law across EU States toward mandatory ecological requirements: reparability or durability for energy-related products sold within the EU	Ecodesign Directive (Directive, 2009/125/EC) Energy Labelling Regulation (Directive, 2017/1369) Ecolabel Regulation (Directive 66/2010) Green Public Procurement Directive (Directive, 2014/24/EU) Extended Producer Responsibility: Articles 8 and 8a in the Waste Directive, as amended by Directive, 2018/851/EU	(Ballardini et al. 2021; Beheshti 2020)
Repairability, refurbishability, reusability, and shareability of products	EU Green Deal Communication and the Circular Economy Action Plan	(Ballardini et al. 2021)
Whole production cycle from the: (a) Use of raw materials, design, production, distribution and consumption of products and services; (b) disposal and recycling of materials used as secondary raw materials	European Commission, Action Plan 2015 European Commission, Implementation Report 2019	(Mak and Terryn 2020)
Environmental challenges regarding: (a) Climate change; Air and water pollution, land use and waste; (b) environmental protection, better information in the fields of energy and transportation	Consumer Policy Strategy 2007–2013	(Mak and Terryn 2020)
"Green" claims	Unfair Commercial Practices Directive (UCPD) Directive 2009/72/EC; Directive 2009/125/EC Directive 2010/31/EU; Directive 2012/27/EU Regulation 834/ 2007; Regulation (EC) No 1222/2009	(Mak and Terryn 2020)

Based on Table 1, above, it is noteworthy that, among others, the current evolution of EU waste law and policy necessitates the utility of extended producer responsibility (hereinafter EPR), as widely applicable tool of environmental policy (Pouikli 2020). EPR sustains a two-fold target: internalization of environmental externalities related to end-of-life management and fostering the operational implementation of sustainable product and waste management schemes in alignment with the waste hierarchy and with qualitative recycling and recovery targets. Such an instrumental tool is shifting the responsibility upstream to the producer away from municipalities, while incentivising producers to incorporate environmental considerations in their products design (Pouikli 2020). Research target is entailing the investigation of opportunities to move toward a more effective EPR while adopting flexible policy instruments. Primarily, definition of EPR, and secondary its implementation schemes in EU law can be interpreted regarding the role of EPR to accomplish targets relating to waste management and product design requirements under the CE context and convergence between waste and product laws (Pouikli 2020).

An EPR system or scheme can be an individual system when a producer organizes its own system (individual producer responsibility, hereinafter IPR), or a collective system (collective producer responsibility, CPR) when several producers decide to collaborate and thus transfer their responsibility to a specific organization: a producer responsibility organization (hereinafter PRO). A producer responsibility organization is setting up in collective EPR schemes in order to put into effect the EPR principle in the name of adhering companies through financing the collection and treatment of targeted waste, organizing and supervising these activities and managing the corresponding data. Typical examples in EU members are that of Duales System Deutschland in Germany and Eco-Emballages in France (Pouikli 2020). However, it can be denoted that in general the relatively sparse literature that has engaged with the relationship between consumer law and sustainability reveals that EU policy has primarily focused on "light touch" regimes that appeal to EU citizens to endorse sustainable lifestyles (Mak and Terryn 2020).

Private individuals and organizations operating in the market, are key-determinants to complement public regulations in areas of private law like IPR and property laws impacting on repair, reuse, and share (such as leasing) of goods. In this respect, radical changes need to occur in the way of conceiving the property entity, such as in IP and property law frameworks in order for these regimes to envisage the CE concept (Ballardini et al. 2021). Moreover, EPR schemes will promote the separate collection of waste, in meeting the municipal waste and packaging recycling targets, and through the avoidance of separately collected waste being sent to landfill and encouraging producers to create more sustainable products. EPR may be also a key instrument in promoting re-use, waste prevention, and eco-design as well as industrial symbiosis by ensuring the provision of high-quality secondary raw materials. Besides, EU States are encouraged via their EPR schemes to modulate fees for such schemes on the basis of durability, reparability, reusability, and the presence of hazardous substances, and a database will be created containing information on hazardous substances in products, thus significantly focusing more on qualitative prevention adopting substance restriction or bans on substances or materials that can cause negative environmental impacts when recovered, recycled, or disposed (Pouikli 2020; Ilyassova et al. 2020). In this respect the adoption of the term "durable lifecycle" refers to making goods of better design to become efficient and simple, ultimately leading to the extension of product life, thus, commercial buyer engaged in such a CE business model has therefore particular interests of obtaining such "durable lifecycled" goods (Beheshti 2020).

3.2. Legislative Tools toward Circular Economy—The "Products" Dimension

The "products" dimension should play a decisive role in drawing legislative tools and regulations toward a CE-market. Next to this social capital point of view, from a natural capital (ecology) point of view, research studies have focused on the possibility of water management that, as a vital public tool for better understanding the water market, appreci-

ating and protecting the natural wealth. The role of water is predominately important for human survival of all, present and future, generations. In this sense, states have played a determining role that transcends territorial boundaries, requiring that international agreements be established for uniform mechanisms of accreditation of promoted practices, fines, and benefits adhering to the movement of CE (Da Rosa and Ramos 2018). Therefore, while inhibiting and encouraging the behavior of state, private, and corporate agents, it is vital, first the suitable design of culturally acceptable mechanisms of sanctions and benefits offered (Da Rosa and Ramos 2018) and, second, products design their relationship with the legislative framework governing parties' rights and duties in the context of the sale of goods transactions (Beheshti 2020). Toward the environmental considerations of social planning it is indicatively noted:

(a) The imperative urgency of waste management law since, in the past, during these key political events, there was no reliable scientific data on the risks associated with e-waste, and the corresponding technical capacity necessary to work with data in the context of rapidly growing rates of e-waste production was not used (Ilyassova et al. 2020).

(b) In a buyer's decision to communicate its particular purpose of using goods compliant with CE, once the buyer's purpose of using goods in the circular business model is known to the seller, a measure of responsibility automatically shifts to the latter such that, where necessary and appropriate, it should investigate the buyer's needs. As such, it is unacceptable that the seller may seek to eschew its obligation by showing that it has received inadequate information from the buyer. Based on recent judicial decisions reported in literature (Beheshti 2020), the buyer should ensure that his/her full intention to use goods for a particular purpose is properly conveyed to the seller. However, a critique of the buyer must explicitly communicate explicitly its particular purpose to enhance the seller's knowledge so that the buyer can safely rely on the seller's skill and judgment, it is treated with skeptism, since this argumentation may appear restrictive and commercially unrealistic (Beheshti 2020).

In Table 2 the key-aspects regarding the "products" orientation of the existing EU legislative framework are presented as follows:

Based on Table 2, above, it is noteworthy that the aforesaid key-aspects have been characterized of utmost importance for the CE. As such, this regulatory framework can promote the transition from a linear (involving take-make-dispose)- to a circular- economy, thus, directives and regulations should promote such activities (Pouikli 2020). In this context, the main piece of EU legislation is epitomized to the repair and reuse, while new business models can be based on sharing and renting. Nevertheless, it is noteworthy that while earlier issued legislative tools have been well established and effectively adapted to national or international environmental situations, the most recent legislative tool of promoting law in force, especially that of the new Circular Economy Action Plan, it is still underdeveloped in an socio-environmental context (Ballardini et al. 2021). It is indicatively noted that according to the Circular Economy Action Plan only around 40% of the waste generated by EU households is currently recycled whereas, in 2013, the total waste generation in the EU amounted to approximately 2.5 billion tons of which 1.6 billion tons were not used or recycled (Pouikli 2020).

Table 2. Key-aspects and legislative tools regarding the "products" dimension.

Key-Aspects	Legislative Tools	Refs
Repairability, refurbishability, reusability, as well as shareability (also including leasing) of products	Waste Framework (Directive 2008/98/EC)	(Ballardini et al. 2021)
Re-manufacturing, refurbishing, repairing, and re-using toward reduction of the quantities of new material needed in national economies	International Resource Panel of the United Nations Environment Programme	(Ballardini et al. 2021)
Waste hierarchy, emphasizing on increasing both the quantity and the quality of recycling; product take-back requirements; economic and market-based instruments; regulations and performance standards; information-based instruments	(a) Circular Economy Package; (b) EPR, as a significant financial and operational instrument which fosters the requirements of the Circular Economy Package in the fields of EU waste law and policy, linking relevant legislative and policy issues; (c) Directive 94/62/EC on packaging and packaging waste; (d) Directive 2000/53/EC on end-of-life vehicles; (e) Directive 2012/19/EC on waste electrical and electronic equipment (WEEE); (f) Directive 2006/66 on batteries and accumulators; (g) The amended Waste Framework Directive 2018/851 concerning the strategic importance of waste prevention by confirming its top priority for waste legislation/waste hierarchy	(Pouikli 2020)
Electronic products and sustainable development	The United Nations Environment Programme (UNEP)	(Ilyassova et al. 2020)

3.3. Legislative Tools towards Circular Economy—The "Services" Dimension

The legislative production regarding the "services" dimension it is mainly focused on the organization fields of quality management and waste management. In this respect, the environmental dimension of CE should be considered as a key aspect as part of a broader policy mix aimed at stimulating sustainable production on the supply side of the market, and sustainable consumption on the demand side. Consequently, consumers can be considered as active contributors to CE citizens contributing to CE through their actions on the demand side, and EU law has sought to facilitate environmentally friendly consumer choices through information rights (Mak and Terryn 2020). Therefore, consumers may be stimulated to opt for repair or to engage in shared use of products through "servitization," thus, envisaging sustainability when shaping consumer law in the light of such a measurable context (Mak and Terryn 2020).

From a technology point of view, it is particularly interesting the investigation of how circular economics are capable to address and use smart technology, while considering the lack of consideration given to ownership issues in such socio-economic contexts (Thomas 2018). The extent to which CE requires controlling goods down-stream, it has been approached by analyzing the implications of smart technology (Thomas 2018). This leads to a close comparison of claimed benefits between companies, arising from CE approaches to smart technology with the potential costs of development, control (or lacking behind) of novel technologies (Thomas 2018). In Table 3 the key aspects regarding the "services" orientation of the existing EU legislative framework are presented as follows:

Based on Table 3, above, it is noteworthy that among the aforementioned key aspects a legal issue of high social interest toward "services" dimension of the CE, it is the development of a contractual framework for the sale of goods in order to investigate whether the national sales law regime can promote a circular business model (Beheshti 2020). The main constraint of such a contractual framework development is the absence of rules and regulations requiring manufacturers produce goods compliant with the CE, implying that, in the case of UK, English Sale of Goods Act has limited capacity to hold manufacturers accountable, but vulnerable to manufacture goods compliant with the CE (Beheshti 2020). Therefore, in investigating the terms abided to national sales law from the CE prospect,

buyers should ensure that their particular intention of obtaining goods compliant with the CE is fully communicated to the manufacturers (Beheshti 2020). Another critical issue of legal interest at the "service" dimension is the examination of those creation mechanisms, through the legal system, which can induce the appropriate behavior to the effectiveness and expansion of the premises of the CE. Considering the microeconomics assumption that agents are optimizing subjects, it is challenging the normative creation of fines and benefits toward the adoption of a pattern of behavior related to the CE (Da Rosa and Ramos 2018). From a generalized individualism-consumerism point of view it should be prioritized the creation of homologating bodies of sustainable practices by corporations, with the accreditation of these behaviors of eco-consumption, industrial ecology, economic functionality, and reuse (Da Rosa and Ramos 2018).

Table 3. Key-aspects and legislative tools regarding the "services" dimension.

Key-Aspects	Legislative Tools	Refs
Waste management among involved stakeholders Supporting decision-making of producers	Polluter Pays Principle (PPP), as a managerial tool to regulate the division of responsibilities among waste managing stakeholders and decision-making producers	(Pouikli 2020)
Legislation on consumer sales Legislation on product liability and product safety	Consumer Sales Directive 1999 and 2019 General Product Safety Directive 2001/95	(Mak and Terryn 2020)
Various aspects of collaboration needed to transform informal e-waste management	8 and 12 United Nations Sustainable Development Goals (SDGs)	(Ilyassova et al. 2020)
(a) Quality terms incurring in national (UK) sales law whereby the buyer may hold the manufacturer responsible for designing and producing goods. This assumption is that such a purpose is well known to the seller through public law quality standards; (b) the legislation of "Ecodesign for Energy Related Products Regulations 2010" belongs to a few regulations reinforcing aspects of the guiding principles of the CE	Ecodesign for Energy Related Products Regulations 2010	(Beheshti 2020)

4. Research Considerations of Legal Practices and Social Planning towards the Circular Economy

The existing legal theories enacted in EU, especially among the Western developed economies, are justifying private property and they are based on some form of utilitarian property theory that emphasizes on rather straightforward economic efficiency. Contrarily, environmental sustainability has not always counted for which, in turn, is leading to a ripple effect (Ballardini et al. 2021).

Environmental sustainability is not the major objective in private law, thus, it is insufficiently reflected in existing theories and practices (Ballardini et al. 2021). However, private law plays a decisive role in fostering technological innovation and creativity, as well as in regulating businesses' processes. Therefore, the need for the assessment of private laws' ability to fulfil the criteria of CE applicability is imperative. Market, or mixed, economy, is implying the urgency of transition to CE in order to steer sustainability principles, to develop technological innovations and to support viable business models. In the EU market, EU-State contributors of mixed economy can form only regulations and issue laws for companies and consumers, having no direct control or intervention on what products and services should be produced and consumed. These States are also unlikely to know the functionality complexities about production and consumption systems, thus, entailing how operation changes should order and embed CE types of vision in market economy (Ballardini et al. 2021). Under the CE concept, EPR is actually valued as a dynamic and evolving policy that needs to be continually reassessed in order to incorporate new

incentive mechanisms for industries to permanently improve their products and processes (Pouikli 2020).

Environmental sustainability does not necessarily exclude economic growth, since green growth uses natural capital in sustainable ways. Consequently, the key aspects of private law are the following: persons, property, contract, tort liability, and remedies. These key-aspects should be embedded into private law in engaging sustainability values, not just that of sectorial inclusion into individual private law regimes (Ballardini et al. 2021). Such an implementation concerns both product and waste policy spheres, in order to close the loops between waste management operations and product-oriented environmental policies. In such a way it should be ensured fair competition between EPR schemes on the national and the EU contexts, thus improving the transparency of performance and costs/fees. Emphasis is given on preventing free-riding by producers and compliance with PROs with respect to managerial responsibilities and environmental conformity with internal market regulations (Pouikli 2020).

Besides, assuming that the terms of "environmental sustainability" and "CE" contain the same theoretical weight and practical functionality in the law system, fostering CE, or "environmental sustainability" in general, it should be the mainstream priority among EU States. The issuing of such directives and regulation can be envisaged as just and attractive in alignment with social planning and property justification. In such a way, a change in the ways of justifying and conceiving private property, might be valued as an important necessity (Ballardini et al. 2021). Consequently, there is possibility to involve consumers in the pursuit of a CE project, thus fostering sustainable consumption. In order to achieve these goals, policymaking in European consumer law has to revisit the linkage between environmental goals and consumer protection. Consumer policy and environmental policy can no longer be considered as separate policies (Mak and Terryn 2020).

According to the new Circular Economy Action Plan, the EC will introduce sustainable legislative initiatives, being initiated by sustainable policies of production in the future. The objective of the aforesaid CE Economy Action Plan is to broaden the range of products covered by the eco-design framework and make it deliver on circularity (Ballardini et al. 2021). Based on the Directives of Waste Framework and the EcoDesign it can be stated that public law regimes are important and relevant, but they should be proven insufficient. It is noteworthy that designing requirements for repairability of all trading products and household appliances within the framework of the EcoDesign Directive would require decades of work by administrative bodies, and still the ultimate conformation result would not be surely satisfactory. Moreover, public law situations could become ineffective, or even blocked, by private law regimes if the goals between the two areas, private-public, are not aligned to each other (Ballardini et al. 2021).

Regarding the public law regimes, the intrinsic nature of public law acknowledges the crucial role of repairability, refurbishability, reusability, and shareability (including leasing) of products to achieve CE, yet, being short-sighted envisage perspectives in a market economy. Similar conclusions can be made by national public policy measures, where EU States are inclined to go far beyond the European policies in their national strategies, though they are incomplete per se, e.g., the powerful tool, value added tax (VAT) rates, is partly controlled from the EU States which can easily promote certain business models, e.g., repair services, by lowering the VAT (Ballardini et al. 2021).

In order to support the public law, the EPR policy sought to shift from local authorities and taxpayers (i.e., the public budget) to producers the burden of taking responsibility to collect end-of-life products and to sort them before their final treatment (Pouikli 2020). According to Article 4 of the Waste Framework Directive, in which the different options for managing waste from "best" to "worst" are listed from an environmental perspective, the priority order is as follows: prevention, (preparing for) re-use, recycling, recovery and, as the least preferred option, disposal; which contains landfilling and incineration without energy recovery (Pouikli 2020). This waste hierarchy is not considered as a rigid prescription, since different methods of waste treatment involve different environmental

impacts (Pouikli 2020). In such an analysis, EPR constitutes a typical second-best policy approach, whose importance lies in the attempt to correct market failures or imperfections deriving from the breach of the most basic rule of waste law—that is of prohibition of the abandonment and dumping wastes of uncontrolled management. The economic background of implementing sound EPR schemes urges producers to internalize treatment and disposal costs so that they have an incentive to design products that last longer and are more easily treated after use (Pouikli 2020).

Another critique over private law regimes resides in the fact of ignoring environmental sustainability in private law because of heavy reliance of private law regimes on pure economic efficiency, utility, and incentives, with the main focus on individual rights ownership (Ballardini et al. 2021). Consumers' shared responsibility for environmental protection toward the transition to a services-based circular industry seems problematic. Consumers are certainly exposed to numerous risks while entering into services agreements. Besides, regarding CE implementation, there is little scope for consumer responsibility beyond taking an informed choice for sustainable product-service bundles. The work of legislators lies in making such an informed choice to ensure the protection of consumers in the product-service system (PSS) either through hard law, or at least to ensure that consumer interests are sufficiently and structurally taken into account when setting standards for services (Mak and Terryn 2020).

Another noteworthy consideration of social planning and legislative interest toward CE is the fact that in countries where a waste management system is lacking or not fully developed yet, e-waste is typically disposed of, incinerated, sold or recycled by utilizing low-quality technologies (Ilyassova et al. 2020). In countries with targeted policies and legislation on e-waste and with developed infrastructure, e-waste that is not recorded as collected and processed by official recycling systems is often disposed with ordinary household waste. E-waste is of pronounced importance since the EU legislation production has been traditionally focused on environmental issues, where only 35% of e-waste ends up in official records of waste collection and recycling systems (Ilyassova et al. 2020). Such a limited research is also attributed to dynamic changes in national or international laws, necessitating a pluralism of approaching the concurring environmental-legislative issues, as well as reviewing trends and prospects regarding international regulations among different types of wastes' co-disposed, including that of electronic, industrial, manufacturing, hospital, and domestic (Ilyassova et al. 2020).

5. Discussion

A critical consideration of legislative interest is the evaluation of environmental hazards associated with the REE industry and the EU's existing environmental and radiation protection. To this end legislation and best practice documentation should be anticipated and a comparison of key regulative aspects among selected countries with existing REE mining industries can be deployed (Keith-Roach et al. 2015).

However, the aforementioned best practice documentation can be considered in alignment with the companies' size and the time span of implementation. Indeed, while the applicable processes can be proven appropriate for all business types, the time span required for realization varies significantly. In particular, large companies tend to suffer from bureaucratic structures, whereas small and micro sized companies are commonly lacking knowledge and resources available (Miehe et al. 2015). In practice, the aforementioned lengthy and complex legislative constraints could be treated by the development of database architectures, which can take into consideration the minimal technical requirements, access and display of records, as well as searching and administrating facilities offered (Macovescu and Guta 2012).

Actually, the foundation of relevant industry-centered legislation for, first, industrial health and safety and, second, environmental orientation, should be convergent with the ongoing technological progress, workforce protection, and local societies' acceptability. To this end shortcomings in legislation should be treated in a proactive way, being un-

dertaken by specialized operating companies to support a multi-parametric background about: theory of law, environmental protection-remediation and technological expertise. Indeed, the balance between a minimum acceptable level of protecting intellectual property should respond about how much protection is needed, being linked to R&D costs incurred in order to pursue innovation through creativity (Ballardini et al. 2021).

6. Conclusions

In better approaching the ways under which the legislative tools should serve the environmental protection, it is noteworthy the collective responsibility of producers, consumers, and central governments toward the environmental impacts of products, throughout their life cycle, including end-of-life management. Therefore, it is proven that the regulation of sharing responsibilities for waste management and pursuing sustainability goals in the CE projects is of utmost importance. The main legislative constraints of such CE development are the lack of harmonized definitions and operabilityconflicting interests among counterparts, access to transparent information, adequacy of controlling and monitoring mechanisms, determination of incurring costs to be internalized through recycling procedures, as well as improvement of eco-design and circular design promotion, especially in the field of packaging waste, but not mixed collection, among EU States to motivate producers to turn to eco- and circular design. Actually, the roles of eco-design and cleaner production are supplementary, but not exclusive, to resolve the underlying critical issue of the linear material consumption and waste generation associated with the use of disposable products of wide consumerism.

Critical considerations for future research must concentrate on finding solutions to facilitate the implementation of CE principles for these CE-made products, while supporting the development of new circular business models. Besides, future research should ensure the engagement of consumers, being appreciated as environmentally alarmed citizens with a shared responsibility toward CE, even though their practical impact is limited, partly due to problems of enforcement. It cannot be signified that, although consumers are generally willing to adapt their behavior towards green choices, EU consumer law is of limited success in facilitating, or even stimulating, such choices.

Actually, the contradictions between public-private law systems and that of former-recent law regimes, are indicative cases of generating possible clashes that may be resolved when CE conceptualization is broadly "diffused" to local societies and the law regimes have a role to play either at a proactive or as post-treatment tools of legal practices and social planning of CE. Finally, among such legal practices and social planning of CE, it cannot be undermined the contribution of eco-efficiency, which is reflecting the necessary transition from a linear to a CE, in terms of resources utility through carbon abatement mechanisms and emissions control.

Funding: This research received no external funding.

Institutional Review Board Statement: No humans or animals are involved in the study/research.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

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Article

Diplomatic and Consular Protection with Special Reference to Article 46 of the EU Charter of Fundamental Rights

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Received: 25 October 2020; Accepted: 15 December 2020; Published: 21 December 2020

Abstract: Central to EU law and policies is the protection of human rights. For the European Union (EU), these rights are sacrosanct. Over the years, more substance to the protection of fundamental rights emerged. The European Court of Justice (ECJ) is notably entrusted with the protection of human rights and has always deemed it imperative that fundamental rights must be protected within the scope of EU law. The Court has always relied on strong European traditions and values and is guided by the inalienable principle of the rule of law. In the human rights record of the EU, the Kadi cases occupy a special place. The scope of the application of Article 46 is limited, and the application of the Charter is still not used to its full potential, and too few citizens are even aware of it. The Commission intends to present a strategy that would improve the use and awareness of the Charter. By the middle of 2020, the UK's withdrawal from the EU had become acrimonious. One issue that still begs the conclusion is the status of and protection available to EU citizens living in the UK beyond 31 December 2020. These basic rights of its citizens are not negotiable for the EU.

Keywords: Article 46; Brexit; Charter of Fundamental Rights; ECJ; EU law; human rights; Kadi cases; Treaty of Lisbon

1. Introduction

This Charter of Fundamental Rights (the Charter) was first proclaimed by the European Union (EU) Parliament, the Council and the Commission of the EU as an instrument of law on 18 December 2000 (Rosas 2012). It became legally binding on the EU and all Member States with the entry into force of the Treaty of Lisbon (the Treaty) on 1 December 2009. With its incorporation into the Treaty, the Charter acquired, in terms of Article 6(1) of the former, equal value with the founding Treaties. In other words, the Charter, according to Lenaerts—who at the time of writing the article in his personal capacity was Vice-President of the European Court of Justice (ECJ)—"is primary EU law" (Lenaerts 2012). For this declaration on the status of the Charter, he refers to several other leading authorities. The Charter followed first on the European Convention on Human Rights (the Convention). This Convention was signed in Rome on 4 November 1950 by 12 Member States of the Council of Europe and entered into force on 3 September 1953. Then the European Social Charter and other human rights conventions were adopted. This Social Charter (revised) of 1996 embodies in one instrument all rights guaranteed by this Charter of 1961, its additional Protocol of 1988 and adds new rights and amendments adopted by the Parties who are members of the Council of Europe. Some of the provisions constitute refinements or even developments of existing human rights instruments (Rosas 2012).

Central to EU law and policies is the protection of human rights. The Treaty guarantees that protection. In Article 2, the values of the EU are enumerated and on which the EU is founded for its adherence to the values of democracy and the rule of law and respect for fundamental rights. The Treaty

gave the Union its own values for the first time (Nakanishi 2018). Lavranos terms these values as the very "untouchable core" of the EU legal order (Lavranos 2009b). For Weatherhill, this ensures "the EU as a project driven by values" (Weatherill 2016). The foundational values are laid down as the rule of law, human dignity and equality. Listing the protection of human rights as an important one of the Union's values, the Article commits the EU to adhere to human rights. The EU's values are, therefore, to be respected not only by the EU's organs but also by Member States (Nakanishi 2018). Article 21(1) of the Treaty formulates the political principles that must guide the EU. These are listed as democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of international law. Nakanishi draws attention to the fact that this also includes respect for the principles of the United Nations (UN) Charter and that human rights, as one of the political principles, boost the EU "in protecting human rights in its external relations" (Nakanishi 2018). For him, the combination of the objectives in the Treaty does not only afford the EU the opportunity to protect human rights in the world, but it also enables the Union to do so in pursuing its own internal and foreign policies. In fact, many international agreements concluded by the EU with third countries include human rights clauses (Nakanishi 2014; Bartels 2015). The objectives to be pursued by the EU are described in Articles 3(5) and 21(2) of the Treaty. Accordingly, all the organs of the EU support and advance this protection as an objective of the EU.

Eeckhout stresses an important point that needs to be highlighted and understood, namely that there is "a proliferation of sources of EU human rights law". He identifies three sources: the Charter, the Convention and general principles of EU law. He concludes that the different sources of EU human rights law should be read in an integrated way, contributing to the further development of a European common law of human rights (Eeckhout 2014). One important point that requires clarification is the relationship between these three sources, especially between the Charter and the Convention, as it is not constitutionally regulated—at most Article 6 of the Treaty "simply juxtaposes them" (Eeckhout 2014). While the existence of the Convention is noted and its importance recognized, it is neither the intention nor the purpose of this article to dwell on it. Suffice it to state that the Charter is clear that it does not want to belittle the Convention in any way. Article 53 of the Charter provides:

> "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. This provision shall not prevent Union law providing more extensive protection."

Furthermore, Eeckhout emphasizes that the Convention is "a special case in that, in substance, it is incorporated in the EU Charter, which is of equal value to the Treaties" (Eeckhout 2014).

The Charter encompasses the ideals underpinning the EU: the universal values of fundamental rights. It brings together in one single text all the rights of the individual. Although the Charter only explicitly refers to the implementation of EU law in Article 6(1), all institutions and Members of the EU must also respect the Charter in the EU's foreign relations.

Article 46 of the Charter deals with diplomatic and consular protection and stipulates the following:

> "Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State."

The ECJ is notably entrusted with the protection of human rights in the EU (Wollenschläger 2018). This Court has guaranteed fundamental rights as far back as 1974. Whereas EU law guarantees human rights to EU citizens, it is the duty of the Court in interpreting EU law to ensure the faithful application of those rights that are protected by the EU and all its laws and human rights instruments (Ofuji 2018). Coupled with the force embodied in the Treaty, more substance to the protection of fundamental

rights emerged with the adoption of the Charter. It is established case law that mixed agreements are within the Court's interpretative jurisdiction in so far as their provisions are within EU competence (Koutrakos 2010). Eeckhout (2014) elaborates further:

> "The EU system of human rights protection ... is characterized by the integration of laws [and] EU human rights law integrates both the constitutional laws of the Member States ... as well as other international instruments."

The EU judicial system unashamedly defends human rights and thereby ensures their adherence and enforcement also on a national level in the Member States.

Great challenges face EU citizens in the post-Brexit era. Then their treaty-ensured legal protection, and in particular those that Article 46 of the Charter guarantees, falls away, and they will henceforth rely for their presence in the UK on new formulations derived from acrimonious negotiations between the UK and the EU during which other issues demanded more time and consideration. In this forthcoming era, the Charter as such will no longer be available to them.

2. The European Court of Justice

Against this background, the vital and complex question of the scope, limits and application of EU human rights law must be discussed (Lenaerts 2012). The ECJ has always deemed it imperative that fundamental rights must be protected "within the scope of EU law". With the Court being the chief interpreter of EU law and having maintained that role ever since its establishment, it is necessary to assess this role in the context of the provisions of the Charter. For that to be done, the prominent place that the ECJ occupies in the structure of the EU must first be evaluated. Its complexity is firmly rooted in a structured framework that demands both a juridical and a political grasp and appreciation. Its role cannot be ignored and must be recognized (Eksteen 2020).

No democracy can thrive without independent courts, guaranteeing the protection of fundamental rights and civil liberties. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. Ovádek (2016) quotes from a full Court opinion in which the ECJ defined this in 2014:

> "A tripartite of interlinked legal issues with particular constitutional significance to the Court and the EU: the protection of fundamental rights in the EU, including its legal sources; the observance and development of international law; and the autonomy of the EU legal system, including the CJEU's [ECJ's] role within it."

The ECJ's mandate has evolved over many decades. It has as its overall aim to ensure that the Union shall be perceived as one unit, speak with one voice, and implement consistent policies (Pernice 2008–2009). When the Court interprets Treaties, it retains to a maximum degree judicial power to interpret that which applies to the Union and plays a key role in developing the law of EU affairs. Being the core to the judicial identity of the Union, the ECJ is one of the most powerful supranational courts in history with an extensive authority that has been clearly achieved and defined. For the EU, the ECJ forms an integral part of overseeing all judicial aspects of the Union. Thus, its Court is a non-negotiable subject.

The rule of law is one of the common values upon which the EU is founded and part of the common constitutional traditions of all Member States. In terms of the Treaty, all EU institutions are responsible for guaranteeing the respect of the rule of law as a fundamental value of the EU and ensuring that EU law, values and principles are respected. For Pardavi (2020), the rule of law "is an essential foundational value of the EU." He added this crucial observation:

> "Without it, neither citizens nor private sector actors can feel secure that their rights will be duly protected. In this sense, our security as European citizens and businesses is what is at stake when the rule of law is threatened."

As guardian of justice, the ECJ is guided by the inalienable principle of the rule of law. Threats to the rule of law challenge its legal, political and economic basis. Deficiencies in one Member State have an impact on the other Member States and the EU as a whole. Bulgaria, Hungary and Poland are lately seen as the Member States that "have been able to run roughshod over the rule of law for several years" (Dempsey 2020). Ensuring respect for the rule of law is a primary responsibility of each Member State. In her State of the Union 2020 address, EU President Ursula von der Leyden observed:

> "The rule of law helps protect people from the rule of the powerful. It is the guarantor of our most basic of every day rights and freedoms."

The other characteristic that is an inextricable part of the Court's existence and flows from the application of the rule of law is judicial review. The Court has re-affirmed in several rulings that "the very existence of effective judicial review to ensure compliance with EU law is of the essence for the rule of law".

The ECJ has always relied on strong European traditions and values. For the Court, the rule of law is vital to create and ensure a democratic and equitable Union and to defend its core values, principles and objectives. Throughout its history, the Court has held the rule of law to be supreme and the fundamental cornerstone of the EU and for what it stands and wants to promote. It is, and remains, undeniably sacrosanct for the Union—as a former Foreign Minister of Luxembourg observed: "The rule of law is the cement of the EU" (Muller and Schult 2017). It is the linchpin of the Union. It permeates the jurisprudence of the ECJ. In the final analysis, it is the EU body politic that proposes, but its judiciary that disposes. The Court will not tolerate any action that will undermine the Union and its effectiveness. Even in times of crisis and conflict, it is incumbent on the judiciary to ensure that the rule of law is respected, obeyed, enforced, and defended so that it remains and is held supreme.

The EU is a major treaty-making power and signatory to numerous bilateral and multilateral agreements. The EU is committed to more than a thousand such agreements. They form part and parcel of the legal order of the EU and bind the Union and each of its Member States. Apart from judicial review being of such crucial importance in respect of all these agreements, the Court also bears the heavy responsibility to oversee the proper and consistent interpretation and application of the foundational law of the Union. Decisions of the ECJ carry, in many instances, profound consequences. EU law, as applied by the ECJ, determines how international law is to be adhered to by the EU and its Member States. Consequently, the Charter forms ipso facto an integral part of the EU's jurisprudence, and together with other major legal instruments, it is a guiding light for the ECJ in its pursuit of enforcing a human rights regime throughout the Union.

3. Methodology in Respect of the ECJ

During the EU's existence, international law has become part of its legal order (Wouters et al. 2008; Cannizzaro et al. 2011; Boschiero et al. 2013). International obligations of Member States are no longer confined to their own domestic constitutional surroundings. They are now increasingly governed by EU law. European integration has brought consequences for the Member States in the field of international law. The ECJ has facilitated and advanced European unification by means of judicial interpretation and influential rulings. This interpretation became central to its transformation of EU law from treaty-based international law into what has been described as "a hegemonic supra-national legal order" (Beck 2018).

It is against this background that the ECJ's application and interpretation of international law must be assessed and recognized. As methodology seeks to define the means of acquiring scientific knowledge, the Court consequently supplies rich, varied and significant research material. As a source of international law, the Court is unique. Its rulings contain persuasive arguments to ensure the proper structuring of core theoretical frameworks for research. The main structure is thus based primarily on qualitative research focusing on the identification of the relevant rulings and, thereafter, systematic analysis of their contents and impact. To complete the understanding of the ECJ's place in

international law, these rulings must be placed in the broader context of the Court's own understanding and appreciation of the EU's legal order (Eckes 2010).

When it comes to the sources of international law and the practice of treaty interpretation, no better institution presents itself than the ECJ. Especially its treaty interpretation is beyond compare. Rulings in which these interpretations are embedded have cemented the pillars of the European legal order. Bold jurisprudence has enabled the Union to advance new policies. What has emerged from this role of the Court is that it presents two sides of equal importance: decisions advancing the aims of the EU; and decisions limiting the formulation and execution of policy.

In methodological writing, the term qualitative data is generally taken to encompass the rough materials researchers collect from the field they study. The case study research method provides insight and enables interpretation leading to a substantive end product—an in-depth study of a particular topic rather than a superficial reading of a few sources. A careful case selection that focuses on relevancy is at the heart of this qualitative research. The array of cases that is available for this purpose is impressive and unsurpassed. One point in this regard that must be noted is the one that has been highlighted as follows:

> "The decision-making of the CJEU is not subject to unusually high legal uncertainty. The CJEU's decisions are probably more predictable than those of many higher national courts. They are predictable, however, not because the CJEU approach is governed by a high degree of methodological rigor, but because its pro-Union prejudice is so settled." (Beck 2018)

4. Basic Tenets of EU Law

Many ECJ decisions have political dimensions. Several rulings have addressed fundamental principles such as human rights, monetary policy, immigration and citizenship. The Court is committed to guiding the EU on these issues. It is this overall involvement that fits into the subject matter of this presentation. During the EU's existence, international law has become part of its legal order. International obligations of Member States are no longer confined to their own domestic constitutional surroundings. They are now increasingly governed by EU law. European integration has brought consequences for the Member States in the field of international law. The ECJ has facilitated and advanced European unification by means of judicial interpretation and influential rulings. This interpretation became central to its transformation of EU law from treaty-based international law into what Beck (2018) describes as "a hegemonic supra-national legal order". In evolving over decades, the ECJ has transformed itself from being a Court by treaty law into one that is dominant and continues to achieve supra-national dominance over the courts of Member States and in matters of international treaty law. Then by doing so, the ECJ has ensured the supremacy of EU law over potentially conflicting international law. The EU demonstrated to the world through its Court that robust international legal oversight can co-exist with important national values such as democracy and human rights, dealing with security threats, and respecting heterogeneous national values. Once empowered as such, the Court was set to rule on the legality of counter-terrorism measures against individuals. The history of court cases captures crucial developments in and important applications of rulings, especially when a particular issue or ruling is studied over a period of time. This life trajectory ensures that critical events are evaluated.

At an early stage, the ECJ established the doctrine of EU law supremacy. That, in turn, created the doctrine of direct effect. In Van Gend and Loos and in Flaminio Costa, the ECJ structured these two pillars of EU law. They carry consequences for every Member State. In the case of a conflict, national law must yield to community law. The impact of these two maxims has been considerable. They are of profound importance for the EU legal system. They are still guiding principles. They resonate until this day. Together these two principles are regarded as perhaps of the most important achievements of the ECJ in constructing a constitutional legal order for the EU and, according to Eckes, the development of the general principles of EU law (Eckes 2010). Due to the establishment of these two doctrines and

their meticulous and consistent application, the Court no longer had to defend its existence, but was able to expand its jurisdiction, and consequently also its influence beyond the borders of the EU.

Over the years, the Court has confirmed and further clarified the principle of effective judicial protection and the right to an effective judicial remedy. No study of the EU legal system and of the impact of ECJ's rulings on human rights is ever complete without due attention paid to what is commonly referred to as the Kadi cases. The main and most important ruling of the four cases is the one commonly known as Kadi II. In the human rights record of the EU, these cases occupy a special place as a beacon that reminds and demonstrates to the Members of the EU, but, moreover, also, most importantly, to the international community, especially the United Nations (UN), that human rights are sacrosanct in the EU establishment.

From the above, it is clear that the foundation on which human rights was constructed was firm. To concretize this fundamental approach to human rights and to understand why these rights were protected without precedent, it is imperative that due regard be paid to the Kadi cases, which became the hallmark of the EU's commitment to human rights.

5. Kadi Cases

Before attending to these cases, it is important to record that the ECJ was already in the forefront of the EU's fundamental-rights protection ever since it made this declaration in the Stauder case in 1969 that fundamental human rights are "enshrined in the general principles of Community law and protected by the Court".

The Kadi cases left an indelible mark on the approach of the ECJ towards human rights and foreign affairs and the EU's relations with the UN Security Council (UNSC). On one hand, the landmark rulings empowered the EU to play a role in foreign affairs and security policy. On the other hand, it placed fundamental rights, and human rights in particular, at the apex of the Union's edifice and the central point of the EU's approach to foreign affairs. To better understand and appreciate the whole Kadi saga and its far-reaching consequences, there is no more useful publication than the one edited by Avbelj and her numerous contributors (Avbelj et al. 2014). It contains indispensable research material. Each of the contributors deals with a wide range of topical subjects. Background on Kadi and the Foundation is necessary to understand the complexity of all the issues the ECJ had to deal with and why each of the different decisions caused such a deluge of commentary—and why the reasoning for each provoked such severe criticism in certain quarters. Suffice it to focus mainly on the second of the four rulings—the appeal handed down by the ECJ on 3 September 2008 that led to the first Kadi ruling on 21 September 2005 being overturned. Ovádek (2016) categorizes this second decision as follows:

> "One of the most important constitutional statements of the Court since the inception of the Union legal order and which has given rise to legal controversies far outside the EU."

The four decisions by the EU's legal system involving Kadi, a Saudi national, and the Al Barakaat International Foundation, being a Somali firm founded and located in Sweden, have special significance for two main reasons when an assessment of the ECJ's role in human rights is made. First, by putting fundamental rights at the heart of the EU legal order and its foreign policy (De Búrca 2010; Tridimas and Guitierrez-Fons 2009), the ECJ placed a sharper focus on security concerns and human rights protection (Harpaz 2009). Second, there is no conflict between European and international law obligations as far as the aim of fighting international terrorism is concerned (Lavranos 2009a). What the Court did was to warn EU institutions and the Member States that they cannot hide behind the UNSC and escape judicial review. For Poli and Tzanou (2009), this is an exercise of full judicial review over EU regulations implementing UNSC resolutions. For De Búrca, a seasoned authority on the ECJ and an expert on the Kadi cases, the most important aspect of Kadi II, in particular, is the Court's vindication of the basic rights of individuals and its insistence on adequate guarantees of due process before an individual's assets can be indefinitely confiscated (De Búrca 2010). However, for her, there was definitely much more at stake in that Kadi case: it established guiding principles that cannot be ignored. The Court

advanced the autonomy of EU law and importance of human rights in the EU in no uncertain terms "the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights".

It presented a high-profile and path-determining opportunity for the ECJ to make its views felt in the international debate about the extent to which human rights principles should inform the UNSC's sanctions regime, as well as to develop its jurisprudence on the relationship between the EU and the international legal orders in the novel context of the UN (De Búrca 2010). Its handling of these cases has not made the ECJ universally popular or appreciated—even among some members of the EU. Some of the decisions went against the will of Member States or caused the chagrin of many international players, such as the UN. The four cases captured the attention of the ECJ for a period of 12 years. In the end, the Court ensured that human rights not only deserve a prominent place in the EU and its legal system but that it will be protected and their fundamental principles are safeguarded.

6. Status of Charter

Although the Charter is part of binding primary EU law and constitutes an important codification and clarification of fundamental rights in the EU, the scope of its application is limited. Rosas describes in what significant way it is limited.

> "The Charter only applies when EU law is at stake. When national courts and authorities in the EU Member States are confronted with problems of purely national law, they are not obliged to apply the Charter but should instead rely on the national constitutional Bill of Rights as well as the international human rights instruments which are binding on the Member State in question. The borderline between EU law and national law is not always easy to establish in a concrete case." (Rosas 2012)

Arnaiz and Perez already concluded in 2012 that the Charter has "thus unmistakably become the instrument of choice for the Court" (Arnaiz and Pérez 2012).

Despite this, the EU Commission had to confess in its 2018 Report on the application of the Charter that the Charter was still not used to its full potential, and too few citizens were even aware of it (Report 2018). This while EU institutions, bodies, offices and agencies are required to comply with the Charter in all their actions and also that cases of noncompliance can be brought before the Court.

The awareness of the Charter had not increased when the Commission issued its ten-year review of the Charter in 2019. In that review, the Commission laments the fact that only one in ten Europeans knows what the Charter is. Eleven years after the Charter became legally binding, the situation remained dismally the same. Although the situation has slightly improved since 2012, by 2019, only 42% of respondents have heard of the Charter, and only 12% really know what it is. This has made it difficult for citizens to use their full potential. Consequently, the Commission intends to present a strategy that would improve the use and awareness of the Charter in the EU so that it becomes a reality for all. In its strategy for the effective implementation of the Charter by the EU, the Commission is on record that it is determined to use all the means at its disposal to ensure that the Charter is adhered to by all Member States when they implement EU law. It also recognizes that for "the rights enshrined in the Charter to be effective, the public needs to be well informed about these rights and how to enforce them in practice when they are violated" (European Commission 2020).

In an effort to improve the situation, the Commission continued to mainstream fundamental rights in its legislative and policy initiatives to ensure compliance with the Charter (Report 2018). On the other hand, the Commission's Report on the involvement of the ECJ with the Charter makes for better reading. References to the Charter by the ECJ have increased substantially—up from 27 references in 2010 to 195 in 2017 and 356 in 2018. National courts are not only referring to the Charter in their decisions; they are increasingly asking the Court for guidance on this subject. When referring questions to the Court by requests for preliminary rulings, national courts increasingly make reference to the Charter—from 84 in 2018 in comparison to 19 in 2010.

However, not one of these referred to Article 46 of the Charter. In its overview of the 2018 ECJ case law, which directly quotes the Charter or mentions it in its reasoning, the Commission noted that no reference was at all made to Article 46. The same applied to the overview of the applications for preliminary rulings submitted to the ECJ in 2018, which refer to the Charter (Report 2018).

7. Application of Article 46

Vigni poses the question of whether diplomatic and consular protection in EU law is either a misleading combination or a creative solution. By referring to the right of EU citizens to diplomatic and consular protection by the Member States other than the State of nationality in the territory of a third country, it is not clear what are the concepts of diplomatic and consular protection embodied in that right. Her paper concludes that political and legal practice of the EU and of Member States has yet to provide clear answers to these questions (Vigni 2010/2011). The Commission's Report of 2018 notes the following:

> "The Charter has proven to be a key instrument to make fundamental rights a reality in people's lives. It is still a relatively young instrument when compared, for example, to the European Convention of Human Rights, which has existed for over 65 years. It will take time and sustained work for it to be used to its full potential, especially at local and national level." (Report 2018)

The Commission expressed these sentiments at a time when the Brexit-exercise was still at a stage where the UK and the EU were confident that all matters stemming from the withdrawal of the UK from the EU would be amicably concluded. By the end of 2020, that withdrawal had become acrimonious, with major issues still begging for finality and solution. One such issue that still escapes the conclusion is the status of and protection available to EU citizens living and visiting the UK beyond the final date of separation on 31 December 2020.

8. Consequences for EU Citizens with the Withdrawal of the UK from the EU

This withdrawal affects both UK citizens in the EU and EU citizens in the UK. However, it is the latter that has been placed in a precarious position since the protection of Article 46 as such for one will no longer be at their disposal to rely on.

From the outset, the EU was determined to ensure that its Court continued to be the protector of all that had been created by the Union for the well-being of the Member States and their citizens, whether the negotiations with the UK succeed or fail. European integration has brought peace and prosperity to the EU and its Members and allowed for an unprecedented level of cooperation on matters of common interest in a rapidly changing world. The ECJ had been instrumental in creating and advancing that unity. Therefore, the EU's overall objective in its negotiations with the UK had been not only to preserve its own interests, but also those of EU businesses, the Member States, and their citizens—all several million of them in the UK. Moreover, for this, the EU owes much gratitude to the ECJ for its role in influencing policies and decisions in this regard.

In the context of Brexit, the term "citizens' rights" was used to define the future status of UK ex-pats living and working in the EU (about 900,000), as well as EU nationals (more than three million) who are in the UK for the same purpose. The Brexit process resulted in the UK withdrawing from various treaties. With that in mind, the UK and EU devoted priority for the rights of these citizens to be resolved so that the legal status of these two groups could be secured. This issue was of pivotal importance to the EU to resolve as a no-deal Brexit would create huge uncertainty over the legal status of the EU citizens present in the UK. The end of the free movement of labor would lead to a sharp fall in the number of persons from EU countries working in the UK. That freedom is one of the fundamental principles for the EU. This right, together with other equally inviolable rights, is incorporated in EU treaties. In important decisions, the ECJ has also enshrined those rights, especially the right to reside and work within the EU, including the UK, while that state was still a member of the EU.

As pillars of the EU, these freedoms are crucial tenets of the EU's foreign policy. As such, they have played a significant role in the evolution and development of the EU and in the achievement of ambitious common aims among the Member States. These basic rights of its citizens are not negotiable for the EU. In the context of Brexit, this issue spiraled into a dispute over basic principles. The EU being a legal community, its agreements are effectively international treaties. The Withdrawal Agreement (WA) signed between the UK, and the EU is no exception. It had been ratified by both parties. It covers the protection of the rights of EU citizens in the UK and UK citizens living in other parts of the EU. These citizens will be among those most affected by Brexit.

When agreements that are enforceable under international law are not complied with or violated, the ECJ will be involved as it is the Court's responsibility to oversee adherence to all EU treaties and commitments. Not without reason that the Commission launched an infringement procedure against the UK, accusing it of violating international law with its plans to adopt its Internal Market Bill that would allow it to rewrite the WA after it had been concluded.

The European Parliament (EP) is the only EU institution that is directly elected by EU citizens. Although it had no direct role in the Brexit negotiations, it did have a veto over the outcome. It was thus more likely to use it over this than any other issue. Consequently, it was not surprising that that institution was particularly focused on the issue of the rights of EU citizens living in the UK and UK citizens living elsewhere in the EU. From the beginning, the EP vigorously protected the rights of EU citizens by demanding equal and fair treatment for those living in the UK and equally so for UK citizens living in the EU. Members of the EP were particularly concerned over how the UK and the remaining 27 Member States of the EU would manage citizens' rights after Brexit. Accordingly, it provided guidelines for the negotiations between the EU and the UK and with that standpoint, the EP played a key role in the outcome of the talks as it adopted several resolutions and statements that reiterated the importance of protecting the rights of these citizens.

The EP endorsed the WA on 29 January 2020. Prior to that vote, Parliamentarians adopted a resolution requiring assurances on the protection of citizens' rights to ensure Parliament's support for the WA. The resolution notes specifically that the WA contains fair and balanced provisions to protect citizens' rights during and after the transition period. For the EP, a thorough implementation of the provisions of the agreement is of the essence in order to protect affected citizens and their fundamental rights in the long-term. In approving the WA, the EP made it abundantly clear that it took due account of "experiences gained and assurances given" about the protection of citizens.

While that agreement gives both UK and EU citizens the right to continue working and living in the country in which they now reside, other issues still had to be decided. However, recent actions by the UK government have not only placed that agreement in jeopardy, but they have also caused EU negotiators to question the UK's bona fides and desire to reach an amicable solution and conclusion to its future relationship with and commitments to the EU. The final stage of Brexit and the future relationship between the EU and the UK are currently very much in limbo, if not in total doubt.

Consequently, were a no-deal eventuates, as it now seems quite possible, EU citizens present in the UK may be left in a rather precarious position since the legal protection they may lack is what is specially provided for in Article 46 of the Charter. EU citizens living in the UK are facing an uncertain future on various points.

From the beginning of the negotiations, the EU warned the UK not to use its citizens as bargaining chips to reduce the rights of EU citizens (Portes 2017). For the EU, its bottom line has been all along for its citizens to continue to be covered by the ECJ. The EU was equally adamant, though: only the Court could provide the guarantees and certainty that EU citizens in the UK required and were entitled to after Brexit. They deserved to be protected by EU law. Their rights may not be diminished after the exit-date. Fearing that no UK court will ever be good enough to ensure that, the EU wanted the ECJ to enforce the settlement also in this respect. Both sides claim that their top priority was to end the uncertainty for millions of citizens living in each other's countries by guaranteeing their rights for the

future. These EU citizens have yet to be convinced that they will not be denied those rights which they were entitled to and enjoyed before Brexit became their worst nightmare.

At the beginning of December 2020, with only a few weeks left to finalize a post-Brexit relationship to commence on 1 January 2021. It has been reported that the UK has agreed to keep it tied to European human rights rules in order to strike a trade and security deal with the EU. The EU claims that the UK has accepted the prerequisites that the EU has advanced on the protection of human rights (Daily Express 2020).

The Kadi cases have no direct relevance to EU citizens in the UK post-Brexit. These cases were brought into the discussion because they set the EU on a firm path of protecting human rights. Because of that protection and the soul of the Charter being human rights and their protection, it is important to view Article 46 against that background. Not that the Kadi cases will, as such, be affecting or assisting EU citizens post-Brexit.

9. Conclusions

The EU has a well-established legal order based on the rule of law in which the protection of fundamental rights is of the utmost importance. Over the years, the EU has adopted many initiatives protecting and promoting the Charter rights of its citizens. References to the Charter by the ECJ have increased substantially. National courts are also referring to the Charter in their decisions and increasingly asking the Court for guidance. All these activities are important in ensuring that the Charter delivers for every citizen the protection it promotes. While the Charter is still not used to its full potential and awareness remains low, it is, therefore, most important that civil societies, organizations and human rights defenders increase their efforts in raising awareness of the Charter rights and ensuring that everyone can effectively enjoy them by knowing that they are protected. Furthermore, EU citizens residing now and in the future in the UK will not be left without access to fundamental rights such as those embodied in Article 46 of the Charter.

Funding: This research received no external funding.

Conflicts of Interest: The author declares no conflict of interest.

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Article

Interrogating the Role and Value of Cultural Expertise in Law

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Received: 2 October 2020; Accepted: 24 November 2020; Published: 30 November 2020

Abstract: It is common for litigation to draw upon expert evidence to assist a judge to arrive at a balanced decision. This paper examines the role of one type of expert evidence submitted to courts, namely cultural expertise (CE), which provides information on socio-cultural issues such as kinship, family, marriage, customs, language, religion, witchcraft and so on. This type of evidence is primarily the result of qualitative, ethnographic research. I begin by examining the views of experts who have provided CE to courts/mediators; I then look at how judges view and make use of CE, and finally I examine lawyers' views on CE. To address gaps in published research, I interviewed British barristers to understand how they make use of experts in the cases they litigate. Finally, I have surveyed legal decisions made by all British appellate courts to arrive at an approximate idea of the extent to which CE has been submitted in English and Welsh courts. I conclude that the extent to which CE—and other types of socio-legal evidence—is submitted varies considerably depending upon the legal/evidentiary procedures followed in different jurisdictions and in different countries.

Keywords: cultural expertise; expert evidence; judges; barristers; appellate courts

1. Introduction

Scholarship on the relation between anthropology and law has slowly recognized that characterizations of the two disciplines as being epistemologically incommensurable are unhelpful and unproductive. Anthropology seeks to address social life in all its variety. As anthropologists have argued, culture as a system of values and meaning is unbounded, dynamic and involves a process of redefining and contesting social norms and forms of power. Law, on the other hand, is a process by which those in power attempt to regulate conflict by deciding/adjudicating the limits of acceptable —restated as enforceable 'legal'—behavior and social norms. In this view, anthropology and law are mutually constitutive, even though many legal professionals perceive their role as being neutral, objective, and independent of cultural concerns and many anthropologists argue that anthropological evidence on cultural issues is routinely rejected by the law.

As the legal process has engaged with socio-cultural and technological change it has had to deal with a more socially diverse range of litigants/claimants, the law has increasingly accepted evidence from a growing range of 'experts'—from the social, cultural, behavioral, scientific, technical, judicial and other fields—who have provided extensive information about the impact of change on social and cultural life. Arguably, in grappling with social change, and law has been forced to address the ubiquity of culture as it decides the rights and wrongs of individuals from diverse cultures, communities, and states.

In this paper, I assess the emerging role of 'cultural expertise' or CE in judicial proceedings in western Europe and North America, a process which has long antecedents but which has recently been spurred by the work of Livia Holden (2011, 2020) and her European Research Council funded project

'Cultural Expertise in Europe—What is it useful for?'[1]. The research which Holden has undertaken and generated has focused primarily on the contribution of academic researchers who have provided expert evidence to courts and decision-makers in an attempt to assist judges/mediators to better understand the cultural issues which arise in different types of disputes.

Holden's initial definition of CE reflected her focus on the role of anthropologists who, she argued, were in a position to provide specialized knowledge to a range of decision-makers who decide disputes in which 'culture' was an issue (Holden 2011). More recently she (Holden 2020, p. 45) has adopted a wider definition of CE as 'the special knowledge that enables socio-legal scholars, experts in laws and culture, or, more generally speaking—the so called culture brokers—to locate and describe relevant facts in light of the particular background of the claimants and litigants and for the decision-making authorities'.

Holden's project raises a number of interesting issues which I address in this paper. First, published research focuses on the perspective of the 'experts' who have submitted CE[2] (given the wide range of experts and differences in their disciplinary training, it is not useful to treat them as a homogenous group). However, there is limited research regarding the value that these experts bring to judicial decision-making. Not to put too fine a point on it, some lawyers and judges are concerned that expert witnesses should be regulated and controlled to prevent them from usurping the role of judges and juries from deciding the 'ultimate issue', i.e., the factual issues arising in the case (though in the U.S. and elsewhere the ultimate issue rule has been set aside).[3] Second, there is very little research about the perspective of lawyers and judges on the value of CE. Finally, research on CE is primarily concerned with individual cases. Existing research provides little insight into the socio-political or structural factors which give rise to different types of claims, be they asylum, criminal or civil claims, nor does it ask whether a legal victory provides a satisfactory resolution of the factors which gave rise to the case or whether it creates new forms of subordination to the state.

As studies of litigation have pointed out, it is useful to explore the legal process and issues surrounding the value of evidence from multiple points of view to better understand the legal field, the meanings which actors ascribe to their activities and the different contexts of dispute resolution (Munger 1990, pp. 601–2). This paper examines the role of CE in western Europe and North America. I begin by reviewing research on the work of experts who submit CE. In the second section, I examine the contribution of CE from the point of view of judges. In Section 3, and in order to situate CE in the wider legal, adversarial context, I look at how barristers who litigate cases in British make use of experts. Finally, I analyze data from a survey of cases reported on Bailii, a comprehensive legal database managed by the British and Irish Legal Information Institute, which suggests that CE is one relatively minor type of expert evidence submitted in British courts. The paper concludes by situating CE in the wider legal, adversarial context where it is relied upon primarily in asylum and immigration law, civil claims, and international criminal law, and secondarily in international human rights law and family law.

2. The Perspective of Cultural Experts

The earliest paper exploring the use of cultural experts was written by Clark (1953), who described the work of anthropologists and psychiatrists involved in civil litigation in the 1950s which overturned racial segregation laws in the U.S. Clark identified a number of difficulties facing experts involved in these cases and argued that 'it will be necessary for the professional societies among

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[1] See: https://culturalexpertise.net/ (accessed on 9 July 2020). My appreciation of CE has benefited greatly as a result of participating in this project as a research associate.

[2] Holden has convened a number of seminars and conferences with experts, lawyers, and judges from across Europe which have been summarized but not analysed. I cite these problematic and somewhat contradictory 'data summaries' below.

[3] See, for instance, rule 704 in the U.S. Federal Rules of Evidence at: https://www.law.cornell.edu/rules/fre/rule_704 (accessed on 15 September 2020).

the social and psychological sciences to develop safeguards against possible ethical abuses; e.g., flagrant manifestations of prejudice, distortion of data and deliberately misleading interpretations' (pp. 9–10).

Subsequently Rosen (1977) wrote about the involvement of anthropologists in litigation between 1950 and the early 1970s. Rosen discussed anthropological involvement in civil litigation in the U.S. which sought to overturn racial segregation and which supported First Nation peoples. He identified a number of landmark legal cases—including *Brown v The Board of Education*, *Plessy*, *Loving v Virginia*, *Wisconsin v Yoder* and *United States v State of Washington*—in which anthropological evidence played an important role in striking down segregation and anti-miscegenation laws and upholding the importance of culture to secure the rights of religious minorities and native land claims.[4]

Today, it is clear that anthropologists, historians, geographers and individuals from other disciplines have engaged with the law on a global scale with respect to legal claims made on behalf of, and sometimes against, individuals and social groups. With regard to the individual claims, anthropologists and others have provided expert evidence in cases involving crime (Fontein 2014), genocide (in the international criminal courts; Eltringham 2013; Anders 2014; Wilson 2015), in claims affecting different diasporas, i.e., South Asians (Holden 2011; Menski 2013); Africans (Clarke 2017) and in asylum and immigration proceedings in the U.K. (Good 2004, 2007, 2008; Hoehne 2016; J. R. Campbell 2017, 2020a), the U.S.A. (Berger et al. 2015; Ngin 2018) and Sweden (Rabo 2019). Anthropological evidence/CE is likely to be of value in asylum proceedings for two reasons. First, Immigration Judges (IJs) applying international humanitarian law are required to understand whether an asylum applicant has 'a well-founded fear' of persecution which requires them to assess an applicant's account of persecution and flight, i.e., his/her subjective and objective fears. Second, unlike courts in other jurisdictions[5], asylum courts are allowed to admit hearsay evidence as well as other evidence which an appellant may wish to submit (though it may attach little weight to this evidence). The focus of the work by experts has been to use anthropological/CE reports—which is uniformly viewed as hearsay evidence—to obtain recognition/protection for individuals.

The second focus of expert evidence relates to disputes concerning indigenous people's land claims. In these cases, anthropologists and historians have provided ethnographic and ethno-historical data in 'native'/indigenous land disputes and in related political struggles in Alaska and Canada (Feldman 1980; Ray 2011), in Australia (Weiner 1999) and in central and South America (Loperana et al. 2020; Hale 2020). However, in recent years, this type of litigation has seen a growing 'refusal' by First Nations/native Americans to engage with the law in its terms in an attempt to refuse political solutions imposed by the state (Hale 2020; Loperana et al. 2020). This paper focuses on litigation by or on behalf of individuals.

Most of the literature on expert witnessing is written primarily by anthropologists concerned with legal proceedings in which 'culture is teleologized in courts of law, by being treated as 'objective evidence" (Good 2008, p. S47). Some anthropologists have tended to distance themselves from lawyers and judges who are said to be 'empiricist and positivistic' and who 'are trained to think in radically different ways' than anthropologists and social scientists (Geertz 1983; Good 2004, p. 129; Bens 2016). However, as Loperana et al. (2020, pp. 588–89) have argued, this distinction obscures the fact that both anthropology and law emerged as powerful forms of knowledge during colonialism.

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[4] Gormley (1955) notes the involvement of anthropologists in 'Indian tribal claims' dating back to 1895 and possibly earlier. He cites '*Choctaws et al. v. United States, 34 C.Cls. 17, 54* et seq.'

[5] In the UK, sec. 114 of *The Criminal Justice Act 2003* defines hearsay evidence as any 'statement not made in oral evidence in the proceedings.' Reliance on a statement made otherwise than while giving evidence to prove the truth of a fact asserted remains hearsay. Hearsay evidence is inadmissible and the rule applies: (a) to both examination in chief and cross-examination; (b) whether the statement was made by the witness personally or by some other person; (c) to any 'out of court' statement, whether oral, written or otherwise; and (d) to statements given as evidence of the truth of its contents—if the statement is given for any purpose which is relevant to the facts in issue in the case, it is admissible, for example, evidence given as to a person's state of mind, rather than what was actually said.

Furthermore, as Eltringham (2013) and Wilson (2015) have argued, an assessment of anthropological involvement in the legal process requires a clear understanding of the adversarial legal process. This begins with lawyers identifying and instructing experts in an attempt to win a case, and culminates when a judge, having assessed the evidence and legal arguments, arrives at a decision. Engaging with the law as an expert may reify and strengthen the law by reinforcing the role of the state over an individual or a community; though occasionally experts may provide evidence which successfully challenges and overturns case law.[6] (cf. Rosen 1977). It is important to step back from Clarke (2020, p. 585) statement on the different tasks of the two disciplines when she states that: 'Where the court's purpose is to establish hegemonic order through judgement, one of anthropology's purposes is to illuminate alternative cosmologies and possibilities rendered by diverse subjectivities'. Experience with the legal process teaches us that the law only perceives a defendant/litigant as either guilty or not guilty; judges in criminal and other jurisdictions have little patience with arguments about culture/cultural relativity, witchcraft/sorcery or which seek to challenge the common sense reasoning they rely on (when this occurs, judges quickly act to rule such arguments inadmissible; (Fontein 2014; Anders 2014)). I argue that the specific role played by the two disciplines needs to be examined on a case by case basis.

Hoehne (2016, p. 253) has argued 'that it is not a fundamental epistemological divide, but rather massive power differentials that characterize the relationship between social anthropologists and legal practitioners' and that this difference 'sits uneasily with the professional, moral and ethical standards of the discipline'. Hoehne argues that anthropologists providing evidence in courts of law must adopt a 'strategic form' of essentialism, as opposed to a post-positivist position reflecting the contingent nature of anthropological knowledge if they 'are to fulfil the requirements of the legal process and maintain one's role as expert' (p. 257). Hoehne's point is echoed by H. Campbell et al. (2017, p. 333) who also make a case for 'strategic essentialism'—which the authors define as 'the pragmatic practice of defining cultural groups or their practices in ways that emphasize commonalities rather than differences while recognizing that a more expansive analysis would include greater nuance and complexity'[7]—via a well-informed understanding of immigration and criminal law. They argue that anthropologists should defend the rights of subaltern peoples caught up in powerful legal proceedings that may unfairly imprison, execute or deport them to their country of origin. The authors argue that anthropologists 'need to find a way to use our ethnographic expertise to not just defend individuals' caught up in legal proceedings 'but also leave a positive social and institutional [i.e., professional] record' (H. Campbell et al. 2017, p. 333). For these anthropologists, witnessing is a political act.

The issue of the legitimacy attached to an expert's evidence was raised by Rosen (1977, p. 555) who observed that most anthropologists 'may not understand how expert testimony fits together with judicial reasoning and legal precedent, and precisely how the court's investigation of the facts articulates with the form of knowledge he possesses.' In particular, and in relation to the rules governing testimony/evidence which allow 'expert witnesses' to testify about specific social and physical phenomena which they have not personally witnessed[8], Rosen draws attention to four issues which anthropologists—and by definition other types of expert—must take into account if their work is to be effective. First there are 'concerns about the adequacy, context, and form of presentation of anthropological evidence in an adversary proceedings' (p. 556). Is testimony adequate given the issues

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[6] See the civil cases identified by Rosen (1977) and *ST (Ethnic Eritrean—nationality—return) Ethiopia CG [2011] UKUT 00252(IAC)*, an asylum claim decided by the Upper Tribunal of the UK's Immigration and Asylum Chamber which overturned five precedents on the basis of expert/CE evidence.

[7] As Clarke (2020, p. 587) has noted, the term 'strategic essentialism' was introduced by Gayatri Chakravorty Spivak to refer to 'a political tactic in which minority groups, nationalities, or ethnic groups mobilize on the basis of shared gendered, cultural, or political identities to represent themselves.' The contrast between how anthropologists describe minority groups in legal claims and how the latter describe themselves is important and is addressed by Hale (2020) and Loperana et al. (2020).

[8] In the UK, eexperts are permitted to testify about relevant socio-cultural issues, culture, family, foreign law, and a growing range of new topics related to the rise of technology, for instance, video/surveillance film, DNA, drone technology and so on.

raised by a case? Will evidence be inappropriate or distorted by adversarial proceedings? What evidentiary standards are anthropologists required to meet? Second, there are questions regarding 'the mutual effect that courts and anthropologists have on one another' (p. 557). Have anthropological concepts been affected or appropriated by litigation? How has anthropological testimony been shaped by adversarial argument and judicial reasoning? How can anthropologists balance their work as experts against wider professional obligations? Third, Rosen notes that there are serious questions regarding 'anthropologists conceptions of their role in such proceedings, and how the courts and the profession may contribute to appropriate reforms' (p. 557). For instance, do anthropologists provide crucial information for judicial decisions or is their information 'simply useful for rationalizing judgements that are founded on other, perhaps judicially less palatable bases?' Rosen asks, 'How should anthropology approach the ethical implications of expert testimony?'

There are, therefore, important political and practical issues which can undermine the effectiveness of experts and the extent to which their testimony will be recognized by a court as constituting valid evidence (and be accepted by their profession) which relate to the jurisdiction in which a case is heard/tried and the epistemological approach followed by the expert. Two examples will have to suffice. While Immigration Judges (IJs) in the U.S. 'have broad discretion to conduct and control immigration proceedings and to admit and consider relevant and probative evidence, including witness testimony', their discretion is not without limit. In the '*Matter of J-G-T- Respondent*'[9] heard by the Executive Office for Immigration Review in 2020, the Board of Immigration Appeals decided that,

> ... in assessing whether to admit the testimony of a witness as an expert, an Immigration Judge should consider whether it is sufficiently relevant and reliable for the expert to offer an informed opinion, and if it is admitted, the Immigration Judge should then consider how much weight the testimony should receive. If a party challenges the expert's qualifications, it is generally best to allow the party, upon request, to *voir dire* the witness before the testimony is presented in full. In considering how much weight to give an expert's testimony, the Immigration Judge should assess how probative and persuasive the testimony is regarding key issues in dispute for which the testimony is being offered. However, to the extent that the record contains contradictory evidence, the Immigration Judge should explain why inferences made by the expert are reasonable and more persuasive than the other evidence presented.

Second, and in relation to transitional justice cases which are heard by International Criminal Tribunals, Jones (2015) raises important questions about the status of expert evidence and how it is evaluated. She notes that different researchers and organizations involved in providing expert evidence to international tribunals follow different epistemological approaches, provide different 'versions of reality' and are able to secure varying levels of legitimacy. Jones argues that in transitional justice, 'first-hand experience' of the countries in question 'and more ethnographic and empirical understandings[10] were generally dismissed by the bench of international judges' in favor of the 'foreign expertise' provided by international NGOs whose evidence more closely resembled the judges own 'legal and fact-based approach' (p. 296). For Jones, the key question concerns the legitimacy which the courts attach to the versions of reality provided by different experts: she asks, whose voices—not only which experts but which local narratives—are being heard? In this regard, Wilson (2015) review of how qualitative research faired in international criminal trials suggests that social scientists should not attempt to challenge the authority of the court and that reports should be written in clear, non-technical and jargon-free language. His analysis indicates that evidence provided by social scientists was more

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[9] This case is cited as Matter of JGT-, 28 I&N Dec. 97 (BIA 2020: https://www.justice.gov/eoir/page/file/1319951/download).

[10] The author explores the value of narrative interviews in providing relevant evidence, but there is no reason to limit research to this method.

frequently cited in judicial decisions than that of military and police experts, document verification experts, financial experts, engineers, and medical experts (p. 732).

The final issue raised by Rosen is what he calls 'the cultural argument', though as discussed below, 'culture' is not the only issue which anthropological/CE experts are asked to address. As Rosen frames the issue, legal cases

> present problems of interpreting to the court the language and concepts of the party involved, and the relation between the legal issues posed and the relevance of anthropological findings. Working closely with counsel, anthropologists have also been instrumental in formulating highly creative arguments that may influence the course and result of a case (p. 567).

Rosen cites several successful 'creative arguments' which includes litigation about the use of peyote by Native Americans, snake-handling cults in the state of Tennessee, the issue of 'arctic hysteria' and 'witchcraft murders'. The creation of a 'cultural defence' in the U.S. arose later (see Dundes Renteln 2002, 2004). The issue of whether it is right that anthropologists should 'interpret' culture rather than allow litigants an opportunity to speak for themselves in legal proceedings is determined in part by whether the litigation strategy adopted by legal counsel empowers parties to speak for themselves and by the disciplinary training of the experts who submit evidence. In group legal claims, such as land right claims, there has been a shift away from the anthropologist acting as the 'expert' to one of facilitating local groups to speak for themselves (Loperana et al. 2020; Hale 2020).

The social sciences have still not addressed the professional and pragmatic issues raised by Clark and Rosen nearly forty years ago. A lack of preparedness for adversarial proceedings can result in shock and surprise when judges dismiss an experts' evidence or when the judiciary appropriates and 'misuses' anthropological concepts and evidence (Riles 2006).[11] Apart from a desire to be useful to the courts, most experts possess a limited awareness about how the courts 'judicialize culture'[12] and they are unaware that they may be required to disclose their sources of information.[13] While professional associations have engaged with the general ethical issues facing members of their discipline, their guidance has left individual members to negotiate thorny issues arising from multiple and cross-cutting obligations to one's informants, and responsibilities to funders, one's university or employer, the nation-state in which fieldwork was conducted, and the courts.[14] The general approach to ethics adopted by professional bodies has had two principle implications for those who engage in expert witnessing. First, relatively few university academics engage in applied research, including expert witnessing (J. R. Campbell 2020a). Second, the ethical approach adopted by those who provide CE reflects their individual understanding of the challenges they confront. While some anthropologists would agree that they have an obligation to support subaltern people confronted by the law (Holden 2019, p. 190-f), they do not necessarily believe that they should challenge the judiciary—for example, by disputing judicial reasoning or challenging legal arguments made by the state—or take a political stance with regard to witnessing.

The problems which arise when anthropologists attempt to raise 'the cultural argument' are complex. First, even in instances where the courts have accepted cultural evidence provided by

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[11] It appears that only a small number of anthropologists who provide expert evidence are familiar with adversarial proceedings, namely Rosen (1977, 1989), Good (2007), H. Campbell et al. (2017), Dundes Renteln (2004) and J. R. Campbell (2015, 2017, 2020b).

[12] See (Rosen 1989; Good 2007; Howes 2005).

[13] See, for instance, the guidance set out by the UK's Crown Prosecution Service (2019a).

[14] See Manners (1956) for an informed and early discussion of the complex issues which arose when anthropologists provided expert evidence in Native American land claims. For the guidance provided by the American Anthropological Association see: https://www.americananthro.org/LearnAndTeach/Content.aspx?ItemNumber=22869&navItemNumber=652. The ethical code of the American Historical Association only notes that historians should avoid any 'conflicts of interest' (see: https://www.historians.org/jobs-and-professional-development/statements-standards-and-guidelines-of-the-discipline/statement-on-standards-of-professional-conduct#Reputation). The American Association of Sociology also sets out very general ethical guidelines, see: https://www.asanet.org/sites/default/files/asa_code_of_ethics-june2018.pdf (sites were accessed on 20 August 2020).

an anthropologist and the argument has been generalized for use across a range of cases—the best documented example is the concept of a 'cultural defense' employed in U.S. courts—the way in which cultural evidence is handled indicates that trial judges fail to apply a sufficiently robust test to assess the veracity of a 'cultural claim', because they rely upon their own 'common sense' to decide cases (Dundes Renteln 2005; Wilson 2015; Maucec 2020). In short, there is a significant difference between the way that anthropologists and judges understand and employ the notion of a cultural defense. It is also the case that the value of a legal victory may be more pyric than real depending on how the state implements the decision and whether a successful litigant is subordinated to the state. In addition, subsequent legal cases may challenge and undermine previous legal victories. This is certainly what occurs in civil and in asylum claims where the direction of the law is dependent upon who possesses the resources to use it. As Nader (Nader 2001–2002) has argued, in legal systems dominated by the state the plaintiff role tends to atrophy and, over time, the legal system disadvantages individual plaintiffs/claimants.

Secondly, 'cultural issues' may not be the principle or only issue raised in a legal case. This situation may arise as a result of the 'liberal' approach adopted by a court when it fails to understand, take cognizance of or reconcile conflicting concepts of culture and justice (Douglas 2005), when a court frames the issues narrowly giving short shrift to underlying cultural issues (Roy 2005), when a court seeks evidence about foreign law and practice (J. R. Campbell 2020a) or when judges exclude expert evidence (Currie 2005; Wilson 2015).

3. The Perspective of Judges on the Value of CE

Jones (1994) provides an excellent overview of the English judiciaries' attempt to regulate 'expert' witnesses in trial proceedings. She observed that when the judiciary realized that experts disagreed in the methods they adopted and the conclusions they provided to the court—even though disagreement was and remains an essential aspect of scientific enquiry—they saw experts as 'suffering from partisanship' (p. 97-f). The judicial view of science and of scientific experts was compounded when experts were called by both parties and/or when fees were paid to experts to provide evidence. This situation contributed to a 'distorted' view of science by the judiciary, namely that scientists should provide evidence that was impartial, disinterested, and neutral. However, when expert evidence deviated from the ideological construct created by the judiciary, judges used procedural rules to 'dismiss expert evidence as the weakest kind of testimony.'

The principle 'stick' devised by the judiciary to 'beat the expert witness' took the form of new rules of evidence and procedural/admissibility rules which 'forced experts to fit their evidence into an artefact of the law's design', namely a written report which addresses issues identified by lawyers. In most jurisdictions, experts have an 'overriding duty' to assist the court—which overrides their obligations to the party which instructed them—and their reports must conform to a specific format.[15] In the United Kingdom, for instance, experts must not advocate on behalf of the claimant.[16] The rules give the lawyer who submits the evidence maximum control over the expert and her evidence, and they give judges the power to admit or refuse expert evidence.[17] Furthermore, the adversarial system relies on the parties to cross examine experts in a process which seeks to undermine the weight that

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[15] The UK Ministry of Justice sets out clear regulations governing the role of experts (see: https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/experts; accessed on 18 August 2020). In the U.S. the case of Daubert has shaped Rule 702 of the Federal Rules of Evidence (see, for instance: https://www.law.cornell.edu/rules/fre/rule_702) and see the discussion of this by Golan (2008).

[16] Legal representatives may instruct an expert relatively late in the day which leaves the expert with limited time to undertake research and write a report. Many instructing solicitors fail to tell an expert about the Civil Procedure Rules which can result in the court rejecting their report.

[17] The UK's Crown Prosecution Service provide a slightly different view of experts. Their guidance states that 'The duty of an expert witness is to help the court to achieve the overriding objective by giving opinion, which is objective and unbiased, in relation to matters within their expertise' (my emphasis, Crown Prosecution Service 2019b).

will be placed on their evidence leaving it to the jury or the judge—depending on the jurisdiction in which the case is being heard—to assess the value of the proffered evidence (Golan 2008, p. 917-f). In effect, experts have been co-opted by the legal process.

The judiciary regulates expert witnesses in part through imposing evidentiary hurdles which vary between different jurisdictions and countries. For instance, the Australian judiciary rely upon 'the field of expertise rule' which has been expressed as 'whether the subject matter on which expert evidence is being adduced 'is such as to be the proper subject of expert testimony'' or is a 'recognized field of specialist knowledge' (Redmayne 2001, p. 100). In the U.S., the Frye and Daubert 'tests' have been devised by the judiciary as an attempt to shift the focus of admissibility away from the credentials of the expert to the specific nature of the scientific knowledge s/he proposes to submit to the court. In this way the Federal courts created a new 'law of evidence' that was intended to prevent the expert from giving his or her opinion on the 'ultimate issue', i.e., the precise factual issues before the jury (Golan 2008, p. 921-f). All the different tests, however, including the hearsay doctrine which allowed judges to exclude 'opinion evidence', have proved unwieldy and have been applied inconsistently by judges. As Redmayne has argued, the tests 'are so flexible that they could be applied strictly or laxly, depending upon the court' to 'screen scientific evidence to ensure its reliability' (Redmayne 2001, pp. 104–5). Such rules exist in many countries and may be used to regulate and prevent expert evidence from being given. In this regard, Currie (2005, p. 81) reports a civil defamation case in Canada in which the trial judge decided that the expert evidence to be provided by a sociologist and an anthropologist about racism in the local police force was inadmissible because sociology and anthropology 'lack the precision and specificity which characterizes a science like chemistry or an area of technical expertise like engineering.'[18]

Admissibility is less likely to be an issue when a judge, rather than a jury, is deciding a case. This is particularly true with respect to hearing minor criminal offences, most civil claims (which are increasingly expected to be arbitrated/mediated) and asylum and immigration appeals.[19] While it is the case that in some countries there is a right to a trial by jury for serious offences and in important civil claims, the reality is that the number of jury trials for all types of claims have declined substantially in North America (Kritzer 2004; Galanter 2004) and the U.K. (Dingwall and Cloatre 2006).[20] It is important to add that across Europe, and in many other countries, civil claims are heard by judges and trial for criminal cases is rare (Leib 2007–2008). In France and Belgium, which follow the civil law tradition, only serious criminal offences are heard by a jury (Germain 2019).

Even though courts use evidence/admissibility standards, many lawyers and judges distrust experts who are seen as 'hired guns' because it is believed that their evidence can mislead juries and judges and may result in wrongly deciding cases (Mosteller 1989; Mantle and Chenane 2014; Wortly and Ward 2019). Judicial views of experts are not without some justification given the extent to which expert evidence is internationally marketed for all types of litigation[21] and because experts are appointed who possess diverse forms of disciplinary training and who have different motivations, including personal gain for providing their expertise.

It is useful to step away from a focus on the rules which judges can use to regulate expert evidence to understand the importance of CE in different countries. This task requires us to distinguish between proposals made to the judiciary which advocate the adoption of an 'appropriate cultural test' (cf.

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[18] On appeal the judge's decision was set aside.

[19] For the UK see: Courts and Tribunals, 'Civil Justice in England and Wales' at: https://www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/civil-jurisdiction/#:~:text=The%20vast%20majority%20of%20civil,is%20%E2%80%93%20and%20then%20giving%20a; for Canada see: Government of Canada, Department of Justice 'The role of the public' at: https://sistemasjudiciales.org/wp-content/uploads/2018/03/947.pdf; for the U.S. see: the Department of Justice guidance on '201. Jury trials in civil cases' at: https://www.justice.gov/jm/civil-resource-manual-201-jury-trials-civil-cases and the EOIR IJ Bench Book Tools, Guide, Evidence Guide at: https://www.justice.gov/eoir/page/file/988046/download.

[20] My survey of the literature did not find any indication that either a judge's directions to a jury or jury selection/screening played a role in the outcome of the hearings/trials discussed in this paper.

[21] See, for instance, 'Expert Evidence International Ltd.' at: https://expert-evidence.com/ (accessed on 1 September 2020).

Ruggiu 2019) from research which explores how judges actually assess and make use of CE. There are relatively few published studies which explore the second issue.

Cooke (2019) study of Finland confirms that while it is possible for the courts to accept CE, this has not happened (though why this does not occur is not discussed). Instead she focuses on the role of 'informal' expertise which occurs when community members are appointed by a judge to address cultural issues. Lopes et al. (2019) 'survey' of Portuguese law identifies and discusses a small number of legal cases relating to migrants whose culture may be relevant when they are charged with specific crimes, i.e., Female Genital Mutilation, forced marriage, specific types of sexual acts, placing children for adoption, the marriage of minors and a child's right to education. In Portugal, expert evidence is only introduced 'through the initiative of a judge' which rarely occurs. The authors found that while 'the courts were relatively indifferent to cultural factors', an extensive network of 'mediators' operated at the community level 'who were mobilized to defend ethnic minority rights' (p. 66).

The situation in Italy is slightly better known. For example, Holden's survey of judges, lawyers and experts suggests a fairly small number of experts are appointed and that experts provide evidence primarily in immigration law (44%), refugee and asylum law (22%), family law (19%) and civil law (16%).[22] Ciccozzi and Decarli (2019) state that while a wide range of experts are recognized in Italian law, 'in most cases, judicial actors are not aware of the cultural complexities of the groups involved in trials and have no on-site experience with the populations to which the parties belong' (p. 37). Furthermore 'the number of experts appointed in Italian trials has been very low'. The authors provide a detailed discussion of Ciccozi's involvement as an anthropological expert in the 'L'Aquila trial' which involved an assessment of whether expert scientific evidence concerning the risk of seismic activities was understood (and ignored) by residents of L'Aquila village with fatal consequences.

With regard to the situation in Sweden, Holden's survey of judges, lawyers and experts[23] found that CE was primarily relied upon in immigration law (13%), refugee and asylum law (22%), international human rights law (11%) and in family law (10%). The majority of judges and lawyers had used experts in less than 10 cases. Rabo (2019) sets out a more nuanced history of CE in Swedish law in which she examines cases concerned with the land rights of the indigenous Sami people, cases of discrimination against Roma people and cases—concerned with deportation, adoption, hate speech, divorce, spirit possession, FGM and murder—involving 'new immigrants'. She notes that the Swedish courts employ the 'free sifting/consideration of evidence (*fri bevisprovning*)' which, in principle, means that there are 'no limitations concerning the sources that can be used by the parties in a trial' (p. 2). Nevertheless, until recently, the direction of the law has been in support of the idea that Sweden is a homogeneous society which has meant that foreigners have been seen as 'inferior' and that they have suffered discrimination as a result of this attitude. Rabo discusses, in some detail, cases litigated by the Roma and the Sami against the state for discrimination in which these ethnic minorities have had to find their own experts and have fought long legal battles against the state, the police, private companies and individuals. With regard to the 'new immigrants'—the largest group are Syrian refugees/immigrants—it is clear that there has been some difficulty in finding appropriate experts to give evidence and that while the most have only submitted reports to a court, they have not been called to give oral testimony. Rabo concludes by noting that the term 'culture' is highly ambivalent because it has been increasingly used by populists/demagogues and 'mainstream opinion makers'. Because the Swedish state 'is quite blind to its multi-cultural history', she argues that it is up to anthropologists/cultural experts and more progressive lawyers to work together to pursue justice for minorities.

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[22] See: https://culturalexpertise.net/wp-content/uploads/2020/04/EURO-EXPERT-Italydatasummary.pdf.
[23] See: https://culturalexpertise.net/wp-content/uploads/2020/06/Sweden.pdf.

The situation in Poland differs from the above cited cases. In Holden's survey[24] of judges, lawyers and experts, it was found that 58% of judges and 45% of lawyers had never instructed an expert to provide CE. When CE had been submitted, it was predominately in family law (15%), crime (14%), refugee and asylum law (14%) and in immigration (12%). Burdziej (2019a) provides a more in-depth study of CE in Poland. He identifies the need for CE to deal with growing cultural diversity facing the immigration services, detention centers and in education—to address issues relating to migrants—and in the military (to prepare Polish troops who are deployed overseas). He undertook a key word search of legal databases—which held four hundred eighty-eight thousand decisions by Poland's appellate courts, administrative courts, and the Supreme Court—which yielded four hundred cases in which some form of CE was submitted (p. 12). He found that in the rare cases which involved CE that the majority 'concerned aspects of Polish dominant culture, not intercultural issues' (p. 13). The principle cases identified were asylum cases, hate speech crimes, defamation cases, media ethics, copyright, and religion. Burdziej found a very small number of cases which turned on CE: namely an honor killing, an attempt to kill a man responsible for an immigrants' daughter's suicide and Islamic terrorism.[25] He thought that many cases which raised cultural issues were simply 'filtered' out of the legal system[26] because 'Poland's relative cultural homogeneity leads courts to perceive culture as a largely non-problematic issue, thus not requiring the assistance of experts' (p. 25).

Burdziej has written a second paper titled 'Judging the Communist Past' (Burdziej 2019b) in which he provides a fascinating analysis of the use of historical expertise submitted to Polish courts which hear cases involved in 'lustration' ('vetting') the right of individuals to hold public office who are accused of collaborating with the communist secret services', cases to change the names of public places named after prominent communists, the removal of Communist monuments and the 'withdrawal of veteran status' from soldiers of the communist security services. The evidence submitted by historians comes from their analysis of what is left of the *Stasi* (secret service) archives (many files were destroyed or 'privatized' for the purpose of blackmail). The work of this court has become highly politicized.

A special appellate court was established in 2006 as was a new law of lustration which defined key definitions of what acts amounted to collaboration. Between 2008 and 2015 the court issued 903 decisions: 459 individuals were found to have been collaborators. Observers have noted the excessive leniency of the court which has led Burdziej to conclude that 'the courts often prefer erring on the side of the defendant' (p. 6). Controversy surrounding the courts decisions have, in part, ensured that prosecutors who submit evidence are 'careful to limit their claims to factual statements on the contents of the (Stasi) archive and not their interpretation as evidence of collaboration' (p. 8). Burdziej argues that this historical expertise has become institutionalized by the state, through the creation of the Institute of National Remembrance, in an effort 'to secure victory in the struggles over the dominant interpretation of the country's past' (p. 22).

In Denmark, which has 'a particularly monocultural, legally homogeneous, monolithic' legal system, Vinding (2019) argues that legal culture has changed very slowly as a result of the impact of migration, religion and EU legislation. Vinding undertook a key word search of the Danish legal database 'Karnov' for the period 2001 to 2018 which held approximately thirty-six thousand cases. He was able to identify one hundred and eight cases in which CE was submitted. The cases primarily concerned the Immigration Service and the Police Intelligence Service, and they concerned expulsion, terrorism, the prosecution of hijackers and cases brought by Iraqi nationals against the Danish Defense

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[24] See: https://culturalexpertise.net/wp-content/uploads/2020/04/Poland.pdf.

[25] Terrorist criminal trials, and Closed Material Proceedings, need to understand the statements and concepts relied upon by the accused to justify their actions including the notion of *jihad*, *Da'wah* and other Islamic concepts. However, courts tend to disregard evidence on social, cultural, and contextual issues (see J. R. Campbell 2020b).

[26] If a 'filtering out' is occurring, this would also involve the police and state/public prosecutors, and would suggest that an examination of judicial decisions alone is only able to provide a partial understanding of the legal process and the role of CE.

Forces. Vinding argues that there is a need for the Danish courts to accept CE, but also a considerable reluctance by the judiciary to abandon its traditional approach to deciding cases.

Vinding's conclusions are supported by the discussion which Vetters and Foblets (2016) had with European judges. They concluded that judges are heavily influenced by their 'legal culture' and 'working environment' which predisposes them to adopt a pragmatic understanding of the 'culture' of immigrants 'that is not so much built on a clear-cut distinction between 'our' and 'their' culture, but rather focuses on notions of culture more directly related to the legal and organizational context within which judges operate' (p. 273). Based on a limited look at asylum proceedings in three countries—the U.K., Belgium, and Germany—the authors argued that judges are constrained by evidentiary norms from introducing CE.

Finally, a study by J. R Campbell (2020b) analyzes the role of CE in the British asylum system—including the rules which govern the submission of evidence—in first instance asylum hearings and on appeal to the Upper Tribunal of the U.K.'s Immigration and Asylum Chamber. These judges rely on CE/expert evidence to decide cases. Of the twenty-eight precedent-setting 'country guidance' cases decided by the Upper Tribunal between 2015 and 2019, he analyzed five and found that Immigration Judges

> use procedural rules to hedge and control expert evidence and that their assessment of this material is often flawed. This is particularly the case with qualitative data, which is treated as *hearsay*, but problems also occur with their preference for, but inability to adequately understand/ 'test', statistical data.

Campbell concluded that Immigration Judges

> lack the training to adequately assess/test testimonial, qualitative and statistical evidence. The problem is that they do not realize their limitations and end up preferring evidence which they assume is more objective or scientific while setting aside cultural evidence on language, culture, kinship and the importance of social relations and social networks. Legal conceptions of objective evidence used by IJs . . . do not assist them to assess social science research . . .

Holden reports on a survey of judges, lawyers and experts in the United Kingdom.[27] She reports that the majority of judges have never instructed an expert (33%; whereas 61% had instructed 10 or less reports) whilst 47% of lawyers had instructed less than 10 cases. Her findings are highly problematic, given that judges are not supposed to instruct experts—though they might be involved in agreeing which experts should give evidence—and solicitors but not barristers should instruct experts.

Research on international criminal courts provides a different picture of the role of CE. Maucec (2020) has, via the examination of a small number of cases, examined the limited availability of expert evidence on 'cultural' issues—i.e., efforts to mount a 'cultural defence', the meaning and use of 'fetishes and mystical power' and 'speech crime'—that have arisen in the International Criminal Court (ICC). Once again, however, the writer's belief in the value of cultural expertise is belied by the limited extent to which CE appears to have been submitted to and accepted by the ICC.

Anders (2014, p. 427) has written about the Special Court for Sierra Leone and argued that the judges 'refused to adopt the anthropologists' arguments (against the evidence relied upon by the prosecution) and did not share their concerns about the methodology and conceptual framework employed by the prosecution experts.' Anders' argues that that anthropological evidence was rejected because the judges 'were reluctant to recognize the challenge posed by Sierra Leone's socio-cultural specificities to the application of international criminal law.' In sharp contrast, Wilson (2015) compiled and analyzed a database of 473 expert reports submitted to the International Criminal Court for

[27] See: https://culturalexpertise.net/wp-content/uploads/2020/06/UnitedKingdom.pdf.

the former Yugoslavia. He found that while 'scientific experts' were called to give evidence twice as often as were other experts, in fact 'social researchers (who provided both quantitative and qualitative data) have a much higher citation rate' than medical, military and police, document verification, financial and engineering experts (p. 732). Judges welcomed socio-cultural and linguistic evidence; however, their receptiveness to expert evidence 'depends on how jealously judges protect their preeminence as the triers of fact' (p. 741). Wilson's findings are supported by Eltringham (2013) who studied the International Criminal Court for Rwanda. There are clearly a number of factors which influence the reception of CE in international criminal courts, which, in addition to the issues already discussed, include judicial conceptions about culture as something practiced by 'distant (read backward) communities', the court's failure to appreciate its own organizational culture (as somehow objective and situated above socio-cultural specificities) and the judges responsibility to assign culpability (Fraser and Leyh 2020).

The above studies provide insight into the diverse ways that courts in different countries and jurisdictions view, instruct, admit and assess CE/expert evidence; however, the studies rely on a small number of published cases and fail to engage directly with judges. In what follows, I seek to fill key gaps in the research cited above, which has not adequately assessed the views of lawyers and the judiciary regarding the value of CE, nor has research assessed the full extent to which CE/socio-legal expert evidence has been submitted in national legal systems.

4. How British Barristers Make Use of 'Experts'

To obtain a clearer picture of the role of CE in the law, I interviewed five London-based barristers who undertake work on behalf of claimants (not the government). The zoom-interviews which ranged from fifty to ninety minutes in length were recorded and transcribed into Word. I asked barristers to identify and discuss at least three legal cases which they were personally involved in which relied upon different types of expert evidence. I also asked barristers to provide me with relevant case material or summaries of their cases which were published on Bailii. Because the published cases identify my informants, I have drawn upon but not cited this material in order to ensure the anonymity of my informants. The barristers I interviewed worked in the following jurisdictions: asylum and immigration law, family law and public law.

The *Asylum and Appeal Act 1993*[28] made it possible for asylum claimants to appeal against the decision of an Immigration Officer to the Immigration and Asylum Tribunal; at roughly the same time, legal aid became available to pay lawyers to litigate these cases. The appeal procedures were initially 'informal' and lawyers relied on reports published by international human rights organizations or the U.S. Department of State; it was rare for an expert to be instructed to provide a report and unheard of for an expert to be cross examined. Over time the situation changed: argument in the Tribunal has become increasingly 'legalized' and 'experts' have increasingly been instructed to provide evidence. Rather than provide its own expert evidence, the Home Office criticizes the experts instructed by claimants and attempts to undermine their reports (Home Office 2005, p. vi). In addition, once lawyers were appointed as Immigration Judges, it became increasingly common to cross-examine experts. This shift has meant that all forms of evidence are much more closely scrutinized in a process which has seen experts who rely on qualitative research and those whose reports are based on the analysis of documents in the public domain, i.e., reports by international organizations, to be deemed by IJs as insufficiently credible. Barristers argue that an analysis of country guidance decisions shows that IJs prefer experts who can analyze published statistics on casualties, death rates, risk of injury, mental health, and so on for a given population rather than experts who possess a good knowledge of an asylum applicant's country of origin.

[28] See: https://www.legislation.gov.uk/ukpga/1993/23/contents.

Barristers rely upon the solicitor who instructs them in a case to identify and instruct relevant experts. Solicitors also set out the Terms of Reference which experts are required to address; barristers may amend the ToRs but they are seldom in contact with experts. Barristers who litigate immigration and asylum claims rely heavily on 'country' experts—anthropologists, sociologists, historians, linguists and journalists who provide CE, as well as experts on foreign law—whose claim to expert knowledge rests on having conducted academic research on the country from which an asylum applicant originates. To identify an expert, immigration solicitors rely on recommendations from other practitioners and/or they contact experts listed on an online directory of country experts.[29] Because some barristers are skeptical about the individuals listed on the directory, they undertake research to identify a suitable expert, they read case law, google university webpages and consult colleagues in their chamber. Once identified and instructed, experts vary in their ability to fully address the terms of reference, in terms of their knowledge of the specific issues raised by a case, and in terms of their willingness to revise their reports to address barristers' concerns before their report is submitted to the court. Barristers who identify experts for their cases are less likely to end up relying on a person who produces generic material and/or who 'recycles' material which they have submitted in other cases (such experts tend to carry little weight with IJs).

Apart from selecting an expert who can address the specific issues raised in a case, a barrister's litigation strategy reflects a number of factors. First, all barristers had very clear views regarding how judges sitting in the jurisdiction in which they worked were likely to assess evidence. Thus, all the barristers' I spoke with held negative views regarding how IJs in the Immigration and Asylum Tribunal assessed expert evidence. One barrister thought that senior IJs were unwilling to take decisions which might be understood by the Government as 'impeding the operation of immigration control.' For this reason, barristers suggested that IJs failed to adequately reconcile international legal frameworks with British law in case their decisions challenged government policy. In order to 'square the circle' without overturning case law, it was suggested that IJs diminished the weight attached to expert evidence.[30] Barristers expressed a much more positive view of the quality of judge craft in jurisdictions where judges had been appointed to a judicial post following a successful legal career, i.e., the Family Division, the High Court, the Court of Appeal and so on.

Barristers who litigated across different jurisdictions provided further insights. For instance, appeals in the Family Court are often linked to claims in the Immigration and Asylum Tribunal which creates a 'gordian knot'—i.e., the need to ensure that both courts consider the decision of the other court—which can result in delays and problems for appellants. This situation arises in: deportation cases which raise an Art. 8 claim relating to the appellant's right to family life or the Human Rights claims of a child whose parent is to be deported; in care or adoption proceedings in the Family Courts; and with respect to claims regarding the threat of FGM to children threatened with deportation (Clark-Platts n.d.).[31] A barrister working in both courts stated that in the Family Courts—unlike in immigration proceedings—both parties must agree on a single expert to provide a report and that judges in the Family Court 'are much more likely to make positive findings from that evidence' and their findings 'tends to undercut adverse findings by IJs 'who criticize expert evidence and who 'think and act like border guards'. The barrister also noted that in the Family Court, legal counsel for the Secretary of State tend to adopt 'a more muted role' in proceedings.

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[29] See: https://www.ein.org.uk/experts (accessed on 20 September 2020).

[30] See J. R. Campbell (2020b). The extent to which experts are attacked and their evidence undermined can be found in a number of appeals, e.g., *HH & others (Mogadishu: armed conflict: risk)* Somalia CG [2008] UKAIT *00022* where the Tribunal attacked and discredited several country experts who had provided cultural evidence. In *KV (Sri Lanka) (Appellant) v Secretary of State for the Home Department* (Respondent) [2019] UKSC *10* the Supreme Court overturned the Tribunal's approach to expert medical evidence.

[31] See: 'Deportation: interrelationship between family and immigration proceedings affecting the best interests of children', UK Immigration Justice Watch Blog at: https://ukimmigrationjusticewatch.com/2014/09/19/deportation-inter-relationship-between-family-and-immigration-proceedings-affecting-the-best-interests-of-the-children/ (accessed on 15 August 2020).

Interestingly, some barristers chose not to instruct experts particularly in the IAT when IJs focus on expert evidence and may fail to appreciate the wider picture. This decision reflected their strategy in mounting a judicial review against a government department, or their view of relevant case law in which experts had been 'trashed' by IJs. For example, one barrister relied on evidence submitted by IT experts in previous 'test cases' in the IAT to successfully mount a judicial review. The evidence—which was available online and was published by a Government Committee—concerned a notorious Home Office decision to set aside the examination results of fifty-thousand overseas students in the U.K. who were attending British educational institutions and who were required to pass the 'Test of English for International Communication' (TOEIC). The Home Office had wrongly decided that student test results were falsified and it revoked the right of overseas students to remain in the U.K. and required them to leave without completing their studies (House of Commons 2019).

In a different case, a barrister acting on behalf of an intervenor in a case heard by the Supreme Court, adduced unpublished social science research to provide the court with 'a macro-perspective' regarding the Government's failure to decide policy without taking into consideration the impact of its decision on sections of the British public. In this case, the barrister decided not to call an expert to submit evidence or testify. A third case involved a judicial review against a 'Conclusive Grounds' decision by the Home Office which had refused to recognize a young woman as a victim of trafficking. While the barrister could have instructed a country expert, she chose instead to instruct an ex-police officer who had extensive knowledge of trafficking in southern Europe. The official provided extensive evidence about corruption in the border force of the applicant's country of origin and the limited efforts by the Home Office to secure intelligence from Europol or Interpol to verify the evidence it relied on. The expert evidence, together with written evidence provided by organizations supporting victims of trafficking, successfully challenged the Home Office policy to refuse to reconsider negative trafficking decisions. All three cases were successful, and all relied on very different types of expert evidence or on legal argument.

It should not be too surprising, given the need to identify specific types of experts to address distinctive legal or factual issues in cases heard in different legal jurisdictions, that a wide range of experts are instructed and that, apart from immigration and asylum proceedings, cultural expertise seems to played a limited role. Nevertheless, interviews with five barristers provide insight into their use of experts, but a limited basis on which to generalize.

5. Cultural Evidence in British Law: A Survey of Bailii

How widely is CE used in British law? If it is used, to what extent and in what legal jurisdictions is it used in? To address gaps in the research cited above—and keeping in mind Golan (2008) conclusion that 'scientists' have been providing expert evidence in British courts since at least the 18th century—I undertook a key word search of decisions made by all seven appellate courts and the Supreme Court in England and Wales to identify all types of expert evidence involved in legal cases.[32] The cases are held on Bailii (the British and Irish Legal Information Institute) <https://www.bailii.org/> a legal data base created in 1999. The database states that some, but not all, legal decisions are entered onto it and that 'Bailii makes available on the Internet a collection of leading cases identified by the legal academic community to support legal education' (Quick Guide to Bailii 2020). Given the long history of the British courts, it is best to assume that Bailli does not contain all the legal cases that have been decided in England and Wales. For this paper, I surveyed all the cases listed on the database in 2019—which contained nearly forty one thousand cases—by undertaking a key word search using the words 'expert', 'expert evidence', 'culture' and 'cultural' across all legal jurisdictions. I then read the cases identified by the key word search to identify the expert evidence submitted in each case.

[32] The term 'expert' is commonly used in British case law. As a reviewer of this paper suggested, the word derives from the Latin term 'expertus' which was initially used to refer to any kind of 'consultant' called in to the court to give evidence.

Case decisions reported on Bailii are appeals from first instance courts; even when expert evidence was submitted, the reported cases on Bailii do not fully summarize the case or the evidence initially submitted. If the appeal concerns an issue of fact, then a decision briefly summarizes the evidence offered by the expert, the police and so on. However, many appeals are concerned with issues of law, not issues of fact, which means that expert evidence was not submitted. As will become clear, the British appellate courts hear cases involving individuals, firms and so on who are based in and outside the U.K.

The Family Division of the High Court hears cases where a child who is the subject of legal proceedings must be protected and this protection is not possible under the *Children Act 1989*. The most common type of case is where a child is made a 'ward of the court'.[33] It can also hear cases about forced marriage, Female Genital Mutilation[34], applications for financial relief where a divorce has taken place outside England and Wales and cases involving parental access to children.[35] The Family Court will normally hear all other cases about family issues, but may transfer some cases to the High Court if complex issues are involved.

In 2019, this court decided sixty-one cases. A key word search for the terms expert evidence/expert identified twenty-nine cases (forty-eight percent of all cases) in which the term was used. I found that the following types of experts were cited: expert accountant/forensic accountant, expert social worker, DNA/blood test evidence and handwriting experts.[36] A key word search for the terms culture/cultural identified thirteen cases (twenty-three percent). In these cases, testimony was provided by social workers, the police, and social services. In each case the term was used in a generic sense as in the culture of one of the parties in the case, cultural heritage, cultural needs (of children in care), cultural practices or cultural forms of abuse (i.e., by a foreign parent).

The Court of Protection makes decisions on financial or welfare matters for people who 'lack mental capacity' to make these decisions. The court is based in London where most cases are heard by District Judges and a senior judge. In 2019, this court decided fifty-eight cases. A key word search for the terms expert evidence/expert identified thirty-seven cases (sixty-four percent of all cases). I read four (eleven percent) cases and identified the following types of experts[37] who submitted evidence: medical experts, social workers, nursing experts and experts on foreign law. A key word search for the term culture/cultural identified ten cases (fourteen percent) and I read two cases (twenty percent). No expert evidence was provided in the first case; in the second case psychiatrists and social workers provided

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[33] This court also handles cases of international child abduction but only if the abduction falls under either *The Hague Convention on the Civil Aspects of International Child Abduction* or *Brussels II Regulation (EC) No. 2201/2003.*

[34] Once evidence of FGM has been found by a doctor/nurse, the case is reported to the police for prosecution. Given the extent to which particular ethnic/minority groups are targeted as likely to have their children 'cut', it is surprising there is no requirement for CE to be submitted to the court. In the only case that has been successfully prosecuted in the UK, there was evidence of 'witchcraft'. See: 'UK. First successful prosecution of FGM' at: https://www.loc.gov/law/foreign-news/article/united-kingdom-first-successful-prosecution-for-female-genital-mutilation/. See Fontein (2014).

[35] For example, in 2017 I provided CE/expert evidence in a case in the Family Court regarding parental access to the children of a divorced couple. During proceedings the High Court Judge mediated between the two parties to arrive at an arrangement that was acceptable to both parents and which safeguarded the interests of the children.

[36] Ministry of Justice (2013, pp. 11–12) guidelines for experts make it clear that socio-legal experts are unlikely to be involved in the family courts. The Guidelines stipulate that experts should have: a 'working knowledge of the social, developmental, cultural norms and accepted legal principles applicable to the case presented at initial enquiry, and has the cultural competence skills to deal with the circumstances of the case'; that 'professional practice is regulated by a UK statutory body'. Furthermore, '[I]f the expert's area of professional practice is not subject to statutory registration (e.g., child psychotherapy, systemic family therapy, mediation, and experts in exclusively academic appointments) the expert would be expected to demonstrate appropriate qualifications and/or registration with a relevant professional body on a case by case basis. Registering bodies usually provide a code of conduct and professional standards.'

[37] These are civil claims. The rules of admissibility state that '[T]he question of admissibility was held to turn on four considerations: (i) whether the proposed expert evidence would assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.' See Ministry of Justice (2016).

evidence. The term 'culture' was used in a generic sense as in 'cultural grounds' (i.e., the orientation of one of the parties) or the 'cultural norms' of one of the parties.

The *England and Wales High Court (Commercial Division)* hears complex national and international business disputes.[38] Many of these cases can also be heard by the Circuit Commercial Court. However, it generally hears the more complex cases, or cases where there is a large amount at stake. This court decided three hundred and thirty cases in 2019. A key word search for the terms expert evidence/expert identified a total of one hundred and seventy-three cases (fifty-two percent). A careful reading of ten of these cases (nearly six percent) showed that the following types of experts had submitted evidence: on ship sale and purchase (ship valuations), foreign law, valuation of costs, on ship cargo, arbitration, handwriting and on commercial transactions. A key word search for the terms culture/cultural identified twenty cases. I read three cases (fifteen percent) which indicated a generic use of the term 'culture' as in 'bank culture' (in dealing with cases of fraud) and the 'cultural fit' of a manager in a bank.

The Chancery Division of the High Court deals with: (a) disputes relating to business, property or land; (b) disputes over trusts; (c) competition claims under European or U.K. competition law; (d) commercial disputes (domestic and international); (e) intellectual property issues; and (f) disputes over the validity of a will ('probate disputes').[39] This court decided seven hundred and two cases in 2019. A key word search for the terms expert/expert evidence identified two hundred and sixty-nine cases (thirty-eight percent of the total). I read twenty cases (seven percent) which indicated that the following types of experts were involved: accountancy, liquidators, and experts in foreign law. However, there was a much larger use of the term generically as in: witness evidence, claimant's evidence, oral evidence, documentary evidence, lack of/no evidence and 'evidenced in writing'. With regard to a key word search for the terms culture/cultural, a total of thirty-eight cases (just over five percent) used the term. I read four cases (ten percent) and all four used the term in a generic sense, as in 'litigation culture', 'cultural activities', the culture of a business and 'company culture'. No expert evidence was adduced in these cases.

The Court of Appeal Civil Division hears appeals against certain decisions from all three divisions of the High Court of Justice and their specialist courts, including the Administrative Court: the county courts and the Family Court. It also hears appeals against certain decisions by other Tribunals.[40] Of particular relevance to this paper, this court hears appeals from the Upper Tribunal of the Immigration and Asylum Chamber which relies on a wide range of experts including anthropologists, historians, linguists and others in deciding asylum and immigration appeals[41] and age-dispute claims relating to assessing the age of child asylum seekers.[42] This court also decides Judicial Review applications.

This court decided four hundred and seventy-seven appeals in 2019. A key word search using the term expert evidence/expert identified a total of two hundred and nine (forty-four percent) cases. I read ten of these cases (five percent) which identified the following types of expert who submitted evidence: child psychologist, social workers, orthopedic experts, medical evidence, transport experts, coroners, and experts in foreign law. A key word search for the terms 'culture'/cultural expert identified

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[38] The cases included: (a) disputes over contracts and business documents; (b) insurance and reinsurance; (c) the sale of commodities; (d) import, export and transport ('carriage') of goods; (e) issues relating to arbitration awards; (f) banking and financial services; (g) agency and management agreements; and (h) construction of ships.

[39] It also hears appeals about: (a) decisions of 'masters'; (b) insolvency decisions made by High Court registrars or the County Court; (c) most decisions of the County Court; and (d) decisions of certain tribunals. It can also handle a wide range of other issues including: (a) claims relating to partnerships (e.g. dissolution); (b) cancelling, setting aside or correcting ('rectifying') errors in deeds and other legal instruments; (c) breaches of trust or contract and (d) professional negligence.

[40] Including the Competition Appeal Tribunal; Employment Appeal Tribunal; Upper Tribunal (Administrative Appeals Chamber); Upper Tribunal (Immigration and Asylum Chamber); Upper Tribunal (Lands Chamber) and the Upper Tribunal (Tax and Chancery Chamber).

[41] A total of one hundred and nine cases were appealed to the CoA from the Immigration and Asylum Chamber in 2019 (sixteen percent of all the appeals heard by the CoA).These cases focus on 'errors of law' made by the Upper Tribunal.

[42] Age-dispute litigation has been heard by the Court of Appeal, the Supreme Court, and the High Court. In 2011 these cases were transferred to the Upper Tribunal of the Immigration and Asylum Tribunal. These cases require 'expert evidence' from paediatrician's, social workers, medical doctors, carers, foster parents, and teachers (see J. R. Campbell 2020c).

seventy-eight cases (sixteen percent). A reading of eight cases (sixteen percent) revealed that in only one case was evidence adduced, namely by a medical expert; I found that the term was used generically, e.g., cultural ties, cultural needs, culturally appropriate placement, cultural reasons, a child's culture and 'culturally integrated'.

The Court of Appeal (Administrative Division) reviews decisions made by people or bodies with a public law function, e.g., local authorities, and regulatory bodies. It hears judicial review applications made by other courts, tribunals and public bodies and it hears challenges to decisions made by certain people or bodies (e.g., ministers or local government) where legislation provides a right to challenge.[43] It also contains a specialist Planning Court which handles judicial reviews of decisions about planning permission and challenges to planning decisions. It is a specialist court within the Queen's Bench Division of the High Court of Justice, which is based at the Royal Courts of Justice, London and in Birmingham, Cardiff, Leeds, and Manchester. Cases may be heard by one High Court judge or by a 'Divisional Court' which consists of two or more judges, normally a High Court Judge and a Lord Justice of Appeal.

In 2019, this court decided six-hundred and eighty-two appeals. A key word search for the terms expert/expert evidence identified two hundred and sixty-one cases (thirty-eight percent of all cases). A careful reading of seventeen cases (six percent) identified the following types of experts who submitted evidence: medical, foreign law, firearms, planning, prison/independent psychologist, experts on human trafficking, the Environmental Agency, parole boards, planning, Migration Advisory Council expertise, Nature England, government regulatory experts, veterinary experts, midwives and experts on public health. A key word search for the term 'culture'/cultural identified ninety cases (thirteen percent of the total). A reading of nine cases (ten percent) revealed that in three cases expert evidence was submitted by a human rights monitor, an archaeologist, a psychiatrist and a psychologist. The term was also used in a generic sense, e.g., sub-culture, cultural norms, cultural heritage, cultural identity, cultural differences, cultural consideration, compliance culture and culture of benefit dependency.

The Court of Appeal (Criminal Division) hears appeals from the Crown Courts. It hears appeals against convictions and sentences (even if the conviction was in a magistrate's court) and confiscation orders imposed by the Crown Court. It also heard applications for permission to appeal and appeals from proceedings in the Crown Court (including cases referred by the Attorney General where there is concern that the sentence given by the Crown Court may have been too lenient).[44] It is based at the Royal Courts of Justice in London. Cases are heard by Lord Justices of Appeal or, in some cases, High Court judges.

In 2019 this court decided four hundred and six appeals. A key word search for the terms expert/expert evidence identified seventy-seven cases (nineteen percent). I read seven of these cases (nine percent) and identified the following types of experts who submitted evidence: the analysis of drugs, health and safety experts, psychiatrists, firearms experts, and medical experts. A key word search of cases for the terms culture/cultural identified fourteen cases (three percent). A careful reading of two cases (fourteen percent) found that no expert evidence was submitted and that the term was used generically, e.g., culture of secrecy and gang culture.

England and Wales Queen's Bench Division of the High Court hears disputes relating to personal injury; negligence; breach of contract; breach of a statutory duty; breach of *The Human Rights Act 1998*;

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[43] This court also hears: (a) applications for 'habeas corpus', (a legal procedure where the court rules on whether the detention of an individual is legal); (b) applications to prevent individuals from continuing to initiate groundless legal proceedings (i.e. 'vexatious litigants') from continuing to do so without first obtaining permission from a court; (c) all applications under the *Coroners Act 1988* (which deals with the appointment and conduct of coroners); (d) appeals 'by way of case stated' from the Crown Court or magistrates' courts (where an opinion is sought on a particular point of law where a mistake may have been made): (e) applications for an order to imprison a person for contempt of court; (f) appeals under the *Extradition Act 2003* (which deals with extradition requests to and from the United Kingdom and decision on bail applications); (g) appeals against decisions made by some professional bodies, e.g. the Nursing and Midwifery Council; and (h) applications for 'restraint orders' or 'certificates of inadequacy' where assets have been frozen or confiscated.

[44] In addition, it hears appeals from decisions from the 'Court Martial Appeal Court'.

libel, slander and other torts; and non-payment of a debt and 'enforcement orders. Many of these cases can also be heard by the Chancery Division.[45] In 2019, this court decided five hundred and seventeen appeals. A key word search for the terms expert/expert evidence identified two hundred and forty-two cases (forty-seven percent). I read fifteen cases (six percent) which identified the following types of expert[46] who submitted evidence: on road accidents, handwriting, medical, neurologist, on the price of drugs, on general medical practice, diabetology, foreign law and clinical psychology. A key word search for the terms culture/cultural identified forty-five cases (nine percent). A careful reading of four cases (nine percent) failed to identify a case in which expert evidence was involved and found only a generic use of the term, as in 'cultural reasons', culture of the defendant, culture (of a foreign country) and institutional culture.

Finally, I reviewed decisions by the United Kingdom's *Supreme Court* which is the final court of appeal in the U.K. for civil and criminal cases from England, Wales, and Northern Ireland. It hears cases of the greatest public or constitutional importance. In 2019 the Supreme Court decided fifty-nine appeals. A key word search for the terms expert/expert evidence identified twenty-two cases (thirty-seven percent). I read four cases (eighteen percent) which identified three types of experts who submitted evidence: medical, handwriting, and judicial experts. A key word search for the terms culture/cultural identified a total of eight cases (thirteen percent); my reading of three cases (thirty-seven percent) found that references were made concerning the expertise of the Department for Digital, Culture, Media and Sport (a government department), and to cultural life and cultural integration (in relation to a deportation appeal).

A lengthy history of immigration has led the U.K. government and British courts to recognize and enshrine certain aspects of the culture of ethnic minorities into British law, e.g., with respect to the right of Sikhs to wear a turban, a 'kara' or a 'kurban'[47], the right of Muslim women to wear a burqa[48], and limited rights accorded to Roma peoples.[49] Legislation has also been adopted which bars ethnic and religious discrimination.[50] Civil law cases in the U.K., which in the past may have called upon anthropologists/socio-legal experts to provide evidence on matters of culture, family, gender, religion and marriage, are now dealt with by the police who enforce civil rights legislation by imposing civil penalties rather than prosecuting individuals in court.

In keeping with studies of the role of CE in other countries discussed above, in England and Wales, the majority of the appellate court decisions recorded on Bailii do not involve CE[51] or expert evidence of any kind (because they are concerned with deciding/interpreting points of law not factual issues). Even so, some form of expert evidence is submitted in all the appellate courts in the U.K. because they

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[45] This Court also handles: applications to 'enroll' (register) deeds, including changing your name by deed poll; registration of judgments obtained abroad so that they can be enforced in England and Wales; election petitions to challenge the results of Parliamentary, European Parliamentary and local government elections; applications for bail; serving documents overseas and obtaining evidence for foreign courts; registration and satisfaction of 'bills of sale'; and 'interpleader proceedings' where a High Court Enforcement Officer is attempting to recover goods to settle a debt and a third party claims to be the owner of the goods.

[46] Experts are regulated by Part 35 of the Civil Procedure Rules. However, the Queen's Bench Guide (Ministry of Justice 2018, sec. 10.8) requires parties to obtain permission from the court before they secure an expert, and both parties are given a very strong steer that they should agree a single, joint expert. The Guide also makes it clear that, 'The most common form of written evidence is a witness statement' (sec. 10.9.2).

[47] See: Grillo (2017) on litigation which expanded the right not to be discriminated against as set out in the *Equalities Act 2010* and the *Human Rights Act 1998*.

[48] See endnote 36, and the discussion on 'face coverings' in 'What are the rules on burqas and face coverings in the UK' at: https://fullfact.org/law/what-are-rules-burkas-and-niqabs-uk/ (accessed on 20 August 2020).

[49] The rights of Roma are not protected by legislation in the UK, though litigation has secured a measure of protection against discrimination (see: Willers and Baldwin n.d.).

[50] These rights are set out in the *Equalities Act 2010*.

[51] The limited extent to which expert evidence is cited in appellate decisions does not indicate whether doctors, psychologists, experts on human trafficking provide 'socio-cultural'/CE evidence. Given the strict regulations on the submission expert evidence in British courts which require an expert to have an acknowledged 'expertise' in their area of work, it seems unlikely that other professionals are allowed to provide CE that is in any way analogous or similar to anthropologists, historians and other social scientists.

hear appeals from first tier courts. The survey of Bailii indicates that the term 'expert' is understood in a very wide sense to include nearly every type of expertise that arises in a modern, technologically complex society.[52] It is notable that none of the cases identified by a key word search involved anthropological/CE for several reasons. First, anthropological/CE evidence, when it is submitted, is heard by the lower courts which are deemed to possess greater expertise in dealing with evidence. Secondly, most first instance cases are not appealed to the appellate courts. Third, it is probably the case that a key word search of a database like Bailii does not identify many relevant cases because the search engine is unable to identify the issues relating to CE/socio-legal expertise. This, in turn, probably means that it is not possible to determine the extent to which the courts deal with CE and whether, over time, courts have accepted more or less CE/expert evidence. Finally, and equally importantly, a key word search of Bailii together with an analysis of the cases requires substantially more resources and time than individual researchers have at their disposal to undertake a comprehensive analysis of the database. Ideally, what is required are more in-depth studies of countries and legal jurisdictions by teams of researchers (supported by external funding). Such studies would enable us to move beyond the analysis of individual cases, as useful as these are for illuminating judicial decision-making, and surveys of legal databases to provide a more complete understanding the role of all legal actors—the police, state prosecutors, lawyers, experts and judges. It is important to know how decisions are made to prosecute or drop cases, e.g., by filtering out and preventing claims from reaching court and, once a claim reaches court, to understand the work of all legal actors involved in providing evidence and arguing and deciding claims in which CE is submitted.

6. Conclusions

An assessment of the contribution of cultural expertise in assisting judges or mediators to better understand the cultural issues which arise in disputes has proven to be a complicated task. A review of the burgeoning literature reveals several issues. First, anthropologists and a wide range of socio-legal experts have increasingly submitted CE/expert evidence in asylum, civil, criminal, family law, indigenous land claims and in claims heard by international criminal courts. It is clear that these experts have quite different reasons for engaging with the courts, ranging from the desire to protect subaltern peoples to profiting from their work. Many, perhaps most, have a limited understanding of the adversarial process.

Second, regardless of jurisdiction and country, judges act as gatekeepers (a fact that has not been recognized in many studies). They exercise this role by imposing evidentiary hurdles and admissibility rules, in their assessment of the evidence, and by deciding legal claims. The judiciaries power is only slightly mitigated by the discretion given the lower courts—particularly asylum and immigration hearings and in civil claims—to admit hearsay/opinion evidence which, occasionally, can have a decisive impact on a judicial decision.

Third, courts in different countries and in different jurisdictions appear to exercise considerable discretion with regard to admitting socio-legal/CE evidence. This probably arises from the extent to which they are insulated from, or are required to engage with, international humanitarian and criminal law. The failure of courts in Denmark, Poland and Sweden seem to indicate that their failure to engage with international law is due in part to their concern to maintain a 'mono-cultural' society. The insular focus of these courts may also explain why so little CE is submitted and thus why judges and lawyers are relatively unfamiliar with CE/socio-legal expertise.

An appreciation of the extent to which CE is submitted in different jurisdictions and countries is constrained by the limitations of existing research which has primarily been based on the analysis of a limited number of judicial decisions. Recently, researchers have attempted to provide a much wider

[52] The role of certain of social workers, psychiatrists and lawyer/mediators in arbitration has been discussed by Brophy et al. (2013), Hallett (2018) and De Girolamo (2013), respectively.

picture of CE by searching legal databases. These studies are problematic for two reasons. The first type of studies are illuminating but they tell us relatively little about the work of all the legal actors—the police, public prosecutors, lawyers, experts and judges—whose work shapes the adversarial process and determines the role and value of CE. Surveys, on the other hand, hold out the promise of situating CE/socio-legal expertise in the wider adversarial system, but findings provide at best a limited picture due to methodological and technical problems involved in searching databases.

Finally, a greater appreciation of how the law works shows that the key differences between anthropology and law are not epistemological but reflect the need for the court to reach a decision. While experts are clearly regulated by the judiciary, it should be clear that the situation they face varies considerably by country and by jurisdiction and that the principal use of CE is in asylum and immigration law, civil claims, international criminal law and secondarily in international human rights law and family law.

Funding: This research received no external funding.

Acknowledgments: I am grateful to the five barristers who agreed to be interviewed about their litigation strategies and to the three anonymous reviewers for their comments on the initial version of this paper.

Conflicts of Interest: The author declares no conflict of interest.

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Article

A 'Wellbeing' Paradigm: A Concept-Based Study of Body Art and Regulatory Challenges

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Received: 1 September 2020; Accepted: 8 October 2020; Published: 15 October 2020

Abstract: In this paper, I trace the changing characterisation of health and consider the evolution of health within a shifting paradigmatic landscape. I argue that understanding health now encompasses the importance of wellbeing as a key determinant of longer-term good health. I use the case study of body modification and body art to explore this further. I argue that, while body modification and body art, as a means of self-expression and empowerment, is relatively easy to access, there are critical gaps in the regulatory framework that may undermine the notion of wellbeing and individual choice. I critique the Court of Appeal's decision in *R v BM*, [2018] EWCA Crim 560 which raises particular public interest concerns, but conclude that it is a missed opportunity in relation to how the law understands the promotion of 'self' within a model of wellbeing.

Keywords: autonomy; body art; health; healthism; regulation; wellbeing

1. Introduction

What do we mean by health? We tend to naturally think of health as a binary concept—we either have good health or poor health. We seek always to be in good health, and expect to be able to access support when our health is failing. However, this dichotomous approach does not allow for the nuances within the conceptual understanding of health. Models of health are conceptual frameworks or ways of thinking about and understanding health. In England and Wales, as with many other parts of the world, the biomedical model of health has reflected established and traditional approaches to health when illness is deemed dependent on primarily biological factors. Diagnosis and treatment were confined to biophysical analysis. However, by the mid- to late-twentieth century, a conceptual shift began to take place with the dominance of the biomedical model being challenged. Medical paternalism is no longer a ubiquitous feature of healthcare. In its place, greater focus has been given to the social interpretation of health where social, economic, and environmental determinants of health have been integrated into health policy development.[1] This paradigm seeks to reduce social inequalities by addressing equity of health access and to empower individuals and communities by providing skills, knowledge, and confidence to make positive health and lifestyle decisions. It urges a holistic approach to health and wellbeing.

Increasingly we are expected to take personal responsibility for our own health and to participate in preventive health strategies. Recent case law developments also underscore this move with judicial attitudes leaning more heavily towards patient rights and the diminishing role of medical paternalism.[2] In this paper, I trace the changing characterisation of health. I consider the evolution of health as a concept in the context of a shifting paradigmatic landscape and the impact this transformation has had

[1] (Marmot and Wilkinson 2005).
[2] See *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

in practice. The definition of health has widened and is being interpreted in an increasingly expansive manner. I will argue that understanding health now encompasses the importance of wellbeing as a key determinant of longer-term good health. Wellbeing refers to 'diverse and interconnected dimensions of physical, mental, and social wellbeing that extend beyond the traditional definition of health. It includes choices and activities aimed at achieving physical vitality, mental alacrity, social satisfaction, a sense of accomplishment, and personal fulfilment'.[3] Therefore, wellbeing goes beyond the narrow confines of healthcare traditionally understood within the biomedical model of health and reaches out to other influencing lifestyle choices.[4]

I will explore this by adopting a case study approach. One area that has witnessed growing popularity in recent years and reflects this broader conception of health and wellbeing is the field of body modification and body art. Specifically, I will consider the largely overlooked question of how tattoos and body piercing fit within the wellbeing space. In this paper, I will chart the rise of body art in England and Wales and will critically assess the existing governance framework. I will argue that, while body modification and body art, as a means of self-expression,[5] is relatively easy to access and may offer a means of empowerment to those who wish to use it as a way of representing themselves to others, there are critical gaps in the regulatory framework that may undermine the notion of wellbeing and individual choice.

I will argue that, while the Court of Appeal's decision in *R v BM*,[6] a case that examines extreme body modification practices and the role of consent, raises particular public interest concerns and important ethico-legal issues, it largely overlooks important questions regarding how we understand the promotion of 'self and identity' within a model of wellbeing. I will conclude by suggesting that contemporaneous opinion about body art will continue to be shaped by external influences and that what is now deemed to be extreme may not be so in the future. How we balance the rights of individuals to self-expression while maintaining effective control over practices to reduce the risks remains an ongoing tension that has failed to be addressed so far.[7] The public interest will best be protected by legislative intervention to create a robust regulatory framework for the body art industry.

2. The Evolving Concept of Health

2.1. The Biomedical Model of Health

The 20th century witnessed several paradigmatic shifts in the governance of medicine and the health and wellbeing of people in the Western world. The traditional approach to medicine focussed on the notion that medicine should be driven by the maintenance and restoration of health, while palliating suffering.[8] In *Airedale NHS Trust v Bland*, Lord Keith observed '[t]he object of medical treatment and care is to benefit the patient. It may do so by taking steps ... towards curing [illness]. Where an illness or the effects of an injury cannot be cured, then efforts are directed towards preventing deterioration or relieving pain and suffering'.[9] This 'biomedical model of health' is driven by biological analysis and pathological diagnostics. It is governed by the idea that the scope and role of medicine is understood and determined by the need to validate objectively medical intervention by evidence-based clinical data. The biomedical model of health is based on several entrenched assumptions, including the notion that the mind and body should be treated separately, that illness is triggered by a 'disease entity'[10] and

3 (Naci and Ioannidis 2015).
4 (Glassner 1995).
5 (Sanders and Vail 2008).
6 [2018] EWCA Crim 560.
7 (Wicks 2016).
8 (Finnis 1993).
9 [1993] AC 789 (HL) *per* Lord Keith.
10 (Nettleton 1995).

that social and environmental factors are irrelevant when understanding the determinants of health and illness.

The biomedical model of health dominated healthcare for a long time and played a valuable role in prolonging life. The inception of the National Health Service (NHS) in 1948 brought with it revolutionary structural changes, and, in turn, this reinforced the paradigm. The medical profession and hospitals became the focus of healthcare provision. Medical paternalism thrived in this environment where the doctor was perceived as the person to solve the medical problem and the patient adopted a passive role.[11] Through the latter part of the twentieth century, as medical technology began to develop, pharmaceutical intervention improved, and diagnostic tools became much more widely accessible, medicine offered hope. This fuelled patient expectations both in terms of access to healthcare and the extent to which it could overcome ill-health.

The biomedical model of health has encouraged technological creativity.[12] Advances in technology and research in the twentieth century was at unprecedented levels. Without this conceptual framework driving the development of medicine, there may not have been the opportunity to understand how to diagnose illness and treat it. Common medical issues can now be effectively treated. Diseases that would once have killed can now be overcome. Life expectancy has risen, and with it, overall life quality has also increased though more age-related diseases are emerging.[13]

While the biomedical model of health has undoubtedly brought significant advantages, it has also been criticised for being too limited in its definition and has required considerable funding.[14] Healthcare is expensive.[15] It relies heavily upon professional healthcare workers, technology, and drugs. The need for medicine to specialise has accelerated as healthcare has become more complex. In turn, this has driven up the cost of professional training, technology, and equipment. Counterintuitively, the biomedical model of health has not promoted good health, because this narrow interpretation of health with its focus on biological analysis and treatment has not encouraged people to adopt healthier lives in order to prevent problems arising in the first instance.[16] Instead, focus is placed on reacting and treating a problem as it arises and ignoring the determinants that might cause it. This approach to healthcare does not account for terminal, incurable, or untreatable conditions. It also overlooks the influence of practical issues that influence the provision of healthcare. Not all 'wonder' drugs are affordable or validated by The National Institute for Health and Care Excellence (NICE), nor are all medical technologies available indefinitely. While this paradigm has laid down the groundwork for advances in medical science, it has also increased patient expectations regarding what medicine can achieve and paved the way for health inequalities to emerge.[17]

2.2. The Social Model of Health

There has been a gradual shift away from the biomedical model of health, and a refocusing upon a model of health which recognises that human interactions are complex and multi-dimensional.[18] The social model of health adopts a more expansive approach to health. It provides a conceptual framework where improvements in health and wellbeing are achieved by addressing the social, economic, and environmental determinants of health, as well as the biological ones.[19] It discourages medicine from having too much control. Biomedicine and medical science have a significant role to play in understanding health and responding to health needs, but it is not enough on its own, as political

[11] (Mildred and Schulz 1993).
[12] (Wade and Halligan 2004).
[13] (Eurostat n.d.).
[14] (Alonso 2004).
[15] (HM n.d.).
[16] (Parsons 1951).
[17] (Glover-Thomas and Fanning 2010).
[18] (Engel 1980).
[19] (The King's Fund n.d.).

decisions and processes also have an important impact on health and the social determinants of health. It seeks to address the broader determinants of health, such as gender, ethnicity, socioeconomic status, and the physical environment in which individuals live and work, as these have a deep relationship with health. This paradigm also seeks to reduce social inequalities by addressing the equity of access to the social determinants of health. Individual and community empowerment that is driven by skills, knowledge, and confidence to make positive decisions regarding health plays a central role. Ensuring individuals and communities have this knowledge is thought to encourage healthier behaviours to emerge.[20] Finally, improving access to healthcare is a significant health status indicator and the social model of health seeks to enhance available access where possible. The types of inhibitors to healthcare access include social factors, such as cultural and language barriers, economic and geographical factors, and education. One of the key objectives of this paradigm is to recognise the need for and support of inter-sectorial collaboration; making coordination better between health providers, government, and national policy development is central.

As the social model of health has become an increasingly accepted framework for health provision, the definition of health has been widened.[21] This definitional shift is not sudden; with the inception of the World Health Organisation (WHO) in 1946, health was defined as 'the complete physical, mental and social wellbeing and not merely the absence of disease or infirmity'.[22] This definition embraces a broader, more holistic conception of health and wellbeing. Often, artificially constructed notions of health are broken down, and barriers between categories of health, for example, physical and mental health, are removed. The influence of the social–environmental domain upon the individual is acknowledged. Focus is placed on policy, education, and health promotion, while acknowledging the role of social change to advance health. This definition of health has facilitated a more proactive and wider role for health and social care workers and policy makers; enabling them to promote health 'not only [by defining] what is bad, but...also what is good'.[23] This definition bestows on medicine the ability to adopt an intrinsically expansive character and presents opportunities for the enhancement and development of new paradigms of health, including 'healthism',[24] the preventive health agenda, and wellbeing.

2.3. Healthism and the Preventive Health Agenda

The social model of health has given rise to an increasingly expansive understanding of medicine and its role in shoring up health and wellbeing. It now underpins much of contemporary health policy and practice in England and Wales. Our understanding of health now reaches far beyond traditional biomedical paradigms. Kennedy observes that illness is a deviation from the 'normal state', and that the notion of normality stretches far beyond traditionally perceived remits.[25] This expansion of normality 'is a product of social and cultural values and expectations', and deviation 'is a matter of social and political judgement'.[26] The social model of health encourages the exploration of 'the myriad of interactions and influences that emerge out of the complexities of human experience and the various inter-relationships of the mind, body and society'.[27]

The open-ended definitional reach of 'health' has come to underpin contemporary practice with the effect of healthcare drawing within many more activities beyond its traditional remit. Many conditions that were once accepted as 'a vicissitude of life' can now be resolved or at least mitigated by medical

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[20] (NHS England 2017).
[21] (Bircher and Kuruvilla 2014).
[22] Constitution of the World Health Organisation, 22nd July 1946.
[23] (Skrabanek 1994).
[24] (Crawford 1980).
[25] (Kennedy 1981).
[26] I. Kennedy, The Unmasking of Medicine (Manchester: Granada Publishing, 1981) p. 3.
[27] (Yuill et al. 2010).

intervention. At the other end of the spectrum, preventive action[28] and healthism[29] have also been increasingly embraced by the social model of health. Healthism is an axiom to describe personal practices and behaviours which are undertaken with the aim of preserving health, strengthening wellbeing, and preventing ill health[30]. It encourages healthy lifestyle behaviours, such as not smoking, participation in physical activities, and self-monitoring[31], including the increasing role of wearables.[32]

Central to healthism and the preventive healthcare agenda is the promotion of health. It seeks to achieve the fullest health possible by reducing health inequalities and promoting social justice and equity of health. As with the social model of health, healthism and the preventive health agenda seek to build public policy around the notion of better health for all. For example, in March 2016, the UK government employed direct action tactics when it announced that a tax on sugary soft drinks would be introduced from 2018[33], as part of a wider campaign against rising rates of obesity and type 2 diabetes. At the same time, subtler nudging techniques have also been deployed to encourage and coax people into healthier living.[34] However, responsibility and nudging, as prevention strategies, might ultimately be incompatible with the empowerment model that healthism is thought to encourage.

The healthism and preventive health model has pushed the frontiers of health further than either the biomedical or social models of health. It brings to the fore the rising tension between increasing demands for individual empowerment, control, and autonomy with the widening understanding of health and the intersection between healthy living, representations and practices of the body, medicalisation, and increasing state expectations of personal health responsibility.

2.4. Wellbeing—A Key Determinant of Good Health

To be responsible for our own health, the state relies on policies that encourage us to take the necessary steps to maintain good health. Healthy living and lifestyles, with no smoking, no obesity, good fitness, clean eating, and so on are regarded as the prudent routes to achieve good health and wellbeing. Healthism has emboldened us as patients: We are more independent, we do research, we seek out second opinions (sometimes from alternative non-traditional sources), we complain, and we are much more proactive in achieving the state's (and our own) ideal of what it is to be healthy.

As I have discussed above, the conception of health has evolved, and now a more holistic approach to good health is the desirable goal. Striving for wellbeing is no longer deemed extravagant or profligate in our expectations; for example, good mental health is supported and encouraged across various sectoral and institutional programmes, often with in-house counselling, yoga, and wellbeing agendas. The concept of wellbeing has often been likened to happiness. Jeremy Bentham[35] once famously argued that human happiness should be conceived as the fundamental principle of human conduct. He observed that happiness should direct and guide our life decisions and the state should have regard to happiness as the standard for improving society. While there are recognisable challenges with the way in which wellbeing is measured,[36] its value as a determinant of health is acknowledged.[37] Anand has observed that health is a 'special good' because it is directly constitutive of a person's wellbeing; and health enables a person to function.[38] It is argued later in this paper that this extended model of health should encourage a more holistic conception of health which should extend to body

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[28] (Codagnone 2009).
[29] (Zola 1977).
[30] (Roberts and Weeks 2018).
[31] (Glorioso and Pisati 2014).
[32] (Metcalf et al. 2016).
[33] (HM Revenue and Customs 2016).
[34] (Quigley 2013).
[35] (Bentham 1823).
[36] (Kahneman and Krueger 2006; Stiglitz 2002).
[37] (Kawachi 2001).
[38] (Anand 2001).

modification and body art. While it is not suggested that all aspects of health should necessarily attract equal treatment or the same financial input in support of wellbeing, it is important to recognise a broader landscape of factors can play a fundamental role in an individual's good health and robust regulatory systems should be in place to maintain this.

3. Medicalisation, Patient Expectations and the Decision-Making Space

One of the effects of this paradigmatic shift is increasing levels of medicalisation where traditional and known domains of medicine have been stretched beyond customary lines. The right to self-determination and to 'lead our own lives rather than be led along them ... '[39] is increasingly acknowledged by the case law. *Montgomery v Lanarkshire Health Board*[40] reinforces the notion of a patient's capacity for self-government and their ability to control their own life. Healthcare and lifestyle decisions have gradually been recognised as ones that can be undertaken with the view that an individual is capable of understanding the process and potential consequences. The social model of health urges a holistic approach to health and wellbeing.[41] Choices and decisions impact on all levels and facets of life and the determinants of health are recognised as going well beyond biomedical remits. This approach not only opens up the decision-making space to other actors beyond clinical professionals; it also provides further opportunities for greater involvement by the individual.

Healthism has boosted patient expectations regarding the role of medicine. With the emergence of healthism, many conditions have received medical labels and the 'normalisation' rhetoric[42] has become an emerging presence illustrated by the increasing breath of conditions deemed 'rectifiable'. The prevalence of these conditions and the increasing preoccupation given over to treating them has raised the public consciousness. Greater awareness of health and wellbeing concerns dislodge prejudice, bias, and ignorance that the general population might hold against a person or group. Legislative steps have achieved much to overcome prejudice and discriminatory behaviour, particularly in relation to disability.[43] However, the concept of normalisation acts as the vital tool to initially expose, indoctrinate, and train people to accept differences in a systematic way. For example, no longer is erectile dysfunction not discussed or acknowledged as a significant problem in men.[44] It is not accepted as a vicissitude of life, and, instead, drug therapy can be relied upon to solve the medical problem at least temporarily. While the landscape of possibility for medical intervention seems to be expanding, the opportunity for individual autonomy to be respected and recognised for those choices to be acted upon is also moving on a pace. Obtaining health and wellbeing assistance is no longer wholly the domain of the doctor's surgery. Pharmacies, dentists, clinics, and specialist shops are now often the frontline of care, offering a system of triage to both reduce demand on the NHS, but also to aid access to care and offer services that reach beyond what the healthcare system can and will provide. Getting your annual flu vaccine does not require a trip to the GP, while accessing low-grade, non-surgical cosmetic procedures, for example, dermal fillers, Botox, microdermabrasion, and laser treatment are easily accessible on the high street, if it can be paid for.[45]

Medicalisation as originally defined by Ivan Illich is the expropriation of health by the medical profession. Illich argued that the medical profession possessed 'the exclusive right to determine what constitutes sickness, who is or might become sick, and what [should] be done'.[46] Medicalisation leads to doctors acting as arbiters of health as it subjects an individual's medical complaints to 'Foucault's

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[39] (Dworkin 1993).
[40] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[41] (Engel 1977).
[42] (Fitzpatrick 2001).
[43] See, the Equality Act 2010.
[44] (McKinlay 2000).
[45] (Finch 2020).
[46] (Illich 1977).

medical gaze'.[47] While Rose's view that medicalisation is now only a 'cliché of critical social analysis' also fails to reflect accurately the current terrain. Rose argues that, while medicine might wish to step beyond the traditional boundaries of what is legitimate medical intervention, this desire is tempered by external constraints, including legal regulation and biomedical frameworks. However, the social model of health has brought with it a wider, more complicated array of actors in determining the nature of health. While in Illich's eyes it was the medical profession that posed a threat to health, and caused 'iatrogenic disease',[48] in the proceeding 40 years since Illich's seminal work was published, medical practice has changed radically. The model of health that is increasingly subscribed to sees a plurality of actors participating in health governance curtailing the 'medical profession's hegemonic power'.[49]

Judicial forays into the sphere of the doctor–patient relationship highlights its evolving nature. *Montgomery v Lanarkshire Health Board*[50] has reinforced the view that 'paternalism no longer rules'[51] with the Supreme Court's modernisation of the law of consent and the explicit introduction of a patient focused test in England and Wales. The right to self-determination is fully acknowledged in *Montgomery*[52] with a person's capacity for self-government and their ability to control their own life taking centre stage.[53]

4. Autonomy, Paternalism, and Broadening Perspectives of Health

Montgomery[54] brought fresh attention to the question of informed consent. It is the latest in a long line[55] of cases that marks a gradual sea change in judicial attitudes towards patient rights and the diminishing role of medical paternalism[56] in healthcare decision-making.[57] The decision has been characterised as supporting patient autonomy over medical paternalism[58] and highlights rising tensions between the professional discretion of doctors and patient choice. *Montgomery* reflects the growing social and legal movement away from the traditional paternalist paradigm towards greater shared decision-making, patient empowerment, and full information disclosure.[59] In 2015, the *NHS Five Year Forward View*[60] was published, setting out a vision for the future of healthcare and social care in England. It called for the health and care system in England and Wales to fully engage with people and communities, to build and sustain relationships where patients are partners, and to involve communities developing local health and care services. Traditional systems of healthcare where divisions between primary, community, and hospital care existed were to be set aside and replaced with new care models characterised by six principles. Care and support should be personalised and empowering; services should be created in partnership with communities; equality and narrowing health inequalities should be promoted; the role of carers should be identified, supported, and involved; wider stakeholders in healthcare and social-care provision should be key partners and enablers; and social action and volunteering should be recognised as key enablers. The role of doctors and medicine are relegated to a less dominant position while wider stakeholder groups are being given

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47 (Foucault 1963).
48 Illich, op. cit., n 58. 1977.
49 Glover–Thomas and Fanning, op. cit., n 18, p 28.
50 [2015] UKSC 11.
51 In *Chester v Afshar* [2005] 1 AC 134, Lord Steyn declared that: 'In modern law medical paternalism no longer rules and a patient has prima facie right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery', 16.
52 *Airedale NHS Trust v Bland* [1993] AC 789, 864 per Lord Goff of Chieveley.
53 In *R(Nicklinson) v MoJ* [2014] UKSC 38, Lord Sumption grounds autonomy in the 'moral instinct' that 'individuals are entitled to be the masters of their own fate', 208.
54 [2015] UKSC 11.
55 (Heywood 2015).
56 (Devaney 2005).
57 (Brazier and Miola 2000).
58 (Farrell and Brazier 2016).
59 *Glass v UK* (2004) EHRR 341 and *Tysiac v Poland* (2007) 45 EHRR 947.
60 (NHS England 2014).

increasing prominence in the process. These principles reflect the changing dynamic of the healthcare landscape where the pendulum has swung firmly towards a broader paradigm of health. Patients are not only the subject of the decision, but have considerable power in the direction of the decision.

This rebalancing of decision-making power between the individual and state has also prompted questions regarding how far individual choices can and should be protected[61] and the scope to which consent offers sufficient defence to serious bodily harm.[62] Judicial commentary provides valuable insight, but before the decision of *R v BM*,[63] which I will analyse later in this paper, no qualifications or recognition has been given to the specific body modification and body art context. Courts have accepted consent as a defence to the infliction of harm in several contexts, including the tattooing of two boys aged 12 and 13,[64] the branding of a wife's buttocks with a hot knife,[65] the practice of minor operations undertaken by a suspended practitioner,[66] and injuries sustained through accepted reasonable sporting conduct.[67] Non-fatal offences, specifically (serious) bodily harm, covers a wide spectrum of conduct from minor to major harm. The offences are defined by two criteria: (1) the degree of harm suffered by the victim, and (2) the fault with which that degree of harm was caused by the defendant. Classification of offences within this spectrum can be difficult. The risk posed by some forms of physical intervention may vary considerably, and the extent of the damage, should it arise, can also be exceptionally difficult to assess. Actual bodily harm is any injury that interferes with the health and comfort of the victim that is more than transient or trifling.

In *R v Brown*,[68] a majority of the House of Lords, with Lord Mustill and Lord Slynn dissenting, concluded that consensual infliction of harm on another person for sexual gratification was not permissible; consent provided no defence against sections 20 (wounding) and 47 (actual bodily harm) of the Offences Against the Person Act 1861.[69] Accepting that consent could authorise the intentional wounding or actual bodily harm to oneself was deemed not to be in the public interest[70], and without good reason for the consent, it would not be a sufficient defence to a charge under Section 20 or 47 of the Act 1861.

Notwithstanding this, as noted above, judicial attitudes towards the role of consent in the infliction of harm has had a varied response, and it has been accepted that, even where some activities may give rise to harm, these forms of harm are permissible. Informed consent will legitimise harms that might be caused as a consequence of surgery, tattooing, body piercing, and violent sports. However, in the context of sadomasochism, Lord Mustill in *Brown* set the threshold just below actual bodily harm.[71] In *Brown,* the House of Lords held that consent would not be a defence where an act inflicted actual or grievous (serious) bodily harm upon others unless the harm was occasioned through (1) legitimate

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61 (Feinberg 1989).
62 (Tolmie 2012).
63 [2018] EWCA Crim 560.
64 *Burrell v Harmer* [1967] Crim LR 169.
65 *R v Wilson* [1996] Crim LR 573.
66 *R v Richardson* [1998] 2 Cr App R 200.
67 *R v Barnes* [2004] EWCA Crim 3246.
68 (1994) 1 AC 212.
69 Actual bodily harm means any injury which is designed to interfere with the health and/or comfort of the victim but must be of a transient or trifling nature (R v Miller [1954] 2 QB 282 at 292). A wound is caused when the skin, dermis and epidermis, is broken including the inner skin within the cheek, lip or urethra (*R v Smith* (1837) 8 C and P 173 and *R v Waltham* (1849) 3 Cox 442). Section 20 of the 1861 Act covers both wounding and also the infliction of grievous bodily harm (DPP v Smith [1961] AC 290; R v Cunningham [1982] AC 566).
70 The decision was largely based on the dicta of Lord Lane CJ in *Attorney General's Reference* (No. 6 of 1980) [1981] QB 715 that it is not in the public interest to permit people to cause each other actual bodily harm for no good reason. See also, *Laskey v United Kingdom* (1997) 24 EHRR 39.
71 The issue of consent in the course of sadomasochistic sexual activity was later considered in *R v Stein* [2007] VSCA 300 in which a participant died as a result of being gagged. The court held that, even if the victim had consented to a being restrained and gagged, his consent was invalid because there was no way for him to communicate his withdrawal once the gag was in his mouth.

surgical operations,[72] (2) consensual adornment procedures,[73] (3) properly conducted 'contact' sports, (4) dangerous pastimes, or (5) reasonable horseplay. This reasoning has since been questioned and criticised for being overly paternalistic[74], and in *R v Wilson*,[75] heterosexual activity that differed in nature, but was driven by similar motivations to those in *Brown*, was deemed lawful by the Court of Appeal.

The line between making choices that could undermine health and wellbeing, such as smoking or participating in a contact sport and choices made that are personal reflections of self and a representation of their body, such as, getting tattoos, other forms of body art, or consensual sexual activity which could also lead to harm, is a fine one. In *Wilson*, it was accepted that there was no aggressive intention on the part of the appellant when he branded his wife with a hot knife. He wished to assist his wife in what she regarded as the acquisition of a desirable piece of personal adornment. Consent between the parties was not questioned. The Court of Appeal recognised that there must be exceptions to the general proposition laid down in *Brown*. Where consensual acts are involved, such as tattooing or body piercing of a consenting adult, then it does not involve an offence under section 47, even though actual bodily harm is deliberately inflicted. 'For our part, we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing. The latter activity apparently requires no state authorisation, and the appellant was as free to engage in it as anyone else'.[76]

At what point these choices should become subject to legal intervention is naturally difficult to identify. Why should consensual activity undertaken in private be subject to legal intervention, particularly when the increasingly dominant paradigm of individual empowerment and choice has emerged? The acts in *Wilson* were not seen as acts of sadomasochism, but rather as acts of personal adornment and an expression of love. However, in *R v Emmett*[77], the Court of Appeal held that the same rules as laid down in *Brown* applied to heterosexual participants in sadomasochistic sex acts. The defendant appealed against conviction after being involved in sexual activity which was said not to intentionally cause harm and to be consensual, though the acts presented a serious risk of harm. The acts involved the use of asphyxiation, using a plastic bag tied over the head of his partner, and the use of lighter fluid poured over his partner and set alight. It was held that these acts could not be lawfully consented to, and the conviction under section 47 Offences Against the Person Act 1861 was upheld: '[T]he point at which common assault becomes assault occasioning actual bodily harm, or at some higher level, where the evidence looked at objectively reveals a realistic risk of a more than transient or trivial injury, it is plain, in our judgment, that the activities [engaged] in by this appellant and his partner went well beyond that line'.[78] These activities presented actual and potential harm, and the risk of injury was at such a degree of unpredictability as to make it appropriate for the criminal law to intervene. 'This was not tattooing, it was not something which absented pain or dangerousness and the agreed medical evidence is in each case, certainly on the first occasion, there was a very considerable degree of danger to life; on the second, there was a degree of injury to the body'.[79]

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72 (Fovargue and Neal 2015).
73 *R v Wilson* (1996) 2 Cr App Rep 241.
74 (Baker 2009).
75 (1996) 2 Cr App Rep 241.
76 *R v Wilson* (1996) 2 Cr App Rep 241, *per* Russell L.J., 244.
77 [1999] All ER (D) 641 (CA).
78 *R v Emmett*, R v Emmett, [1999] All ER (D) 641 (CA), p. 8.
79 *R v Emmett*, op. cit., 8.

5. Case study—Body Art, Tattooing, and Body Piercing

5.1. Body Art—The Reinforcement of 'Self'?

Reliance on the exceptions articulated in *Brown* to ensure an act is lawful depends upon clear and uncontested notions of harm. However, how are we to categorise actions where individuals seek to express themselves through various forms of body art?[80] Body art or body modification is the deliberate altering of the human anatomy or physical appearance for aesthetic purposes. What drives a person to undertake forms of body modification is often deeply complex. Tattoos or piercings may be used as a means of articulating a separate identity. This may be particularly common in developing young people seeking to detach themselves emotionally from their families as they grow older. For others, use of body modification may be about working through or controlling difficult personal experiences, whereby the choice of tattoos or piercing is about taking back control. Having a tattoo or getting a tongue piercing may be a simple case of being 'on trend' and belonging,[81] or body modifications could be purely an art form.[82]

For many, use of body art reinforces a sense of self or identity and promotes wellbeing.[83] Body art and modification can be achieved through a number of different routes, including cosmetic surgery, which includes facial contouring, such as, rhinoplasty; facial rejuvenation, such as facelifts; and body contouring, such as liposuction and breast augmentation.[84] Cosmetic surgery is lawful if performed by a licensed doctor in England and Wales who is listed on a Specialist Registrar.[85] If expectations around consent are met, standards of information disclosure are achieved, and the patient's needs and vulnerabilities are considered, cosmetic surgery would fall within the recognised medical exception in Lord Slynn's category-based rationale in *Brown*.[86][87]

As body art in the form of tattooing and body piercing has become increasingly popular in the United Kingdom, the range of procedures available has expanded rapidly. With more extreme procedures becoming available, concerns have risen over the risks to recipients and the standards of care provided by body art practitioners.[88] There is currently limited data on the prevalence of tattoos in England and Wales. However, it is thought up to 35% of those between the ages of 30 and 39 have tattoos, with an estimated one in five people in the UK having at least one.[89] This increase in interest is also reflected in the significant rise in the number of tattoo parlours in the UK. In 2014, *The Guardian* found that, between 2004 and 2014, there was a 173% rise in parlours.[90] There is no comprehensive data for the UK on the prevalence of body piercing, either, but one small study undertaken by Bone et

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80 (Bibbings and Alldridge 1993).

81 The motivation for body modification has been subject to considerable sociological, psychoanalytic and personal experience narratives, which extends beyond the remit of this paper. For further discussion, see: (Brain 1983; Pitts 2003).

82 For example, ORLAN (Mireille Suzanne Francette Porte) is a French contemporary artist who has acquired fame through her work with cosmetic surgery in the early to mid-1990s.

83 A sense of self is related to our perception of ourselves and an awareness of who we are. For a detailed discussion, see, (Vartanian 2009).

84 (Griffiths and Mullock 2017).

85 General Medical Council Guidance on cosmetic interventions http://www.gmc-uk.org/guidance/ ethical guidance/28687.asp. See also, See the Royal College of Surgeons webpages: http://www.rcseng.ac.uk/surgeons/surgical-standards/-practices/csic/main-areas-of-work.

86 *R v Brown*, op. cit. n 80, p 227. Surgeries that are designed to modify the body for non-therapeutic, but religious purposes may well be supported by Article 9 of the ECHR, which guarantees respect for religious freedom. However, some argue that non-therapeutic circumcision of male infants and young boys violates the child's right to bodily integrity under Article 8 of the Convention. See (Fortin 2009).

87 While cosmetic surgery offers an important route through which some may seek to enhance their wellbeing, this facet of body modification is outside the scope of this paper. This important issue has been considered elsewhere, see, for example: (Widdows and MacCallum 2018).

88 Tattooists must be registered under the Local Government (Miscellaneous Provisions) Act 1982, Part VIII, but there is no registration scheme in place for body modification and no training or qualifications system is in place for either.

89 (Henley 2010).

90 (Wood and Butler 2014).

al. in 2008 estimated that body piercing, other than of the earlobes, in the general adult population in England, was 10%.[91]

Body art and the use of tattoos and piercings have existed for a long time. Decorating the human body in various forms is often used as a permanent representation of membership to a club, religious group, and secret society. Tattoos and body piercings have been used as a marker to identify people and to bring people together. They also provide a means of permanently depicting something of importance in an entirely personal and unique way. For example, the popularity of the Manchester worker bee tattoo as a means of demonstrating solidarity following the Manchester Arena attack became an international representation of support.[92]

5.2. Types of Body Art and Body Modification

Body art includes a wide range of procedures undertaken on the human body. It commonly involves tattoos and body piercing, but there is growing interest in other forms of body art, including subdermal implants, scarification, shaping, scalpelling, scleral tattooing (the practice of tattooing the white part of the human eye), corset piercing, and tongue bifurcation or forking. Tattooing historically was linked to particular socioeconomic groups, criminals, sailors, and working men's groups. However, tattoos and other forms of body modification are increasingly common across many more population groups, and as they have become more accessible, the stigma surrounding them has been reduced. Body piercing has gradually shifted away from traditionally accepted practices. Piercing of the earlobes has been practiced across the globe for thousands of years, but over the last 40 years, the practice of piercing has become more widespread, with multiple piercings becoming common, including nose, lip, and tongue piercings. Nipple, genital, and navel piercings have also become more popular for a variety of reasons, including increased media attention, celebrity endorsement, and contemporary music and art depicting body modification.

5.3. Body Art—The Risks

For many, tattoos and body piercings are positive actions, but there are both physical and psychological risks and complications associated with them. Many forms of body art will be irreversible, either because the intervention is permanent or scarring remains. Often, body piercing will leave scarring whether the jewellery is removed or not. For tattoos, the use of permanent ink will make it difficult to remove the tattoo in its entirety, should there be a change of heart in the future.

A primary medical challenge with any tattoo or piercing is the risk of infection. Both forms of body art involve the piercing of the skin, and with this, there is always some risk. Ensuring the body art practitioner meets industry standards and uses autoclave-sterilized instruments reduces this risk. Effective aftercare guidance during the healing process is also essential. However, this relies upon there being robust industry standards in place and that enforcement strategies are developed and maintained. Despite basic steps to protect against infection, the popularity of multiple piercing of the ear, which involves higher ear-piercing puncturing through the cartilage, increases the risk of auricular perichondritis[93], and with this comes greater need for hospital care and longer-term healthcare intervention. Risk of localised infection around the tattoo or piercing site can be high if appropriate hygiene standards are not met and allergic or toxic reactions to various substances used on or in the skin is always a potential risk. However, the risk of transmission of blood-borne viruses, for example Hepatitis B, Hepatitis C, Hepatitis D, or HIV, presents serious and long-term health consequences which will have significant repercussions. It is therefore important that practitioners

[91] (Bone et al. 2008).
[92] (Perraudin 2017).
[93] (Santhanakrishnan and Bhat 2017).

operate within a system of safe working and good infection-control practices are followed at all times, so that both clients and practitioners are protected.

While tattooing and body piercing has become increasingly popular, it has been identified as particularly prevalent among adolescents and young people.[94] While body modification and art may, for some, provide a true representation of identity and 'self',[95] given the potential risks involved, effective governance is critical to ensure the notion of wellbeing and individual choice is not undermined.

6. Regulating Body Art

So, to what extent is body art and body modification regulated in England and Wales? Before answering this question, some consideration should be given to the type of regulatory regime and theory that dominates many areas of medical law. Regulatory design plays an important role in both the justification and success of regulation, yet 'regulation' itself remains difficult to define.[96] For the purposes of this paper, regulation is a mechanism to prohibit, control or require specific conduct. Most lawyers are familiar with regulatory instruments that use command-based mechanisms and rules to exert control on behaviour. Failure to comply with these rules results in some form of sanction. A command and control regulatory framework benefits from relative clarity where there is knowledge and understanding of the legal standard that should be achieved, information about the mode of legal enforcement and the extent of regulators' roles in the enforcement process. However, this certainty within command and control frameworks is also heavily criticised for its relative rigidity and inability to evolve easily—a problem that is particularly evident in the health law sphere.[97] However, despite this, regulatory regimes are evaluated on the basis of the outcomes they achieve. One way of undertaking this assessment is to adopt a welfarist approach. Welfarism is a type of consequentialism that identifies wellbeing as the 'sole intrinsically morally relevant feature of outcomes'.[98]

Welfarism features clearly within the sphere of medical regulation. Acts and omissions to act are scrutinised and assessed with the patient's wellbeing and best interests in mind. While this approach necessarily opens up questions about the balance of paternalism and autonomy, another key feature of the regulation debate within health is driven by risk[99] and an increasingly risk-adverse society.[100] Why and when should governments introduce legislation to regulate behaviours?

Regulation is used to reduce and avert risk and, importantly, maintain its repetition through sanctions. Haines argues that regulation offers an important avenue for solving problems for communities that are deemed at risk. Where risk is perceived to exist, this incentivizes governments to legislate and to tighten regulatory frameworks in order to be seen to be doing something proactive to reduce the likelihood of political support being lost (political risk). Regulation may contain and reduce risk by using an actuarial approach whereby risk is managed by calculating the risk through quantitative assessment of the evidence (actuarial risk). Alternatively, regulation may be used to reassure the public when they feel vulnerable to risk (sociocultural risk).[101] Irrespective of the driver to reduce and manage risk in the health arena, the increasing evidence of risk aversion suggests that governments are regulating in response to this.[102] Body modification techniques are beginning to witness increasing levels of risk. Extreme body modification practices, such as scleral tattoos, are introducing risks that are less predictable and quantifiably more impactful if the procedures were

94 (Mayers et al. 2002)
95 (Cipolletta et al. 2010).
96 (Ogus 1994).
97 (Latin 1985).
98 (Adler 2010).
99 (Glover-Thomas 2011).
100 (Haines 2012).
101 (Haines 2017).
102 (Farrell et al. 2013).

to go wrong. An effective regulatory framework can aid compliance in terms of requiring more robust training requirements and qualifications, better controls over advertising and insurance. All of these are 'realistically achievable'.[103] Within the context of this paper, the question this leads us to is: what is the justification for the regulation of body art and modification, what would be the optimal legal response and what are the outcomes being sought?

To say that regulation of the body art industry in England and Wales is patchy with little direct and national regulation in place would not be unwarranted. In 2013, Sir Bruce Keogh believed the sector was 'a crisis waiting to happen' and called for an urgent need for systematic and mandatory regulation.[104] Children are offered some protection under the Tattooing of Minors Act 1969, which imposes a statutory minimum age of 18 years for permanent tattooing, unless carried out for medical reasons. When this is contravened, the offence sits with the person who carries out the procedure, rather than the person seeking the tattoo.[105] Consent is not a defence, though where the practitioner had good reason to believe the person was over 18 years of age, this may be sufficient.[106]

For skin piercing, there are no minimum age requirements and the regulatory framework is localised relying on area licensing models. In the *Tattooing and Body Piercing Guidance and Toolkit* produced by Public Health England and The Chartered Institute of Environmental Health in 2013, it states that 'the ... law allows children under the age of 18 to consent to cosmetic body piercing provided they are sufficiently mature to understand the nature of the request'.[107] Implicit within this statement is that the body art practitioner should be able to assess a young person under the age of 18 as to their maturity.[108] This is a subjective assessment that can be very hard for the practitioner to make and is determined on a question of fact. Ensuring sufficient information is provided to allow a client to make a decision in an informed way is essential and is important in the assessment of a person's maturity when under the age of 18.[109]

Local authorities are given scope to state minimum age requirements and safe practice systems for these procedures.[110] However, reliance on model byelaws has stymied the development of nationwide standards of compliance and competence setting. Instead, local and regional guidance have been developed by different agencies in a rather haphazard manner, and through an environmental health and health protection perspective rather than derived from meeting national health and social care standards. There is inconsistency of approach with some local authorities setting no minimum age restrictions, with some setting particular prohibitions on the type of cosmetic piercing for those under 18 or 16 years old, some allowing most procedures when accompanied by parental consent, others allowing any skin piercing above the waist for all over the ages of 16 or 18, and others prohibiting all types of genital and nipple piercing.[111]

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[103] Farrell, A. M., S. Devaney, T. Hervey, and T. Murphy. 2013. Regulatory 'desirables' for new health technologies. Medical Law Review 21: 1–10, at p. 2.

[104] (Keogh 2013).

[105] Tattooing of Minors Act 1969, section 2.

[106] When an offence is committed, the police will enforce the legislation with fines up to £1000.

[107] (Public Health England and The Chartered Institute of Environmental Health 2013).

[108] This principle was established by *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 where the House of Lords observed that the child's voice should be listened to when they reach sufficient understanding to be capable of making up their own mind.

[109] Though the legal requirements for body piercing are very limited in England and Wales, it is a matter of good practice to ensure the client signs a declaration of age and a consent form prior to any work being commenced. Consent will only be valid if full information regarding the nature of the process and potential problems involved is disclosed. Informally, for those under the age of 16, adults with parental responsibility are required to sign the consent form. While not a formal indemnity device, the practitioner relies upon it as the primary means of protection.

[110] Under section 120 of the Local Government Act 2003 cosmetic piercing and semi-permanent skin-colouring businesses have been added to the existing powers under the Local Government (Miscellaneous) Provisions Act 1982 to regulate ear piercing, tattooing, acupuncture and electrolysis by requiring registration and observance of byelaws. Local authorities in London already had these powers under private legislation, the London Local Authorities Act 1991 and the Greater London Council (General Powers) Act 1981.

[111] Under the Sexual Offences Act 1956, girls and boys under the age of 16 cannot legally give consent to intimate sexual contact under any circumstances, consequently piercing of nipples and genitalia (for girls) or genitalia (for boys) can be regarded as

Currently, as a result of this patchwork of guidance and localised regulatory practices, any attempt to engage body art practitioners with existing regulatory models and the development of nationwide standards has proved difficult. There are currently no nationally recognised accredited training courses or agreed competencies, standards for practice, agreed knowledge and skills frameworks, or arrangements for monitoring, and reporting of professional competence are all currently absent.[112] Under statute, local authorities are responsible for regulating and monitoring businesses offering cosmetic body piercing (including ear piercing), permanent tattooing, semi-permanent skin colouring (micropigmentation, semi-permanent makeup, and temporary tattooing), electrolysis and acupuncture.[113] These procedures involve a degree of skin piercing, thereby carrying the potential risk of skin infections, allergic or toxic reactions to various substances used on or in the skin, and transmission of blood-borne viruses.[114] Failure to obtain a license or register premises where these body art procedures are carried out will result in statutory breach and result in a criminal offence being committed.[115]

Why is a national regulatory system necessary? Having an appropriate system of regulation will offer better protection to both recipients and providers of body modification ensuring least harm is caused and any risks mitigated. Currently, regulation and the legislative frameworks concerning body modification across the whole of the UK are disparate and inconsistent. Legislation needs to be formalized to enable better guidance for local authorities and other involved agencies so as to determine the most effective means of achieving good risk management. Current registration practices are no longer fit for purpose, particularly with the exponential rise in demand for body modification.

R v BM—A Missed Opportunity?

In *R v BM*,[116] the appellant was charged with three counts of inflicting grievous bodily harm contrary to Section 20 of the Offences Against the Person Act 1861. The question presented to the Court was whether the defence of consent was available to an individual who caused serious bodily harm when performing body modifications on another. The case concerned an appellant who was a professional tattooist and body piercer. Over recent years, he had extended his services to include 'bodily modifications' of various kinds. The appellant had removed a client's ear, removed another client's nipple, and divided a further client's tongue to achieve a reptilian-like effect. The appellant was not a medically qualified professional, though no concerns were raised in court regarding the premises and its sterile conditions. All of these modifications were carried out without anaesthetic. The clients sought out the services of the appellant and consented to the different procedures. The consent provided was accepted by the court as valid and informed. The case instead turned on whether consent could provide a defence for these counts on the indictment. It was found by the Court of Appeal that there was no good reason why body modification of this nature should be placed in a special category of exemption from the general rule laid down in *Brown*.[117] Consent to injury provided no defence to

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an assault. Evidence that such contact was for sexual gratification would be required in order to constitute an indecent assault. The Female Genital Mutilation Act 2003 states that certain procedures in respect of female genitals are illegal unless carried out for medical reasons.

[112] The Tattoo and Piercing Industry Union is recognised as the only professional body for tattoo and body piercing practitioners in the UK.

[113] Local Government (Miscellaneous Provisions) Act 1982, section 14(2), section 15(2), section 4(7) and section 15(7). This legislation does not apply when the procedures are carried out under the supervision of a medical practitioner—see sections 14(8) and 15(8).

[114] The Local Government (Miscellaneous Provisions) Act 1982, as amended, is concerned with the minimisation of infection and controlling practitioner behaviour and premises hygiene to meet this objective. Local authorities are responsible for regulating and monitoring premises which carry out body art procedures through compulsory registration and licensing. Registration provides lawful authority to undertake the specified tasks and local authorities may also supplement the registration scheme with bye laws directed, in particular, at cleanliness and hygiene.

[115] Local Government (Miscellaneous Provisions) Act 1982, as amended, section 16.

[116] [2018] EWCA Crim 560.

[117] Compare *R v Brown* (1994) 1 AC 212 with *R v Wilson* (1996) 2 Cr App Rep 241.

the person who inflicted that injury if the violence caused actual bodily harm or more serious injury. Consequently, the Court of Appeal held that consent of the defendant's clients to the removal of an ear and nipple, and the division of a client's tongue did not provide him with a justification for removing body modification from the ambit of the law of assault. Unlike surgery, which falls clearly within the exceptions laid down in *Brown*, as the procedures in *BM* were neither carried out by a medically qualified practitioner, nor were for medical purposes, the surgery exception was not met. The question in *BM* was whether there was sufficient justification for a further exception to be created that would allow for consent to bodily harm done during extreme body modification procedures. The Court of Appeal concluded that no adequate justification could be found. Lord Burnett of Maldon outlined four reasons: inherent within the criminal law is a protective, paternalistic role, which includes protecting people from themselves; associated with all body-modification procedures is the risk of unintended and unwanted injuries; such procedures have no material social benefit and could instigate further risk; and the decision to extend the exceptions allowing consent to act as a defence to bodily harm is a task for Parliament rather than the judiciary.

There was an unwillingness to extend the established boundaries allowing consent to act as a defence without good reason. The protection of practitioners undertaking extreme body modification procedures was not deemed to be in the public interest. However, the line between the reasoning in *BM* and *Wilson* is a fine one. In both cases, the procedures undertaken left permanent, irreversible marks. In both cases, it was accepted by the court that consent had been informed and freely given by the clients and wife concerned. The only factual difference was in the status of the appellants. In *Wilson*, the husband had undertaken his wife's wishes, while, in *BM*, the procedures were carried out by a paid body art practitioner. The contractual nature of the relationship between BM and his clients was not an issue of interest, yet, in *Wilson*, the loving private relationship between Wilson and his wife and his desire not to hurt her was given particular emphasis. The risk of harm arising out of the procedures undertaken in *BM* was also of particular focus in the reasoning in the case. In *BM*, Lord Burnett of Maldon observed that the removal of body parts could give rise to significant risk. For example, it was noted that ear removal presents a 'moderate to severe … [risk of] … hearing loss and injury to the facial nerve and would not be a procedure undertaken by a plastic surgeon for aesthetic reasons'.[118] It was also noted that nipple removal and tongue splitting would generally not be justifiable surgical procedures. Tongue splitting, in particular, brought particular risks, notably heavy blood loss and breathing problems if the tongue swelled following the procedure. Despite the risk, it is contended that in *Wilson* there was recognition of an important objective beyond the protection of physical health—the importance of wellbeing and the ways in which this can be enhanced.

This paper argues that *BM* represents a missed opportunity to conceptualise health more broadly and to recognise the importance of individual wellbeing as a determinant of good health. The defendant in *BM* was characterized as someone who operated beyond the scope of his license to practice. The consent of his clients was not deemed relevant nor able to legitimize the defendant's action. No efforts were made in the judgment to consider the reasons for the individuals to seek out the body modifications that they did. However, on several occasions, tacit references were made, indicating a lack of judicial understanding regarding these decisions.[119] This failure to grapple with the motivation of the clients delimited the opportunity for judicial recognition of a broader conception of health. The notion of body modification was not deemed to be sufficient to extend the exceptions to the general rule laid down in *Brown*. These exceptions were justified because they might 'produce a discernible social benefit' and it would be 'regarded as unreasonable for the common law to criminalise the activity if engaged in with consent'.[120] However, with health increasingly being recognised more

[118] *R v BM*, op. cit., n 1, p 13.
[119] *R v BM*, op. cit., n 1, p 43.
[120] *R v BM*, op. cit., n 1, p 40.

comprehensively, *BM* provided an opportunity to acknowledge that 'discernible benefit' can be derived and experienced by those who desire these forms of modifications and body art.

The importance of 'artistic engagement and the psychological and biological manifestations' of the connection with good health has become the focus of considerable research.[121] Much of this work currently focuses upon the impact of art on an individual either as an observer or producer of creativity.[122] The human skin presents an alternative, yet deeply personal canvass for some. Health psychologists highlight the ways in which art therapy can be harnessed to deal with emotional injury, help with self-reflection and understanding, reduce symptoms, and carve out new behavioural patterns.[123] I argue that body art and modification should be seen in a similar vein; another mode of creative expression that, for some, could have significant psychological and physiological impacts, enhancing wellbeing and overall good health. Acceptance of the definition of health being more than the absence of disease[124] and the shift towards a much more holistic and proactive health paradigm should spur the courts to actively engage with a whole-person approach to good health and its sustenance.

7. Conclusions

The legal controls in place for piercing and tattooing offer a less-than-perfect system of regulatory governance and raise their own questions about whether these controls are sufficiently robust to protect individual health and wellbeing. For those seeking a more extreme form of body art or body modification, the issue of regulatory oversight presents an even greater challenge and is now subject to the gaze of the criminal law. Currently, the rules regarding piercing and tattooing are strictly defined as 'the insertion into the skin of any colouring material designed to leave a permanent mark' and does not directly cover the methods adopted for more extreme body art. Local authorities have oversight responsibility of premises which operate within the definition under the legislation, but those that undertake broader practices may slip through this system overseen by local authorities. For now, *R v BM* provides clarity regarding the legal position of extreme body-modification procedures, but it has not engaged with the wider question of how we better monitor and regulate activities that some might undertake in order to improve their wellbeing.[125]

Consent does not protect the practitioner when undertaking extreme body modification procedures on clients as they are deemed to be against the public interest. However, the line between body adornment, which has become 'normalised', and more extreme body art has become blurred. As body art continues to become more prevalent and reflects cultural norms, for those people who regard body art as more than a trend, but a statement of self and identity, the push for more extreme body modification may likely increase.

In *BM*, the procedures undertaken highlighted how close some of these procedures are to surgery. Piercing the skin for jewellery is notably different from having a functional body part removed altogether. The removal of the client's ear required the use of a scalpel, and, if undertaken for medical purposes in a hospital, it would have been accompanied by anaesthetic. The client had, nonetheless, consented to the procedure and wished it to be done for the purpose of fulfilling their wishes. Thus, how individual choice regarding body art is protected appears dependent upon risk of harm and, importantly, on existing sociocultural norms.

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[121] (Stuckey and Nobel 2010).
[122] (Staricoff and Loppert 2003).
[123] (Stickley et al. 2017).
[124] WHO, op. cit., n 23.
[125] In the future, more extreme forms of body modification may be better scrutinised by requiring psychological assessment before it can be carried out, adopting a similar approach to transgender surgery, which requires a diagnosis of gender dysphoria by a psychologist and continued review and management by a gender-identity-development unit. Adopting this more rigorous approach would act as a more effective gatekeeper to ensure recipients are fully committed to the procedure and understand the risks.

The influence of these norms and social mores marks the gradual dominance of the social paradigm of health. Over the last half century, focus has shifted away from the preoccupation with how the body works and how to fix it biomedically. Recognition that the determinants of health and wellbeing are multi-factoral has not only shaped health policy in England and Wales, but has had an impact upon how individuals understand their own health and the control they have over it. Healthism has encouraged personal responsibility over health and lifestyle choices. It has also nudged us to participate in preventive healthcare strategies to improve our overall health projections. These paradigmatic changes have had a transformative impact upon the way in which health and wellbeing is perceived both at individual and organisation levels. Medical paternalism no longer dominates; where medicine has lost ground, a plurality of health and wellbeing stakeholders have stepped in. With the paradigmatic shifts in health and wellbeing, no single profession fully monopolises. The health and wellbeing industry is increasingly comprised of many specialist services, both traditional and alternative. We, as patients and clients, have become empowered; choice, autonomy, and control have moved into the lexicon of healthcare.

As the definition of health expands further and incorporates the amorphous notion of wellbeing, 'fixing' people can no longer be achieved through the biomedical route alone. The social model of health requires a deeper understanding of people and the determinants of health and wellbeing. It forces us to confront difficult questions, including, for instance, what makes us happy? For some, body art and body modification, in one form or another, provide this. These procedures offer a route which enables the portrayal of themselves in the way they wish. It boosts their sense of self. Making choices about what tattoos or piercings to have and where, and how they wish to represent themselves to others empowers them. The social model of health acknowledges the complex array of factors that influence health.

The governance framework of the body-art industry is currently inadequate. Regulation is viewed through an environmental health lens, taking little account of the considerations normally attendant in the health sphere. Consent is at best mechanistic where some, though not all, practitioners rely upon a consent form to confirm the client's willingness.[126] Information disclosure regarding risks appears dubious and is likely inconsistent across the industry. The criminal law has so far been the designated safety net. However, the reasoning in *Brown*, *Emmett*, and *BM* disregards the tension between the right to choose and protection in the public interest. The nuances are more pronounced in *Wilson*, though the particular relationship between the appellant and the recipient of the body art underpinned much of the analysis.

So, what would a properly regulated body art industry look like? Prohibition on the grounds of public interest ignore the desire for self-expression and empowerment. Such an approach also belittles the human condition and the complexity of what wellbeing is and what identity looks like. Instead, a regulatory system needs to be introduced that sets national standards and requires practitioners to obtain nationally recognised qualifications. Reliance on training within independent studios at local level without national benchmarks creates silos of knowledge that should be shared, while also concealing inadequate and potentially dangerous practice. Given the development of procedures being undertaken, as well as the new techniques and new trends emerging, practitioners should be integrated into a national framework of continuing professional development. Currently, body art is seen as a service industry where individuals can pay for services requested. When things go wrong, breach of contract or negligence may be the primary mechanism for financial redress. However, neither of these routes serve to protect all people from receiving inadequate care. There is currently an unwillingness within the criminal law to recognise the broader health and wellbeing components within the body art and modification industry. Instead, the reasoning in *R v BM* indicates a preference for shutting down the idea that body art and modification should be seen as an exception to the general principle laid

[126] (McKinney et al. 2005).

down in *Brown*. Currently, the choice about where to acquire body-art services is dependent on local knowledge and sheer luck that the practitioner is competent.

If the paradigmatic shift towards a social model of health which harnesses healthism and wellbeing is to be fully realised, these tensions cannot continue to be ignored. Prohibition and protection in the public interest may continue to be effective for extreme body modification procedures, but sociocultural norms will continue to evolve and push forwards. Contemporaneous opinion about more extreme body art will continue to conflict and be shaped by external influences. What is currently deemed extreme may not be so in the future. Legislative intervention to create a regulatory framework for the body art industry that goes beyond environmental health concerns is a pressing need. It would be short-sighted to ignore this.

Funding: This research received no external funding.

Conflicts of Interest: The author declares no conflict of interest.

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Article

The UK Government's Covid-19 Response and Article 2 of the ECHR (Title I Dignity; Right to Life, Charter of Fundamental Rights of the EU)

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Received: 3 July 2020; Accepted: 12 August 2020; Published: 31 August 2020

Abstract: The purpose of this article is to assess the impact of the UK government's response to the Covid-19 outbreak from a human rights perspective, particularly its apparent tension with Article 2 of the European Convention on Human Rights (ECHR) in relation to non-Covid-19 patients whose lives were put at risk by not being able to attend appointments and treatments for pre-existing conditions and illnesses. The UK has also rejected the application of the Charter of Fundamental Rights of the European Union with the European Union Withdrawal Act 2018, which will leave the population even more exposed to potential human rights violations. This seems to be a direct consequence of the narrative and slogan employed by the government: "Stay Home; Protect the NHS; Save Lives". Other potentially threatened categories, the NHS staff and prisoners are also mentioned in the same context. The latter have already launched a judicial review application along the same lines: Article 2 of the ECHR and the due regard duty stemming from the Equality Act 2010. The NHS staff were directly at risk, and evidence was emerging almost on a daily basis that implied authorities' responsibility for the shortage of personal protective equipment and testing kits. While there have been a number of discussions on other issues in relation to the lockdown and the strategy directly or indirectly impacting human rights, it appears that no discussion on the impact of the strategy for non-Covid-19 patients and other categories from a human rights perspective has taken place. This gap in analyses and literature merits the present analysis.

Keywords: Article 2 of the ECHR; right to life; Charter of Fundamental Rights of the EU; positive duty to protect life

1. Introduction

> *"The state finds its highest expression in protecting rights, and therefore should be grateful to the citizen who, in demanding justice, gives it the opportunity to defend justice, which after all is the basic raison d'etre of the State"* (Calamandrei 1992)

The outbreak of Covid-19 at the beginning of 2020 has resulted in an unprecedented response by governments throughout the world that affected population at large at a scale unknown in recent history. Indicative of the prediction expressed in this article is a successful challenge of legality of lockdown in New Zealand. The focus of this article is on the compatibility of the UK government's response, primarily the lockdown and its consequential developments with the right to life under Article 2 of the European Convention on Human Rights (ECHR).

Whilst there have been a wealth of analyses and discussions about the response from human rights perspectives (freedom of expression, freedom of association, the right to protest, the right to liberty and security of person, the right to fair trial, and the right to respect family life and privacy (Council of Europe 2020; Amnesty International UK 2020; Equality and Human Rights Commission 2020;

Maini-Thompson 2020; United Nations Office of the High Commissioner 2020) there is nothing yet about the impact of the lockdown on the right to life of particularly exposed groups that continue to suffer as a result of what the lockdown and its consequences have caused and continue to cause even more than four months since its introduction. The purpose of this article is to examine the impact of the lockdown and the related measures on non-Covid-19 patients, the healthcare workers, and prisoners as well as an increasing tension between the government's response and Article 2 of the ECHR in that respect.

On 24 March 2020, the UK government introduced lockdown measures in an effort to slow the rate of infection of Covid-19 in the country, shielding the National Health System (NHS) and its expected capacity to respond. A slogan was adopted: "Stay Home; Protect the NHS; Save Lives". Arguably, the strategy and measure were accompanied by a strong psychological element and effect on the population through persistent and frequent repetition of the slogan by the Prime Minister himself, as well as by other members of the government. In fact, the government launched an advertisement, which, in addition to the slogan stated above, added: "If you go out, you can spread it. People will die." For the purpose of this article, a question may be posed as to what the individuals can possibly do to *protect* the system that is established to protect themselves, especially those with terminal illnesses, cancer sufferers, patients with cardiovascular diseases, stroke sufferers, etc.

2. Chronology

On 28 March, the Prime Minister sent a letter to 30 million households warning that "things will get worse before they get better." Then, he repeated the main reason for the lockdown: " . . . The action we have taken is absolutely necessary, for one very simple reason. If too many people become seriously unwell at one time, the NHS will be unable to cope." (PM Letter to Nation on Coronavirus 2020) It became therefore, quite clear that the only reason for the lockdown was to "protect the NHS" ("to put it simply, if too many people become seriously unwell at one time, the NHS will be unable to handle it—meaning more people are likely to die, not just from coronavirus, but from other illnesses as well" (Nsubuga 2020).

On 26 March 2020, Professor Azra Ghani, report author from the Centre for Global Infectious Disease Analysis (GIDA) said:

> "Acting early has the potential to reduce mortality by as much as 95 per cent, saving 38.7 million lives. At the same time, consideration needs to be given *to the broader impact of all measures that are put in place to ensure that those that are most vulnerable are protected from the wider health, social, and economic impacts of such action*" (emphasis added).

This article relates primarily to the second part of the statement above. The measures, regardless of the rationale and urgency for their introduction, would cause an impact on other groups, on groups other than Covid-19 patients, the NHS staff, prisoners, etc.

It is beyond the merits of this article to discuss the effectiveness of the measures for two reasons: I am not a medical expert, and, secondly, evidence of their effectiveness is not yet available. However, the lockdown measures are directly related to the main point and argument in this article, so I will have to say a few words about their origin and effectiveness.

3. "Almighty" Lockdown!

The very origin of the "lockdown" expression and, especially, "quarantine" could be traced back to the 14th century during the spread of plague, when 25 million people, or 60% of Europe's entire population, died (Benedictow 2005) and about a half of the population of England lost their lives. People becoming ill from an infectious fever caused by the bacterium *Yersinia pestis*—likely transmitted from rodents to humans through bites by infected fleas rather than through a virus were dying within hours of the infection, with 80% of the cases ending in mortality. (Augustyn) In a desperate attempt to stop or to slow down the spread, the first lockdown measures were introduced in Europe. *Quarantine*,

on the other hand, originated in Venice at the same time, when the city desperately tried to stop the disease from spreading. Ships arriving in Venice from infected ports were required to sit at anchor for 40 days before landing. This practice was called quarantine, derived from the Italian words *quaranta giorni*, meaning "40 days" (Center for Disease Control and Prevention 2020). Unfortunately, the measure did not stop or slow down the spread. More than 100,000 Venetians died during the outbreak of the plague in the 14th century (Carr 2020).

What transpires from the above is that the very origin of lockdown was pragmatism and epidemiology rather than an effective medical strategy or advice, and this distinction is crucial to my point here, which is that the way the lockdown measures were pursued in the UK had an unintended and unfortunate consequence: By sticking strictly to the narrative of "Stay Home, Protect the NHS", many non-Covid-19 patients' lives were unnecessarily put at risk. (Chakelian and Goodier 2020). On the other hand, the lockdown itself will be instrumental in generating human rights issues because it will affect peoples' immunity, negatively leading to excessive deaths, which in turn, may be put into the context of Article 2 of the ECHR. There are, unfortunately, other categories of individuals whose lives were also put at risk as a result of this narrative, which I will also briefly mention below.

4. Article 2 of the European Convention on Human Rights

Under Article 2 of the European Convention on Human Rights (ECHR) "everyone's right to life shall be protected by law". This duty is *positive* in character, and it refers not only to the individual, but to a wider public. According to the guidance of the European Court of Human Rights (ECtHR) on Article 2 of the ECHR, the States' parties to the Convention are not only required to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction (The European Court of Human Rights 2020). The point was powerfully made in *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania* para. 130). In broad terms, this positive obligation has two aspects: (a) The duty to provide a regulatory framework and (b) the obligation to take preventive operational measures. In *Mehmet Şentürk and Bekir Şentürk v. Turkey* the Court reiterated that "the positive obligations imposed on the State by Article 2 of the Convention imply that a regulatory structure be set up, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients' lives are protected."

This positive duty requirement has long been confirmed in a number of cases (*L.C.B. v. the United Kingdom*; *Calvelli and Ciglio v. Italy*). The rationale of the duty is to be found in a higher and more permanent standard and appeal to law transcending national borders and requiring state authorities to be more proactive in protecting fundamental rights and dignity, as both the ECHR and the Charter of Fundamental Rights of the EU (CFR) (Bolado 2020) require in the spirit, not only the letter, of the treaties (Dupré 2014). It requires national authorities to act and take necessary measures to protect the rights of the individual. A positive duty is, therefore, the most distinctive and quintessential characteristic of a human rights argument. It transforms freedoms into rights as the ultimate and the most assertive positive entitlements, which give powers to the individual to seek judicial protection by referring to a failure of national authorities to act in a particular set of circumstances.

In the context of healthcare, the positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives (*Calvelli and Ciglio v. Italy* para. 49; *Vo v. France* para. 89; *Lopes de Sousa Fernandes v. Portugal)*.

In *Aydoğdu v. Turkey* the Court considered that the authorities responsible for healthcare must have been aware at the time of the events that there was a real risk to the lives of multiple patients, owing to a chronic state of affairs that was common knowledge, and yet had failed to take any of the steps that could reasonably have been expected of them to avert that risk. The Court noted that the Government had not explained why taking such steps would have constituted an impossible or disproportionate burden for them, bearing in mind the operational choices that needed to be made in terms of priorities and resources (para. 87). It therefore held that Turkey had not taken sufficient care to ensure the proper organisation and functioning of the public hospital service in this region of the

country, particularly because of the lack of a regulatory framework laying down rules for hospitals to ensure protection of the lives of premature babies in that case.

In addition, an issue may arise under Article 2, where it is shown that the authorities of a Contracting State have put an individual's life at risk through the denial of the healthcare which they have undertaken to make available to the population in general (*Cyprus v. Turkey*, para. 219; *Hristozov and Others v. Bulgaria*, para. 106).

The Court has also accepted that the responsibility of the State, under the substantive limb of Article 2, was engaged as regards the acts and omissions of healthcare providers—firstly, where an individual patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment (*Mehmet Şentürk and Bekir Şentürk v. Turkey)*.

5. The Government's Strategy and the Consequences

With all this in mind, I assess the impact of the government's strategy on non-Covid-19 patients, the NHS staff, and prisoners.

First of all, there was an alarming lowering of the rate of admissions to hospitals since the announcement of the measures on 28 March 2020 (Chakelian and Goodier 2020). On 13 April 2020, the official figures indicated that 40.9 per cent of NHS's general acute beds were unoccupied as of the weekend—37,500 of the total 91,600 relevant beds recorded in the data. According to the source, that was 4500 more than the 33,000 the NHS said had been freed up on 27 March, and nearly four times the normal number of free acute beds at this time of year. (West 2020)

Apparently, the reason behind this phenomenon was the slogan "Protect the NHS" because, according to the source above, "The clearout follows a huge ramping up of discharges from hospitals in recent weeks in preparation for the Covid-19 surge, with funding rules and checks scrapped . . . and staff told to focus on discharge, change their thresholds, and be more directive about patients leaving hospitals. The number of patients who have spent 21 days or more in hospital—so-called 'super stranded patients'—has reduced by 40 per cent (West 2020), which will surely lead to harm being done to those who fail to get treatment and widespread suspensions of planned operations.

This is precisely what engages Article 2 of the ECHR and its implicit positive duty to protect life. In fact, in the present context, the UK government *actively* contributed to a failure to protect life of non-Covid-19 patients by encouraging, or, more precisely, by pressuring hospitals to slow down admissions for non-Covid-19 patients, which clearly violates the spirit of the positive duty under Article 2 of the ECHR in the cases stated above, especially in *Calvelli and Ciglio v. Italy* para. 49, where the ECtHR stated: "Those principles apply in the public-health sphere too. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives." Pressuring or incentivising hospitals to speed up discharge from hospitals and to slow down new admissions of non-Covid-19 patients appears to be a very contradiction of the duty referred to by the Court.

6. The Slogan and Cancer Patients, Prisoners, and the NHS Staff

There has been a worrying tendency among cancer patients to refuse cancer treatment in hospitals due to fear of catching the virus (Joshi 2020). I will provide just few illustrations and evidence here. According to Professor Charles Swanton, Cancer Research UK's chief clinician, "Cancer survival rates would drop, and the delay in diagnosis and treatment would render some cancers 'inoperable' when they would have been curable if caught earlier." (Wheeler 2020). Then, on 20 April 2020, oncologists expressed their concerns about the impact of the strategy (especially the "Protect the NHS" part) in a letter to the government. They claimed: "In our view, there is a real risk that patients who need proton beam therapy will be denied that treatment and given sub-optimal conventional treatment, which was not theirs nor their clinician's first choice, thus potentially increasing unwanted late toxicities and affecting their quality of life in the long term. Furthermore, parents of children with cancer requiring proton therapy will hope that the Covid-19 situation should not compromise the long-term cure and

quality of life for their children." (Elsom 2020). According to a report by the Institute for Public Policy Research and Carnall Farrar from August 2020 there was a 43% drop in urgent cancer referrals in comparison to the same period last year. (Gregory 2020)

I finally wish to buttress my argument here by reference to the Office of National Statistics figures released on 21 April, according to which there has been a significant increase in non-Covid-19 deaths in the UK in relation to the same period last year. There were 18,500 deaths in the week up to 10 April—about 8000 more than is normal at this time of year. However, 6200 of these deaths were linked to coronavirus and Covid-19, which means that there was a significant increase in deaths of non-Covid-19 patients (Triggle 2020).

According to Karol Sikora, the chief medical officer at the Rutherford Cancer Centre: "Every day, about one thousand new cases of cancer are diagnosed in the UK. This means that, in the seven weeks since the UK shut down to contain coronavirus, roughly 50,000 people should have found out they had cancer. Instead, oncologists and pathology labs across the country have only caught about 10% of those cases."

However, it is not just about cancer patients. "Cardiologists and other healthcare professionals are also sounding the alarm. People have been told to stay at home, so they are not coming into hospitals for checkups or visiting emergency rooms if they feel ill. In April, doctors postponed more than 2 million surgeries to free up 12,000 beds for coronavirus patients, at a potential cost of £3 billion ($3.7 billion)". (Timsit 2020) According to the NHS leaders, "The waiting list for hospital treatment could soar to almost 10 million people by Christmas amid a huge backlog caused by coronavirus disrupting services". (Campbell 2020)

The right to life claim can potentially be made by the NHS staff themselves in the light of increasing credible evidence of failure to provide personal protective equipment (Blackall 2020) to frontline medical staff (Horton 2020). If armed forces can bring Article 2 claims against the government (especially paragraphs 75–86), then surely the NHS staff can do the same. In *Smith and Ors v. Ministry of Defence*, the failure by the Ministry of Defence (MoD) to provide equipment and technology to protect against the risk of friendly fire fell within the MoD's duty of care on the grounds that it would be fair, just, or reasonable to extend the duty (para. 101) (UK Parliament Defence Committee 2014).

Finally, prisoners are also impacted by the strategy, and a judicial review application has already been launched. According to the Pre-Action protocol letter sent to the Lord Chancellor and the Secretary of State for Justice by Bhatt Murphy Solicitors on 17 April 2020: "The rate of infection following tests is increasing rapidly. Since our clients first wrote to you jointly on 27 March 2020, the number of prisoners infected has increased from 27 on 26 March 2020 to 232 as of 15 April 2020, an increase of almost ten-fold." It was clearly only a matter of time before some of these issues started to come before the European Court of Human Rights. Expectedly, at the beginning of July 2020, a case involving the UK Government concerning the impact of Covid-19 on conditions of detention in prison was communicated (*Hafeez v UK*).

The Pre-Action letter mentioned above also reminds the government of the positive duty, which is the crux of my argument here: The duty applies to all individuals who are detained (*Keenan v. United Kingdom* para. 111; *Kudla v. Poland* para. 94). *Keenan* established the uncontroversial proposition that one of the reasons the state owes this duty is because of the inherent vulnerability of those who are detained by the state, para. 110. The duty is "particularly stringent in relation to those who are especially vulnerable by reason of their physical or mental condition" (*Rabone v. Pennine Care NHS Foundation Trust* para. 22 per Lord Dyson (Howard League 2020).

7. Conclusions

> *"Progress is not an illusion, it happens, but it is slow and invariably disappointing . . . Consequently two viewpoints are always tenable. The one, how can you improve human nature until you have changed the system? The other, what is the use of changing the system before you have improved human nature?"* (Orwell 1969)

As suggested in this article, the duty to protect life under Article 2 of the ECHR requires positive action, meaning not only pre-emptive, but also proactive, forward-looking and lateral thinking as to what needs to be done to comply with the Article and the spirit of the ECHR and CFR. It unfortunately transpires that the strategy (by which I mean an inevitable psychological element, which was seemingly given almost in a state of panic by the government) of "Protect the NHS" had created conditions that are already proving harmful for non-Covid-19 patients and other categories as identified in this article. Using powerful slogans by the government in order to cause an exaggerated sense of fear of the virus among the population, thereby actively discouraging people from seeking medical assistance for conditions unrelated to Covid-19 seems to be contrary to the very spirit of both the ECHR and CFR and the positive duty to protect life. There are also a number of other aspects indicating a tension between the strategy and human rights (Arts. 3, 8, 9, 10, 14). (Hoar 2020)

One has to admit, though, that the government seemed to be aware of the problem, and, since the middle of April 2020, the ministers were pleading with non-Covid-19 patients to make appointments and go for treatments. However, this plea can also be seen as a recognition of creating the problem in the first place.

This episode demonstrates how fragile and uncertain the status of fundamental values may be, even today, when social, democratic, and economic progress made us all take them for granted. The CFR (rejected by the UK with the European Union Withdrawal Act 2018) (Blackstone Chambers 2018) by placing the right to life within "dignity", implicitly elevating the fundamental character of the right, provided an opportunity for the member states to adopt a more protective stance towards the right to life. It seems, therefore, that rejecting the Charter and the European Court of Justice (ECJ) robust jurisdiction in matters such as those presented in this article will clearly have a huge impact on the modern concept of protection and promotion of human rights in the UK.

Funding: This research received no external funding.

Conflicts of Interest: The author declares no conflict of interest.

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ISBN 978-3-0365-2231-9