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Foreword to the First Volume by Lord Hope of Craighead

I offer my warmest congratulations to those whose idea it was to institute the Edinburgh Student Law Review and to everyone who has been responsible for bringing this issue forward to publication. It is the first student-produced law review in Scotland and only the third in the United Kingdom. It is fitting that the Law School at Edinburgh – a city that was in the forefront of publishing political reviews in the age of enlightenment – should lead the way here north of the border.

Ground-breaking though its publication may be in this jurisdiction, the Review follows a tradition that has long been established among the leading law schools in the United States. The editorship of student law reviews in that country is much sought after, as is the privilege of having a paper accepted by them for publication. The stronger the competition for these positions, the higher the standard that is exhibited by those who occupy them. It is well known that their editors are singled out by the Justices of the US Supreme Court and the Federal Appeals Courts when they are recruiting their law clerks. The reflected glory that this produces enhances in its turn the reputation of the reviews. A reference to editorship of this Review will not escape notice if it appears on the CV of someone who is applying to be a judicial assistant to the UK Supreme Court. But participation in its publication will be of benefit in so many other ways too.

This is pre-eminently a publication by and for students. Its aim is to enhance standards of thinking and writing about law and to promote discussion among all those who are studying law, at whatever level this may be. Law is pre-eminent among the professional disciplines in its use of words to convey ideas. Thinking and writing about law is an essential part of legal training. So too is the communication of ideas about law, as each generation has its part to play in the way our law should develop for the future. I wish all success to those who will contribute to this project, whether as writers or as editors, and I look forward to the benefits that will flow from making their contributions available through this publication to the wider legal community.

David Hope
March 2009

Editorial

The Edinburgh Student Law Review is pleased to present this special issue featuring selected papers from the Edinburgh Postgraduate Law Conference (EPLC) 2024. Under the theme "From Words to Action: Rethinking Justice in a Globalised World", this year's conference held on May 29 and 30, 2024, at Edinburgh Law School, gathered emerging and established scholars to explore the evolving role of law in addressing contemporary global challenges.

EPLC 2024 created a vigorous platform for legal scholars, practitioners, and students to explore and discuss the multifaceted dimensions of law in a global context. Participants engaged in a wide array of sessions covering various legal disciplines. Each panel was meticulously curated to ensure a comprehensive understanding of current legal dynamics and their practical implications. The discussions underscored the increasing intersection of law with social, political, and technological transformations, reinforcing the need for legal frameworks that respond effectively to global shifts. This special issue showcases thought-provoking contributions from the conference, offering fresh perspectives on pressing legal issues. The selected papers critically engage with current legal frameworks, question traditional doctrines, and propose innovative legal solutions.

We express our sincere appreciation to the keynote speaker, panel chairs, and presenters for their invaluable contributions. We also extend our gratitude to the authors who published their work in this special issue. Your efforts have made a significant impact. Special thanks to the organising committee members - Gokce Kolukisa, Jin Wang, Xinyu Lyu, and Muhammet Dervis Mete - for their tireless efforts in ensuring the success of this event. Finally, our gratitude goes to the Edinburgh Student Law Review Team, whose efforts have made this special issue possible and Edinburgh Law School's Postgraduate Research Office for their support and guidance.

We hope these contributions inspire further research and dialogue on the role of law in an increasingly interconnected world.

Gokce Kolukisa, Jin Wang, Xinyu Lyu, and Muhammet Dervis Mete
EPLC 2024 Organiser Committee

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Enforcing Restrictive Measures Against Russia Through Criminal Law
A Truly Effectiveness-enhancing Choice?

*Lorenzo Bernardini**
*Leonardo Romanò***

"The lack of effectiveness is a luxury that criminal justice cannot afford"[1]

A. INTRODUCTION

Today, it seems natural to discuss about European Union (EU) criminal law as a subject as pertinent and significant as any other topic within EU law. Indeed, addressing the need of combating emerging transnational crimes is becoming increasingly paramount to the European Union's goal of strengthening and preserving its Area of Freedom, Security and Justice (AFSJ), placing the EU at the forefront of global actors promoting fundamental rights and the rule of law in a globalised and uncertain world.

In this evolving landscape, the concept of 'effectiveness' has historically played a crucial role in the development of EU criminal law, and increasingly so in recent years. The idea that criminal law can be used when *essential* to ensure the *effective enforcement* of EU law and policies is generally regarded as a crucial argument to justify the harmonisation of criminal norms and penalties at the European level.[2] This seems the road the EU has decided to undertake firstly in the field of environmental crimes, and subsequently with the Lisbon Treaty, where effectiveness as a rationale for expanding EU competences in criminal matters has been codified in Article 83(2) of the Treaty on the Functioning of the EU (TFEU).

More recently, the recognition of the 'super-effectiveness' of criminal law interventions in addressing sensitive cross-border phenomena has been the catalyst for a new wave of criminalisation, with the Russian invasion of Ukraine in 2022 serving as the newest test case in this realm. In particular, to enhance the effectiveness of the sanction enforcement system adopted to compel Russia and its allies to cease their unlawful military activities, the EU legislator put forward an unprecedented legislative strategy to tackle on this brand-new transnational criminal phenomenon: the violation or circumvention of EU restrictive measures has become an EU crime as per Article 83(1) TFEU.

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[1] Carlo Enrico Paliero, 'Il principio di effettività del diritto penale' (1990) RIDPP, 430, 471.
[2] On this topic, see *passim* Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law,* (Hart Publishing 2012).

This paper's starting point is the acknowledgement that the EU elected criminal law as the principal – and in fact exclusive – tool through which ensure the *effective enforcement* of the EU economic sanctions enforcement regime. Yet, we argue that employing criminal law as the most suitable effectiveness-enhancing tool *vis-à-vis* non-criminal frameworks characterised by a suboptimal enforcement may lead to complexities, or tensions, in the context of core principles of substantive criminal law as well as over-criminalisation, which conversely often produces ineffective results.

Against this backdrop, the aim of the present paper is twofold. The first part sets the stage by examining the general concept of effectiveness in relation to the foundational principles of criminal law (harm principle, proportionality, *ultima ratio*) and to the theory of 'legal goods' (*Rechtsgut*) rather than symbolic criminal legislation (§ 2). Next, we shift our focus to a critical assessment of a prevailing trend within EU law: the increasing over-reliance on the super-effectiveness of criminal sanctions as a panacea for ensuring the "enforcement of EU law" (§ 3). In particular, we observe this trend "in action" by analysing the recent decision to criminalise conduct that breaches or circumvents EU restrictive measures, using it as a case study to evaluate the broader implications of prioritising effectiveness in EU criminal law (§ 4).

Ultimately, we aim to address a provocative question which underlies the very justification and limits for the exercise of EU criminal law competences: do we really need criminal sanctions for the enforcement of EU law, in general, and of EU sanctioning system, in particular?[3]

B. IN THE BEGINNING WAS THE WORD: *EFFECTIVENESS* AS A GENERAL PRINCIPLE OF CRIMINAL LAW

Since the focus of the present analysis is not the 'general effectiveness' of EU law[4] but rather the 'effectiveness of criminal sanctions' in relation to the enforcement of EU law, we should start by clarifying the meaning of this concept in the criminal law domain. In fact, why is it important and what exactly is meant by it seems still somewhat unclear.[5]

The notion of effectiveness as a legal principle is a very broad subject with deep philosophical underpinnings, particularly regarding the very essence

[3] This question was first posed in these terms by Jacob Öberg, 'Do We Really Need Criminal Sanctions for the Enforcement of EU Law?' (2015) 5(3) NJECL 370.

[4] Since the early days of the EU, effectiveness has played a crucial role in the process of European integration. This principle is often held to stem from the more general loyalty obligation enshrined in Article 4(3) of the Treaty on European Union (TEU), and requires Member States to guarantee the 'full effectiveness' of EU law. See Herlin-Karnell (n 2) 42ff. See also Matej Accetto and Stefan Zleptnig, 'The principle of effectiveness: rethinking its role in community law' (2005) 11 ELRev, 375; Malcolm Ross, 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality' (2006) 31 ELRev 476.

[5] Herlin-Karnell, 'Effectiveness and constitutional limits in European criminal law' (2014) 5(3) NJECL, 273.

and objectives of criminal law.[6] At its core, effectiveness serves as a measure of a system's capacity to achieve its intended outcome. In criminal law, this concept evokes an instrumental conception of crime which revolves around the idea of *goal of protection*. But protection of what, exactly? Going back to the first classic doctrinal elaboration of this idea by Von Liszt, "criminal law is a coercive instrument that infringes upon fundamental liberties (of the perpetrator) to protect basic legal interests (of the society as a whole)".[7] The author emphasises the dual nature of the *jus terribile* both as a 'means to an end' (the end being social control), and also as a mechanism which responds to suffering (in the form of to serious violations of basic legal interests) by allocating more suffering (in the form of criminal sanctions).[8]

This allows us to infer a value judgment and a criminal policy corollary. First, criminal law is admittedly the harshest and most dysfunctional mechanism States employ to achieve social control; it is a 'double-edged sword' that produces its own 'victims' as well as high social costs, thus being the least efficient tool for the resolution of social conflicts. This, in turn, leads to a corollary: a decision to criminalise any given socially harmful conduct is *legitimate* insofar as it is *effective* in order to safeguard a concrete *object of protection*.[9] Such position takes into account both the common law tradition that has justified criminalisation based on the 'harm principle',[10] as well as the doctrinal 'theory of legal goods' (*Rechtsgut*) accepted in certain civil law jurisdictions.[11] In particular, the harm principle entails a rational test which prevents abstract moral, ethical, religious or ideological interests (eg peace or mankind) from being included in the sphere of legal protection (so-called 'symbolic criminal law'[12]), which ought to be avoided in a liberal criminal justice system oriented towards concrete objects of protection (eg other individuals' physical integrity or property interests); on the other hand, at least according to some of its interpretations, the *Rechtsgut* principle not only lends material substance to the otherwise empty (harm to what?) harm principle, but also plays an important 'critical-selective function' by limiting the State's power to criminalise conduct.[13]

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[6] Herlin-Karnell (n 2) 43.
[7] Translation from Von Listz, *Der Zweckgedanke im Strafrecht. Zeitschrift für die gesamte Strafrechtswissenschaft* (Berliner Wissenschafts-Verlag 2002) 161.
[8] Maria Kaiafa-Gbandi, 'The importance of core principles of substantive criminal law for European Criminal Policy Respecting Fundamental Rights and the Rule of Law' (2011) 1 ECLR 7.
[9] Ibid 12.
[10] On the harm principle, see *ex multis* Nina Peršak, *Criminalising harmful conduct. the harm principle, its limits and continental counterparts* (Springer 2007) 104ff; Andrew Perry Simester and Alexander von Hirsch, *Crimes, Harms, and Wrongs. On the Principles of Criminalisation* (Hart Publishing 2014) 21; Joel Feinberg, *The Moral Limits of the Criminal Law – Volume 1: Harm to Others* (OUP 1987) 36.
[11] See Johannes Keiler and David Roef, *Comparative Concepts of Criminal law* (Intersentia 2019) 35-82. See also Claus Roxin, *Strafrecht Allgemeiner Teil 1* (Verlag C. H. Beck 2006) 8ff.
[12] On 'symbolic criminal offense', see Jacob Turner, 'The expressive dimension of EU criminal law' (2012) AJCL 555.
[13] See Santiago Mir Puig, 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct' (2008) 11(3) NCLR, 409.

However, while the principle of protecting fundamental legal interests is crucial for determining when criminal measures *could* be adopted, it does not guarantee that these measures will always be liberal or just. In other words, the conclusion that a criminal sanction pursues a legitimate aim does not immediately lead to the conclusion that the legislator *should* use its criminalisation powers. Given the sensitive nature of criminal law, other factors and moderating principles must also be considered alongside the doctrine of legal goods to ensure that criminal law is both just and liberal: proportionality and necessity of penalty (or *ultima ratio*).[14]

A general principle of EU law,[15] the so-called *material proportionality*, is a typical standard of material rationality requiring that the *means* (legislative action) should not exceed what is necessary to achieve the *goals* (policy objectives). It answers the question of whether the legislator should act at all.[16] This principle features a three-pronged test: criminal sanctions must be *appropriate*, *necessary* and *proportionate stricto sensu* to achieve a certain goal of protection that is deemed to be legitimate.[17] Firstly, the appropriateness test prescribes that a criminal measure is deemed disproportionate if it is inadequate to control the conduct at hand and to achieve an *Rechtsgut*.[18] Second comes necessity (or *ultima ratio*), which constitutes the second parameter of the test. Generally, this test can be declined both in terms of *positive* and *negative* necessity of penalty. On the one hand, necessity can entail a *utilitaristic* policy judgment stating that criminal law should be used only if it is proven to be the most efficient and cost-effective means available for controlling the conduct at hand. On the other hand, a second understanding of necessity links it more to the 'subsidiary' and the 'fragmentary' nature of criminal law, whereby it should only be used as the 'last resort' in exceptional cases.[19]

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[14] SS Buisman, 'The Future of EU Substantive Criminal Law. Towards a Uniform Set of Criminalisation Principles at the EU level' (2022) 30 EJCCLCJ 161. In other words, there is a distinction between discussing whether certain conducts *could* be criminalised and arguing that they *should* be criminalised. The former analysis involves precisely defining the behaviours to be prohibited, thereby enabling an assessment of their harmfulness, wrongfulness, and/or their interference with protected legal interests. The latter scrutiny, differently, involves other principles, such as necessity and proportionality, that comes to the fore at a later stage. For a practical application of this twofold test, see Lorenzo Bernardini and Sara Dal Monico, 'A Way Forward: Criminal Law as a Possible Remedy in Addressing Gynaecological and Obstetric Violence?', in Gert Vermeulen, Nina Peršak and Stéphanie De Coensel (eds), *Researching the boundaries of sexual integrity, gender violence and image-based abuse* (Maklu 2024), § 4.2 of the manuscript and the references cited therein, forthcoming.

[15] This principle is codified in Article 5(4) TEU, which obliges the European Union legislator to comply with the proportionality principle when exercising its powers. See Jacob Öberg, *Limits to EU Powers* (Hart 2017) 32.

[16] Buisman (n 14) 172ff.

[17] On the proportionality test, see Jannemieke Ouwerkerk, 'Criminalisation powers of the European Union and the risks of cherry-picking between various legal bases: the case for a single legal framework for EU level criminalisation' (2017) 23 CJEL 504, 532.

[18] The intention here is not to embark on any grand tour of proportionality and subsidiarity, as these principles have already been extremely well dissected in the legal doctrine. On material proportionality, see Carlo Sotis, 'Les principes de nécessité et de proportionnalité' in Geneviève Giudicelli-Delage and Christine Lazerges (eds), *Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne* (Société de Législation Comparée 2012) 59.

[19] Herlin-Karnell (n 2) 124. See also Martin Bose, 'The principle of Proportionality and the Protection of Legal Interests' (2011) 1 ECLR 35, 39-40; Sakari Melander, '*Ultima Ratio* in European Criminal Law' (2013) 3(1) Oñati Socio-legal Series 42, 54-57.

Here, the basic idea is that criminal sanctions should be reserved, in the absence of adequate milder means, to provide subsidiary protection against the most serious breaches of specific legal goods worthy of protection; less serious misconduct, in turn, can be more appropriately dealt with by civil law or by administrative regulation.[20] Thirdly, proportionality *stricto sensu* entails a reasonable balancing of *costs* and *benefits* of criminalisation, requiring that the criminal measure does not have excessive effects on individuals affected by the measure considering the importance of the aim pursued.

In light of these fundamental principles, the concept of effectiveness acquires crucial importance as a parameter for assessing the legitimacy of criminalisation choices.[21] First, the legislator must show that criminal law is 'effective' in adequately safeguarding a legal good worthy of protection. Secondly, the legislator must demonstrate that criminal sanctions are more 'effective' than non-criminal sanctions. In other words, criminal sanctions should not be applied in an 'absolute' manner (from the Latin *ab-soluto*: detached from any meaningful goal or purpose), but rather judiciously, recognising that criminalisation entails significant social costs and should only be utilised when other, less intrusive measures are insufficient to address the underlying issues. In fact, an absolute approach to criminal law, one that imposes strict and inflexible rules without consideration for the necessity and appropriateness of sanctions, would not only lack constitutional legitimacy but could also undermine the overall effectiveness of criminal prohibitions. After all, a criminal justice system that over-criminalises behaviours is *always* ineffective for several reasons: it not only strains law enforcement resources, diverting attention and efforts away from addressing more serious crimes, but also can result in unfair and disproportionate punishments, eroding public trust in the justice system and potentially violating constitutional principles of justice and fairness, as well as reducing the overall deterrent effect of the law.[22]

Ultimately, considering all these factors, it is only reasonable to expect that the effectiveness principle should also constrain a supranational entity such as the EU when it comes to the justification and limits of its criminalisation powers. Indeed, it cannot be denied that "both the EU and its Member States are equally bound to establish substantive grounds for resorting to the harshest form of social control in a democratic society based on a concrete object of protection justifying criminal punishment".[23] The next section will closely examine how the reasoning of effectiveness manifests in EU criminal law, with a specific focus on the competence provision of Article 83(2) TFEU and recent developments.

C. FROM WORDS TO ACTION: EFFECTIVENESS OF CRIMINAL LAW IN RELATION TO THE ENFORCEMENT OF EU LAW

[20] Cfr. Bernardini and Dal Monico (n 14) § 4.1 of the manuscript, and references cited therein, forthcoming.
[21] Von Liszt (n 7) 19.
[22] Douglas Husak, *Overcriminalization. The limits of the criminal law* (OUP 2007) 17ff.
[23] Kaiafa-Gbandi (n 8) 16.

There is today a fierce ongoing legal debate on the proper role for criminal sanctions in ensuring the 'effective enforcement of Union policies'. Before delving further into this question, however, some repetition can be helpful.

The starting point when discussing effectiveness in EU criminal law is to account for its role in the development of EU competences in criminal matters. Prior to the Lisbon Treaty, when the EU only had an indirect and limited influence on national criminal laws, there have been a number of important cases before the Court of Justice of the EU (hereinafter 'CJEU' or simply 'the Court') where effectiveness has constituted an important parameter in the decision on whether to grant the EU a criminal law competence. Importantly, in a seminal ruling known as the *Environmental Crimes* judgment, the Court adopted an innovative approach towards effectiveness by stating that the imposition of criminal penalties at EU level is justified insofar as they are 'essential' to ensure the 'full effectiveness of EU law' when pursuing the protection of the environment.[24] In the subsequent *Ship-Source Pollution* judgment, the Court further elaborated on this vague and broad legislative competence, pointing out that 'effectiveness' refers to the capacity of criminal penalties to ensure compliance within the concerned policy area and contribute to the achievement of the underlying Union objectives.[25]

More recently, the idea that the effective enforcement of EU law would require criminal sanctions has been codified in Article 83(2) TFEU, providing for an explicit legal basis for EU criminalisation process.[26] In particular, the second paragraph of this provision allows for the approximation of criminal law if proved "*essential* to ensure the *effective implementation* of a *Union policy* in an area which has been subject to harmonisation measures" (emphasis added). In other words, Article 83(2) TFEU takes a functional view of criminalisation, as it considers criminal law as "a means to an end, the end being the effective implementation of other EU policies".[27]

In any case, this 'poorly worded provision'[28] has drawn criticism from both criminal and constitutional law perspectives concerning its effectiveness-based view of criminal law.[29] Among other issues, a first fundamental question

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[24] See Case C-176/03, *Commission v Council* (Environmental Crimes) [2005] ECR I-7879, para 48. For a critical view, see Valsamis Mitsilegas, *EU criminal law* (Hart 2009) 75-79 and Herlin-Karnell (n 2) 29ff.

[25] See Case C-440/05 *Commission v Council* (Ship-Source Pollution) [2007] ECR I-09097, paras 68-69.

[26] For an overview of the historical background that led to the evolution of the EU's criminal law competence and the provision of Article 83 TFEU, see Öberg (n 3).

[27] See Valsamis Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart 2016) 117. A second legal basis for the harmonisation of criminal law is provided by Article 83(1) TFEU, which allows the European Union to "establish minimum rules concerning the definition of criminal offences and sanctions" in certain areas of serious crime with a cross-border dimension (so-called 'securitised criminalisation'). To this end, it provides for an exhaustive list of 'euro-crimes' that pose global security threats, including money laundering, human trafficking and computer crime.

[28] Cfr. Buisman (n 14) 176ff, making a distinction between 'securitised' and 'functional' EU criminalisation powers.

[29] See *ex multis* Valsamis Mitsilegas, 'The transformation of criminal law in the area of freedom, security and justice' (2007) 26(1) YEL 1; Herlin-Karnell (n 5) 268.

that needs to be answered is *what* the new legislation is meant to protect.[30] According to the *Rechtsgut*-theory, we must *always* assume that criminal law protects a fundamental legal interest from a harmful and wrongful conduct.[31] Similarly, the harm principle implies that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent conduct causing harm to others, individually or collectively.

Yet, as will be argued, the capacity of these doctrines to shape the normative foundations of EU criminal law remains limited, with the main reason being that normative limits of EU-level criminalisation have so far predominantly been articulated under Article 83(2) in terms of the 'effectiveness' rationale.[32] In fact, the issue lies not in the term 'essential' itself, which theoretically implies even stricter criteria than the more common 'necessary', but rather in the lack of specificity regarding the object of protection. Instead of being tied to a specific object of protection (i.e. a *legal good*), the test of essentiality appears to be linked to the broader concept of 'effective enforcement of a Union policy' (i.e. a *legal provision* or *framework*).[33] Consequently, it is not always clear whether EU criminal offences are intended to *directly* safeguard fundamental legal interests, or if they are designed to *indirectly* protect these interests by primarily achieving higher compliance with substantive EU law. Depending on the particular benchmark of the essentiality test (whether it pertains to a legal good or a legal framework), we may transition from a 'teleological' to a 'normativist' criminalisation paradigm.

A clear example of the first paradigm is the EU fraud recently codified by the so-called PIF Directive[34] Such conduct *directly* affects a core *Rechtsgut* of the EU (i.e. the financial interests of the European Union) thus justifying criminalisation at the supranational level.[35] Similarly, there are various other examples of criminal measures which protect certain fundamental rights as EU *Rechtsgüter*, demonstrating that the scope of European criminalisation extends far beyond those legal interests directly linked to the EU itself or its internal market.[36]

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[30] Kaiafa-Gbandi (n 8) 12.

[31] Cfr. Jannemieke Ouwerkerk, 'Old wine in a new bottle: Shaping the foundations of EU criminal law through the concept of legal interests (*Rechtsgüter*)' (2022) 27(4-6) ELJ 426, arguing that the concept of legal interests is essential to further shape the normative foundations of EU criminal law.

[32] For a discussion on the meaning of the 'essentiality' condition from a linguistic, systematic, contextual and functional perspective, see Öberg (n 3) 7ff.

[33] See Carlo Sotis, 'I principi di necessità e proporzionalità della pena nel diritto dell'Unione europea dopo Lisbona' (2012) 1 DPC 111, 120-121. Other scholars hold an opposing view, asserting the legitimacy of the normativist criminal paradigm. Cfr. Alessandro Bernardi, 'La competenza penale accessoria dell'Unione Europea: problemi e prospettive' (2012) 1 DPC 43.

[34] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198 (PIF Directive). See Grazia Bruzzese and Leonardo Romanò, 'La directive sur la lutte contre les fraudes portant atteinte aux intérêts financiers de l'Union' (2023) 672 RUE 544.

[35] Other examples of core EU *Rechtsgüter* are the protection of fair competition, the environment and the integrity of the public administration.

[36] Cfr. Pedro Caeiro, 'Beyond competence issues: why and how should the EU legislate on criminal sanctions' in Robert Kert and Andrea Lehner (eds), *Vielfalt des Strafrechts im*

At the same time, however, there are other examples where criminal measures play a rather complementary or 'accessory' function in relation to the respective non-criminal harmonisation legal framework.[37] This is clearly illustrated, for instance, in the Directive on the protection of the environment through criminal law, which compels Member States to criminalise even conduct that violates mere administrative regulations (i.e. 'regulatory offenses').[38] When viewed from the perspective of the doctrine of legal goods, such regulatory offences cannot be deemed 'necessary' or, even more so, 'essential', precisely because they prove to be inadequate in protecting the environment. This inadequacy often arises due to the difficulty in establishing a causal link between the conduct and the vast, complex, and sometimes abstract concept of the environment.

Similarly, a recent example of the use of Article 83(2) is the Market Abuse Directive (MAD).[39] This directive sets out criminal sanctions to ensure compliance with the rules on preventing and fighting market abuse in the form of market manipulation, unlawful disclosure of inside information and insider dealing.[40] Once again, one of the most difficult problems posed by the prohibition of market abuse is defining the protected legal interest. While MAD states that its objective is to *ensure the integrity of securities markets and enhance investor confidence in those markets,* these legal interests find no precise definition in the regulatory texts. Commonly, the term 'market integrity' can be negatively defined as *a market that is free from market abuse practices*.[41] The difficulty is, however, that while avoiding prohibited trading behaviours is crucial, the absence of abuse does not automatically guarantee market integrity. True market integrity encompasses a broader spectrum: transparency from issuers and market participants, non-discriminatory access to the market, ethical conduct by intermediaries, etc; in essence, a truly 'integral' market resembles the theoretical ideal of a 'perfect market'.[42] It therefore contributes little to maintain that the objective of the prohibition of market abuse

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internationalen Kontext. Festschrift für Frank Höpfel zum 65. Geburtstag (Neuer Wissenschaftlicher Verlag 2018) 652ff.

[37] On the 'accessory' function of Article 83(2) TFEU, see Rosaria Sicurella, 'EU competence in criminal matters' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstantinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 62.

[38] Directive 2008/99/EC, L 328 of 6 December 2008, as recently replaced by Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC [2024] OJ L.

[39] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 173.

[40] The MAD has complemented the regulatory framework laid down in Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance [2014] OJ L 173 (Market Abuse Regulation or MAR). For a general introduction to the MAR administrative sanctions regime, cfr. Vanessa Franssen and Solène Vandeweerd, 'Supranational Administrative Criminal Law' (2019) 90(2) RIDP 13, 34ff.

[41] See Ester Herlin-Karnell and Nicholas Ryder, *Market Manipulation and Insider Trading Regulatory Challenges in the United States of America, the European Union and the United Kingdom* (Hart Publishing 2021), ch 2.

[42] Ester Herlin-Karnell, 'White-collar crime and European financial crises: getting tough on EU market abuse' (2012) 47(4) ELRev 481.

is market integrity, as impairment of this interest is not specific to market abuse conducts and hence does not suffice to justify the necessity of criminal intervention in this field. What seems clear is that the need for the effective implementation of the EU market abuse framework becomes the primary focus of the criminalisation process, thus overshadowing the underlying legal good.[43]

Ultimately, these examples suggest that EU criminal offences are intended to *directly* safeguard the effectiveness of EU law rather than protect the underlying legal interests. This, however, may pose significant challenges. Firstly, there is a presumption that, in certain (sensitive) areas of EU policies, criminal law represents the most suitable means to ensure the effective implementation of EU law.[44] Secondly, this over-reliance on the perceived 'super-effectiveness' of criminal law *vis-à-vis* supposedly ineffective non-criminal frameworks characterised by suboptimal enforcement may jeopardise the 'critical-selective function' of the legal good, since a criminal measure can be perfectly *appropriate* to ensure the overall compliance with a certain legal framework – for example, by establishing what is right and what is wrong or indicating the correct scale of values at stake – but, at the same time, be completely *inadequate* to effectively protect the underlying legal interest.[45] Thirdly, this seems to be in direct conflict with the *ultima ratio* principle, as the need for 'effective enforcement of EU law' might give the Union *carte blanche* to legislate in criminal matters thus leading to over-criminalisation.[46]

One thing is for sure: the unique nature of criminal law cannot allow it to be reduced to a panacea for rectifying perceived deficiencies in non-criminal frameworks. This raises a critical question: can the essentiality test, grounded on the effectiveness rationale, continue to serve as an adequate constitutional parameter for justifying criminalisation decisions at the EU level? What are its limits (if any)? In other words, while effectiveness is undoubtedly a crucial consideration in the development and application of criminal law, its over-reliance must be carefully scrutinised in light of the constitutional identity of criminal law.

As anticipated, the remainder of this paper will try to tackle this question in relation to the most recent test case in this realm: the use of criminal law tools in order to enhance the overall effectiveness of the EU restrictive measures enforcement regime, in the wake of the Russian military invasion and aggression of Ukraine.

D. A BRAND-NEW, EFFECTIVENESS-BASED, CRIMINALISATION INITIATIVE. THE CASE OF THE ENFORCEMENT OF EU RESTRICTIVE MEASURES VIA CRIMINAL LAW

[43] For a focus on the European Central Bank (ECB) reporting duties with respect to potential market abuse crimes, cfr. Silvia Allegrezza, 'Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies' (2020) 4 Eucrim 302.
[44] Herlin-Karnell (n 2) 56.
[45] Sotis (n 33) 120.
[46] Kaiafa-Gbandi (n 8) 19.

While several issues may arise from considering criminal law as a means to enhance the effectiveness of other areas of EU law, this conviction has nonetheless remained steadfast in the mind of the EU legislator.

Indeed, a recent legislative initiative exemplifies the emerging trend of viewing criminal law as inherently effective in enhancing the effectiveness of non-criminal legal frameworks – the enforcement of EU restrictive measures via criminal law. This unexpected convergence between the EU's restrictive measures framework and criminal law is a relatively new phenomenon, catalysed by the Russian military invasion of Ukraine in 2022. Despite its novelty, the underlying logic of this legislative initiative remains consistent – when a certain area of EU policy requires stronger enforcement, criminal law is typically deemed suitable for this purpose. The methodology adopted involves criminalizing behaviours that seemingly hinder the effectiveness of that policy area. The belief is that by prohibiting (and punishing) these behaviours, the system at stake will become more effective, as those attempting to undermine it will face criminal penalties. However, when it comes to restrictive measures, the situation is even more complex, as will be discussed in the following paragraphs.

But what exactly are 'restrictive measures'? Why were they previously ineffective? And to what extent does the EU legislator believe that criminalizing their violations can provide an added value to this legal framework?

To address these questions, we will first provide an overview of the relevant EU legislative framework concerning restrictive measures, delineating their *nature* and *scope of application* (§ 4.1). Next, we will examine the main issues related to their lack of enforcement and the recent criminalisation package proposed by the EU legislator aimed at enhancing the economic sanctions' regime. This analysis will include identifying which *violations of EU restrictive measures* now constitute *criminal offences* (§ 4.2). Finally, we will critically discuss the principal drawbacks of this strategy, emphasizing that without a precise definition of what constitutes 'effectiveness' within the EU restrictive measures legal framework, the employment of criminal law should be cautiously reconsidered (§ 4.3).

(1) The multifaceted nature of EU restrictive measures

In line with established international practices, economic sanctions – more accurately termed 'restrictive measures' within the European legal framework – serve as the EU's most frequently employed foreign policy tool.[47] Historically, the EU has integrated United Nations (UN) sanctions into its own legal order,

[47] Luigi Lonardo, *EU Common Foreign and Security Policy After Lisbon* (Springer 2023) 73ff. The historical and legal analysis and reconstruction of the EU restrictive measures against Russia and its allies in the following sections draw upon some reflections already developed in Lorenzo Bernardini, 'Criminalising the violation of EU restrictive measures: towards (dis)proportionate punishments vis-à-vis natural persons?' (2024) 14 EuCLR 4, 4-10.

either by direct adoption or by implementing additional measures.[48] However, the cornerstone of the EU's Common Foreign and Security Policy (CFSP) lies in its *autonomous* economic sanctions. These are measures adopted *independently* of the UN and other regional organisations. They typically include economic, non-military penalties against States, entities, or individuals ('the targets'), as *tools to achieve foreign policy and security objectives*.[49]

As early as 2004, the EU openly committed to using 'sanctions' as a pivotal instrument for maintaining and restoring international peace and security, aligning with the principles of the UN Charter and CFSP.[50] This commitment was enabled by Article 301 of the Treaty Establishing the European Community (TEC), which broadly permitted the interruption or reduction of economic relations with third countries, granting considerable discretion to EU institutions to adopt the 'necessary urgent measures'.[51] The need to clarify the scope of this article led to its amendment.[52] Following the Lisbon Treaty, the legal basis for adopting restrictive measures is now found in Article 215(1) and (2) TFEU.[53]

It is no secret that the current geopolitical scenario, particularly the Russian invasion of Ukraine, has stressed the crucial role of *autonomous restrictive measures*. Despite their fragmented and heterogeneous nature, these measures have emerged as a primary means of exerting pressure on global actors threatening EU values. A close analysis of the economic sanctions implemented by the EU reveals their intrinsic nature as an alternative, albeit not entirely oppositional, to military activities.[54] To identify their main characteristics,

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[48] A well-known case is the EU sanctions against the Democratic People's Republic of Korea (North Korea), which not only directly implement those established at the international level (UN) but also include additional and more stringent measures.

[49] Considering the *scope of application* of restrictive measures and their *impact* on the targets, they may be distinguished into two categories:

- *sectoral sanctions*, i.e., restrictive measures which aims at affecting specific market sectors. Prominent examples may be (i) arms embargoes; (ii) import/export bans; (iii) restriction on access to financial markets and services and (iv) investment bans;
- *individual sanctions*, i.e., restrictive measures which aims at affecting specific individuals. Examples of those measures may be (i) travel bans or (ii) asset freezes.

[50] 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (*Council of the European Union*, 7 June 2004) <https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf> accessed 20 May 2024.

[51] Article 301 TEC maintains that "where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission."

[52] Tarcisio Gazzini and Ester Herlin-Karnell, 'Restrictive Measures Adopted by the European Union from the Standpoint of International and EU Law' (2011) 36 ELRev 801, 801ff; Nadia Zelyova, 'Restrictive measures – sanctions compliance, implementation and judicial review challenges in the Common Foreign and Security Policy of the European Union' (2021) ERA Forum 167, 167ff.

[53] Francesco Giumelli, 'Implementation of sanctions: European Union', in Masahiko Asada (ed), *Economic Sanctions in International Law and Practice* (Routledge 2019) 120ff.

[54] While it is not possible to fully explore the relationship between restrictive measures and military activities here, it is worth recalling the famous observation by US President Woodrow Wilson, who asserted that economic sanctions represent "something more tremendous than

the package of restrictive measures against the Russian Federation and its allies will be used as a benchmark. This is due, firstly, to the significant scope of this specific sanctions regime, which accounts for approximately 45% of all measures currently in force within the EU legal order.[55] Secondly, because it was the need to enforce *this* specific sanctions *regime* that triggered the EU criminalisation initiative under analysis.

Despite only two EU legal acts containing the principal restrictive measures adopted in this context,[56] the regulatory framework remains particularly heterogeneous. It has been frequently reconsidered, amended, and revised over the years, resulting in a somewhat inconsistent approach. This is unsurprising, as the European Union's actions since February 2022 have *had* to adapt rapidly to a swiftly changing historical and military context, influenced by numerous economic and political factors that precluded the creation of a harmonious legal framework.[57] It is crucial to remember that the current events involving Russia and Ukraine should be viewed in their entirety, as the latest phase of a prolonged military conflict – the so-called Russo-Ukrainian war – that began in February 2014.[58]

Indeed, it was following the invasion of Crimea in the same year that the *first restrictive measures* against the Moscow government were implemented. These measures aimed to deter Russia from threatening European (and global) order and security by destabilizing neighbouring EU and NATO Member States.

Regulation 269/2014 was adopted to this end, forming the cornerstone of the economic sanctions against 'certain persons' close to the Russian regime, listed in Annex I (the so-called blacklist).[59] In March 2014, this list

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war […] apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon that nation" (as cited in Hamilton Foley, *Woodrow Wilson's Case for the League of Nations* (Princeton University Press 1923) 67ff). For a more recent critique in a similar vein, see Neil Arya, 'Economic sanctions: the kinder, gentler alternative?' (2008) 24 Medicine, Conflict and Survival 25, 25ff, and Keyvan Shafiei, 'Sanctions Are Not an Alternative to War' (*The American Prospect*, 2020) <https://prospect.org/world/iran-us-sanctions-not-an-alternative-to-war/> accessed 20 May 2024. Conversely, and supporting the implementation of economic sanctions as an alternative to military activities, see James Pattinson, *The Alternative to War: From Sanctions to Nonviolence* (OUP 2018) 39ff, particularly the author notes that "they more fairly distribute costs" (ibid 69).

[55] 'EU Sanctions Tracker' (data.europa.eu, 2024) <https://data.europa.eu/apps/eusanctionstracker/> accessed 19 May 2024.

[56] They are: (i) Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78, 6–15; and (ii) Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L 229, 1–11.

[57] Alexandra Hofer, 'The EU's 'Massive and Targeted Sanctions' in Response to Russian Aggression, a Contradiction in Terms' (2023) CYELS 1, 1ff.

[58] André Härtel, Anton Pisarenko and Andreas Umland, 'The OCSE's Special Monitoring Mission to Ukraine' (2020) 31 Security & Human Rights 121, 121ff.

[59] Regulation 269/2014 explicitly refers to Council Decision 2014/145/CFSP, adopted on March 17, 2014, which was the first to require Member States to implement the necessary measures to introduce the so-called travel ban. This measure aimed to prevent "the entry into, or transit through, their territories of the natural persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, and of natural

included 21 individuals whose "funds" and "economic resources" were to be "frozen", with a concurrent prohibition on making funds or resources available to blacklisted individuals.[60] The Regulation stipulated that only those responsible for actions threatening Ukraine's territorial integrity, sovereignty, or independence could be listed in Annex I.[61] These were thus *'individual' restrictive measures*, targeting specific persons (both natural and legal), subjecting them to limitations on certain fundamental rights, notably property rights (due to asset freezes) and freedom of movement (due to travel bans).

Further restrictive measures against Russia and its allies were established a few months later by Regulation 833/2014. These were *'sectoral' economic sanctions*, designed to restrict or prohibit certain commercial or financial transactions in specific economic sectors. The broader scope of these sanctions aimed to "increas[e] the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis".[62] Among other provisions, the regulation banned transactions involving "dual-use goods and technologies […] to any person, entity, or body in Russia or for use in Russia, if the items might be for military use or a military end-user".[63] It also required prior authorisation for selling, supplying, transferring, or exporting listed goods to Russia or for use in Russia.[64]

It goes without saying that the 2022 invasion of Ukraine imposed a review of these measures in light of evolving historical events. The two key regulations of the sanctions package have been amended multiple times since. Their scope has been expanded to enhance the effectiveness of these measures.

Specifically, Regulation 269/2014 has undergone two significant amendments. Firstly, it now includes provisions not only for asset freezes – the original core of this piece of legislation – but also for information and cooperation obligations imposed on all potential "natural and legal persons, entities and bodies".[65] These obligations involve providing information to facilitate the implementation of the regulation, such as identifying the person who owns or controls the funds, the amount, and type of funds.[66] This is accompanied by a new prohibition against participating in activities designed to circumvent the asset freezes (anti-circumvention clause).[67] Secondly, the list of individuals subject to asset freezes has been significantly extended. As of January 2024, the list includes 1,584 individuals and 249 entities.

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persons associated with them". The Decision included an exhaustive list of individuals subject to the travel ban in Annex I (the so-called 'blacklist').

[60] Regulation No 269/2014 (n 56) art 2(1) and (2).

[61] Ibid, art 3(1).

[62] Regulation No 833/2014 (n 56) Recital 2.

[63] Ibid, art 2(1).

[64] Ibid, art 3(1). This was not an excessively extensive list, which included, among other items, line pipes, drill pipes, liquid elevators, and sea-going light vessels.

[65] Regulation 269/2014 (n 56) art 8(1).

[66] Ibid, art 8(1a).

[67] Ibid, art 9.

Similarly, the illicit behaviours covered by Regulation 833/2014 now span a wide range of economic, commercial, and financial sectors. The list of prohibited goods has been substantially expanded (eg to include luxury goods, precious minerals, cigarettes, caviar, shellfish, and textiles), resulting in 40 annexes associated with Regulation 833/2014.

In this highly complex regulatory framework, a crucial issue, extending beyond the restrictive measures adopted in the context of the Russian invasion, has quickly emerged – *how to ensure the effectiveness of the EU's economic sanctions system*? In other words, how can restrictive measures be made genuinely *effective* and *practically enforceable*?

(2) A lack of enforcement that called for a criminalisation strategy

To prevent the violation of restrictive measures, the EU legislator has largely relied on *national legal systems*. Traditionally, Member States have been empowered to establish "rules on penalties" applicable to relevant violations, provided that such penalties are "effective, proportionate, and dissuasive".[68] However, the EU legislator did not specify the *nature* of the sanctions to be implemented at the national level for those who violate or circumvent the restrictive measures.

As a result, some legal systems opted for purely administrative sanctions (primarily fines), others adopted a twin-track system (combining administrative and criminal penalties depending on the severity of the offence), and some imposed exclusively criminal sanctions.[69] Additionally, there has been significant divergence in defining the criminal offences of 'violation of restrictive measures' domestically, as well as the sanctions imposed (eg varying levels of fines).[70]

The lack of a harmonised approach in imposing penalties for violations of restrictive measures has led to numerous inconsistencies, rendering the entire enforcement system ineffective. This is evidenced by a 2021 Eurojust report, which indicated that only a limited number of violators have been held accountable at the national level.[71] Moreover, this regulatory fragmentation has hindered the objectives of the CFSP and encouraged forum shopping, allowing violators to conduct their illicit activities in Member States with more lenient penalties.[72] To close these loopholes, the European Commission (herein after 'the Commission') launched an unprecedented legislative initiative in May 2022,

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[68] Regulation 269/2014 (n 56) art 15 and Regulation 833/2014 (n 56) art 8.
[69] Francesco Giumelli and others, 'United in Diversity? A Study on the Implementation of Sanctions in the European Union' (2022) 01 Politics and Governance 36, 40ff.
[70] 'Prosecution of sanctions (restrictive measures) violations in National Jurisdictions: A Comparative Analysis' (*Eurojust*, December 2021) <https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf> accessed 20 May 2024.
[71] Ibid.
[72] Ibid.

approximately three months after the Russian invasion of Ukraine, unfolding in three phases.[73]

Initially, the Commission proposed to criminalise violations of economic sanctions by identifying such conduct as a criminal offence to be included in the list of 'Euro-crimes' under Article 83(1) TFEU.[74] This proposal was eventually approved in November 2022.[75]

As a second step, the Commission presented a draft directive aimed at harmonising the 'definition of criminal offences and penalties for the violation of Union restrictive measures'.[76] The primary objective was to standardise the definitions of offences and criminal penalties for these violations across all Member States, thereby ending impunity for those currently violating or circumventing restrictive measures. This directive was recently approved in April 2024.[77]

Lastly, as the third and final step, the Commission proposed a directive on the 'recovery and confiscation of assets'. Once approved, the rules on freezing, confiscating, tracing, identifying, and managing assets instrumental to a crime or constituting the proceeds of a crime – applicable to all 'Euro-crimes' – will also extend to assets related to violations of EU restrictive measures. This directive includes provisions to facilitate the swift tracing and identification of assets owned or controlled by individuals or entities subject to such restrictive measures.[78] This not only supports the effective implementation of economic sanctions but also empowers national authorities to consider funds linked to violations of restrictive measures as 'proceeds' of crime, subject to freezing and confiscation, and potentially available for post-war reconstruction efforts in Ukraine.[79] This directive was also approved in April 2024.[80]

The primary outcome of this three-pillared legislative strategy is clear: violations of EU restrictive measures are now classified as *criminal offences*, obliging Member States to *impose criminal penalties* on wrongdoers. In the context of subsequent criminal proceedings aimed at determining the culpability

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[73] Francesca Finelli, 'Countering circumvention of restrictive measures: The EU response' (2023) 60 CMLRev 733, 747.
[74] Proposal for a COUNCIL DECISION on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union [2022] COM(2022) 247 final. See n 27.
[75] Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union [2022] OJ L 308. This represents the first expansion of the catalogue laid down in Article 83(1) TFEU.
[76] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the definition of criminal offences and penalties for the violation of Union restrictive measures [2022] COM(2022) 684 final.
[77] Directive (EU) 1226/2024 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 [2024] OJ L.
[78] Michael Kilchling, 'Beyond Freezing?' (2022) Eucrim 136, 136ff.
[79] Alan Rosas, 'From freezing to confiscating Russian assets?' (2023) ELRev 337, 337ff.
[80] Directive (EU) 1260/2024 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation [2024] OJ L.

of those accused persons, authorities may issue orders to *freeze* the assets involved in the criminal conduct. Where applicable, and as provided by national law, these assets may also be subject to *confiscation*. Thus, criminal law has become the *principal tool* for managing – and ideally deterring – conduct that violates or circumvents restrictive measures.

(3) Looking for Godot – what is effectiveness, exactly?

At first glance, this choice may not seem overly surprising. Criminal law has played, and continues to play, a crucial role in the European integration process. Thus, relying on it to implement EU restrictive measures stems from the (correct) perception that fragmented – and therefore ineffective – application of such measures undermines the European Union's ability to "speak with one voice" in such a sensitive area of the CFSP.[81]

However, while the *goal* of criminalising violations of restrictive measures is laudable, and entirely justifiable (i.e., make Russia and its allies pay for their crime of aggression against Ukraine), the increasingly prevalent trend of resorting to criminal law as a remedy for systemic deficiencies in non-criminal systems raises questions about the *legitimacy* and *appropriateness* of this strategy from a theoretical perspective. In other words, the recent criminalisation of violations of EU economic sanctions clearly reveals – once more – how criminal law is used by the EU legislator as a means to 'correct' deficiencies within a specific normative system characterized by poor application.

Notably, the Commission explicitly acknowledges that this is the fundamental aim of the entire criminalisation process, noting that "in the absence of law enforcement, and judicial authorities having the right tools and resources available to prevent, detect, investigate and prosecute the violation of Union restrictive measures, designated individuals and legal persons whose assets are frozen continue to be able to access their assets in practice and support regimes that are targeted by Union restrictive measures".[82] To ensure the smooth enforcement of restrictive measures, imposing criminal sanctions for their violation should provide concrete assistance.

However, employing criminal law requires considering the multiple implications of its application, which the EU legislator seems not having thoroughly examined. For instance, the principles of *legality* and *ultima ratio* must be respected. One might question the compliance of the criminalisation initiative with these principles and, thus, the appropriateness and legitimacy of using criminal law in this context.[83]

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[81] 'Commission welcomes political agreement on new rules criminalising the violation of EU sanctions' (*EU Commission*, 12 December 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6535> accessed 20 May 2024.
[82] COM(2022) 247 final (n 74) 6.
[83] See, for further reflections on this issue, Bernardini (n 46) 7–10 and Lorenzo Bernardini and Francesca Finelli, 'Violation of EU Sanctions and Criminal Penalties: Proportionality at Peril?' in Valsamis Mitsilegas, Stefano Montaldo and Lorenzo Grossio (eds), *Proportionality of Criminal Penalties in EU Law* (Hart 2024) ch 8, forthcoming.

Against this background, we find the EU legislator's conviction that the *effective* application of EU restrictive measures can *only* be achieved through criminal sanctions unpersuasive.

The theoretical basis for criminalising the violation or circumvention of restrictive measures is justified by the European Commission in the following terms: "the violation of Union restrictive measures should be qualified as an area of crime *in order to ensure the effective implementation of the Union's policy on restrictive measures*".[84] Despite its brevity, this statement encapsulates the rationale behind the entire criminalisation process under scrutiny. It has been emphasised that, according to the European legislator, there is a direct relationship between criminal law and the efficiency of the economic sanctions enforcement system. Using a mathematical metaphor, the two variables appear to be directly proportional: the more sanction violations are criminalised, the more effective the entire regime of restrictive measures becomes. Accordingly, the approach adopted by the EU legislator is primarily *teleological*, aiming at the effective implementation of economic sanctions, which should ostensibly be achieved *exclusively* through criminal sanctions for those who violate restrictive measures. In these terms, it is safe to argue that such a criminalisation initiative should have been developed under Article 83(2) TFEU.[85] This is why, although the criminalisation process took place under Article 83(1) TFEU, we find it useful to engage in an in-depth analysis of the effectiveness-based grounds on which the process is deeply entrenched.

Despite substantial academic contributions on restrictive measures, there is a lack of in-depth studies specifically exploring the advantages and disadvantages of *relying on criminal law* to counter violations of economic sanctions and enhance their enforcement regime. This research gap can likely be attributed to the absence of a universally accepted definition of what constitutes an 'effective' enforcement system for restrictive measures. Thus, what contribution can criminal law make to the effective implementation of restrictive measures if defining such 'effectiveness' is highly complex? The intangible nature of this concept makes justifying the use of criminal law difficult, preventing an *ex ante* or *ex post facto* evaluation of the alleged positive impact criminal law might have on enforcing economic sanctions.

Nevertheless, we can attempt to give meaning to this expression. The 'effective implementation of the EU's policy on restrictive measures' can be associated with at least three different meanings. Not all of these perspectives,

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[84] COM(2022) 247 final (n 74) 7 (emphasis added). This is a consideration the Commission deems necessary to address first, before other justifications for criminalisation: (i) the violation of restrictive measures threatens international peace and security and thus constitutes a particularly serious area of crime; (ii) the violation of restrictive measures is a conduct with a transnational dimension; (iii) there is a heterogeneous response at the domestic level to the violation of restrictive measures (ibid 7–8).

[85] I have already addressed this issue briefly in Lorenzo Bernardini, 'Strengthening the Biting Effect of EU Restrictive Measures Via Criminal Law – Some Critical Remarks' (*CELIS Blog*, 28 March 2024) <https://www.celis.institute/celis-blog/strengthening-the-biting-effect-of-eu-restrictive-measures-via-criminal-law-some-critical-remarks/> accessed 20 May 2024. In the same vein, see Bernardini and Finelli (n 83).

at least at first glance, seem to require a criminal law intervention for their implementation.

The first definition originates from political science and can be classified as the *means-end approach*, or the 'effectiveness of the means in relation to the ends'. In this perspective, restrictive measures that achieve their objectives (eg compelling a third country to cease hostilities due to the deterioration of its economic system) are considered effective. This requires evaluating both the economic and commercial impact of restrictive measures on the targets and, subsequently, the resulting behavioural change.[86] Various economic indicators, such as changes in trade patterns, investment flows, and economic growth rates, can be examined to determine how restrictive measures have affected the target's economy and to adjust actions accordingly to mitigate negative impacts on their economy.[87] If an effective enforcement system is one that successfully induces behavioural change in the targets, criminal law does not seem *necessary* to justify its use. There is no empirical evidence that criminalising the violation of EU restrictive measures directly leads to a behavioural change in the targets (countries, entities or individuals). Moreover, the perceived utility of criminal sanctions could be questioned by considering a broader use of administrative measures, which might more swiftly – and, thus, concretely – induce a shift in the targets' conduct.

A second approach to measuring the effectiveness of the enforcement system for restrictive measures could focus on the volume of frozen assets, money, or objects, or the number of individuals prosecuted and punished for violating economic sanctions, regardless of whether the measures prompted a behavioural change in the targets. This would be a *quantitative approach*, deeming systems effective if they achieve certain thresholds concerning the economic value of frozen assets or the individuals held accountable for violating restrictive measures. This perspective is also reflected in the Commission's considerations, where the low number of frozen assets and individuals investigated or convicted for violating economic sanctions is mentioned as a relevant factor describing the inefficiency of the *status quo*. Still, even this angle does not strongly justify the use of criminal law. Firstly, mere numerical factors are not inherently indicative of inefficiency. For instance, the low number of individuals investigated or convicted could be attributed to the limited resources allocated by Member States for conducting such investigations. Similarly, it might result from a lack of political will in certain jurisdictions to pursue violations of restrictive measures. Additionally, the complexity of the investigations – whether administrative or criminal – required to identify the assets to be frozen (often located abroad) or the individuals to be investigated can also be a

[86] On this point, see Mirko Sossai, *Sanzioni delle Nazioni Unite e organizzazioni regionali* (Roma TRE-Press 2020) 13ff. and references therein. The deterrent purpose of economic sanctions is also mentioned by Daniel P Ahn and Raymond D Ludema, 'The sword and the shield: The economics of targeted sanctions' (2020) 130 European Economic Review 1, 3ff, and Gary Clyde Hufbauer and Euijin Jung, 'Economic sanctions in the twenty-first century' in Peter A G van Bergeijk (ed), *Research Handbook of Economic Sanctions* (Edward Elgar 2021) 36. The latter authors also cite the retributive and rehabilitative purposes of economic sanctions (ibid 37–38).

[87] Niccolò Ridi and Veronika Fikfak, 'Sanctioning to Change State Behaviour' (2022) 13 Journal of International Dispute Settlement 210.

significant factor in this regard. Secondly, it should be noted that in 12 Member States, violations or circumventions of sanctions were considered exclusively criminal offences prior to the recent criminalisation process, while in another 13 Member States, such conduct was punished through a dual-track system of administrative and criminal penalties, depending on the severity of the offence. Despite this, the enforcement rate of economic sanctions has been particularly deficient. This suggests that the added value of criminal sanctions has not been conclusively demonstrated, at least at first glance. Whether greater reliance on administrative law could enhance the implementation of restrictive measures from a 'quantitative' perspective remains an open question, which the EU legislator does not seem to have fully considered.

Finally, the enforcement of restrictive measures could be deemed effective in achieving broader objectives beyond those directly related to the CFSP. In the current geopolitical scenario, this notion of effectiveness could aim not only to penalise Russia and its allies for their actions but also to establish the legal framework for repurposing frozen assets and funds to support the post-war reconstruction of Ukraine. This perspective, which can be classified as a *restorative approach*, suggests that, in the absence of better alternatives, national authorities should be equipped with adequate tools not only to freeze assets linked to the violation of restrictive measures but also to facilitate their subsequent use for the aforementioned purposes. Therefore, if only restrictive measures that ultimately enable the *concrete repair of damages* caused by the targets' conduct are considered effective, then the use of criminal law might, in theory, be appropriate.

Indeed, if we calibrate the concept of 'effectiveness' in this manner, it could be argued that the only legal instruments capable of definitively severing the *fil rouge* between an asset and its owner are those related to criminal procedure, specifically *confiscation* orders, typically preceded by *interim* freezing orders. This aspect is crucial. Restrictive measures may at least *freeze* assets or funds belonging to targets, but such a measure is provisional. As the Commission has stated, "sanctions in general and asset freezes in particular do not entail expropriation and are of a temporary nature".[88] However, it goes without saying that only assets *definitively* removed from their owner can be effectively repurposed for restorative purposes. In this light, the criminalisation process could find its own justification, as it would provide national authorities with the most appropriate tool (i.e., confiscation measures) to achieve the restorative purpose of ensuring the post-war reconstruction of Ukraine.[89]

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[88] 'Asset freeze and prohibition to provide funds or economic resources' (EU Commission, 24 July 2023) <https://finance.ec.europa.eu/system/files/2023-07/faqs-sanctions-russia-assets-freezes_en.pdf> accessed 19 May 2024.

[89] Rosas (n 79) 337ff. For an examination of the legal challenges and feasibility of investing the frozen assets of Russia's Central Bank and using the proceeds to support Ukraine's post-war reconstruction efforts, see Ron van der Horst, 'Illegal, Unless: Freezing the Assets of Russia's Central Bank' (2023) 34(4) EJIL 1021, 1021ff.; Menno T Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?' (2023) 70 Netherlands International Law Review 1; Ivan Yakoviyk and Anna Turenko, 'Confiscation of Russian Assets for the Restoration of Ukraine: Legal Problems of Implementation' (2023) 161 Problems of Legality 6, 6ff.

Nevertheless, even this approach presents several challenges. Given the foregoing, it is evident that the EU restrictive measures legal framework lacks mechanisms capable of *definitively* expropriating assets from a target. This highlights a fundamental misalignment with the 'restorative' approach, as restrictive measures are *inherently* designed to be *temporary*. Accordingly, their purposes – whatever they be – could never be that of post-war reconstruction, as this step requires, as anticipated, permanent expropriation measures not provided for within their frameworks. In this context, criminal law cannot be regarded as a tool for enhancing the effectiveness of the sanctions enforcement mechanism, since it does not inherently align with the temporary nature of these measures. Consequently, criminal law seems to be employed here to introduce an *ancillary tool* (i.e., confiscation orders) in this field that, although beneficial for restorative purposes, extends beyond the core objectives of the existing enforcement system.[90]

To sum up, none of the three proposed models adequately identifies what we are talking about when determining when and to what extent the enforcement of EU restrictive measures is to be deemed 'effective'. The notion of 'effectiveness' remains elusive, though at least one partial consideration can be made. Whatever grounds render such a system effective shall be linked to the temporary nature of restrictive measures. This is why a 'restorative' approach to effectiveness should be set aside, as it would disregard the fact that economic sanctions were not designed to be permanent. The difficulty in identifying an effective sanctions enforcement mechanism consequently clouds the determination of the necessity for criminal law-based legislative interventions. What added value can criminal law provide in this area if it is challenging to establish the criteria for such a framework to be effective? Without a clear and compelling justification for the *essentiality* of criminal law in a specific field, its application should be cautiously reconsidered.

E. CONCLUDING REMARKS

In conclusion, while criminalising the violation of restrictive measures may initially appear to offer a deterrent effect against such conduct, the multifaceted nature of 'effectiveness' in relation to the implementation of economic sanctions – which criminal law should seemingly support – suggests a need for a strategic shift in this regard.

Perhaps, other-than-criminal legal tools, such as those related to civil or administrative law, might better suit the matter at hand, avoiding the rigidity and complexities of criminal proceedings. Recalibrating the strategy to ensure meticulous, rigorous, and comprehensive adherence to the restrictive measures against (but not limited to) Russia could be the winning approach for

[90] This contrasts with the previously discussed 'means-end' and 'quantitative' approaches. Although not fully consistent with the use of criminal law in this domain, these approaches at least propose that the criminalisation initiative could enhance the enforcement of restrictive measures – whether through inducing behavioural change in the relevant targets or creating a deterrent effect by freezing a significant number of assets. These approaches suggest that criminal law might strengthen the existing sanctions regime, provided that these objectives remain *temporary*.

achieving a tangible, swift, and effective implementation of these foreign policy tools.

The notion that restrictive measures are “easy to adopt, difficult to implement”[91] should not mistakenly lead one to believe that the same applies to criminal sanctions. Criminal sanctions should *never* be adopted lightly. This is especially true when employing the burdensome machinery of criminal justice to oversee a highly complex and technical area like the CFSP, which, in contrast, requires streamlined and functional tools to operate optimally.

In this context, the enduring relevance of the questions posed by Advocate General Mazák, which remain unanswered, merits further reflection – “When are rules in a specific field not sufficiently effective or not ‘fully effective’, thus necessitating the instrument of criminal law? What is the contribution of criminal penalties to the effectiveness of a law?”.[92]

[91] Bryan R Early, ‘Confronting the Implementation and Enforcement Challenges Involved in Imposing Economic Sanctions’ in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill 2016) 43.
[92] Case C-440/05 (n 25) Opinion of AG Mazák, paras 116–117.

THE RIGHT TO EDUCATION FOR CHILDREN ON THE MOVE: A STATUS-BASED REALITY?

Nya M. Gnaegi

A. INTRODUCTION

(1) Setting the Scene

The value and importance of education are not novel nor revolutionary. George Danton is cited to have declared, in the midst of the French revolution, "après le pain, l'éducation est le premier besoin du peuple."[1] This fundamental significance of education is reflected not only in international law,[2] but also shared moral values; education *should* be universal, all children *should* go to school. With nearly all states having signed and ratified the UNCRC and the ICESCR, as well as numerous other international instruments that promise universal education, the right has come to be applicable to all children, regardless of nationality, socio-economic background, race, gender, legal status, or other dividing characteristics.[3] While the concept of "Education for All" has near-universal appreciation and acknowledgement,[4] its application falls short of its universal character. One group that faces difficulties in accessing this right, are children on the move, a term deliberately chosen through its

[1] "After bread, education is the primary need of the people.", (author translation) George Danton, at the National Convention (1793), quoted in Allison Anderson, Peter Hyll-Larsen and Jennifer Hofmann, "The Right to Education for Children in Emergencies", (2011), Journal of International Humanitarian Legal Studies, Vol. 2(1), p85.

[2] United Nations Convention on the Rights of the Child, (adopted 20 November 1989, entered into force 2 September 1990) 1577 U.N.T.S 3, (hereafter UNCRC), art 28-29; International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 999 U.N.T.S 171, (hereafter ICESCR), art 13; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), (hereafter UDHR), art 26.

[3] See ibid.

[4] UNESCO, "World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs", (adopted by World Conference on Education for All Meeting Basic Learning Needs), Jomtien, 1990, (ED-90/COF.205), (hereafter Jomtien Declaration on Education).

inclusive nature. This paper will examine how states have limited children on the move from the accessibility of the right to education through a *de facto* nexus to legal status. By creating legislation around access to education, states, in effect, exclude children on the move from their educational institutions. This article will examine this phenomenon through an in-depth analysis of sub-Saharan migrants in Morocco and Syrian refugees in Lebanon. These two states were chosen specifically due to their presence of children on the move and the depth of discussion surrounding their educational opportunities.

The underlying tension surrounding this discussion rests on two competing state interests: on the one hand there is the international legal obligation to provide education for all children. On the other however, is the desire to limit and control migration. Refugees and migrants pose unique challenges to the state due to their lack of third-state protection. As James Hathaway articulates, "when the bond of protection between citizen and state is severed, no international entity may be held accountable for the individual's actions. The result is that states are reluctant to admit to their territory individuals who are not the legal responsibility of another state."[5] This breakdown of state protection gives rise to xenophobia and the often exaggerated, fear of potential terrorists. By asserting that "people want the boy in Queen Rania's story, not in the Charlie Hebdo's", this explanation suggests that it is this fear of educating potential terrorists that keeps states from fulfilling their international obligations.[6] Resolving these two competing interests is the tension field in which refugee and migration law lies.

This article will firstly examine the current international law surrounding the international right to education to analyse and justify the term "children on the move". Then the focus will shift to the two case studies in Morocco and Lebanon, where both the domestic frameworks surrounding children on the move, as well as the barriers within these frameworks will be considered. The case studies of Morocco and Lebanon will be used in a comparative analysis to illustrate how the different legal statuses attributed to children can lead to exclusion and how the migration-control theory provides for an ideological justification.

For the present purposes, "children" will be defined as "every human being below the age of eighteen years".[7] The focus will remain on states'

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[5] James Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984), International and Comparative Law Quarterly, Vol. 33(2), p358.

[6] Jana Tabak and Leticia Carvalho, "Responsibility to Protect the Future: Children on the Move and the Politics of Becoming", (2018), Global Responsibility to Protect, Vol. 10(1-2), p140-144; see also Rachel Humphris and Nando Sigona, "The Bureaucratic Capture of Child Migrants: Effects of In/visibility on Children on the Move", (2019), Antipode, Vol. 51(5), p1496-1497; Roberto G. Gonzales, "On the Rights on Undocumented Children", (2009), Society (New Brunswick), Vol. 46(5), p419; Marcelo M. Suárez-Orozco, *Humanism and Mass Migration: Confronting the World Crisis*, (2018, California Scholarship Online), p85-87+105+268.

[7] UNCRC, n2, art 1.

obligations to provide for the right to education, rather on potential for derogation. Similarly, the emphasis of this article is primary and secondary education, tertiary and higher education as well as vocational or other training will be largely set aside. While it is acknowledged that universal education encompasses more challenges than accommodating for children on the move, such as cultural, gender, transport, financial, etc., the focus will remain with children on the move.

(2) Terminological Framework

One of the major issues surrounding the application of the right to education in the context of children on the move, is its placement within refugee and migration law more broadly. As mentioned, the difficulty arises from the precarious nature of refugees and migrants due to the lack of state protection coupled with the international obligation on states to provide certain rights to *all*. States have, as a response, created various groupings of people based on clear and established definitions (e.g. "refugees", "irregular migration", "migrant worker", "internally displace people (IDPs)", "unaccompanied and separated children (UASC)"). On the basis of this, international instruments have come to apply selectively to those people falling within those specific definitions.

For example, the Convention Relating to Refugees protects the rights of those who fall within the definition of 'refugee' contained in article 1.[8] A 2005 CRC General Comment on UASC ensures that "every UASC, irrespective of status, shall have full access to education in the country that they have entered".[9] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides protection to children of migrant workers.[10] And the Kampala Convention guarantees the right to education for IDPs within the AU.[11]

This fragmentation on the basis of definition has created a system in which universal rights, such as the right to education, is protected and promoted on the basis of legal status. The extent of this uneven treatment is most acutely seen in the New York Declaration for Refugees and Migrants in which states: "will consider developing *non-binding guiding principles* and voluntary

[8] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S 137, (hereafter Refugee Convention), art 1(2); UNICEF, *In Search for Opportunities: Voices of Children on the Move in West and Central Africa,* (July 2017), p19; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, (réalisée pour Caritas au Maroc et Médecins du Monde Belgique), (April 2016), p81.
[9] UN Committee on the Rights of the Child (CRC), "General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin", (1 September 2005), CRC/GC/2005/6, para 41-43.
[10] International Convention on the Protection of the Rights of All migrant Workers and Members of Their Families, (adopted 18 December 1990, entered into force 1 July 2003), 2220 U.N.T.S 3, art 2(1)+30.
[11] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), (adoption 23 October 2009, entry into force 06 December 2012), art 1(l) + 9.

guidelines […] on the treatment of *migrants* in vulnerable situations",[12] yet are "*determined* to provide quality primary and secondary education in safe learning environments for all *refugee* children".[13] In their opening phases they proclaim that the protection of the two groups have "separate legal frameworks" with equal "universal human rights and fundamental freedoms."[14]
It is precisely due to this unequal treatment towards a right that international law promises to be universal that the international community moved towards more inclusive terminology, 'children on the move'.[15] This new term was sought after as an umbrella term to include refugees, asylum seekers, migrants, IDPs, UAWC, and any other "children who have left their place of habitual residence and are either on the way towards a new destination or have already reached such a destination."[16] Though the biggest categories within the group are refugees, asylum seekers, IDPs, and migrants, the definition centres around the *inclusion* of any child who has left their habitual residence, rather than the *exclusion* via status definition.[17] The term 'children on the move' acknowledges that different statuses lead to exclusion,[18] that legal status can alter and fluctuate,[19] that these children all face similar challenges,[20] and mostly that children are first and foremost children.[21] As UNICEF proclaims; "regardless of whether they are migrants, refugees, or internally displaced, children are children. They have a right to education."[22] The "gaps in the systems" can only be combatted with inclusive-based terminology, that encompasses all 65 million children estimated to be on the move.[23]

(3) International Legal Protection

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[12] UNGA Resolution, "New York Declaration for Refugees and Migrants", (3 October 2016), A/RES/71/1, para 52.
[13] Ibid, para 81, (emphasis added).
[14] Ibid, para 6.
[15] See Daniela Reale, *Away from Home – Protecting and Supporting Children on the Move*, (2008, Save the Children UK), p3-4; Kyle Vella, "Power, paternalism and children on the move", (2016), Journal of International Humanitarian Action, Vol. 1(1), p6; Tabak and Carvalho, "Responsibility to Protect the Future", n6, p122+130-131; Suárez-Orozco, *Humanism and Mass Migration*, n6 p83-84 + 186-7.
[16] Mike Dottridge, *What can YOU do to protect children on the move*, (2012, Terre des Hommes International Federation), p22.
[17] Tabak and Carvalho, "Responsibility to Protect the Future", n6, p122; Anderson, Hyll-Larsen and Hofmann, "The Right to Education for Children in Emergencies", n1, p90-93; Rachel Marcus, et al, *What Works to Protect Children on the Move: Rapid Evidence Assessment*, (July 2020, UNICEF), p20 + 25.
[18] Suárez-Orozco, *Humanism and Mass Migration*, n6 p186; Aysen Üstübici, *The Governance of International Migration: Irregular Migrants' Access to Right to Stay in Turkey and Morocco,* (2018, Amsterdam University Press), p26.
[19] Ibid, p19-20.
[20] Marcus, *What Works to Protect Children on the Move: Rapid Evidence Assessment*, n17, p7.
[21] OHCHR, *Recommended Principles to Guide Actions Concerning Children on the Move and Other Children Affected by Migration*, (June 2016).
[22] UNICEF, *Education Uprooted: For every migrant, refugee and displaced child, education*, (September 2017), p5.
[23] UNICEF, *In Search for Opportunities*, n8, p2 + 19.

As early as 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child as the first international children's rights declaration.[24] After WWII, the UDHR articulates the right to education specifically,[25] and it is later formulated as a legal obligation on states in the ICESCR; "state Parties […] recognise the right of everyone to education."[26] The protection of children's rights however, finds its most concrete footing in 1989 within the UN Convention on the Rights of the Child (UNCRC).[27] The Convention devotes articles 28 and 29 to the right to education, reaffirming the universality of this right, "on the basis of equal opportunity", making "primary education compulsory and available free to all". Moreover, in that same article the duty to provide this "equal", "compulsory" and "free" education is placed squarely on the shoulders of states; "they shall" provide education for all.[28] It is the duty of state parties to make education free and compulsory, encourage regular attendance, ensure disciplinary actions follow "the child's human dignity" and promote international cooperation.[29] With most states, including Morocco and Lebanon, having signed and ratified the UNCRC, the duty on states to provide universal primary education is firmly rooted within their international law obligations.[30] On a regional level, this protection is ensured within the African Charter on Human and Peoples' Rights,[31] the Charter of OAS,[32] the ASEAN Human Rights Declaration,[33] and the ECHR.[34] The picture that emerges is simple; the right to education is universal, firmly embedded in international law and is to be ensured and provided for by states.[35]

While this right is entrenched in international instruments, its application often falls short.[36] Worldwide, at least 258.4 million children are estimated to be

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[24] Geneva Declaration of the Rights of the Child, (adopted 26 September 1924), League of Nations.
[25] UDHR, n2, art 26.
[26] ICESCR, n2, art 13.
[27] UNCRC, n2.
[28] Ibid, art 28 + art 29.
[29] Ibid, art 28.
[30] Ibid, ratifications.
[31] African (Banjul) Charter on Human and Peoples' Rights, (adopted 27 June 1981, entry into force 21 October 1986), 21 I.L.M. 58, art 17(1).
[32] Charter of the Organisation of American States, (adopted 30 April 1948, entry into force 13 December 1951), 119 U.N.T.S 3, art 34.
[33] ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), (adopted February 2013) ASEAN Secretariat, (hereafter ASEAN Human Rights Declaration), art 31(h)+49.
[34] Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), (adopted 4 November 1950), (hereafter ECHR), protocol 1, art 2.
[35] Anderson, Hyll-Larsen and Hofmann, "The Right to Education for Children in Emergencies", n1, p86-92+97-98; for further discussion see Isolde Quadranti, "The Right to Education of Unaccompanied Minors and the Persistence of an Education Gap in their Transition to Adulthood", in Yvonne Vissing and Sofia Leitão, *The Rights of Unaccompanied Minors: Perspectives and Case Studies on Migrant Children*, (2021, Springer International Publishing), p165.
[36] see Jomtien Declaration on Education, n4, preamble; as well as UNESCO, "The Dakar Framework for Action, Education for All: Meeting our Collective Commitments", (adopted by World Education Forum), Dakar, 2000, (ED.2000/WS/27), (hereafter Dakar Framework for Action), art 5.

out of school, 23% of which are primary school aged.[37] In reality, this number may be much higher as children on the move are typically excluded from national data as many find themselves in "irregular" migration situations.

As a result of the failure of the international community to realise the right they had confirmed,[38] a number of international conferences took place in the 1990s, starting with the World Conference on Education in Jomtien in 1990,[39] and leading to the formulation of the Education for All agenda in 2000.[40] In the Framework for Action, appropriately named *Education for All: Meeting our Collective Commitments*, world leaders acknowledged that it was "unacceptable in the year 2000 […] more than 113 million children have no access to primary education", and pledged six goals towards the achievement of universal education by 2015.[41] This was reflected in the MDGs established in that same year in goal 2: "achieve universal primary education" by 2015,[42] and then again in 2015 in SDG 4 to "ensure that all girls and boys complete free, equitable and quality primary and secondary education" by 2030.[43]
Regardless how much these soft law instruments have fleshed out the right, it crucially however, is a fundamental and core human right first and foremost and not a "tool or a non-binding development goal".[44] The right to education is a crucial right spelled out in major human rights instruments, both internationally and on a regional level. States have an international obligation to ensure and provide for compulsory, free, and universal education for all. This obligation is not constructed through the soft law instruments emerging in the 1990s but was established with the development of international human rights instruments.

B. BARRIERS TO EDUCATION: MOROCCO

(1) Contextualising the Right to Education

Due to its geographic location on the border of the EU, Morocco provides for an excellent example to contextualise the right to education for children on the move. Starting in the late 1990s, Morocco became a transition state for people on the move, often irregular sub-Saharan migrants with the dream to go to

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[37] UNESCO, *New Methodology Shows that 258 Million Children, Adolescents and Youth are Out of School*, (September 2019), UIS/2019/ED/FS/56; UNESCO, *Global Education Monitoring Report 2020 – Inclusion and Education: All means all*, (2020), ED/306/19, p4.
[38] Kai-Ming Cheng, "Education for All, but for What", in Joel E. Cohen and Martin B. Malin, *International perspectives on the Goals of Universal Basic and Secondary Education*, (2010, Routledge), p43.
[39] Jomtien Declaration on Education, n4.
[40] Dakar Framework for Action, n36.

[41] Ibid, art 5 + 7, (emphasis added).
[42] UNGA "United Nations Millennium Declaration, Resolution Adopted by the General Assembly", (18 September 2000), UN Doc A/RES/55/2, goal 2.

[43] UNGA "Transforming our world: the 2030 Agenda for Sustainable Development", (21 October 2015), UN Doc A/RES/70/1, goal 4.
[44] Anderson, Hyll-Larsen and Hofmann, "The Right to Education for Children in Emergencies", n1, p121.

Europe.[45] With the hope of crossing either the land borders to the Spanish enclaves, Ceuta and Melilla, the Mediterranean to the Spanish mainland, or the Atlantic to the Canary Islands, the influx of migrants has brough several challenges, including the right to education for the children involved.[46]

The classic tale goes as follows: nationals from sub-Saharan Africa, most often from Cameroon, Ivory Coast, Guinee Conakry or Senegal, leave their homes, often overcome horrific events to reach the border of Europe in Morocco, and then wait for the right opportunity to cross.[47] This waiting period can last a long time, with accounts ranging from a few days to years.[48] Their legal status during this waiting period is often precarious; most often they find themselves in the situation of "irregular migrant"; that is, "in a given territory without authorization by the sovereign state".[49] As a result of this, access to public services, including educational institutions become "one of the main sites of exclusion".[50] The children impacted by this exclusion from public services fall broadly into two categories; those born on the move who have reached school age, and those who have travelled either independently or with family members with the dream of achieving *Boza*, the term used by the community to mean having made it to Europe.[51]

To comply with their international obligation and strengthen the protection of children on the move, the government of Morocco has implemented various tools including signing and ratifying the UNCRC, incorporating the universal right to education within the Moroccan Constitution of 2011,[52] and establishing two domestic instruments. In October 2013 the Ministry of Education launched a circular "on the access to education for sub-Saharan and Sahel migrant children".[53] This was widely regarded as a crucial

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[45] Halima Qassemy*, Les enfants migrants et l'école marocaine: État des lieux sur l'accès à l'éducation des enfants migrants subsahariens au Maroc*, (April 2014, Tamkine Migrants), p5; UNICEF, *Situation des Enfants au Maroc: Module 4 – Les Enfants Migrants*, (November 2019), p9; Üstübici, *The Governance of International Migration*, n18, p56; Ministère délégué auprès du Ministre des Affaires Estrangères et de la Coopération International, Chargé des Marocains Résident à l'Étranger et les Affaires de la Migrations, *Politique National d'Immigration et d'Asile – Rapport 2018*, (2018), p11.

[46] Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p77.

[47] See Üstübici, *The Governance of International Migration*, n18, p15; but also Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p77; UNICEF, *In Search for Opportunities*, n8, p4.

[48] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p5; UNICEF, *Situation des Enfants au Maroc: Module 4 – Les Enfants Migrants*, n45, p9.

[49] Üstübici, *The Governance of International Migration*, n18, p19.

[50] Ibid, p26.

[51] Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p50-53 + 77.

[52] La Constitution, Royaume du Maroc: Secrétariat Général du Gouvernement, (edition 2011), art 31; see also Üstübici, *The Governance of International Migration*, n18, p108; UNESCO, *Global Education Monitoring Report 2019 – Migration, Displacement and Education: Building Bridges, Not Walls*, (2019), ED/306/15, p44; Qassemy*, Les enfants migrants et l'école marocaine*, n45, p12; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p32.

[53] Circulaire nr. 13-487 du 9 October 2013 sur l'Accès à l'Éducation des Enfants Migrants Subsahariens et du Sahel, (9 October 2013), 13-487, Morocco, (author translation); see also

step in the right direction and welcomed warmly.[54] In the 2015-16 academic year it was reported that over "7500 [...] children were enrolled in public schools".[55] However, this figure includes all foreign children, including children of expats in international schools and is an overestimation of the number of *migrant* children in schools. Additionally, conditions of access enclosed within circular continue to be difficult to achieve for many migrant families, making it challenging for them to profit from the new policy.[56]

As a more general approach to the challenges faced by the flow of irregular migrants, Morocco released a new "Stratégie Nationale d'Immigration et d'Asile" (National Strategy for Immigration and Asylum, SNIA) in 2014.[57] The new strategy aimed at "ensuring a better integration of immigrants and management of migratory flows within the framework of a coherent, global, humanist and responsible policy."[58] In its educational section, SNIA recognises education as a fundamental right and articulates programs to encourage the enrolment of all, regardless of their legal status.[59] While these policies have made progress,[60] the education framework surrounding children on the move still leaves out many. Both the circular and SNIA have been successful to a certain degree to include children on the move in education, yet they also have created some fundamental barriers discussed below.

Üstübici, *The Governance of International Migration*, n18, p110; UNESCO, *Global Education Monitoring Report 2019*, n52, p44; Caritas Maroc, *L'Intégration Scolaire Des Élèves Primo-Arrivants Allophones dans le Système Scolaire Public Marocain: Observations et recommandations de Caritas*, (June 2015), p4; Qassemy*, Les enfants migrants et l'école marocaine*, n45, p12; UNICEF, *Situation des Enfants au Maroc: Analyse selon l'approche équité,* (November 2019), p91; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p32.

[54] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p8-9 + 17, (author translation); UNESCO, *Global Education Monitoring Report 2019*, n52, p44.
[55] UNESCO, *Global Education Monitoring Report 2019*, n52, p44.
[56] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p10 + 17; Caritas Maroc, *L'Intégration Scolaire Des Élèves Primo-Arrivants Allophones dans le Système Scolaire Public Marocain*, n53, p8; Üstübici, *The Governance of International Migration*, n18, p110.
[57] Ministère Chargé des Marocains Résidant à l'Étranger et des Affaires de la Migration, *Stratégie National d'Immigration et d'Asile,* (December 2014), (author translation); see also Ministère délégué auprès du Ministre des Affaires Estrangères et de la Coopération International, *Politique National d'Immigration et d'Asile – Rapport 2018*, n45; Ministère délégué auprès du Ministre des Affaires Estrangères et de la Coopération International, Chargé des Marocains Résident à l'Étranger et les Affaires de la Migrations, *Politique National d'Immigration et d'Asile – Rapport 2020*, (2020).

[58] Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p40, (author translation).
[59] Ministère Chargé des Marocains Résidant à l'Étranger et des Affaires de la Migration, *Stratégie National d'Immigration et d'Asile,* n57, p10-12; see also Ministère délégué auprès du Ministre des Affaires Estrangères et de la Coopération International, *Politique National d'Immigration et d'Asile – Rapport 2020*, n57, p3; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p40.
[60] See Ministère délégué auprès du Ministre des Affaires Estrangères et de la Coopération International, *Politique National d'Immigration et d'Asile – Rapport 2018*, n45; Ministère délégué auprès du Ministre des Affaires Estrangères et de la Coopération International, *Politique National d'Immigration et d'Asile – Rapport 2020*, n57.

(2) Barriers in Morocco

This framework, the circular and SNIA, has not gone far enough and has failed to take regard of significant barriers facing a large proportion of irregular migrants in Morocco. This section will outline the following barriers: the lack and difficulty in obtaining the documents necessary for enrolment in schools, the constant fear of deportation and violence, the racism and hatred experienced, the language and cultural difficulties surrounding the integration of children into the school system, and finally the mobility of migrants. These difficulties have continued to make access to education difficult for many.[61]

The first barrier is the difficulty in obtaining the necessary documents to enrol in schools.[62] These, per the 2013 circular, are fivefold: a formal request signed by the father or guardian of the child, a school certificate for each completed school year, a copy of the father or guardian's passport or ID, a copy of the residence card, and a copy of the birth certificate or equivalent of the child.[63] These documents are difficult for many to obtain, birth certificates especially are rare; "the lack of access to a birth certificate has led to the transmission of illegality from one generation to the next and has deprived children of public education."[64] However, this is not the only document needed for enrolment. The need for a formal paternal request has as systematically excluding unaccompanied minors.[65] The requirement for a residency card, further provides for a limitation as irregular migrants lack legal standing for a residency card.[66] While the 2013 circular therefore in theory opened education opportunities up to sub-Saharan migrants in Morocco, the conditions attached on the enrolment of children "constitutes an administrative barrier which restricts their effective access to educational establishments."[67] The attached conditions make the situation *de facto* excludes children on the move.[68]

In a similar fashion, the illegality of their stay brings about fears of violence and deportation.[69] While many migrants enter Morocco legally, often

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[61] Plateforme Nationale Protection Migrants, *État des Lieux de l'accès aux services pour les Personnes Migrantes au Maroc: Bilan, perspectives et recommandations de la société civile*, (2017), p20.
[62] Üstübici, *The Governance of International Migration*, n18, p109; Qassemy*, Les enfants migrants et l'école marocaine*, n45, p9+17+40; UNICEF, *Situation des Enfants au Maroc: Module 4 – Les Enfants Migrants*, n45, p27; UNICEF, *Situation des Enfants au Maroc: Analyse selon l'approche équité,* n53, p91; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p88.
[63] Circulaire nr. 13-487 du 9 October 2013, n53.

[64] Üstübici, *The Governance of International Migration*, n18, p109; see also Qassemy*, Les enfants migrants et l'école marocaine*, n45, p40.
[65] UNICEF, *Situation des Enfants au Maroc: Analyse selon l'approche équité,* n53, p91.
[66] Circulaire nr. 13-487 du 9 October 2013, n53; see also Qassemy*, Les enfants migrants et l'école marocaine*, n45, p40-41.
[67] Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p88, (author translation).
[68] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p9+17; UNICEF, *Situation des Enfants au Maroc: Module 4 – Les Enfants Migrants*, n45, p27.
[69] Üstübici, *The Governance of International Migration*, n18, p21-22+30+47+58+207-14; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p77+100.

due to no-visa regimes with their country of origin, many do so without having their passport stamped or overstay their visa-free period. The fragmented definitional approach of refugee and migration law has led to many migrants in Morocco being classified as "irregular". This results in a situation where many are afraid to access public services in fear of deportation; "migrants also consciously choose not to send their children to school, […] because these are ways that they can be identified and targeted by the authorities."[70] This "criminalization of irregular migration at the policy level, and at the level of public opinion" has led to a situation where exclusion and hiding become daily realities.[71] The marginalisation of irregular migrants and the fear of deportation has not been addressed within the Moroccan policy and continues to be a major difficulty surrounding education for all in Morocco.

Racism and hatred are widespread realities for Sub-Saharan migrants in Morocco.[72] Racism, "marked by a lack of respect and humiliation", is often cited as a reason why parents are hesitant to send their children to school.[73] Parents are quoted to express that "frankly it hurts my heart to see my children cry every day. Other students take their belongings and destroy them. I choose to keep them at home instead of watching them suffer."[74] This hostility toward migrant communities is not only at the hands of other children, but also at the hands of adults and teachers, both in schools and within day-to-day life; "people here are very racists with the blacks."[75] In their newsletter, the Délégation Diocésaine des Migrations, a church run organisation in northern Morocco, published a poem by "M.K. A Black Stranger";
"In this ruthless forest, I no longer am a human being. / I no longer am a being with rights. / I no longer am a being of love. / I no longer am a being respected and considered. / I no longer am a free being. / In this ruthless forest, I am just a stranger who one needs to chase – seize – strike – steal – or often injure."[76] In this reality, access to education becomes characterised by exclusion, racism and hatred.

The exclusion of otherness poses further difficulties when it comes to language and religion, which in Morocco are established as being Arabic and Islam. Children from sub-Saharan families often do not speak Arabic and

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[70] Üstübici, *The Governance of International Migration*, n18, p30 also 22+47+211.
[71] Ibid, p212-214.
[72] Caritas Maroc, *L'Intégration Scolaire Des Élèves Primo-Arrivants Allophones dans le Système Scolaire Public Marocain*, n53, p6; Qassemy*, Les enfants migrants et l'école marocaine*, n45, p24+37; Caritas au Maroc, *Perceptions & Expériences de l'accès des personnes migrantes aux services publics marocains – Une étude menée à Casablanca, Fès, Meknès, Rabat & Tanger*, (April 2017), p45.
[73] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p24, (author translation) + 37; Caritas Maroc, *L'Intégration Scolaire Des Élèves Primo-Arrivants Allophones dans le Système Scolaire Public Marocain*, n53, p6.
[74] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p37, (author translation).
[75] Caritas au Maroc, *Perceptions & Expériences de l'accès des personnes migrantes aux services publics marocains*, n72, p45, (author translation); Caritas Maroc, *L'Intégration Scolaire Des Élèves Primo-Arrivants Allophones dans le Système Scolaire Public Marocain*, n53, p6; Qassemy*, Les enfants migrants et l'école marocaine*, n45, p37.
[76] M.K. Un étranger noir, *Dans la forêt impitoyable*, as quoted in Délégation Diocésaine des Migrations – Zone Orientale, "Novembre-Decembre 2020: Newsletter 6", *Délégation Diocésaine des Migrations Newsletters*, (December 2020), p7, (author translation).

parents from non-Muslim backgrounds oppose Islamic teachings.[77] Migrant children often come from English or French speaking backgrounds and face challenges with the curriculum taught in Arabic.[78] This is particularly pronounced as many do not plan to stay in Morocco; their goal is to reach Europe, with Morocco being a State of transition.[79] "Some parents are not convinced of the usefulness of learning Arabic for their children, especially for those who whose main goal remains going to Europe."[80]

Additionally, many migrants often do not stay in one city for a prolonged time due to the violence and racism. The movement often occurs between cities of rest and work, where issues around deportation and racism are less severe, such as Fes, Meknes, Casablanca or Rabat, and the cities closer to the borders of Europe, where there is the potential for *Boza* yet fear of violence, such as Tangier or Nador.[81] This inter-state mobility does not go well with educational opportunities, with schools being stationary in one place; "the constant mobility of their parents has a negative influence on the school process of the child".[82] While this is a self-inflicted barrier, the mobility of children on the move continues to present a challenge to their education.

Due to its geographic location Morocco has faced an influx of migrants and has taken various legislative steps to incorporate the right to education for the irregular migrants within their jurisdiction through the implementation of the 2013 circular and the 2014 SNIA. However, children on the move continue to face difficulty accessing education, due to several hurdles including the lack of documentation, the fear of deportation, the daily racism and hatred, the language barrier in schools, and the mobility of migrant communities. This has created a framework that *de facto* excludes children on the move from accessing a right that promises to be universal.

C. BARRIERS TO EDUCATION: LEBANON

(1) Contextualising the Right to Education

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[77] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p24; UNICEF, *Situation des Enfants au Maroc: Module 4 – Les Enfants Migrants*, n45, p3 +34; UNICEF, *Situation des Enfants au Maroc: Analyse selon l'approche équité,* n53, p97; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p88.

[78] UNICEF, *Situation des Enfants au Maroc: Module 4 – Les Enfants Migrants*, n45, p30.

[79] Ibid, p43; UNICEF, *Situation des Enfants au Maroc: Analyse selon l'approche équité,* n53, p97; Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p88; Qassemy*, Les enfants migrants et l'école marocaine*, n45, p24.

[80] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p24, (author translation); see also Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p88.

[81] Consulting&Development, *Mineur-e-s non accompagné-e-s, en recherche d'avenir*, n8, p79-80.

[82] Qassemy*, Les enfants migrants et l'école marocaine*, n45, p41, (author translation); see also Vijitha Rajan, "The Ontological Crisis of Schooling: Situating Migrant Childhoods and Educational Exclusion", (2021), Contemporary Education Dialogue, Vol. 18(1), p163.

Lebanon too is also confronted with the inclusion of many non-nationals into their national education system yet, contrary to Morocco, this is not a new phenomenon. “Housing a large percentage of refugees is far from a foreign concept to the Lebanese”, seeing first Armenians refugees following the collapse of the Ottoman Empire and later Palestinians following the Palestinian war, 1948-1967.[83] The large flow of recent Syrian refugees has created new challenges due to the highly sectarian nature of the Lebanese State, coupled with its complicated history with Syria.[84]

Lebanese society is a collection of more than 18 religious sects that largely dominate one’s “identity, social position and political power”.[85] Tensions between those groups have led to periodic unrest and a civil war from 1965 to 1989 which saw the entering of the Syrian army in 1976.[86] The Taif Agreement, ending the civil war, assigned equal numbers of parliamentary seats to religious groups and determined the religious affiliations “of the positions of president, prime minister and speaker of the chamber of deputies to a Maronite, Sunni and Shia, respectively.”[87] It further established a “special relationship” between Lebanon and Syria, constituting itself as Syrian occupation over a major part of Lebanon and interference in domestic politics. This did not end until 2005 with the assassination of the Lebanese prime minister.[88]

These communal tensions also impacted the Lebanese educational system, with difficult debates on the history curriculum, citizenship education and multilingualism marking the post-war era.[89] The only agreement that emerged is on multilingualism, with various subjects being taught in either English or French, as well as Arabic.[90] As a result of the ongoing curriculum debate, the majority of Lebanese students attend private schools, often affiliated to religious institutions, where the curriculum is more flexible.[91]

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[83] Shereen Hamadeh, “A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework”, (2019), Journal of Education Policy, Vol. 34(3), p377-378.
[84] Ibid, p378-380; Elizabeth Buckner, Dominique Spencer and Jihae Cha, “Between Policy and Practice: The Education of Syrian Refugees in Lebanon”, (2018), Journal of Refugee Studies, Vol. 31(4), p447-448; Sarah Dryden-Peterson, et al, *Inclusion of Refugees in National Education Systems*, (Background paper from Global Educational Monitoring Report 2019), (2018), ED/GEMR/MRT/2018/P1/6, p31-32; World Bank, *Lebanon: Economic and Social Impact Assessment of the Syrian Conflict*, (September 2013), No. 81098-LB, p5; Giuditta Fontana, *Education Policy and Power-Sharing in Post-Conflict Societies: Lebanon, Northern Ireland, and Macedonia,* (2017, Springer International Publishing), p5 + 62-77.
[85] Fontana, *Education Policy and Power-Sharing in Post-Conflict Societies*, n84, p5.
[86] Ibid, p73-75; Hamadeh, “A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework”, n83, p378; Buckner, Spencer and Cha, “Between Policy and Practice: The Education of Syrian Refugees in Lebanon”, n84, p447.
[87] Fontana, *Education Policy and Power-Sharing in Post-Conflict Societies*, n84, p74; see also Hamadeh, “A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework”, n83, p378.
[88] Fontana, *Education Policy and Power-Sharing in Post-Conflict Societies*, n84, p74; Hamadeh, “A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework”, n83, p378; Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p31.
[89] Fontana, *Education Policy and Power-Sharing in Post-Conflict Societies*, n84, p127-133+163+198-199; see also Buckner, Spencer and Cha, “Between Policy and Practice: The Education of Syrian Refugees in Lebanon”, n84, p448.
[90] Ibid, p198-202.
[91] Buckner, Spencer and Cha, “Between Policy and Practice: The Education of Syrian Refugees in Lebanon”, n84, p448.

The recent influx of Syrian refugees, the vast majority being Muslim, raised concerns about the political effects and dangers of upsetting this religious balance, with the civil war still being in "living history".[92] The irony that it is the same "soldiers who left Lebanon in [2005 who] have returned to the Lebanese cities they were based at with their families as refugees" is not lost to the Lebanese, and led to a reserved response toward the Syrian civil war from the Lebanese government.[93] Nevertheless, the sudden and large influx of refugees could not be set aside, "the undeniable truth is that a sudden increase in population of 1.5 million of over half being school aged children comes with challenges that must be considered."[94]

This "undeniable truth" however, has a second layer to it; Lebanon is not a signatory to the 1951 Refugee Convention.[95] While this paper, and international literature, refers to Syrians displaced due to the war as *refugees*, notable is that Lebanon has not assigned them refugee status and refers to them as "displaced" or "non-Lebanese".[96] This has created a situation where people, who would be classified as refugees under international law, have no legal status and face difficulties surrounding access to public services.[97] The closing of their border with Syria, as well as the instruction to the UNHCR to stop the registration of Syrian refugees in 2015, added to this and increased difficulties surrounding access to humanitarian support.[98] This has pushed NGOs working within this field to approach the topic of Syrian refugee education in Lebanon from a "child-rights" rather than a "refugee-rights" point of view, focusing on Lebanon's commitment to children's rights under UNCRC, ratified

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[92] Ibid, p447; Fontana, *Education Policy and Power-Sharing in Post-Conflict Societies*, n84, p76-77; Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p379 + 383; Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p30; World Bank, *Lebanon: Economic and Social Impact Assessment of the Syrian Conflict*, n84, p5; Shelly Culbertson and Louay Constant, *Education of Syrian Refugee Children: Managing the Crisis in Turkey, Lebanon, and Jordan*, (2015, RAND Corporation), p52.

[93] Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p378; Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p451.

[94] Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p374 + 380; see also World Bank, *Lebanon: Economic and Social Impact Assessment of the Syrian Conflict*, n84, p1 + 3; Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p ix-x,49.

[95] Refugee Convention, n8, ratifications; see also Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p30; Morten Greaves, Mona Nabhani and Rima Bahous, "Tales of resilience and adaptation: a case-study exploring the lived-experiences and perceptions of Syrian refugee teachers in Lebanon", (2021), International Journal of Qualitative Studies in Education, Vol. 34(4), p431; Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p445.

[96] Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p30; Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p447; Greaves, Nabhani and Bahous, "Tales of resilience and adaptation", n96, p431.

[97] Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p447.

[98] Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p30; UNESCO, *Global Education Monitoring Report 2019*, n52, p57.

in 1991.[99] "[T]hey have advocated for Lebanon's international legal obligations to children, fully distinct from their legal obligation to refugees".[100]

In 2012 public schools were opened to children regardless of their status, with the Ministry of Education and Higher Education (MEHE) first bearing the costs of the new influx of students.[101] There was a fundamental shift in 2014 when a new policy aimed at improving infrastructure and support for Syrian refugees and disadvantages Lebanese students in public schools was implemented, "Reaching all Children with Education" (RACE).[102] This framework sought to improve "access, quality and systems strengthening" and "expand the capacity of the existing school system".[103] This policy has been supported financially by the international community.[104] While this financial support has made the implementation of the strategy possible, it has also opened up the policy to criticism and allegations that RACE was used to improve the Lebanese educational system rather than open education up to Syrian refugees; "RACE was widely viewed as an opportunity to strengthen the Lebanese education system."[105] As a part of RACE, MEHE introduced afternoon "Syrian-only" school shifts in an attempt to accommodate the large increase of school aged children.[106] These second shifts allowed for 250,000 Syrian children to be enrolled in the Lebanese national education system, accounting for 65% of refugee children in Lebanon.[107] While all of these steps made progress towards integrating children on the move in Lebanon into the national education system, limitations still constraint their educational opportunities.[108]

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[99] Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p453.
[100] Ibid, p453.
[101] Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p381.
[102] Ibid, p381-382; Ministry of Education and Higher Education, *Reaching All Children with Education (RACE)*, (June 2014); Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p447 + 452-453; UNICEF, *Education Uprooted*, n22, p25; Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p36.

[103] Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p452; Ministry of Education and Higher Education, *Reaching All Children with Education (RACE)*, (June 2014); see also Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p382; World Bank, *Lebanon: Economic and Social Impact Assessment of the Syrian Conflict*, n84, p3; UNHCR, *The Future of Syria: Refugee Children in Crisis*, (November 2013), p45.

[104] Buckner, Spencer and Cha, "Between Policy and Practice: The Education of Syrian Refugees in Lebanon", n84, p453.
[105] Ibid, p452-3; see also Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p382.
[106] Ibid, p452; Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p32; UNESCO, *Global Education Monitoring Report 2019*, n52, p63-64; Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p13.
[107] Greaves, Nabhani and Bahous, "Tales of resilience and adaptation", n96, p431.
[108] UNICEF, *Education Uprooted*, n22, p25; Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p13; World Bank, *Lebanon: Economic and Social Impact Assessment of the Syrian Conflict*, n84, p2-5; UNHCR, *The Future of Syria*, n103, p45; Dina Kiwan,

(2) Barriers in Lebanon

The main barriers facing the inclusion of Syrian refugees into the education system are the continued lack of capacity of schools, the multilingualism, transportation and other perceived access costs, and finally hatred and discrimination.

Even though RACE has aimed at expanding capacities, the "408,000 required spaced for Syrian children" has been a large increase for any school system to handle.[109] The large number of Lebanese students attending private schools since the civil war has pushed the public school system into the background, making its sudden increase in students difficult.[110] The second shift for Syrian children in the afternoon has allowed for more students to attend school, yet has also led to the overworking and exhaustion of teachers, with many teaching both the morning and afternoon shifts.[111] Additionally, teachers are often not trained the psychological trauma that many Syrian children carry with them.[112] The need for increased space and teacher qualification therefore presents one challenge to the education of Syrian refuges in Lebanon.

Furthermore, language barriers continue to be a hurdle difficult to overcome for many. One of the only educational debates settled after the civil war was the language of instruction.[113] In Syria the language of instruction in schools is entirely Arabic and many, particularly older children struggle to adjust to the English or French taught parts of the curriculum.[114] While this has been addressed in some schools who teach the entire curriculum in Arabic for Syrian students, other schools have not yet made an effort to overcome this language barrier.

Additionally, parents are hesitant to send their children to schools due to the transportation and perceived access costs.[115] As a result of RACE, international organisations and agencies "have agreed to pay for primary

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"Inclusion and citizenship: Syrian and Palestinian refugees in Lebanon", (2021), International Journal of Inclusive Education, Vol. 25(2), p284.

[109] Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p16.

[110] Ibid, p16.

[111] UNESCO, *Global Education Monitoring Report 2019*, n52, p64.

[112] Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p49+52.

[113] UNICEF, *Education Uprooted*, n22, p25; Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p17+52; UNHCR, *The Future of Syria*, n103, p49; Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p385.

[114] UNHCR, *The Future of Syria*, n103, p49; Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p17+52.

[115] Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p18-20; UNHCR, *The Future of Syria*, n103, p47; Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p33; Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p386.

education up until grade nine."[116] However, parents are still unaware of this and continue to be reluctant to send their children to school because of the perceived costs.[117] Those who are aware of this, are in turn sceptical due to the high transportation costs to schools.[118] This is a particular issue for those living in rural areas, where the "only way to get to school is by collective taxi", a fee often too high for refugee families to bear.[119] Some families estimate this cost to be as high as school fees themselves.[120] Costs continues to be a difficult burden for Syrian refugees to attend schools, either because they are unaware of the lack of school fees or due to the high transportation fees.

The final limitation is the discrimination and hatred from Lebanese students and teachers towards Syrian refugees.[121] The history of the war and the Syrian occupation, raises hostilities and tensions in schools. Students are being "subjected to verbal and physical abuse by teachers, principals and other students."[122] This discrimination constitutes itself as blaming Syrian children for issues such as political and economic problems in Lebanon to missing school materials.[123] This marks the daily experience for many and is a barrier to effective integration into the educational system.

Like Morocco, Lebanon has created a framework for the incorporation of children on the move into their educational sector. However, barriers facing Syrian refugees in Lebanon have continued, particularly in the continued lack of capacity of schools, the language of instruction, the cost (perception and transportation) and finally the discrimination and hatred.

D. UNIVERSAL EDUCATION: IS IT JUST TOO DIFFICULT?

(1) Comparing Case Studies

While some of the challenges facing Syrian children in Lebanon and sub-Saharan children in Morocco are similar, one fundamental difference comes to the foreground: Syrian refugees mostly face challenges *in* schools, while children on the move in Morocco face difficulties *getting access* to schools. The Moroccan 2013 circular's required documents for enrolment alongside the deportation and violence, systematically excludes irregular migrants from the Moroccan school system, undermining and disrespecting their universal right to education. The Syrian refugee population in Lebanon by contrast, do not face such legal hinderances. While in Lebanon issues surrounding quality and

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[116] Hamadeh, "A critical analysis of the Syrian refugee education policies in Lebanon using a policy analysis framework", n83, p386.
[117] Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p20.
[118] Ibid, p18; UNHCR, *The Future of Syria*, n103, p47; Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p33.
[119] UNHCR, *The Future of Syria*, n103, p47.
[120] Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p18.
[121] UNHCR, *The Future of Syria*, n103, p45+51; Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p35; Lebanese Institute for Democracy and Human Rights (LIFE), *Unprotected Refugees: The Second Legal Report of the Situation of the Syrian Refugees in Lebanon*, (June 2015), p13; Jida Khansa and Rima Bahous, "Challenges of teaching Syrian refugee children in Lebanon: Teachers' Insights", (2021), Intercultural Education, Vol. 32(3), p283.
[122] Khansa and Bahous, "Challenges of teaching Syrian refugee children in Lebanon: Teachers' Insights", n121, p283.
[123] Dryden-Peterson, et al., *Inclusion of Refugees in National Education Systems*, n84, p35.

access still are prevalent challenges to children on the move, in Morocco there is a legal barrier in the form of legal status. While SNIA includes mechanisms for informal migrants to get residency cards, it stipulates the need to prove having lived in Morocco for more than five years, a condition that many transit migrants are unable to fulfil.[124] The lack of documents required to enrol children in schools, has created a *de facto* legal exclusion of many children on the move in Morocco from the education system.

UNHCR registration counts as residency in Morocco and enables children to access schools. There is some irony in this situation; the Refugee Convention was written to protect fleeing persons; in Morocco, who has ratified the Convention, the asylum application mechanism and the resulting difference between refugees and irregular migrant status results in negation of protection of rights for one group. In Lebanon, which has not ratified the 1951 convention, there is no asylum process, but all Syrian refugees are automatically granted refugee status by UNHCR, with the UNHCR is paying for Syrian children's education opportunities. Children with refugee status are afforded international protection, while other children on the move receive significantly less to no protection or guarantee to having their rights respected. While this is a somewhat simplified version of reality, the segregation of children on the move and the respect of their universal rights based on their legal status remains.[125] By comparing the barriers to the right to education faced by Syrian refugees in Lebanon and sub-Saharan migrants in Morocco, one key difference emerges; refugees face access difficulties, while irregular migrants face legal obstacles.

The comparison of education opportunities of children on the move in Morocco and Lebanon has shown many similarities. These phenomenal similarities mask a major quantitative difference: in Lebanon, the majority of children on the move go to school, even though they make up a high percentage of the overall student population; in Morocco, the majority of children on the move do not go to school, even though their number is small in relation to the overall student population.[126] The difficulties Lebanon is mastering in striving for universal education is much higher, than what would be needed in Morocco. While it is acknowledged that resource and capacity constraints of states are

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[124] Ministère Chargé des Marocains Résidant à l'Étranger et des Affaires de la Migration, *Stratégie National d'Immigration et d'Asile,* n57.

[125] Charlotte Goodburn "Educating Migrant Children: The Effects of Rural-Urban Migration on Access to Primary School", in Shibao Guo and Tan Guo *Spotlight on China: Changes in Education under China's Market Economy*, (2016, Springer), p365-369; Yvonne Vissing, Sofia Leitão and Jan Marie Fritz "Clinical Sociology and Its Application to Analysis of Unaccompanied Children" in Yvonne Vissing and Sofia Leitão, *The Rights of Unaccompanied Minors: Perspectives and Case Studies on Migrant Children*, (2021, Springer International Publishing), p12; UNICEF, *Education Uprooted*, n22, p14; UNESCO, *Global Education Monitoring Report 2019*, n52, p18; Marcus, *What Works to Protect Children on the Move: Rapid Evidence Assessment*, n17, p23; Titiporn Tuangratananon, et al. "Education Policy for Migrant Children in Thailand and How it Really Happens: A Case study of Ranong Province, Thailand", (2019), International Journal of Environmental Research and Public Health, Vol. 16(3), p430-431.

[126] UNICEF, *Education Uprooted*, n22, p25; Culbertson and Constant, *Education of Syrian Refugee Children*, n92, p13; World Bank, *Lebanon: Economic and Social Impact Assessment of the Syrian Conflict*, n84, p2-5; UNHCR, *The Future of Syria*, n103, p45; Kiwan, "Inclusion and citizenship: Syrian and Palestinian refugees in Lebanon", n108, p284.

difficulties for granting education to all children, the comparison shows that the argument may be weaker than it seeks.

(2) A Migration-Control Justification?

The crux of the argument so far, has focused on the concept that it is the status embedded and created in law that excludes certain children from their enjoyment of the right to education. The key suggestion this paper makes is that this exclusion is a result of the fragmentation of refugee and migration law. The uneven treatment of children on the move on the basis of legal definitions of 'refugees' and 'irregular migrants' has led to the creation of different legal frameworks and allowed for a rise in xenophobia to those deemed 'undeserving'. This has led to migration-control regimes emerging mainly from the Global North as a justification for keeping the 'undeserving' out.

The true reason behind the exclusion is the "profound ambivalence toward [children on the move] embedded in the institutional ideology of migration-control regimes".[127] This is embedded within the fear that educating children on the move could result to educating future terrorists, an example of which are recent EU policies.[128] This has created an ideological paradox, where on the one hand the EU and Europe as a whole, present themselves as the right-bearing champions of the world, where children are first and foremost seen as children deserving of protection and education regardless of their legal status. On the other hand, however, xenophobia, the fear of terrorism, and the general ambivalence towards the 'other', sees the risk these children pose as their key characteristic.[129] "The ambivalent understanding of others, particularly of children on the move leaves us trapped between these two images".[130] While the most well-known juxtaposition between these two images is documented in the United States,[131] over 100 states "are known to detain, arrest and deport children for migration related reasons".[132]

Until this dichotomy between seeing children as being in need for international protection, yet staying ambivalent towards their rights, is resolved, the right to education and protection of children on the move will continue to be undermined by the international community. "While we remain trapped in ambivalence, our responsibility to protect is undermined by the idea that 'not all children' are 'our' future because not all children are 'ours' and because not all children promise or portend a desired future."[133] Adherence to status-based protection, will continuously lead to short fallings of international child rights

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[127] Suárez-Orozco, *Humanism and Mass Migration*, n6 p85-87 + 105 + 268; Humphris and Sigona, "The Bureaucratic Capture of Child Migrants: Effects of In/visibility on Children on the Move", n6, p1496-1497; Tabak and Carvalho, "Responsibility to Protect the Future", n6, p140-144; Gonzales, "On the Rights on Undocumented Children", n6, p419.
[128] Gonzales, "On the Rights on Undocumented Children", n6, p419; Suárez-Orozco, *Humanism and Mass Migration*, n6 p105 + 268.
[129] Suárez-Orozco, *Humanism and Mass Migration*, n6 p268; Humphris and Sigona, "The Bureaucratic Capture of Child Migrants: Effects of In/visibility on Children on the Move", n6, p1496-1497; Tabak and Carvalho, "Responsibility to Protect the Future", n6, p140-144.
[130] Tabak and Carvalho, "Responsibility to Protect the Future", n6, p142.
[131] Suárez-Orozco, *Humanism and Mass Migration*, n6 p86.
[132] Tabak and Carvalho, "Responsibility to Protect the Future", n6, p140.
[133] Ibid, p141.

obligations, as there will be children rendered invisible as a result of their legal status.[134] In an effort to shift the focus to children being children, regardless of their legal status, UNICEF launched a series of videos named "Unfairy Tales".[135] Ending each one with the phrase "some stories were never meant for children",[136] the message is very clear; these children are children, "forced out of childhood", and deserving of respect towards their fundamental human rights.[137] Until this is achieved, the right to education for children on the move will always be undermined due to the Global North's emphasis on exclusion.

E. CONCLUSIONS

This paper has examined the right to education for children on the move and the extent to which it is limited and regulated by legal status. The right to education is firmly embedded in international law through the UNCRC and developed thoroughly soft law. The translation of this right for children on the move into national legislation in Morocco, has its footing within the 2013 circular and the SNIA, while Lebanon has addressed similar challenges through RACE. Nevertheless, the application of the right falls short of this protection, with many children on the move still not being able to access education. By comparing the barriers faced by sub-Saharan migrants in Morocco and Syrian refugees in Lebanon the picture emerges that it is a child's legal status first and foremost, that determines their access to educational opportunities. By enacting conditions and regulations surrounding enrolment procedures, states *de facto*, exclude children on the move from their education system based on the legal status. The migration-control theory provides the ideological justification for this; the Global North continues to be ambivalent towards the rights of these children and instead focuses on potential risk they pose, "the *becoming* often overwhelms the *being*."[138] Until the international community starts to see these children as a collective group with universal rights, the right to education for children on the move will continuously be undermined by the fixation on their legal status.

States have used international definitions as a tool to classify people into groups and categories, on the basis of which international protection and the guarantee of rights are distributed: refugees good, irregular migrants bad. Refugees are characterised by their endurance of sufferance, while irregular

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[134] Suárez-Orozco, *Humanism and Mass Migration*, n6 p85; Humphris and Sigona, "The Bureaucratic Capture of Child Migrants: Effects of In/visibility on Children on the Move", n6, p1501-1511; Tara Polzer and Laura Hammond, "Invisible Displacement", (2008), Journal of Refugee Studies, Vol.21(4), p417-422; UNESCO, *No More Excuses: Providing Education to All Forcibly Displaced People*, (May 2016), ED/GEMR/MRT/2016/PP/26 REV, p6.

[135] UNICEF, "Unfairy Tales: Malak and the boat", (28 March 2016), < https://www.youtube.com/watch?v=MT49ghJ7aGA>, accessed 12 January 2022; UNICEF, "Unfairy Tales: The Story of Ivine and Pillow", (29 March 2016), < https://www.youtube.com/watch?v=3scOr_d9Dwo>, accessed 12 January 2022; UNICEF, "Unfairy Tales: Mustafa goes for a walk", (29 March 2016), < https://www.youtube.com/watch?v=2mfkYtZkPVQ>, accessed 12 January 2022.

[136] Ibid.

[137] Tabak and Carvalho, "Responsibility to Protect the Future",n6, p126.

[138] Ibid, p142.

migrants are seen primarily as a potential risk and danger. The term “children on the move” was created to provide for inclusion, a term applicable to all children on the basis of their movement away from their habitual residence. What is needed now, is for reflection of this inclusion into national and international legislative frameworks. An approach that affords children a guarantee of the rights regardless of their legal status, explicitly naming the excluded groups by their legal statuses, and explicitly naming the rights they have despite their status; a recognition that some rights, such as the right to education, are independent of legal status. Children on the move must be seen as collective group with rights not dependent on a legal classification of their current situation but with their status as children.

BACK TO QUO WARRANTO: PRACTICAL DIFFICULTIES IN ACHIEVING JUSTICE WITHIN AND AGAINST DISTRIBUTED AUTONOMOUS ORGANIZATIONS AS AN IMPEDIMENT TO LEGAL PERSONALITY IN THEM BEING PLAUSIBLE

Martina Cerna

A. INTRODUCTION

Distributed/decentralized autonomous organizations (DAOs) are an innovative way of running a business to which the law still seems to be searching for the right approach. One of the ideas on how to treat them is to provide them with a legal personality similar to the one of the traditional companies.[1] This, however, brings many unexpected points of view on the questions of traditional law. One of them is a question of justice. How the algorithmic nature of DAOs aligns with the human-centric idea of justice? Can DAOs be expected to behave in a manner which brings just outcomes and to what extent the law can be applied to and enforced against them and can just results be achieved in such an application and enforcement? Seeking answers to those questions, this contribution shall bring some conceptual thoughts about why this question is

[1] While most of the national jurisdictions do not have a specific legal framework covering DAOs in a tailor-made manner, first examples of such a focused approach appear. Some US states (such as Wyoming or Vermont) have adopted laws providing for a DAO-suited corporate form. Malta adopted an extremely elaborate legal framework enabling registration of technological arrangements without providing them with a separate legal personality (on a basis similar to the registration of cars or firearms) which comfortably covers DAOs. A number of other jurisdictions opted for an activity-based approach, providing specific regulation for some of the activities typical for DAOs, rather than for the DAOs as socioeconomic units.

important when thinking about legal personality for DAOs and an example of what issues could arise if it is not satisfactorily answered.

Notably, DAOs appear to be largely out of reach of at least some of the traditional means of application and enforcing the law. This paper discusses the selected problems stemming therefrom in five sections. The first section is to introduce the core questions of legal personality which need to be reiterated and set into the context of the technological nature and practical reality of DAOs. The second section points out the detachment of a DAO‘s behaviour from its human stakeholders as a key problem of functioning of DAOs within the framework of the human-imposed rules. This is followed by some of the more general and conceptual issues touching on both the results of the algorithmic decision-making within the DAO itself being just and the ability of a DAO to face external justice being discussed in the third section.

In the fourth section, the troublesome nature of making DAOs subject to external justice is demonstrated by an example of the forced dissolution of a legal entity, explaining that while an incorporated DAO could be officially declared dissolved, which would make it cease to exist as a subject of law, its technological nature may still leave it comfortably able to continue its factual activity as there might not be any possibility to reach the practical goal of the dissolution, i.e. to remove the smart contract forming the DAO from the underlying database or otherwise physically force a DAO to stop operating. A parallel is made to a procedure called *quo warranto* and some historical examples of difficulties related thereto, as described by (Philip J Stern 2017), are used to show how the DAOs’ key features, such as the DAO being immaterial on its own and running on a technological infrastructure which prevents it from being localized or taken under external control may effectively allow not only for a revival of some of the long-resolved problems of the practical enforceability of the law against corporations but even for their transformation into unexpected and difficult-to-tackle dimensions.

In its fifth section, this contribution suggests that resolving those problems will require a search for a different approach to preventative control in incorporated entities than what national jurisdictions currently apply to traditional entities, so that the particularities of the technological nature of DAOs are reflected, as well as re-thinking the idea of the ‘autonomous’ element of DAOs in terms of finding an adequate level of viable involvement of humans in a control of a DAO. Imposing a duty for every DAO to be under a meaningful human control of identified natural persons and to have robust procedures for responding to legally binding decisions being made about them included in its code, which would trigger automatically upon the occurrence of a certain predefined event (such as a decision of a court), is presented as one of the viable options.

This contribution aims to be jurisdiction-neutral, working with examples from several national jurisdictions, and discusses questions which can be expected to be relevant in a number of jurisdictions.

B. DAO AS A POTENTIAL ARTIFICIAL LEGAL PERSON: CORE QUESTIONS OF LEGAL ENTITIES IN NEED OF RE-ITERATION

Assigning rights to an artificial subject will always give rise to numerous questions. While the sense and purpose of doing so is obvious when it comes to closely-knit collectivities/groups – legal personality serves here as a certain kind of 'visibility cloak' which helps other parties track obligations and entitlements of such an establishment[2] - there are always other aspects which must be taken into consideration and carefully balanced against the benefits of such a visibility cloak. When discussing the possibility and plausibility of granting artificial legal personality to DAOs, it may be noticed that, among many others, similar questions related to accountability, responsivity to legal measures and achieving justice as those which used to emerge at the advent of traditional legal entities may emerge once again. This, however, does not mean that the answers will automatically be the same.

To address this problem, the initial part of this contribution shall present some ideas and notions of accountability and capability of justifiable conduct as well as facing external justice in the conceptual context of legal entities, reiterating some core, but particularly difficult, questions which the concept of artificial legal person traditionally brings. It will also take a closer look into how the existing challenges change if a centralized human-managed business arrangement is replaced by a distributed and automated one.

Apparently, some kind of a visibility cloak for DAOs, as collectivities, could become useful in certain aspects, same as in traditional business entities. To illustrate this idea, it might be helpful to look at the well-known case of the MangoDAO exploit.[3] Notably, there was, among others, a civil lawsuit finally brought by Mango Labs, LLC,[4] the entity in charge of further development of Mango Markets, to which the governance token holders turned, and also a criminal one,[5] which gave rise to an important question: What is the status of the DAO community as a victim? Whom should the relevant authorities address regarding the exploitation? Without the DAO as such having a legal personality, and with it not being easy to reach the individual governance token holders, there was only one option left: to use the DAO's discussion forum to submit legally relevant documentation. It is understandable to common sense that this is not an ideal solution and a DAO being a single entity might seem capable of resolving the underlying problem and therefore to contribute to the justice being achieved much more efficiently. However, it could have equally given rise to other problems at the same time.

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[2] Visa A J Kurki, *A Theory of Legal Personhood* (Oxford Legal Philosophy, First Edition, Oxford University Press 2019) 167.

[3] For detailed information about the case see Max Koopsen, 'Mango Labs Sues Avraham Eisenberg Over Mango Markets Exploit' *Decrypt* (26 January 2023) <https://decrypt.co/120054/mango-labs-sues-avraham-eisenberg-mango-markets-exploit> accessed 29 August 2024

[4] Mango Labs, LLC v. Eisenberg, 1:23-cv-00665, (S.D.N.Y.)

[5] U.S. v. Eisenberg, 1:23-cr-00010, (S.D.N.Y.)

Following the paradigm that blockchain arrangements (including DAOs) are not automatically the same as traditional legal entities (firms),[6] although similarities are present, it can be concluded that, instead of automatically treating them the same as the traditional business entities, the relevant questions of collective accountability and possibility to achieve justice both within and against a collectivity should be asked again and answers to them should be sought with regard to the technological and socioeconomic nature of DAOs. The answers should help us to assess thoroughly whether granting DAOs legal personality makes sense at all, and, in particular, what challenges this will bring in terms of the human-centric notion of justice being applied to them. Therefore, in this text, the selected core topics of corporate personality, stemming especially from the collective responsibility and the plausibility and possibility of a collectivity being granted rights and held liable for its actions, will be briefly reconsidered and put in the context of DAOs. An artificial person theory as described by (Susanna K Ripken 2019) will thereby serve as a basis for understanding the core features of legal personality of entities, although other approaches may be reflected if appropriate.

C. ACTING IN JUST MANNER AND ASSUMING RESPONSIBILITY IN TERMS OF HUMAN-IMPOSED RULES: WHAT DOES IT MEAN FOR DAOS?

It can be assumed that a number of people are involved in developing a DAO and setting it into operation. It appears almost inevitable that there will be numerous token-holders involved in subsequent decision-making and promotion of changes within a running DAO. This means that questions of collective and shared responsibility and just assumption of this responsibility are relevant.

Overall, cooperation and collective decision-making may benefit from synergy effects and help reach more accurate decisions, as well as opening doors for new ideas to be identified and pronounced. However, it has its dark side as well. Sharing responsibility with others may help individuals to relieve negative feelings about potentially undesirable outcomes of their decisions,[7] making them prone to decide in a more ruthless way than they would on their own. This has a serious impact on the effectivity and quality of decisions adopted even within traditional legal entities and things seem to get even more complex when we think that, contrary to a traditional legal entity having a rather limited number of members of the decision-making body, a DAO may have myriads of token-holders entitled and expected (but not necessarily forced) to participate in the decision-making, that a consensus among those token-holders must be reached for each decision which has not been initially

[6] Thibault Schrepel, *Blockchain + Antitrust: The Decentralization Formula* (Edward Elgar Publishing 2021) 95-98.

[7] Cf Marwa El Zein, Bahador Bahrami and Ralph Hertwig, 'Shared Responsibility in Collective Decisions' (2019) 3(6) Nature Human Behaviour 554.

incorporated into the DAO's code and that other, specific groups of stakeholders (such as core developers) may play their own role.[8]

Apart from that, it must be noted that cooperation and a synergy effect may easily disappear at the level of the token-holders, although the negative effects of the collective decision-making are likely to persist. The token-holders' decision-making in this point generally resembles a *per rollam* voting in a general assembly of a big traditional PLC, where each participant (shareholder) makes decision on their own, based on the information they have at their sole disposal, possibly without there being the possibility of any discussion prior to the voting.[9]

A consensus of 51% of all tokens must be achieved to adopt a decision, with no possibility of taking the decision-making process under an external control. This consensus mechanism in DAOs helps to reduce the risk of malevolent action by an individual, although it fails to exclude it completely. A majority of 51% of all votes being gathered by one person (or a small handful of co-operating persons) and being used in a way which harms the minority has already been noted and described in the literature.[10]

The same consensus mechanism further makes decision-making ineffective where a large number of token-holders are expected to vote and reach a consensus. It is already known that individuals tend to assume less responsibility, and to be less prone to take action, in collective settings compared to when on their own.[11] In the context of DAOs' decision-making, this may result in various sorts of unwanted and unjust results. For example, where the number of token-holders is high and the level of understanding of the question on which the voting takes place differs among the individual token-holders, the cooperation or synergy effect is likely to be replaced by some token-holders perhaps not voting, or voting randomly because they don't believe their vote will make a difference in the context of so many others, or by stronger tendencies towards herding behaviour[12] by less-informed token-holders. The consequences thereof may be further aggravated by that, contrary

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[8] Cf for example Philipp Hacker, 'Corporate Governance for Complex Cryptocurrencies?' in Philipp Hacker and others (eds), *Regulating Blockchain: Techno-social and Legal Challenges* (First Edition. Oxford University Press 2019).

[9] This is, however, a resolvable problem and there are already examples of DAOs whose founders took care of the maintenance of the stakeholders community and ran a discussion forum on which the proposals having been raised can be further discussed, cf for example the Gnosis DAO (see https://forum.gnosis.io/) or MangoDAO (see https://dao.mango.markets/dao/MNGO). On the other hand, success of such discussions is, again, largely dependent on the activity of the participants.

[10] Cf Christoph Jentzsch, 'Decentralized Autonomous Organization to Automate Governance Final Draft - Under Review' (23 March 2016) <https://perma.cc/338L-74SJ> accessed 29 August 2024 2

[11] Cf for example Katie K Martin and Adrian C North, 'Diffusion of Responsibility on Social Networking Sites' (2015) 44 Comput Hum Behav 124 or Peter Fischer and others, 'The Bystander-effect: A Meta-analytic Review on Bystander Intervention in Dangerous and Non-dangerous Emergencies' (2011) 137(4) Psychol Bull 517.

[12] Herding behaviour may be described as a situation in which "*investors suppress their own beliefs and try to mimic the actions of others that they consider better-informed*," see Stavros Stavroyiannis and Vassilios Babalos, 'Herding Behavior in Cryptocurrencies Revisited: Novel Evidence from a TVP Model' (2019) 22 Journal of Behavioral and Experimental Finance 57.

to the traditional companies, no mechanism is in place for protecting minority shareholders, or holders of a dissenting opinion.[13]

Apart from general questions of achieving just results in terms of collective responsibility and collective liability, which would apply to traditional legal entities as well (although now they are often modified or aggravated by the technological nature of DAOs), there are further questions which emerge on top of them which should be discussed taking into consideration the nature of DAOs as autonomous electronic systems. Those generally relate to the ethics of algorithmic agents and would apply to DAOs with a high level of autonomy, i.e. those which are managed solely or highly prevailingly by algorithms, rather than by the decision-making of the membership token (sometimes also 'governance token') holders based on continuous oversight and active participation in raising proposals and voting on them.

Although this may now seem like a matter of the future, the idea that DAOs can be equipped with artificial intelligence and programmed to operate autonomously, i.e., without needing to be actively operated by their founders or token-holders, is still worth considering in terms of whether, or to which extent, the complex legal rules and ethical standards acknowledged by humans can be translated into code and adhered to by an artificially intelligent electronic system in a way which promises just results being achieved.[14] The underlying questions are the same which have been broadly discussed in connection with tangible autonomous electronics systems, such as robots or autonomous weapons, and any conclusions reached there basically apply to DAOs analogically – with one difference: a DAO cannot be localised and easily physically fixed or destroyed if it gets out of control.

To provide just a very brief illustration of how artificial intelligence may fall short in compliance with human-set standards of conduct, let us have a look at the example of the Titanic maritime disaster as presented by (Meredith Broussard 2018). Starting with the known properties of survivors and victims, we can, processing the data with a mathematical model, conclude that wealthy people have better chances of surviving similar accidents and therefore could be for example charged lower premiums on life insurance. This makes sense computationally and logically, indeed, wealthy people usually have better means to secure their sustenance and protection in general, not only in the case of a shipwreck, but the broader social impact of such a conclusion appears to be everything but just. The benefit of insurance lies in an even distribution of risk across a large pool of people,[15] which allows the insurers to earn reasonable profit while each of the insured ones can afford to stay protected. Therefore, charging the wealthy ones less based on them having

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[13] Although such protection of the minority token-holders in DAOs is technically possible, cf Jentzsch (n 10) 2-3, there is no statutory requirement for it being in place and its implementation fully depends on the decision of the DAO's originators.

[14] Cf for example Lynn LoPucki, 'Algorithmic Entities' (2018) 95(4) Washington University Law Review 887 <https://openscholarship.wustl.edu/law_lawreview/vol95/iss4/7> or Jurica Dujmovic, 'On-Chain AI May Be the Future of Crypto' *Weiss Ratings* (9 January 2022) <https://weissratings.com/en/weiss-crypto-daily/on-chain-ai-may-be-the-future-of-crypto> accessed 29 August 2024.

[15] Meredith Broussard, *Artificial Unintelligence: How Computers Misunderstand the World* (MIT Press 2018) 114.

(mathematically) a better chance to live long, including a better chance for rescue if hit by an unfortunate event, practically limits the poorer ones in access to protection via insurance.[16] This, obviously, is not an approach which could be called ethical or socially responsible and is likely to be even unlawful based on the applicable laws, for example in the field of consumer protection or protection against unlawful discrimination.[17] We can surely imagine a fully autonomous, artificially intelligent DAO following similar patterns of conduct. The question is if we can imagine a fully autonomous, artificially intelligent DAO programmed in a way which secures that it will not do so.[18]

A simple understanding of the problem might lead one to answer 'yes', imagining a certain kind of if/then-commands-based code, which, once launched, automatically drives the entity so that it behaves lawfully and justly while performing its business activity, allows for response to decisions of courts and other competent authorities and even executes an automatic wind-up of the entity, if required by the law or by an official decision. A more advanced arrangement may even automatically consult official sources of law in predefined time intervals (if available online or otherwise supplied to the system) and modify its behaviour within the time so that any changes in the law are reflected and adequately responded to.

However, attempts to imagine such an arrangement working in the everyday practice meets some stumbling blocks. As well as noting the burden on business registration authorities, which would have to check the code of each such entity-to-be for the ability to comply with the law for a later discussion, we can dispute whether writing a code allowing for such conduct is reasonably practicable. This, however, does not diminish the importance of the underlying questions.

To start a detailed search for the answer to the core question of this problem, we must first ask what is actually right and what is wrong and what can we consider a just result of an automated decision-making process in an artificially intelligent DAO. This is a hard-to-answer question. The notions of right and wrong is established by people and their content largely depends on people's understanding of numerous, very often abstract notions and perceptions of various circumstances. Thus, while we can reasonably assume that programming a DAO in a way that makes it check the official sources of law regularly and directs its actions in order to secure compliance with the applicable law is theoretically possible, securing that such directions are made in a way which leads to the conduct mandated by the legislator is another story.

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[16] For further reading on algorithmic bias in the field of insurance see for example Arthur Charpentier, *Insurance, Biases, Discrimination and Fairness* (Springer Actuarial, Springer 2024).

[17] In the UK, the Equality Act 2010 will be the starting point in analysing such matters. However, it should be noted that the scope of protection and therefore the extent to which use of such systems can be contested will depend on the particular national laws applicable in a given case.

[18] For further reading on selected examples of the risks of algorithmic bias and algorithm-fuelled discrimination in socioeconomic decision-making see for example Kevin Sevag Kertechian and Hadi El-Farr, 'Dissecting the Paradox of Progress: The Socioeconomic Implications of Artificial Intelligence' in Hadi El-Farr (ed), *The Changing Landscape of Workplace and Workforce* (IntechOpen 2024).

Indeed, "*[l]aw and society are set up to accommodate all of the things that humans think matter. Data-driven decisions rarely fit with these complex sets of rules. The same unreasonable effectiveness of data appears in translation, voice-controlled smart home gadgets, and handwriting recognition. Words and word combinations are not understood by machines the way that humans understand them.*"[19] Thus, the answer does not seem to sound like a persuasive 'yes', at least not at the current state of the art.

To continue, the written law sometimes relies on unwritten norms of conduct and vague notions. Moreover, both legal and ethical norms of conduct regularly change over time and are sometimes understood differently from person to person. Thus, even finding a computationally-functional way how to incorporate lawful and ethical conduct into a DAO's code does not necessarily have to bring the desired results, as it would first have had to be unanimously understood and agreed what lawful and ethical conduct actually is for all situations which the DAO in question can get involved in, and such a DAO would have needed to be supplied with this information.[20] This may, indeed, become another stumbling block as the laws, as well as an overall idea of what is ethical and correct, change over time and there are often several various interpretations of the same norm, leading to different results.[21]

Similarly, a DAO might need to be able to deal with highly non-standard situations in which compliance with the formal law may not be desirable for a particular reason and predict if any defence can be successfully claimed in such cases. Those issues are sometimes not easy to resolve even for human reasoning, never mind a computer program. While there are experiments with legal artificial intelligence already in existence,[22] a fully autonomous artificially intelligent DAO would need to be equipped with a very advanced and well-working legal artificial intelligence to secure its plausible functioning as a party to legal and socioeconomic relationships. This does not seem feasible under the current state of the art.

D. BREACHES, REMEDIES AND MEASURES: WAYS DAOS CAN(NOT) FACE JUSTICE

Of course, breaches of the law cannot be avoided completely, regardless of whether we think about a future fully autonomous and artificially intelligent DAO, or about the DAOs of today, which are still rather simple-coded and at least partially controlled by their creators or members. Therefore, it should be also discussed whether and how remedies can be reached if a breach occurs.

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[19] Broussard (n 15) 119; for an illustrative example of such discrepancy see also Broussard (n 15) 166.

[20] At this point, it should be pointed out that the *ignorantia iuris non excusat* principle may fall short in fully autonomous DAOs, even if they are equipped with advanced artificial intelligence and can harvest information from the Internet. The reason was described above: it is the difficulty of recognizing relevant pieces of information from less relevant or even misleading ones, which may lead to the impossibility of ensuring that the DAO will autonomously and reliably pick up up-to-date legal texts and writings of renowned experts in the field as a basis for its future conduct. However, a just approach to this problem is still to be found.

[21] Cf Jentzsch (n 10) 1, pointing out that "people do not always agree what the rules actually require."

[22] Cf for example Peter Wahlgren, *A Study on Artificial Intelligence and Law* (Kluwer Law and Taxation; 1992 1992) or Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (First edition, Hart Publishing; Bloomsbury Publishing 2020).

Traditionally, civil and criminal liability, as well as administrative sanctions, may be imposed on those who breach the law, but it must be asked how DAOs fit into this concept.

In general, remedies for breaches of law committed by a DAO which is under enough of human control may work well and bring just results even without the DAO having a separate legal personality, as long as the people behind such a DAO can be identified and found. In such cases, a DAO may be understood as a certain kind of tool in the hands of its originators, actual operators or members, who are responsible for its operation.[23] Thus, standard liability rules can usually apply in such cases. An example of this may be an arrangement called The DAO,[24] which was created and operated by an existing German corporation. This corporation called Slock.it UG was investigated by the U.S. Securities and Exchange Commission (SEC) with regard to the activities of The DAO relevant to the U.S. markets, and although no enforcement action was taken in the end, it was found that there might have been a breach of the U.S. securities laws on the part of both the corporation and its co-founders, as well as some of the stakeholding intermediaries.[25] The absence of incorporation and formal legal personality of The DAO itself had no substantial impact on this finding. Comparably, currently, existing arrangements such as GnosisDAO or MangoDAO are not separate corporations. For example, GnosisDAO was launched by Gnosis Limited, a company incorporated in Gibraltar, and is, in the words of its founders, "*a collective that uses Gnosis products to transparently guide decisions on development, support, and governance of its token ecosystem.*"[26] In comparable cases, the main result of a DAO's separate legal personality is that it can help its originators and operators could to limit their own liability.[27]

A different situation may occur if we have a fully (or highly) autonomous DAO running on a public blockchain. Being left alone by its originators after being launched, with the membership token holders, or other benefactors, possibly being anonymous and therefore extremely hard to find, as it could easily become the case, as for example in MangoDAO, a DAO having legal personality appears to be a promising way to have a subject to be held liable for any damages and breaches of law which may occur in the course of its operation. In such cases, the legal personality of such a DAO itself should theoretically provide more protection to the common users and other

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[23] Cf Luciano Floridi, 'Artificial Companions and their Philosophical Challenges' (2009) 19(1) Dialogue and Universalism 31.

[24] For a detailed description of the case see for example David Siegel, 'Understanding The DAO Attack' *CoinDesk* (25 June 2016) <https://www.coindesk.com/learn/understanding-the-dao-attack/> accessed 29 August 2024.

[25] See U.S. Securities and Exchange Commission, 'Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO: Securities Exchange Act of 1934' (25 July 2017) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi6rab5r7byAhWFoFwKHakqDxIQFnoECAMQAQ&url=https%3A%2F%2Fwww.sec.gov%2Flitigation%2Finvestreport%2F34-81207.pdf&usg=AOvVaw0PEtv82DrcFTrNgmtN8p5l> accessed 29 August 2024.

[26] See https://gnosis.io/gnosisdao/.

[27] Cf Stephen D Palley, 'How to Sue A Decentralized Autonomous Organization' *CoinDesk* (20 March 2016) <https://www.coindesk.com/markets/2016/03/20/how-to-sue-a-decentralized-autonomous-organization/> accessed 29 August 2024.

stakeholders. However, the practical aspects thereof may be much more complex than expected.

Right at the beginning, for example, it may remain unclear who is responsible for maintaining the public blockchain upon which a DAO runs, or the extent of liability for any flaws in the DAO's code. The possible fiduciary duties of the blockchain developers have been discussed for example by (Angela Walch 8 September 2016); however, a practical possibility to apply this theory may be a very different story. Flaws in a DAO's code constitute a separate subtopic of this question and a unanimous and persuasive answer is difficult to reach. While we could treat any misbehaviours of the DAO in the same way as defects of any other product (computer program)[28] and therefore apply the general norms regulating product liability, the practical impact does not necessarily be the desired one. With DAOs likely to be open-source, community-based projects in which numerous people are involved without any formal structure, at least some of them possibly remaining anonymous, it may be nearly impossible to determine who has written the flaw-containing part of the code, or to reach such a person once the problem becomes visible. Another aspect which must be taken into consideration is the defence of the state of the art, which helps the person who brought the flaw into the code free themselves from liability (even if identified) if they proceeded following the available knowledge in the art and could not reasonably foresee that what they program is actually a flaw.[29]

Further, if a flaw is brought into the code by its subsequent changes, it could be asked if only the author of the proposal for the flaw-containing change should be held liable, or if such liability should attach to all token-holders who voted in favour of the change. While this could be handled by applying the rules about the members and/or managers of a traditional entity having to use sound business judgment and act in the justifiable interest of the entity, there may be, again, doubts about the extent to which any token-holder who is entitled to raise proposals and/or vote on them can be practically expected to have sufficient expert knowledge to make a well-grounded decision in such matters. This all closes the vicious circle of the failure of an accountability principle in DAOs, leaving the liability for the damages caused by flaws in the code being imposed on the DAO as such being perhaps the most imaginable solution - but still, it should be understood that such imaginations may have their downsides and that the results may turn out everything but just to the end.

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[28] Cf Jentzsch (n 10); Susanne Beck, 'The Problem of Ascribing Legal Responsibility in the Case of Robotics' (2016) 31(4) AI & Soc 473 474.

[29] Indeed, undesirable behaviour of the algorithm sometimes cannot be reasonably foreseen even if the highest standard of care is applied. This has been described yet by Curtis E Karnow, 'Liability for Distributed Artificial Intelligences' (1996) 11(1) Berkeley Technology Law Journal 147 <https://www.jstor.org/stable/24115584> accessed 15 February 2020 161, who calls such incidents "pathological decisions" and warns that they are more of an indivisible part of artificially intelligent programs than of flaws in the true sense. In other words, once artificial intelligence is deployed, pathological decisions will occur. There is no way to prevent, or even effectively foresee, them. This is, however, not to argue that exclusively human-based decision making is free of pathological decisions. Rather, it should be understood as stressing the point that predicting, preventing and even identifying and remedying pathological decisions made by an algorithm follows different principles from dealing with those made by humans, and may be beyond the capabilities of the human mind.

Thus, among other, DAOs should be able to respond to the decisions of the state authorities (such as courts, administrative bodies or arbitrators) adequately and bear liability imposed on them as a consequence of breaches of law committed by them. This is not necessarily limited to paying fines, complying with a ban to obtain subventions and enter into procurement contracts or, even facing forced dissolution order by a court (which constitutes a particularly thorny point and will serve as an example of the difficulties which need to be expected if DAOs are legal entities), to name just a few examples of punishments which may be imposed on a legal entity. It should be equally able to pay civil-law damages or to refrain from certain activities, if ordered to do so. Moreover, a DAO should be able to do further things to be a valid participant in social and legal relationships; for example, to modify its behaviour in response to reputational risks and well-reasoned social pressures, respond to formal requests to rectify a faulty status, if relevant, or learn from punishment and refrain from faulty behaviour in the future.[30] Again, unless the autonomy of a DAO is limited and substantial changes can be made by the individuals behind it, this apparently needs to be secured by embedding the respective mechanisms in the DAO's code.

In all cases, it should be noted that granting DAOs legal personality is everything but a universal way of achieving just results of their operation or making them face external justice. On the contrary, some of the difficulties in achieving those goals may even speak against DAOs having legal personality at all. Further, granting DAOs legal personality means an even stronger commitment to police them and secure that, at least those which officially exist as legal persons, comply with the law and that breaches are punished by the jurisdiction which does so. Otherwise, the whole concept of legal personality for DAOs would basically stop making sense and, more seriously, could undermine the principle of legal certainty and the general trust in the state and law even in other fields.

E. PERPETUAL EXISTENCE OF DAOS AS AN EXEMPLAR OBSTACLE TO ACHIEVING JUSTICE AGAINST THEM

It has been seen that traditional legal entities (especially corporations) are, or should be, of perpetual existence.[31] This concept deserves some discussion when it comes to its application on DAOs. This section will provide some thoughts on this topic, including an example of how the technological nature of DAOs may cause issues in terms of understanding of the perpetuality of existence of a legal entity and its impact on DAOs being able to face forced dissolution.

Most notably, if the wording of 'perpetual existence' is set in the context of the technological substance od DAOs, it may be rather automatically understood as that a particular legal entity is expected to last forever.[32] Such an interpretation would, however, bring some difficulties. A closer examination

[30] Cf LoPucki (n 14) 904.
[31] Cf for example Andrew A Schwartz, 'The Perpetual Corporation' (2012) 80(3) The George Washington Law Review 764.
[32] Cf Shawn Bayern, 'The Implications of Modern Business–Entity Law for the Regulation of Autonomous Systems' (2015) 19(1) Stan Tech L Rev 93 101-102.

will show that the notion of perpetuity is to be understood as being only relative, meaning basically nothing more than that when membership of existing members stops it does not automatically mean that the entity ceases to exist as well.[33] This can be concluded just from the fact that national jurisdictions usually provide both for procedures regarding voluntary or forced dissolution and winding-up of an entity and for procedures preventing an entity from being dissolved in situations when the general conditions for doing so are met but salvaging the entity and securing its recovery and continuation appears to be more desirable. DAOs, in spite of their technological nature, should not be any exception in those terms.

Indeed, the perpetual existence of an entity (traditional or algorithmic) should be understood practically as a synonym for its separate legal personality and transferability of shares, meaning that an entity's existence is not dependent on the existence and participation of any of its current members. In other words, an entity as a legal person will persist unchanged even if its members change over time. This also appears to be the reason why some jurisdictions deal rather comprehensively with cases in which an entity loses some or even all its members unexpectedly apart from predicting some cases, in which an entity does cease to exist. The latter, which will be given more attention now, may happen for various reasons, such as by virtue of law, upon a decision of a court or by a decision of the members.[34] While the particularities may differ from jurisdiction to jurisdiction, it can be concluded that the law may allow the members to wind up the entity if they agree that they do not want to continue its activity, as well as an entity being wound up involuntarily either because of a reason prescribed by the law[35] or upon a decision of the court.[36]

Therefore, it should be understood as normal that a legal entity is bound to cease to exist at a certain time point and every entity which is incorporated should be prepared for this eventuality happening one day. The concept of traditional legal entities has developed well-working mechanisms regarding how to dissolve and wind up an entity over time, both on a voluntary and forced basis. DAOs may make some of the old and long-resolved problems of a corporation needing to be dissolved revive, especially if this should happen without the founder's consent and before it has reached its goal. But even in such cases, deep roots of the problem may be identified as being already known, which may suggest how to approach it. In particular, even at the very

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[33] Cf Schwartz (n 31), especially 773-783, further remarks on the same idea see also Shawn Bayern and others, 'Company Law and Autonomous Systems: A Blueprint for Lawyers, Entrepreneurs, and Regulators' (2017) 9(2) Hastings Science and Technology Law Journal 135 <https://repository.uchastings.edu/hastings_science_technology_law_journal/vol9/iss2/1> 157-159

[34] For comprehensive material regarding dissolution and winding-up of an entity in the UK law see for example Nicholas Grier, *Company Law* (5th edition, Thomson Reuters 2020) Chapter 17.

[35] Taking an example from the Czech law, a legal entity is dissolved when the time for which the entity was established has lapsed or if the entity has reached its goal, cf for example zákon č. 89/2012 Sb., občanský zákoník (Czech Civil Code), S 168.

[36] There may be various reasons for such decision being issued. Apart from the criminal-law sanctions, the law may further provide for subjects entitled to apply for an entity to be wound-up in civil proceedings, or for situations when the court must wind-up an entity even *ex officio*, cf for example Czech Civil Code, S 172 and zákon č. 90/2012 Sb., Zákon o obchodních společnostech a družstvech (Czech Corporations and Cooperatives Act), S 93.

beginning of so-far existing corporate law, situations used to occur when a corporation was under threat of being dissolved without the founder's consent and before it reached its goal. As an illustrative and memorable example, it might be interesting to mention a common-law institution called *quo warranto*,[37] which used to find broad use in England in the times when corporations used to be habitually founded by a royal charter, and which, as described by (Philip J Stern 2017), was "*attacking the validity of corporations by accusing their governors of failing to live up to the terms of their charters or questioning the very validity or origin of the charter itself.*"[38] The procedure, however, hasn't always worked smoothly even in those long-ago times; again, (Philip J Stern 2017) describes a case when "*[f]amously, the Crown tried as early as the 1630s to recall the Massachusetts corporate charter via quo warranto, but was unable successfully to examine the charter, not least because the company, many of its leaders, and even the document itself had been transported across the Atlantic*."[39]

The whole story might have appeared to be nothing but a piece of history for a long time. However, it bears an important message which appears to be reviving and is notably relevant for any jurisdiction when we discuss DAOs as possible legal persons. While today's companies usually get incorporated upon meeting the general conditions prescribed by the applicable law and filing the required documents with the competent authority,[40] rather than on the basis of a sovereign's charter, forced dissolution still remains an option in certain cases. This normally happens as a result of corporate criminal liability, if the corporation stops meeting legal requirements or for other reasons provided for by the applicable law.[41] And again, a certain procedure must be followed and certain steps must be effectuated – which means that they must be feasible first. And, indeed, although the option of deliberately moving the seat of a corporation to a jurisdiction which offers more lenient requirements on how a business is run remains live, physical removal of corporate documents, assets and personnel from the reach of the national authority seeking dissolution of such corporation could hardly be sufficient to reach the goal described above. This is because today's jurisdictions require copies of all substantial corporate documents to be kept by a registrar authority and can use instruments such as extradition and letters rogatory if the case requires an outreach to another country's territory.

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[37] It should be noted that the (troublesome) application of quo warranto in the described case serves here merely as an accessible and memorable example to illustrate that DAOs as a new corporate form are likely to revive (in a slightly modified form) some of the problems the law had to deal with in the past with regard to the corporate forms we now understand as traditional. The actual institute of quo warranto is not a subject of research for the purposes of this article; for further reading on this topic see for example 'Quo Warranto against Private Corporations' (1927) 41(2) Harvard Law Review 244 <http://www.jstor.org/stable/1330889> or Catherine Patterson, 'Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts' (2005) 120(488) The English Historical Review 879 <http://www.jstor.org/stable/3489222>.

[38] Philip J Stern, 'The Corporation in History' in Grietje Baars and André Spicer (eds), *The Corporation: A Critical, Multi-disciplinary Handbook* (Cambridge University Press 2017) 2.

[39] Ibid.

[40] Cf for example Companies Act 2006 (UK) Ss 9-16.

[41] Cf for example Companies Act 2006 (UK) Ss 1000-1002A and Economic Crime and Corporate Transparency Act 2023 (UK) S 70.

Even under the today's state of corporate laws, DAOs, however, appear to be generally rather safe from the risk of forced dissolution and therefore from termination of their legal personality simply due to their nature, which renders certain steps in the dissolution procedure unfeasible. Operating upon a distributed ledger infrastructure makes them intangible, practically unstoppable and impossible to localize, which may quickly return state authorities to the times of *quo warranto* in the sense that the physical object on which the relevant proceedings should be effectuated will not be available. Of course, DAOs could be officially declared dissolved, which would make them cease to exist as subjects of law, but, at the same time, they could comfortably continue their factual activity as there might not be any other practical possibility to achieve dissolution in fact, such as removing the smart contract forming the DAO from the underlying database or otherwise physically forcing a DAO to stop operating. On top of that, there is a risk of DAOs equipped with advanced artificial intelligence emerging in the rather near future, and these may even autonomously replicate if they find themselves at risk of destruction.[42] This would open doors to further issues on top of the difficulties of stopping/dissolving the original organization.

On the top of that, the difficulties of dissolution of a DAO offer an interesting, although maybe less apparent follow-up in a risk of a DAO running on a public blockchain reaching a stage in which it cannot be dissolved even voluntarily, for technical reasons. For example, if a sufficient number of the token holders are inactive, this may result in a situation in which the other members, if they decide not to continue with their activity, only have the option of abandoning the DAO and leaving it to run alone. This is clearly not a just case, taking into consideration that common users may remain unaware of this fact and incur damage if they attempt to interact with such an abandoned DAO,[43] as well as the position of the active members who may fear liability for issues of their own DAO they would rather like to see duly would up.

F. POSSIBLE SOLUTIONS

While the idea of legal personality for DAOs definitely deserves consideration and there are signs that it may, at least in some aspects, contribute to an adequate level of legal certainty around those arrangements being achieved, serious issues have been identified on the other hand in terms of both a DAO achieving just results of its own conduct and external justice being achieved against a DAO. The example of impossibility to dissolve a DAO, either forcefully

[42] Cf LoPucki (n 14) 904-905.

[43] This could be compared with a situation when a traditional entity is in the process of winding up. In such cases, the law may, depending on jurisdiction, provide for a duty to inform the stakeholders, and even the public about the entity terminating its activity. This usually applies in cases when the entity ceases to exist without a legal successor and a liquidation (settlement of the entity's property) is being performed, cf for example Czech Civil Code S 187-209; words "in liquidation" must be appended to the name of the legal entity under Czech Civil Code S 187 (2) in such cases.

or voluntarily, has illustrated what can, mutatis mutandis, apply to many other cases of justice encountering DAOs. Those and many other related issues are not negligible and need to be addressed before legal personality for DAOs is considered. Some ideas how to approach this question will be suggested below.

(1) Re-Thinking the Balances: Need for Adaptation of the Incorporation and Registration Procedures to the Reality of DAOs

As DAOs differ significantly from traditional legal entities in the way their functioning is secured technically, and therefore also in the way in which it can be influenced from outside, specific solutions may require to be implemented in order to tackle the known issues and to make sure that a DAO will be technically capable of complying with the laws and acting in a just manner, as well as seeking to secure that its general nature and technological features will not be used as a vehicle for illicit activities. These solutions should be embedded in the source code of the DAO before its launch, to avoid, as far as possible, the complexities of any subsequent changes being made to a DAO. Of course, a DAOs' creators would be responsible for doing so, but the role of the registering authorities in securing that things are done properly is not negligible either. This, however, may require a non-negligible change of paradigm with respect to the particular powers and activities which registering authorities exercise in the course of the registration procedure.

Firstly, it must be noted that the constitutive requirements on traditional legal entities are usually rather easily met. While details differ from jurisdiction to jurisdiction, in general, they tend to focus on verification of the basic conditions being met for an entity to be validly established and allowed to perform the activity it is established to perform.[44] Thus, the registrars are likely to check the basics, such as whether the articles of association were drafted in the form which the law requires for them, whether the members of the entity's bodies meet the general legal requirements on executive managers, whether the initial capital was paid up in the required form, or whether any license required for the entity's activity (if applicable) is present and valid.

This is normally demonstrated by documentary evidence in paper, or electronic form, such as certificates, transcripts or deeds, which are written in a natural language and the registrar's employees are trained to read and assess them. And while any entity is likely to be subject to numerous pieces of regulation throughout its existence, its future compliance with such pieces of regulation is not assessed at the point of the entity's incorporation and registration. Rather, any such regulation has a punitive character, which means that it is presumed that an entity will comply with it through the decisions of its human members, managers and other representatives and action is taken only by the authorities if a breach is already demonstrated.

With DAOs consisting in a source code written in a programming language and effectively replacing both the articles of association and the everyday decision-making of the entity's bodies and agents, including their members, employees and other responsible co-workers, the situation will change substantially. The core steps necessary to ensure that any registered DAO is at least in principle able and prepared to comply with the applicable law,

[44] Cf for example Companies Act 2006 (UK), Ss 9-16.

will need to be made before the DAO is registered as an entity. In practice, this means that the registrar would need to verify that a DAO is equipped with technical features which allow it not only to perform the subject matter of its business lawfully (including compliance with any regulatory requirements), but also to respond to any relevant changes in the outer environment, such as being sentenced by a court, being subject to administrative measures or being subject to a law which changes during the existence of the entity. This, however, requires a very different scope of expertise than that required for registration of traditional entities which has to be added on top of legal expertise, although the latter does not cease to be needed.

The example of Malta which will be described more in detail below shows that a separate specialist authority might be a solution for the difficulties which the specific nature of DAOs brings to preventive control, while the elevated requirements on the responsible person (compared to those for traditional companies) may help reduce the risk of straw-persons. On the other hand, it must be taken into account that establishing such an authority will involve substantial costs for the state, especially as highly qualified experts need to be employed to check the source codes and related documentation of DAO proposed for registration.

(2) Incorporation, Registration and Preventative Control in Current Legal Approaches to DAOs

One of the possible tools which may help address the difficulties of achieving justice in DAOs is enhanced preventative control at registration, which needs to be approached differently than in traditional legal entities. This may require a particular adjustment in the entire process of registration of a DAO, resulting in registering a DAO in a more or less different way from a traditional entity. Some jurisdictions already try to address this problem, and examples of solutions can be found. However, no jurisdiction seems to have achieved a combination of legal personality for DAOs and an effective level of preventative control in them.

In particular, we can either see blockchain-based establishments being registered without their own legal personality, or perhaps simply partial regulation, which provides DAOs with legal personality but does not provide a comprehensive and tailor-made regulation as to matters of incorporation and registration, basically following the pattern of incorporation and registration applicable to an equivalent traditional entity. Still, some of those examples are worth mentioning as they may establish a stepping stone for the approach to preventive control in smart contracts for the future.

Maltese law gives a prominent example, where the mere concept of the regulation makes it obvious that a blockchain establishment is understood as something other than a traditional entity and therefore requiring a different approach. The recognition under Innovative Technology Arrangements and Services Act (ITASA) is issued to a designated person (usually the applicant) rather than to the technological arrangement alone. The Malta Digital Innovation Authority Act (MDIAA) establishes a specialized authority designated to perform the certification, registration and supervision of innovative technology arrangements and innovative technology service providers and to maintain a register of such arrangements and providers, which

is separate from the register of traditional companies.[45] This authority executes preventative control of whether the standards of legality, integrity, transparency, compliance and accountability stemming from the applicable law are met and awards certification or other recognition to the arrangements and providers.[46]

ITASA provides a number of material requirements which an arrangement must meet to obtain recognition, including the need to be able to secure compliance with the applicable law, to meet legal obligations or to allow for an intervention of an administrator if a loss to a user or a breach of law occurs[47] as well as to being able to respond to reasonably predictable changes of law.[48] There is also a duty to have a representative regularly resident in Malta[49] and a duty to provide the authority with specific information in specified cases.[50] Obviously, compliance with all those requirements needs to be enforced.

Thus, MDIA is equipped with a wide range of powers relating to registration and authorisation[51] or certification[52] of innovative technology solutions such as DAOs. Granting authorization of an innovative technology solution entails an elaborate procedure in which various factors are considered by the authority, such as whether the applicant (the innovative technology service provider, its technical administrator or any other person involved in the innovative technology arrangement) is a fit and proper person with regard to the arrangement in question,[53] or whether the arrangement itself meets legal and other requirements, especially with regard to Malta's overall reputation and international commitments, protection of the public and legal entities or reputation and overall fitness of the applicant and further stakeholders.[54] Thereby, the type and amount of information, and documentation to be provided to the authority, is not limited. The authority may require any documentation and information it deems necessary to determine whether the innovative technology solution in question is capable of being registered and authorized in terms of the existing legislation.[55] Certification requires a technological audit of the solution proposal being performed as well.

First signs of laws providing for a separate legal entity form for DAOs are present in some U.S. states. Concerningly, however, the preventative control presumed by them does not generally reach the level of elaborateness of the Maltese law. Thus, the Wyoming Decentralized Autonomous Organization Supplement enables DAOs to be established and incorporated as a specific form of LLC, while the Wyoming Limited Liability Company Act still applies with specific modifications to them in such a case.[56] The law includes a reasonably

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[45] See ITASA S 6.
[46] See ibid S 8 (3).
[47] See ibid S 8 (4) (d).
[48] See ibid S 8 (4) (c) (iii).
[49] See ibid S 15.
[50] See ibid S 12.
[51] ibid Part III.
[52] MDIAA Part 6.
[53] Ibid, S 27 (1)(a).
[54] Ibid, S 27 (3).
[55] Ibid, S 26(1).
[56] W.S. 17-31-103 a).

comprehensive list of requirements on what the articles of organization and operational agreement should cover, but the documents are submitted to the secretary of the state for filing and there does not seem to be any specialist preliminary check of the content of them.[57]

Also, while each DAO must have a registered agent as provided for by the relevant provisions of the general corporate law,[58] there is no alignment of the role to the nature of DAOs, nor any specific requirements regarding qualification of such a registered agent in relation to the nature of the DAO and, in addition a registered agent may be not only a natural person but also a legal entity[59] i.e. even another DAO.

A practically analogical approach can be found in the U.S. state of Vermont, which also adopted a set of laws relevant to blockchain, and also there, it remains unclear how preventive control is made at the level of a DAO's source code, as well as at the level of qualification of the responsible people. There is equally not enough clarity about to what extent any steps which were not anticipated by the DAO's algorithm can be enforced. In spite of any possible imperfections of the law, the first blockchain-based LLC thereunder has already been registered,[60] thus, it can be expected that a need with related problems will emerge sooner or later. Here, it appears particularly advisable to address exactly the practicalities of preventive control.

(3) Meaningful Human Control over an Automated Electronic Agent as a Possible Way of Helping Justice in DAOs

It has been explained that the concept of DAOs as predefined, algorithmic, memberless organizations appears to be troublesome with regard to traditional, human- focused, frameworks of liability, accountability and acting in a just manner. While some of the issues can be mitigated by procedures leading to just conduct and ability to respond to external justice taking place being encoded in the DAO, this being enforced by the means of meticulous expert preventative control, the difficulties connected therewith may still constitute a certain level of impediment to DAOs being granted a separate legal personality. However, response to this can be sought in the notion of meaningful human control, a concept which is already broadly known from the discussion about the legal aspects of autonomous weapons systems[61] but which could be transferred to the field of automated socioeconomic arrangements and provide a certain kind of base for the discussion about how to secure human

[57] W.S. 17-31-106 and W.S. 17-31-107.
[58] W. S. 17-31-105 b) in connection with W.S. 17-28-101 through 17-28-111.
[59] Cf W. S. 17-28-101 a) ii).
[60] See Openlaw, 'Operating Agreement of dOrg, LLC' <https://lib.openlaw.io/web/default/template/bbllc-dao%20-%20vermont> accessed 29 August 2024.
[61] See for example Filippo Santoni de Sio and Jeroen van den Hoven, 'Meaningful Human Control over Autonomous Systems: A Philosophical Account' (2018) 5 Frontiers in Robotics and AI 15.

accountability in DAOs and thereby also a better fit into the human-centric idea of justice.

In this context, accepting artificial autonomous systems as self-containing and self-responsible decision-makers may not seem desirable at all and it should be rather thought about active human engagement in functioning of DAOs needing to become a requirement, as long as DAOs should be a non-negligible part of a well-governed society as subjects of the law.

This could help justice being achieved if needed by preventing both human stakeholders from escaping liability, for example through the chaining of companies in them, and the robot-in-boardroom effect from occurring. In terms of DAOs, two groups of persons should be focused on, as those who are actually responsible for the condition of the DAO-governing algorithm and therefore as possible human controllers of a DAO; namely the authors of the original code of a DAO and the token holders with voting rights. General laws can be applied to many of the related situations and the first pieces of regulation dealing specifically with this point are already available.

Thus, the liabilities of non-participating authors of the code can, theoretically, follow traditional norms regulating contractual or product liability on the part of developers and the liability for choice of a contracting party on the part of founding members of the DAO, although the practical application thereof may become difficult, due to the typical nature of the DAO projects. Further, especially in smaller DAOs, it must be taken into account that a single stakeholder falling into both those groups is likely to be very common. Here, the State of Vermont Blockchain Act provides a source of inspiration and possibly a valuable first step towards a model effectively dealing with the responsibility of members for the condition of the DAO's source code, foreseeing such situations and providing that such a person has to comply with any applicable fiduciary duties.[62]

The fact that the importance of immediate human involvement has been realized even by legislators can be further illustrated by the example of the Wyoming Decentralized Autonomous Organization Supplement, which has undergone fast-paced development in its still rather short existence. The law has always foreseen human actors being involved, but, interestingly, the first version thereof differentiated DAOs based on the level of human engagement with their day-to-day management, allowing for the establishing of two types of DAOs; namely a member-managed DAO and an algorithmically managed DAO.[63] Overall, each DAO established under the Wyoming Decentralized Autonomous Organization Supplement was required to have one or more members,[64] which means that memberless DAOs have never been permitted and certain involvement of persons was presumed, even in the case of

[62] State of Vermont Blockchain Act, S 4174 (a)
[63] W. S. 17-31-104 e) (as applicable until 31st June 2022).
[64] W. S. 17-31-105 a) (as applicable until 31st June 2022). This requirement has persisted even after the law was amended.

algorithm-managed DAOs. Moreover, each DAO must have a registered agent as provided for by relevant provisions of the general corporate law.[65]

However, it was foreseen that the management of the algorithmically-managed sub-type of DAOs would be vested in a smart contract and therefore seemed to presume a very low level of engagement of human members in the functioning of the DAO-governing algorithm. At the same time, the first version of the Wyoming Decentralized Autonomous Organization Supplement paid surprisingly little attention to the legal details of such an arrangement, providing solely that algorithmic-managed DAOs were only permitted if smart contracts, in which the management of such an entity was embedded, could be updated.[66] It did not provide for any specific criteria which such a smart contract should have met, nor did it provide for any specific mechanisms of preventive control (especially at the level of the DAO's source code) or enforcement, beyond that provided by general corporate law.

Eventually, the law was amended in 2022, which resulted in algorithm-managed DAOs being abolished as a separate sub-type of a DAO, with management options being changed, so that a DAO can be managed either by the members, or by the members and a smart contract. More precise requirements were also introduced on what the articles of association must provide for. This development clearly argues in favour of a rather higher level of human control in DAOs being seen as the plausible option. However, there seems to be significant room for development in the field of the overall understanding of what should be understood as meaningful human control in an algorithmic business arrangement.

G. CONCLUSION

The idea of decentralized/distributed autonomous organizations (DAOs) as separate legal persons habitually brings out an image of such an arrangement as a self-contained and self-responsible algorithmic entity being a subject of law. This gives rise to the question of how justice can be achieved with regard to such arrangements. Those questions, some of which this contribution had a closer look at, are valid; indeed, the distributed and algorithmic nature of DAOs is an element which is capable to put the idea of them being subject to the general, human-centric, notion of justice at least disputable.

While legal personality for DAOs turns out to be helpful in some aspects of achieving justice with regard to them, it does not seem to be a necessary condition thereof. Further, it equally brings problems in other aspects thereof and there are many questions which need to be resolved first. This contribution firstly had a look at some conceptual problems of how the distributed algorithmic nature of DAOs (mis)aligns with the need for the conduct of the subjects of law bringing just outcomes as well as for those subjects being able to submit to the external justice. An element of possibly advanced artificial intelligence was considered as well, showing that there are substantial risks stemming from a high autonomy and advanced artificial intelligence driving DAOs towards applying economically optimal but unjust patterns of conduct.

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[65] W. S. 17-31-105 b) (as applicable until 31st June 2022) in connection with W.S. 17-28-101 through 17-28-111. This requirement has persisted even after the law was amended.
[66] W. S. 17-31-105 c) (as applicable until 31st June 2022).

Secondly, the difficulties relating to the unvoluntary (but possibly even voluntary) dissolution of a DAO were discussed as an instructive and memorable example of how the technological nature of DAOs may impair the regular course of justice being taken against legal entities, as well as of the risk of unjust treatment of active minority of members in particular cases.

The issues described in this contribution do not seem to find a unanimous and effective response so far, which has been shown on the example of several jurisdictions which are known to approach the DAOs in a specific and tailor-made manner. While the overall conclusion is that legal personality for DAOs should not be promoted unless satisfactory solutions for the underlying problems is available, some suggestions were made in terms of how they could be approached as a third substantial element of this contribution.

Maltese law was touched on as an example of a law providing for extensive and elaborate preventative control of registered technological solutions (including DAOs), which is a valuable source of inspiration suggesting that a similar approach could be advisable where granting a separate legal personality to DAOs is considered. However, elevated costs and demands of such approach must be taken into account, plus it does not seem that robust requirements on DAOs codes and their control upon incorporation could be enough, merely because it is not possible to foresee and program all possible alternatives of future events and suitable responses to them. The latter clearly should be seen as an impediment for allowing legal personality for fully or highly autonomous DAOs. On the other hand, maintaining meaningful human control in DAOs is likely to be an effective response to those problems, and therefore should be seen as a reasonable requirement on DAOs to be considered as plausible candidates on legal personality. Thus, a semi-autonomous DAOs, in which identified human token-holders actively participate by overseeing the activity of the arrangement, raising proposals for further development and voting on those proposals, may be plausible to enjoy legal personality.

A combination of both those safeguards, i.e. imposing firstly the requirement on DAOs to be able to act in just way and respond to justice being sought against them by default, this being checked in the course of preventative control as much as possible; secondly the requirement on meaningful human control being exercised over a DAO by identified natural persons, may be a sound way how to allow most of DAOs benefit from a separate legal personality without allowing them to become a disruptive element to the overall idea of justice – both in terms of achieving just outcomes of the entity's conduct and of facing external justice.

Introducing *Ubuntu* to Property Law: A Case for Environmental Stewardship

Sfiso Benard Nxumalo[*]

'*If you sell your father's land to buy a trumpet, where will you stand to blow it*.'

- African Proverb

A. INTRODUCTION

Ubuntu refers to humanness.[1] Although it is difficult to translate *ubuntu* into Western epistemological thought easily, it posits that a human being is a human being because of other human beings.[2] It is a relational perspective in which individual identities are inextricably linked to the well-being of the collective.[3] At its core, *ubuntu* encompasses, *inter alia*, values of group solidarity, community, sharing, compassion, respect, and human dignity. It is a meta-concept, a worldview rooted in African societies, that recognises the interdependence of the members of a community. Contradistinguished from individualism, it places primacy on community. In *Makwanyane*, a seminal South African case in which the Constitutional Court declared the death penalty to be unconstitutional, Mohamed J described *ubuntu* as expressing —

> 'the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.'[4]

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[1] It is derived from the isiZulu saying '*umuntu ngumuntu ngabuntu*', which means that a person is person because of others. See Lucy Allais, 'Humanness and Harmony: Thad Metz on *Ubuntu*' (2022) 51 Philosophers Papers 203-237.

[2] Leyla Tavernaro-Haidarian, 'Deliberative Epistemology: Towards an *ubuntu*-based epistemology that accounts for a priori knowledge and objective truth' (2018) 37 South African Journal of Philosophy 229-242.

[3] Ellen Fungisai Chipango, 'Why do Capabilities need *Ubuntu*? Specifying the relational (im)morality of energy poverty' (2023) 96 Energy Research and Social Science 1-9 and Adrian D. van Breda, 'Developing the notion of *Ubuntu* as African theory for social work practice' (2019) 55 Social Work 439-450.

[4] *S v Makwanyane and Another* 1995 (3) SA 391 [263].

In this paper, I argue that *ubuntu* offers an alternative and attractive understanding of property and property law. I argue that currently understood property is based on the right to exclude. This right to exclude enjoys a high premium in a capitalistic society. Property, built on the right to exclude and market efficiency, has demonstrably failed to address environmental challenges. The dominant view, emphasising private ownership of resources with minimal state intervention, incentivises unsustainable exploitation. This approach has led to deforestation, land degradation, and the depletion of natural resources.

Ubuntu represents a normative break from abstract, hierarchical property rights arrangements centred around the right to exclude. Property generally follows an abstract, syllogistic logic predicated on an immutable, hierarchal rights arrangement. *Ubuntu* challenges the hegemonic hierarchical rights arrangement, privileging the right to exclude.

Under *ubuntu*, the environment is an integral part of the community. Individuals and nature are seen as interconnected and interdependent. *Ubuntu* imbues moral value to nature and inanimate objects. Land is seen as connecting all living forms. Nature and humans form a coherent whole. Under *ubuntu*, the premise of human action is interrogated. It questions whether one's actions are motivated by selfishness and resource-depleting actions. These types of actions would be at odds with *ubuntu*. Simply put, the senseless (read selfish) depletion of natural resources means the destruction of humanity itself.

The point of the argument is captured in the opening proverb. The proverb 'If you sell your father's land to buy a trumpet, where will you stand to blow it?' illustrates the dangers of absolute ownership. Selling the land, a valuable resource for future generations, for a fleeting pleasure like playing the trumpet represents disregarding one's responsibility as a custodian. On the other hand, *ubuntu* emphasises responsible use of resources for the benefit of present and future generations.

In the following few pages, I will argue the following. First, I contend that the dominant understanding of property has adverse environmental ramifications. This dominant understanding, perhaps most strongly articulated by William Blackstone, is predicated on the right to exclude over a thing.[5] Under a political economy that prizes capitalism and individualism, this has contributed to deleterious climate change and unsustainable practices. Secondly, I sketch the normative content of *ubuntu* as a legal philosophy. *Ubuntu* is notoriously difficult to define and has shifting meanings. However, this does not denude its significance. It remains an attractive relational, multi-dimensional worldview of 'African ontological values of interconnectedness, common humanity, collective sharing, obedience, humility, solidarity, communalism, dignity, and responsibility to one another.'[6] Thirdly, I propose *ubuntu* as an alternative legal philosophy to underpin our understanding of property. Under *ubuntu*, property ownership is seen as custodianship, with responsibility for future generations.

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[5] William Blackstone, Commentaries on the Laws of England (vol 2, Liberty Fund 1765) 2.
[6] Ndjodi Ndeunyema, 'Re-Invigorating *Ubuntu* Through Water: A Human Right to Water under the Namibian Constitution' (PULP 2021) 68-69.

This contrasts with individual ownership (with the right to exclude), where the owner has unfettered rights to exploit the resource. Custodial ownership necessitates sustainable practices that ensure the long-term viability of the resource.

For clarity, this paper does not propose that *ubuntu* can rescue the right to exclude over a thing and its shortcomings. *Ubuntu* and the right to exclude over a thing are conceptually distinct concepts, which are mutually exclusive at worst or not easily reconcilable at best. In addition, this article should not be understood as suggesting that *ubuntu* will solve all environmental issues that may arise. Its contribution is less ambitious. All I seek to do is suggest a different way of understanding property, which may have less adverse impact on the environment. I do not offer *ubuntu* as a perfect theory or 'way of knowing'. It has been criticised, and I will turn to these criticisms later. But these criticisms, I think, are not fatal to *ubuntu* and do not detract from its attraction.

The attraction of *ubuntu* lies in its emphasis of understanding the world through the lens of community, shared stewardship and its emphasis on our collective responsibility to take care of our resources. This appeal is particularly strong in the case of land, a finite resource. While the Earth itself may not be shrinking, the amount of usable and productive land certainly is. Desertification, soil erosion, rising sea levels, and unsustainable practices all contribute to this ongoing loss. Imagine a finite pool of fertile soil constantly under pressure - *ubuntu*'s emphasis on shared stewardship encourages practices that maintain, and even improve, this vital resource for future generations..

Two caveats are necessary. First, while in this paper I extrapolate and engage with the philosophical of property generally, I am specifically concerned with land as the anchoring for the arguments I seek to make. Despite this paper being concerned with property in the form of land, the arguments I present will have purchase in other forms of property. I say this because I am particularly concerned with property, which refers to legal relationships between individuals and a thing, and my arguments go the DNA of the property. These arguments are relevant to property broadly, despite my focus on land.

Secondly, the paper is not jurisdictionally restricted. While *ubuntu* is an African concept, I do not present an African-based focus but aim to demonstrate that *ubuntu* is a universally attractive point. It is an attempt to engage with the theoretical underpinnings of property by introducing a different lens from which to understand property. *Ubuntu*, which emphasises communal relationships, mutual respect, and collective well-being, transcends geographical and cultural boundaries. By situating *ubuntu* within a global context, the paper seeks to illustrate its relevance and applicability to various legal systems and societal structures worldwide. The idea is to move beyond the traditional, often Western-centric, perspectives on property and to offer a more holistic and inclusive approach.

This broader perspective allows for a richer, more nuanced discussion about property rights and obligations. It challenges the conventional notions of individual ownership and private property by highlighting the importance of

community and shared resources. In doing so, it provides a fresh and innovative framework for rethinking how property is conceptualised and managed in different contexts.

Moreover, this approach aligns with contemporary global challenges, such as environmental sustainability and social justice, where collective action and shared responsibility are crucial. By integrating the principles of *ubuntu*, the paper advocates for a more equitable and sustainable model of property relations that can resonate with diverse cultures and legal traditions. This exploration also opens up new avenues for interdisciplinary dialogue, inviting insights from anthropology, sociology, environmental studies, and beyond. It underscores *ubuntu*'s potential to contribute to a more inclusive and equitable understanding of property that benefits not just individuals but communities and societies at large. This also leads me to the following related point.

This paper is decolonial.[7] Property and the law of property served to exclude and diminish the lives (not just modes of living) of colonised peoples. This was achieved by introducing the concept of possession and ownership being dependent on improvement of the land.[8] Central to this was the idea of property being crucial to forming someone as a legitimate legal subject.[9] In the colonies, being a property owner and having the ability to acquire property were seen as essential prerequisites for someone to be considered a proper legal subject, or a fully recognised citizen-subject under the law.[10] This demonstrates, as Fanon argued, that property law functioned as a tool of colonial domination.[11]

A decolonial approach to property provides a way for us to (re)think the racialised notion of use and improvement and reconfigure and transform the grammar of property itself. Reconstructing use and improvement enables us to defang property's racialised, exploitative and exclusionary nature. In other words, property is conceived outside of predatory colonial-capitalistic relations. In a decolonial context, property is recognised as being more than a commodity to be exploited – it has a significant social component.

B. DOMINANT CONCEPTS OF PROPERTY: THE *SINE QUA NON* OF PROPERTY – THE RIGHT TO EXCLUDE

The aim of this section is to discuss the dominant conception of property. The argument is that the right to exclude [over a thing[is at the heartland of property. When one speaks of property, they are speaking of the right to exclude, which

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[7] See Margaret Davies, 'Decolonising Property Justifications' (2019) 4 Journal of Global Indigeneity 1-5.
[8] Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes* (Duke University Press 2018) 3.
[9] Ibid 4-5.
[10] Sfiso Benard Nxumalo, 'The Role of Property in Postcolonial Contexts' (2022) 10 African Law Review 31, 32.
[11] Franz Fanon, *The Wretched of the Earth* (Penguin Classics 1961) 109-111.

is the 'the right to prohibit one or more persons from using a particular resource, either at all or in some category of way.'[12]

(1) The Right to Exclude As the Necessary and Sufficient Condition of Property

Property is ubiquitous.[13] Hammond J in *White v Chandler* stated that property rights, next to constitutional rights, are the strongest interests recognised in law.[14] Despite the ubiquitous nature of property and its importance as a social institution, there is marginal agreement on what constitutes property. Some property scholars eschew a rigid definition of property. For instance, Harris notes that there is no true definition of property and that what might constitute property in one jurisdiction might not be considered property in another.[15] As Digest 50.17.202 cautions, any definition in law is dangerous as it may easily be subverted (*omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset*).[16] The abstruse peregrination of defining the nature of property is not prompted by abstract academic curiosity but because defining property, which is a significant component of society's social relations, has practical implications. To this end, the South African Constitutional Court recognised that: 'The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it.'[17] Though this was about land, the sentiment applies to property broadly.

However, this has not detained political philosophers and scholars from debating the philosophical justifications of property and the essence of property law.[18] On the one hand, Hugo Grotius,[19] John Locke[20] and Georg W.F. Hegel[21] argue that property is pre-social, a natural right that came into existence prior to the emergence of the State and law. On the other hand, Thomas Hobbes,[22] David Hume[23] and Jeremy Bentham[24] contend that property is social, a positive

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[12] James T. Stern, 'What is the Right to Exclude and Why does it Matter?' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press 2018) 39. '

[13] JW Harris, *Property and Justice* (Oxford University Press 1996) 4 and 6.

[14] *White v Chandler* [2001] 1 NZLR 28 [67].

[15] Ibid 139-140.

[16] *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd* 2011 (2) SA 157 (SCA) [30].

[17] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) [1].

[18] Richard Schlatter, *Private Property: The History of an Idea* (George Allen & Unwin 1951); Felix Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers Law Review 357; Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988); Stephen Munzer, *A Theory of Property* (CUP 1990); John Christman, *The Myth of Property* (OUP 1994); James Penner, *The Idea of Property in Law* (Clarendon Press 1997); Thomas Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 730.

[19] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (FW Kelsey tr, Clarendon Press 1925),

[20] John Locke, *Second Treatise of Government* (OUP 1690).

[21] Georg WF Hegel, *Philosophy of Right* (CUP 1821).

[22] Thomas Hobbes, *Leviathan* (Clarendon Press 1651).

[23] David Hume, *A Treatise of Human Nature* (Clarendon Press 1739).

[24] Jeremy Bentham, *The Theory of Legislation* (Kegan Paul, Trench, Trubner & Co. 1802).

right created by the State, the community or the law to secure other objectives. For economic property theorists, property comprises an authoritative list of recognised and permitted uses of a specific valuable resource, which is indispensable for well-functioning markets.[25]

Even with these debates, there generally appears to be some consensus on certain aspects of property. First, in a legal sense, property goes beyond a physical thing and concerns a person's rights and the legal relationships that flow from such rights. Second, property is more than mere possession or control over a thing. Third, property involves rights over tangible and intangible things. Fourth, there must be some way to enforce property rights.[26]

Historically, property was regarded as a collection or bundle of rights between persons involving a 'thing', which are enforceable against the world.[27] Thus, property rights are *in rem*.[28] Stated differently, property refers to a legal relationship between persons over a thing, which conferred rights to a particular individual to exclude a large and indefinite category of other people (that is, the world) from the thing. This can be contrasted with a right *in personam*, which refers to a right against a specific or small number of identified persons.[29] Consider this example: X owns a manor house and can occupy and use the house. There is a *prima facie* duty on the world to not interfere with X's rights to own, occupy, use and sell his manor house. This can be understood to be a right *in rem*. In contrast, X may lease his property to Y and demand Y to pay him monthly rent. This right to rent from Y is a right *in personam*.

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[25] Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26 The Journal of Interdisciplinary History 639. Also see Thomas Merrill and Henry Smith, *'What happened to Property in Law and Economics?*' (2001) 111 Yale Law Journal 357 and Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and inequality* (Princeton University Press 2019).

[26] Thomas Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 729, 731-733.

[27] Wesley N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal. Hohfeld provides a compelling quadrumvirate explication of property, which involves rights, power, liberties and immunities. These are understood as forming the basis of the 'bundle of rights' thesis. A M Honoré, 'Ownership' in Anthony Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) is generally perceived as the source for the modern 'bundle of rights' thesis. Honoré identifies eleven 'standard incidents of ownership', which explicate an understanding of ownership. An owner has rights to possession, use, management, income, capital, security and transmissibility, duties to prevent harm, liabilities to the execution of judgment debts and on insolvency and rights to the residue when lesser interests end, all for an indefinite term. See further James Penner, 'The "Bundle of Rights" Picture of Property' (1995-96) 43 UCLA Law Review 711; and Eric Claeys, 'Property 101: Is Property a Thing or a Bundle?' (2008-09) 32 Seattle University Law Review 617.

[28] Jürgen Kohler, 'The Law of Rights *In Rem'* in Werner Ebke and Matthew Finkin (eds), *Introduction to German Law* (Kluwer Law International 1996) 227, 23. Blackstone famously described property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe' in *Commentaries on the Laws of England* (1753) (J.B. Lippincott Co., 15th edn, 1809). Blackstone's view was that property is a real right but the reference to the "sole and despotic dominion" was a hyperbole or overstatement.

[29] Robert Stevens, 'When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?' (2012) 92 Boston Law Review 919, 920.

The bundle of rights thesis as an explanation is wanting. The bundle of rights thesis implies that property is a concept without a core – different arrangements of the incidents may all constitute property, but no particular arrangement is definitive. The bundle thesis, metaphorically speaking, does not have a soul. As Penner states, the bundle of rights thesis claims that property is without a definable essence.[30] Related to this point, Shroader states that under the bundle of rights thesis, 'property does not, or at least should not, exist'.[31] Property loses objectivity and can only be a myth without unity and physicality. Because property is everything, property is nothing.

Further, the bundle of rights thesis does not distinguish property from other contracts or torts. Contract and tort can equally be defined as a bundle of rights. The law of tort, which upholds the right not to be harmed, or conversely, the duty not to cause harm, encompasses numerous rights or duties. Similarly, the law of contract emerged historically from combining various actions with distinct conceptual foundations.[32]

Van der Walt has argued that, generally, property has been characterised by an abstract ownership paradigm underpinned by a syllogistic relationship between property rights and remedies.[33] The common conception is that ownership is usually regarded as the most comprehensive right one can have over property. Thus, ownership is considered to be the most superior right in property. Incidental to ownership is eviction, which logically flows from the right to exclude. The right to exclude an intruder from one's property is vital to the ownership and property. Merrill contends that it is the *sine qua non* of property.[34] Without the right to exclude, there is no property. In other words, or one to claim that they own property, the right to exclude is a necessary and sufficient condition.[35] Badenhorst and his co-authors note that the exclusionary focus of property demonstrates that ownership is the vertex of property.[36] They also recognise that inherently, in property, there is a hierarchy of rights, with superior rights on one end of the spectrum and weaker ones on the other.[37]

Thus, a property holder's rights, such as the right to own, will generally trump weaker rights or interests not recognised under property law, such as a personal right. As van der Walt notes, 'this syllogistic logic locks the adjudication of property disputes into an abstract doctrine that ranks various rights and interests in an immutable hierarchy that allows no or little room for

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[30] James E. Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA Law Review 711, 723.
[31] Jeanne L. Schroeder "Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property" (1994) 93 Michigan Law Review 239, 240.

[32] Penner (n 30) 739.
[33] AJ van der Walt, *Property and Constitution* (PULP 2012) 114 and AJ van der Walt, 'Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation' (2002) 2 Journal of South African Law 254, 255.
[34] Merrill (n 26) 730.
[35] Ibid 731.
[36] PJ Badenhorst, Juanita Pienaar, Hanri Mostert, *Silberberg and Schoeman's The Law of Property* (LexisNexis Butterworths, 4th edn, 2003) 93.
[37] Ibid.

considerations of context or fairness.'[38] This preoccupation with ownership and the right to exclude demonstrates that property primarily protects property holders from non-owners. It also evinces that property has a particular problem with non-owners.[39]

Thus, the dominant conception of property involves the protection of individual control over valuable resources.[40] It is commonplace that, as Merrill and Smith aver, the right to exclude is at the core of property rights.[41] Douglas and McFarlane asseverate that the distinctiveness of property is that it confers a right on the property-owner (or holder) to exclude non-owners and the correlative duty it imposes on the rest on the rest of the world to not deliberately or carelessly interfere with the owner's property. Van der Walt remarks that property acts as a fence that protects and safeguards owners against external threats and that the exclusionary nature of property triggers a legion of legally conclusive results.[42] In *Wolf*, Mauceri J enunciated that the property owner may exclude anyone and everyone from her property for any reason whatsoever.[43] And this is the central fault line of property and property law.

(2) Recognising Other Progressive Forms of Property

The fact that I have labelled the right to exclude as the dominant conception means that there are other conceptions, which are axiomatically not dominant. One such conception is the bundle of rights, which I discussed above.

Other conceptions see property as being underpinned by human values. Accordingly to the progressive theory, property has to be informed by human values. The values underlying rights and property law are various and incommensurable. A non-exclusive list of values that may be associated with property includes the following: human dignity, fairness, social justice, economic efficiency and social welfare.[44] As Singer argues, the social quality of property rights should be emphasised.[45] Every legal right should be construed not merely with reference to the rights, liberties, privileges and immunities it gives the property owner. Rather, it should be understood with reference to the

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[38] Van der Walt, *Property and Constitution* (n 33).
[39] Rashmi Dyal-Chand 'Sharing the cathedral' (2013) 46 Connecticut Law Review 647, 651 and Rashmi Dyal-Chand, 'Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law' (2014) American University Law Review 1683, 1687.
[40] Gregory S. Alexander, Eduardo M. Peñalver, Joseph W. Singer and Laura S. Underkuffler, 'A Statement of Progressive Property' (2009) Cornell Law Faculty Publications 743, 743.
[41] Thomas W. Merrill and Henry E. Smith, 'The Morality of Property' (2007) 48 WM & Mary Law Review 1849, 1849, 1857, 1861-1862.
[42] Van der Walt, *Property and Constitution* (n 33) 82-83.
[43] *People v Wolf* (1970) 63 Misc.2d 178
[44] Joseph William Singer, 'Property and Social Relations: From Title to Entitlement' in G. E. van Maanen and A. J. van der Walt (eds), *Property Law on the Threshold of the 21st Century* (Maklu 1996) 69-90.
[45] Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 Cornell Law Review 1009, 1046-1047.

impact of the exercise of those powers on non-owners and the shape and character of the social relationships generated by those rights and powers.[46]

There is also a theory of sustainable webs of interests, which argues that property can be understood as a web of interests.[47] Under this theory, property interests are defined and perceived through certain characteristics of the object of the property (which includes natural features and environmental carrying capacity) and the interconnected relationships that people, entities and institutions form with respect to the particular object.

There are clearly other conceptions of property that try to numb the harshness of the dominant conception. However, none of these alternative conceptions emphasise the importance of community (past, present, and future) and duties (shared responsibility) in the same way as *ubuntu*—this will be discussed later.

Largely, property law falls within private law and is generally divorced from environmental law and environmental issues, which fall within public law.[48] Property, arguably, forms the basis of modern-day capitalism. This is because capitalism is dependent on property rights and their robust protection. This provides a plausible explanation for why most states place strong protection against property – to ensure that capitalism persists. But this can be traced back several centuries. In the 18th century, Adam Smith built upon these ideas propounded by Locke and Hobbes when formulating his theory of capitalism. Essentially, Smith argued that individuals, motivated by rational self-interest, would direct their efforts towards maximising the value of their output. This necessitates efficient accumulation of capital, which can be exchanged in a competitive marketplace, ultimately fostering economic growth.[49] Central to this model is the importance of secure property rights, serving as a dependable store of wealth and a means to mobilise financial resources. It is to this relationship I turn to next and its impact on the environment.

C. ON PROPERTY RIGHTS, CAPITALISM AND ENVIRONMENTAL LAW

Having established that the right to exclude is central to property, it is important to consider how property fits into the capitalism puzzle. Once this is shown, I move on to making an argument about how the relationship between capitalism and property has had detrimental effects on the environment.

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[46] Ibid 1047.
[47] Craig Anthony Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 Harvard Environmental Law Review 281-364 and Craig Anthony Arnold, 'Sustainable Webs of Interests: Property in an Interconnected Environment' in David Grinlinton and Prudence Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff 2010).
[48] David Grinlinton, 'The Intersection of Property Rights and Environmental Law' (2023) 25 Environmental Law Review 202, 202.
[49] Adam Smith, *Wealth of Nations* (New York, P.F. Collier & Son, 1909-14).

(1) Property Rights and Capitalism

Capitalism is an 'ism'. It is an ideology. It is an ideology and economic system predicated on the notion that specific individuals should possess capital while others labour for them. Within the classical Marxist paradigm, this arrangement entails workers receiving wages while capitalists accrue a disproportionate surplus value, owing to their ownership of the means of production.[50] The worker produces while the capitalist owns the means of production. Capitalism requires class stratification on the basis of money. Property law, employment contract law and corporate law are central to maintaining that stratification because they fix ownership of assets within one class while organising the obligations of the other classes as different types of workers.[51]

Property rights are a necessary but insufficient condition for capitalism. Or at least that is what Rubin and Klumpp argue.[52] Other ingredients for capitalism include the enforcement of contractual arrangements, free markets and competition to organise exchange, and the existence of profit-maximising firms and so-called entrepreneurs to organise and drive production. Property rights, orientated around the right to exclude,[53] are instrumental: for the use and development of resources; for trade and alienation; for capital accumulation and growth and; for the resolution of conflict.[54] I expand on why this is so below. However, in setting this out, I do not endorse capitalism as indispensable and vital to the functioning of society. I make these observations without any endorsement. I also do not set out all the criticisms of capitalism in this paper. It is beyond my expertise to do so. I observe the adverse impact capitalism has on the environment.

Without private property rights, there would be a lack of incentive for the efficient use and development of resources. Or so the argument goes. Property rights affect resource allocation by encouraging people to carry out productive activity involving the asset, undertake investments that maintain or enhance its value, and also to trade or lease the asset for other uses.[55] It is said that without private property rights, the tragedy of the commons arises. Consider this example. Imagine a pasture that is open to all local farmers for grazing their animals. Each farmer wants to maximise their own benefit, so they keep adding more animals to the pasture to increase their own profit. However, as more

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[50] Karl Marx, *Capital: A Critique of Political Economy* (Penguin Classica 1990) 293.
[51] Alaster Hudson, 'Law as Capitalistic Technique' (2018) 29 King's Law Journal 58, 58-59 and Geoffrey M. Hodgson, *Conceptualizing Capitalism: Institutions, Evolution, Future* (University of Chicago Press 2015) 120-124.
[52] Paul H. Rubin and Tilman Klumpp, 'Property Rights and Capitalism' in Paul H. Rubin, Tilman Khumpp and Dennis C. Mueller (eds), *Property Rights and Capitalism* (OUP 2012) 204.
[53] Katharina Pistor, 'Liberal Property Law vs. Capitalism' *LPE Project* (27 January 2021) <https://lpeproject.org/blog/liberal-property-law-vs-capitalism/> accessed 13 May 2024.
[54] See Timonthy Besley and Mitreesh Ghatak, 'Property Rights and Economic Development' in Dani Rodrik and Mark Rosenzweig (eds), *Development Economics* (Elsevier 2005) 4526-4589.
[55] Maitreesh Ghatak, 'Property Rights and Productivity of Resource Allocation in Developing Countries' *London School of Economics* (5 February 2020) available at: <https://personal.lse.ac.uk/ghatak/PropertyRightsEDI.pdf> accessed 13 May 2024.

animals graze on the pasture, the grass becomes overgrazed, leading to soil erosion and eventually rendering the pasture unusable for everyone.[56]

The tragedy of the commons is that they face two dangers: overuse (that is, a demand-side failure) and underinvestment (that is, a supply-side failure).[57] This is because people with unfettered access to a finite, valuable resource (goods with rivalry and excludability) will generally overuse and underdevelop them. After all, they do not incur any costs or losses. This echoes Aristotle's caution that:

> 'For that which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest, and only when he is himself concerned as an individual. Besides other considerations, everybody is inclined to neglect something he expects another to fulfil.'[58]

Thus, property held in common is likely to be neglected by everyone because the benefit to any one particular individual of maintaining or caring for the commons will not be significant enough for them to do so.[59] Consider the deterioration of grazing fields as an instance of the tragedy of the commons. Farmers are motivated to maximise their earnings by grazing numerous animals on communal land. Nevertheless, if all farmers pursue this strategy, the land will suffer from overgrazing, resulting in soil erosion and decreased productivity.

A possible solution that has been proposed is private property rights—particularly the right to exclude. As a result of the right to exclude, res (things) that are part of the common pool are converted into private goods and assets. The argument here is that the right to exclude encourages the efficient use and development of property, thus demonstrating that private property is a necessary condition for capitalism. A private property right will allegedly incentivise investing and looking after the resource because they will be

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[56] Marcel Fafchamps, 'The Tragedy of the Commons, Livestock Cycles and Sustainability' (1998) 7 Journal of African Economies 384-423.

[57] Ibid 209. For a broader discussion on the tragedy of the commons, Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243-1248.

[58] Aristotle, *Politics* (T. A Sinclair translated, Penguin 1981) 1261.

[59] It must be noted that the tragedy of the commons has been robustly challenged. Chomsky has questioned whether the tragedy of the commons are based on lived experiences and how the world works. He said, 'The tragedy of the commons [is] a doctrine which holds that collective possessions will be despoiled so therefore everything has to be privately owned. The merest glance at the world shows that the opposite is true. It's privatisation that is destroying the commons'. See Nomi Chomsky, 'The U.S Behaves Nothing Like a Democracy, But You'll Never Hear About It in Our "Free Press"' *DW Global Media Forum* (15 August 2013) <https://lorenzohagerty.com/blog/chomsky-the-u-s-behaves-nothing-like-a-democracy/> accessed 13 May 2024.
The premise of the tragedy of the commons was also disproven in Elinor Ostrom, 'Public Entrepreneurship: A Case Study in Ground Water Management' (Doctoral thesis, University of California, Los Angeles, 1968).

adequately compensated. Therefore, private property fuels businesses and resource development as long as enforcing ownership rights is cost-effective.[60]

Furthermore, a robust property rights system is the linchpin of a thriving market economy.[61] Trade flourishes, and long-term prosperity takes root through the secure recognition and enforcement of these rights. Specialisation, the cornerstone of a state's wealth, thrives when individuals and businesses focus on their areas of expertise.[62] However, this very specialisation necessitates exchange – the ability to trade goods and services to unlock the benefits of such focused activity.[63] In a market economy, prices act as crucial signals, guiding production, consumption, and investment decisions.[64]

For exchange to flourish, however, individuals must possess unwavering confidence that their property rights will be respected.[65] This confidence hinges on two fundamental pillars. First, secure ownership: individuals must be assured of a valid title upon acquiring property through a legitimate transaction. They require the unfettered ability to possess and utilise their property, free from the threat of interference by third parties.[66] Secondly, the enforcement of rights requires more than a mere governmental declaration protecting property rights. The legal system must inspire public faith in its unwavering commitment to upholding these rights.[67]

Additionally, stable property rights serve as a powerful incentive for saving and investment, both critical drivers of economic growth. Without secure property rights, the very act of saving becomes a precarious venture, fraught with the fear of arbitrary appropriation. This principle is particularly germane to the development of the modern capitalist firm.[68] Investment, in essence, is a form of a delayed exchange. The entrepreneur commits resources to the firm in exchange for a claim on future returns, which can be either positive or negative. Property rights act to solidify this claim for the investor. They bear the inherent risk associated with the business itself, but not the additional risk of losing their investment due to an arbitrary seizure in the event of success. In this context, property rights operate in tandem with contracts, which guarantee payments to those who provide labour or loan capital to the firm.[69] But this is not all.

Property rights play a pivotal role in mitigating conflicts that often arise from competing claims over scarce resources or one individual's imposition of

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[60] Rubin and Klumpp (n 52) 209.
[61] Armen A. Alchian, 'Property Rights' *Econlib* https://www.econlib.org/library/Enc/PropertyRights.html accessed 10 May 2024. See also Armen Alchian and Harold Demsetz, 'The Property Rights Paradigm' (1973) 33 Journal of Economic History 16-27.
[62] Rubin and Klumpp (n 52) 209.
[63] Ibid 210.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.

negative externalities onto others. Resolving such disputes typically incurs substantial costs for the involved parties and society, from safeguarding possessions against appropriation to litigation expenses and even to the extremes of violence. These cumulative costs represent a welfare loss from an aggregate economic standpoint.[70]

The Coase Theorem, a fundamental economics principle, asserts that with clearly defined property rights and absent transaction costs, the allocation of externalities[71] in an economy will be Pareto-efficient,[72] irrespective of the initial distribution of entitlements.[73] In essence, this theorem underscores the potential of a well-enforced system of private property rights to diminish the costs associated with conflict resolution.[74]

I hope I have demonstrated the role of property rights in protecting and advancing capitalism, particularly the right to exclude. In the next section, I argue that capitalism, coupled with the right to exclude, has adversely affected the environment. The argument is not that capitalism is the sole or primary driving factor for environmental degradation.

(2) Capitalism and Environmental issues

Capitalism was designed to efficiently allocate scarce resources, encourage human ingenuity, and improve the quality of life for those willing and able to participate in the system. This economic model has been prodigiously effective at enabling people to convert natural resources into fungible commodities and monetary wealth. Capitalism has generated wealth (significant inequality) and prosperity by transmuting vast natural resources into marketable products. In theory, the production of wealth and the collective quality of life can be constantly enhanced under this economic model. Although wealth accumulation has hitherto entailed the unsustainable depletion of natural resources, capitalism maintains that when a commercially viable resource is exhausted, the market will produce an alternative. Thus, capitalism is supposedly an indefatigable method for perpetually generating more wealth (and inequality).[75]

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[70] Ibid.

[71] An externality refers to an indirect cost or benefit that arises from the production or consumption of a good or service and is experienced by a third party not directly involved in the transaction. These external costs or benefits are not reflected in the market price of the good or service.

[72] Pareto efficiency refers to an economic condition in which no feasible reallocation of resources can enhance the position of one party without a corresponding decline in the position of another. See Andrea Ventura, Carlo Cafiero and Marcello Montibeller, 'Pareto Efficiency, the Coase Theorem, and Externalities: A Critical View' (2016) 50 Journal of Economic Issues 872-895.

[73] Ronald Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1-44.

[74] Rubin and Klumpp (n 52) 210.

[75] Geoffrey Jones, 'Capitalism and the Environment' in Catherine Casson and Philipp Robinson Rössner (eds), *Evolutions of Capitalism: Historical Perspectives: 1200-2000* (Bristol University Press 2022) 188-190.

Whilst capitalism has yielded numerous socio-economic benefits over its relatively brief tenure,[76] it has also precipitated undesirable consequences.[77] Each product comes with a corollary by-product, and our capacity to extract and consume vast natural resources has generated a correspondingly significant volume of waste, manifesting in physical refuse, atmospheric pollution, and other forms of environmental degradation. The most severe consequence of our society's excessive atmospheric pollution is unequivocally global climate change.[78]

The unyielding pursuit of economic growth and profit under capitalism has propelled industries to exploit natural resources at an unprecedented pace.[79] This has fuelled innovation; enhanced living standards for many; and continuous creation of consumer protection, but it has also led to the depletion of finite resources and irreversible harm to ecosystems. Forests have been depleted, rivers contaminated, and habitats decimated to satisfy consumer demands. Moreover, the linear model of production and consumption inherent in capitalist systems fosters a 'take-make-dispose' mentality, exacerbating resource scarcity and waste generation.[80]

Furthermore, capitalism's emphasis on short-term gains often undermines long-term sustainability. Enterprises singularly focused on maximising shareholder returns may overlook environmental externalities and neglect investment in cleaner technologies or sustainable practices. This myopic approach not only perpetuates environmental degradation but also undermines economic resilience in the face of climate-related risks and disruptions.[81] In addition to environmental concerns, capitalism's unequal distribution of wealth and power exacerbates susceptibility to the impacts of climate change. Low-income communities and marginalised groups, who contribute the least to atmospheric pollution, frequently bear the brunt of its consequences. They are disproportionately affected by extreme weather events, food and water shortages, and displacement due to rising sea levels.

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[76] See Jeffery D. Sachs, 'Twentieth-Century Political Economy: A Brief History of Global Capitalism' (1999) 15 Oxford Review of Economic Policy 90-101.

[77] Friedrich Lenger, 'Wallerstein on Early Modern Capitalism and Global Inequality: A Reevaluation (2021) 15 Socio 49-70; Jonathan T. Park, 'Climate Change and Capitalism' (2015) 14 Consilience 189-206; Dylan Sullivan and Jason Hickel, 'Capitalism and Extreme Poverty: A Global Analysis of Real Wages, Human Reight, and Mortality Since the Long 16th Century' (2023) 161 World Development 1-18; Paul Collier, Diane Coyle, Colin Mayer and Martin Wolf, ' Capitalism: What has gone wrong, what needs to change, and how it can be fixed – global propositions, national initiatives, local authority' (2021) 37 Oxford Review of Economic Policy 637-649.

[78] Park (n 77) 191-192.

[79] Ibid.

[80] Karen Bell, 'Can the Capitalistic Economic System Deliver Environmental Justice' (2015) 10 Environmental Research Letters 1, 2-3.

[81] David M. Ong, 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives (2001) 12 European Journal of International Law 685, 703-704.

This exacerbates social inequalities and widens the affluent and impoverished gap.[82]

Addressing these challenges necessitates a paradigm shift towards a more sustainable and equitable economic system. This entails reassessing the tenets of capitalism and integrating environmental and social considerations into economic decision-making. Policies such as carbon pricing,[83] incentives for renewable energy, and measures to enforce corporate accountability can help internalise environmental costs and promote responsible business conduct. Furthermore, fostering international cooperation and solidarity is imperative to ensure a fair transition to a low-carbon economy and support vulnerable communities adapting to climate change impacts.

While capitalism has propelled economic progress and innovation, it has also contributed to environmental degradation and social inequality, culminating in the existential threat of climate change. Mitigating these challenges requires concerted efforts to reform capitalist structures, prioritise sustainability, and address systemic injustices. Only through reimagining our economic systems and collaborating towards a more equitable and resilient future can we hope to surmount the crises confronting humanity.

I interpose at this juncture to reiterate that I recognise that one can claim that other areas of the law, such as tort, international environmental law, and corporate social responsibility, may provide some tools to address some of the harsh consequences of capitalism on the environment. I do not deny the value of those mechanisms and their value. What I propose is fundamentally how we think about property itself and its role in a capitalist society.

D. WHAT DOES *UBUNTU* ADD TO OUR UNDERSTANDING OF PROPERTY

(1) Situating and Understanding Ubuntu

Ubuntu reflects African cultural commons, predicated on communal co-existence and respect towards nature and its resources. But this is only one facet of *Ubuntu* as a meta-seminal concept. In addition, it functions as a

[82] Lesile King, 'Environmental Justice and Capitalism' in Katherine Legun, Julie C. Keller, Michael Carolan and Michael M. Bell (eds), *The Cambridge Handbook of Environmental Sociology* (CUP 2020) 452-455.

[83] To combat climate change, a carbon price is a fee placed on the cost of emitting greenhouse gases (GHGs) like carbon dioxide. This financial incentive encourages polluters to find cleaner ways to operate, ultimately reducing their overall GHG emissions..

principle in public policy,[84] as a constitutional value,[85] as a means of resolving conflicts,[86] as a guiding principle in business and education,[87] and as the cornerstone of moral theory in Africa.[88] From an *ubuntu* perspective, as Murithi contends, a community's prosperity hinges on the well-being of all its members.[89] At its core, it is about the interdependence of humanity.[90] It concerns the capacity to 'express compassion, reciprocity, dignity harmony, and humanity in the interests of building and maintaining community with justice and mutual caring.'[91] *Ubuntu* thrives in fostering sustainable communities.

Ubuntu can be understood in several ways. *First*, it is a social philosophy. This philosophy is deeply embedded in African culture and stresses the interdependence of human beings. As alluded to in the introduction, *ubuntu* is derived from the isiZulu saying, *umuntu ngumuntu ngabantu*, which roughly means that a person is a person because of others. It provides that I am because we are.[92] As a social philosophy, it is underpinned by normative values of trust, care and sustainable communities to foster harmony.

Secondly, it has ontological consequences. From this perspective, it recognises the interdependent relationship between humans, animals and plants. These entities have to co-exist. The ontological facet of *ubuntu* underscores a paradigm wherein individual advancement is nurtured through interrelation and mutual engagement, diverging from the notion of oppressive communalism while accentuating the value of communal interaction in personal development.[93] According to African ontology, our existence unfolds within a fluid realm of vital energies, choreographed by the harmonious rhythms of a cosmic symphony. This ever-evolving cosmos defies confinement within rigid

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[84] Gessler Muxe Nkondo, '*Ubuntu* as public policy in South Africa: A conceptual framework' (2007) 2 International Journal of African Renaissance Studies 88-100.
[85] Yvonne Mokgoro, '*Ubuntu* and the law in South Africa' (1998) 15 Buffalo Human Rights Law Review 1-6 and Thino Bekker, 'The re-emergence of ubuntu: A critical analysis' (2006) 21 South African Public Law 333-344.
[86] Tim Murithi, 'African approaches to building peace and social solidarity' (2006) 6 African Journal on Conflict Resolution 9–34.
[87] Moeketsi Letseka, 'In Defence of *Ubuntu*' (2012) 31 Studies in Philosophy and Education 47-60; Elza Venter, 'The notion of *ubuntu* and communalism in African educational discourse' (2004) 23 Studies in Philosophy and Education 149–160; Phillip Higgs, 2003, 'African philosophy and the transformation of educational discourse in South Africa' (2003) 30 Journal of Education 5–22; and Andrew West, '*Ubuntu* and business ethics: Problems, perspectives and prospects' (2014) 121 Journal of Business Ethics 47–61.
[88] Thaddeus Metz, 'Toward an African moral theory' (2007) 15 The Journal of Political Philosophy 321-341. See also Kyriaki Topidi, '*Ubuntu* as a Normative Value in the New Environmental World' in Domenico Amirante and Silvia Bagni (eds), *Environmental Constitutionalism in the Anthropocene* (London, Routledge 2022) 51.
[89] Tim Murithi, 'A Local Response to the Global Human Rights Standards: The *Ubuntu* Perspective on Human Dignity' (2007) 5 Globalization, Societies and Education 277, 277.
[90] Barbara Nussbaum, '*Ubuntu*: Reflections of a South African on Our Common Humanity' (2003) 4 Reflections 21, 21-22.
[91] Barbara Nussbaum, 'African Culture and *Ubuntu*: Reflections of a South African in America' (2003) 17 Perspectives 1, 3.
[92] Fidele Mutwarasibo and Abelheid Iken, 'I am because we are - the contribution of the *Ubuntu* philosophy to intercultural management thinking' (2019) 18 Interculture Journal 15, 15.
[93] Thembisile Molose, Geoff Goldman and Peta Thomas, 'Towards a Collective-Values Framework of *Ubuntu*: Implications for Workplace Commitment' (2018) 6 Entrepreneurial Business and Economics Review 193, 196.

analytical constructs. In this African worldview, distinctions between subject and object, body and mind, reason and emotion, or contemplation and action blur into a seamless unity.[94]

Connected to this is the view that *ubuntu* is a cosmological ideal. This is the *third* facet of *ubuntu*. It embodies indigenous knowledge about the physical environment, such as land, and the interaction between humans and such an environment. In this sense, *ubuntu* acknowledges and accepts that humans' existence is related to and dependent on the spiritual and material environment.

Fourthly, *ubuntu* may be seen as a moral theory. As a moral theory, *ubuntu* relates to the process by which one becomes 'an ethical human being by promoting the cosmic balance in just and caring dependency of relationships.'[95] It underscores the idea that individuals exist within a network of relationships and are intrinsically tied to one another.[96] This moral philosophy promotes empathy, compassion, and communal responsibility. It suggests that one's humanity is enhanced and realised through interactions and relationships. Ubuntu, as a moral concept, encourages individuals to prioritise the community's well-being and recognise the inherent dignity and worth of every person. It emphasises cooperation, mutual support, and the idea that one's actions have ripple effects on the broader community.[97]

Ubuntu underscores the significance of interconnectedness and communal welfare, supported by five fundamental principles. These principles include: (i) reverence for the innate dignity of individuals; (ii) a collective orientation towards survival; (iii) a sense of unity in pursuing objectives; (iv) the crucial role of empathy in fostering relationships; and (v) the symbiotic relationship among these principles.[98] This comprehensive framework accentuates the importance of acknowledging the intrinsic value of individuals (that is, respect for their inherent human dignity), a shared dedication to survival, the recognition that collaborative efforts are essential for attaining ambitious goals, and the significance of nurturing connections through empathy. In short, these fundamental principles are espoused by the following [correlating] values: (i) dignity, (ii) survival, (iii) solidarity, (iv) compassion, and (v) respect.[99]

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[94] Mogobe B. Ramose, *Ubuntu: stroom van het bestaan als levensfilosofie* (Ten Have 2017) 59 writes: 'For the Africans, the invitation of the dance of be-ing is indeclinable since it is understood as an ontological and epistemological imperative...To dance along with be-ing is to be attuned to be-ing.'

[95] C. W. Maris, 'Philosophical racism and *ubuntu*: In Dialogue with Mogobe Ramose' (2020) 39 South African Journal of Philosophy 308, 316.

[96] Victor C. A. Nweke, '*Ubuntu* as a Plausible Ground for a Normative Theory of Justice from the African Place' in Jonathan O. Chimakonam, Edwin Etieyibo and Ike Odimegwu (eds), *Essay on Contemporary Issues in African Philosophy* (Springer 2021) 174 and Leonard T. Chuwa, 'Interpreting the Culture of *Ubuntu*: The Contribution of a Representative Indigenous African Ethics to Global Bioethics' (Doctoral dissertation, Duquesne University 2012) 2-27;

[97] Benjamin Elias Winks, 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) African Human Rights Law Journal 447-464.

[98] Paul Terngu Haaga, '*Ubuntu* Philosophy as Archetype in Resolving Conflict in 21st Century Africa' (2022) Theology, Philosophy and Education in the 21st Century 103-117.

[99] Molose, Goldman and Thomas (n 93) 199. Lovemore Mbigi and Jenny Maree, *The Spirit of African Transformation Management* (Sigma 1995);

Transversing these definitions of *ubuntu* reveals the centrality of community. It is important to note that 'community' includes the living and the 'living dead'.[100] The latter refers to those yet to be born and the spirits of the deceased ancestors. Good relations between the living and the living dead are vital as they are a necessary condition for justice and peace.[101]

(2) Ubuntu: Fact or Fiction?

It would be remiss to ignore some shortcomings of *ubuntu*. While Ubuntu is not fiction, the writings on *ubuntu* have some characteristics of creative writing. The claims of its impact and significance are sometimes overstated and exaggerated. *Ubuntu* also risks being a normatively empty rhetoric, similar to the rule of law and intersectionality, which have become buzzwords in legal academic discourse.

The first criticism is that *ubuntu* is normatively unattractive as it is too open-ended and vague. It may be manipulated to further a collectivist philosophy that is patriarchal, discriminatory, homophobic and deeply unequal. Oyowe and Yurkivska offer a feminist critique of *ubuntu*, claiming that the predominantly male theorists who defend Ubuntu ignore how profoundly unequal African traditions are.[102] In their view, ubuntu reproduces and perpetuates gender inequality. Those who defend *ubuntu* overlook the role that gender plays in the conception of personhood through the lens of *ubuntu*.[103] Oyowe and Yurkivska assert that African philosophy often overlooks feminist concerns like gender-based violence due to its perceived gender neutrality. They argue that despite being framed as gender-neutral, the African communitarian concept of personhood inherently carries gendered implications due to its relational and community-centric nature.[104] This is what they write:

> 'the African communitarian concept of personhood as it is envisioned by African communitarian philosophers speaks neither of women nor for them and as 'gender-blind' intellectual and analytical perspectives, continue to hold central stage the impact of persisting male domination on all aspects of social and political life remains unproblematised and normative.'[105]

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[100] Maris (n 95) 316.
[101] Ramose (n 94) 64. See also Maris (n 95) 316.
[102] Oritsegbubuemi A Oyowe and Olga Yurkivska, 'Can a communitarian concept of African personhood be both relational and gender-neutral?' (2014) 33 South African Journal of Philosophy 85-99.
[103] Ibid 85.
[104] Ibid 87.
[105] Ibid 87.

Oelofsen, a feminist philosopher, argues against this characterisation.[106] She contends that *ubuntu* and Afro-communitarian conceptions and understandings of personhood and ethics would not, at least in principle, condone the subordination and oppression of women. Afro-communitarian neither requires nor thrives on the oppression of women.[107] She posits that, notwithstanding the centrality of gender disparities to the conception of personhood within the framework of African communitarianism, it remains plausible to forestall the subjugation of women by embracing the concept of gender complementarity.[108] This proposition underscores the potential of Afro-communitarianism to foster gender egalitarianism.

Nevertheless, notwithstanding this contention, certain challenges persist concerning gender complementarity. For instance, there exists apprehension regarding the veneration of motherhood, which may lead to women being assessed solely on the basis of their reproductive capacities, thereby potentially circumscribing their autonomy, particularly in electing to eschew childbearing without encountering societal censure.[109] Moreover, the accentuation of a binary gender paradigm and complementarity raises concerns of heteronormativity and heterosexism, as individuals are expected to conform to socially and biologically prescribed gender roles. Nonetheless, it merits consideration that Amadiume's portrayal of the adaptable nature of gender roles in traditional African societies suggests that such constraints may not be as immutable as in societies where gender roles are strictly delineated by biological sex.[110]

Matolino and Kwindingwi argue that *ubuntu* is dead. According to them, *ubuntu* is outdated and appropriate for small, undifferentiated, and close-knit communities, which, in any case, have their own flaws. These communities are known for their aversion to outsiders, lack of tolerance for differing opinions, and significant emphasis on blood relations as the primary means of acknowledging others.[111] Thus, *ubuntu* is at odds with tolerance, democracy, and cosmopolitanism.

In reply to this article, Metz disagrees with this argument.[112] Metz himself develops a contemporary ethical theory founded on *ubuntu*, departing significantly from Ramose's interpretation. Metz abstracts more from African traditions, stressing normative philosophy over descriptive cultural

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[106] Rianna Oelofsen, 'Women and *ubuntu*: Does *ubuntu* condone the subordination of women?' in Jonathan O. Chimakonam and Loiuse du Toit (eds), *African Philosophy and the Epistemic Marginalisation of Women* (Routledge 2018) 42-56.
[107] Ibid 54.
[108] Ibid 52-53. It must be noted that 'gender complementarity' is a contested concept and has been subject to criticism.
[109] Ibid 54.
[110] Ibid 51-52. See also, Ifi Amadlume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1989).
[111] Bernard Matolino and Wenceslaus Kwindingwi, 'The End of *Ubuntu*' (2013) 32 South African Journal of Philosophy 197, 202.
[112] Thaddeus Metz, 'Just the beginning of *ubuntu*: Reply to Matolino and Kwindingwi' (2014) 33 South African Journal of Philosophy 65-72.

anthropology.[113] He aims to reframe the understanding of *ubuntu* by current moral standards. Referred to as 'Afro-communitarianism', Metz's approach differs from Ramose's *ubuntu* on two key points: it excludes ancestors from ontology. It introduces individual human rights into ethics, albeit within a communitarian context.[114] In Metz's modernised account of *ubuntu*, human dignity arises from the capacity to participate in a community. This capability comprises two aspects: first, the ability to empathise and share a way of life with others (identity); second, the capacity to uphold the well-being of those others (solidarity).[115] Metz introduces a systematic approach to African oral traditions academically, distilling them into a central principle that encompasses and elucidates prevailing moral intuitions.[116] At the core of Metz's *ubuntu* ideal lies the principle of friendship or love, characterised by a sense of solidarity identity. According to Metz, this entails the typically African model of consensual democracy alongside recognition of individual human rights. Indeed, transgressions against human rights are viewed as acts of hostility and consequently immoral.[117] As Metz grounds human dignity and rights in a universal human capacity, they are not contingent upon membership in any specific community.[118]

Another criticism relates to the tension between *ubuntu* and individual human rights. Oyowe views individual human rights and *ubuntu* as strange bedfellows.[119] The tension, Oyowe argues, is because *ubuntu*'s focus on communities and duties is antithetical to human rights, which are concerned with individuals and entitlements. *Ubuntu* prioritises and privileges communal goods rather than individual ones.[120] The onus is on the proponents of *ubuntu* to demonstrate that communal harmony and individual freedom are compatible.[121] According to Oyowe, Metz and other scholars failed to do this.[122]

Metz mounts a response against this argument. First, he argues that Oyowe does not understand his articulation of *ubuntu*[123]. He contends that Oyowe is attacking a strawman and does not engage with salient elements of *ubuntu*.[124] Oyowe interprets Metz's theory as suggesting promoting two separate ultimate goods: individual freedom and communal relationships. However, Metz proposes a unified fundamental good: human dignity, which is defined as the ability to engage in communal relationships and should be upheld. Metz argues that human rights should be viewed as ways of

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[113] Maris (n 95) 317.
[114] Thaddeus Metz, 'African Communitarianism and Difference' in Elvis Imafidon (ed), *Handbook of African Philosophy of Difference* (Springer 2020) 35-41.
[115] Thaddeus Metz, '*Ubuntu* as a Moral Theory and Human Rights in South Africa' (2011) 11 African Hunan Rights Law Journal 532, 536.
[116] Metz (n 114) 48.
[117] Ibid 70.
[118] Metz (n 112).
[119] Anthony Oyowe, 'Strange bedfellows: Rethinking *ubuntu* and human rights in South Africa' (2013) 13 African Human Rights Law Journal 103-124.
[120] Ibid 104.
[121] Ibid 112.
[122] Ibid.
[123] Thaddeus Metz, 'African values and human rights as two sides of the same coin: A Reply to Oyowe' (2014) 14 African Human Rights Law Journal 306, 307.
[124] Ibid 307.

acknowledging individuals as unique due to their capacity for communion rather than as mechanisms for balancing conflicting interests in freedom and community.[125] By misunderstanding Metz's theory, Oyowe's criticisms fall short.[126]

E. MAKING A CASE FOR AN UNDERSTANDING OF PROPERTY UNDERPINNED BY *UBUNTU* AND HOW IT RELATES TO ENVIRONMENTAL JUSTICE

So the question becomes, what does *ubuntu* contribute to our understanding of property? As alluded to earlier, the right to exclude is the *sine qua non* of property. That is the dominant conception of property. *Ubuntu* displaces this concept. In a South African case concerning evictions, Sachs J held:

> '[W]e are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'[127]

Ubuntu represents a normative break from abstract, hierarchical property rights arrangements centred around the right to exclude. Property generally follows an abstract, syllogistic logic predicated on an immutable, hierarchal rights arrangement. *Ubuntu* challenges the hegemonic hierarchical arrangement of rights, privileging ownership and the right to exclude.

Under *ubuntu*, the environment is an integral part of the community. Individuals and nature are seen as interconnected and interdependent. *Ubuntu* imbues moral value to nature and inanimate objects. Land is seen as connecting all living forms. Nature and humans form a coherent whole. Under *ubuntu*, the premise of human action is interrogated. It questions whether one's actions are motivated by selfishness and resource-depleting actions. These types of actions would be at odds with *ubuntu*. Simply put, the senseless (read selfish) depletion of natural resources means the destruction of humanity itself.

Ubuntu emphasises interconnectedness and communal well-being, offering a stark counterpoint to the dominant paradigm. That paradigm often frames human-environment relations as inherently conflictual and driven by self-interest. *Ubuntu*, however, rejects this rigid compartmentalisation of nature and

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[125] Ibid 308.
[126] Ibid 307-308.
[127] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [37].

society. Instead, it advocates for integrating scientific knowledge with political action to pursue sustainable development. Western property law emphasises individual ownership and the right to exclude others. This creates a sense of alienation from the environment and encourages a focus on individual gain, often at the expense of the collective good. *Ubuntu* disrupts this by emphasising interconnectedness. Property, under *ubuntu*, becomes a form of stewardship, with a responsibility to use resources to benefit the community and future generations. This reframing challenges the notion of property as a purely individual right, introducing a concept of communal ownership and responsibility.

Central to *ubuntu* is the concept of collective agency. Sustainability is not achieved by isolated individuals but necessitates a shared responsibility and a collaborative decision-making process. This fosters ecological intelligence, which is characterised by inclusivity, adherence to ethical principles, and the application of creative problem-solving. This intelligence extends beyond the human sphere, recognising the inherent value and interconnectedness of all elements within the natural world, both animate and inanimate.

This framework necessitates a fundamental shift in resource management practices. *Ubuntu* rejects the exploitative utilisation of natural resources, advocating instead for their mindful utilisation solely to meet essential needs. Such an approach inherently discourages waste and environmental destruction. Moreover, the pursuit of sustainable development becomes intricately linked with the preservation of cultural diversity. *Ubuntu* recognises that diverse communities hold valuable knowledge and practices that contribute significantly to responsible environmental stewardship.

This reframing offers a compelling addition to the legal discourse on environmental governance. By emphasising collective responsibility, ethical considerations, and the intrinsic value of nature, *ubuntu* provides a framework for legal systems to promote sustainable practices and foster a deeper connection with the environment. This philosophical underpinning can inform the development of robust legal instruments that encourage responsible resource use, promote environmentally sound decision-making, and ultimately, foster a more ecologically responsible future. A central tenet emerges from recognising the perils of prioritising individual interests over collective welfare, often leading to overexploiting natural resources.

The fundamental proposition of the tragedy of the commons, as set out above, is misplaced and a myth.[128] *Ubuntu* demonstrates that humans have a capacity for sharing resources with generosity and foresight. *Ubuntu* supports the survival of shared resources, provided that certain characteristics exist: clearly defined boundaries for the managing community, effective monitoring of the shared resource, a fair distribution of costs and benefits among participants, a reliable and equitable process for resolving conflicts, a system of escalating

[128] Michelle Nijhuis, 'The Miracle of the Commons' *AEON* (4 May 2021) <https://aeon.co/essays/the-tragedy-of-the-commons-is-a-false-and-dangerous-myth> accessed 18 May 2024.

penalties for rule-breakers, and strong connections between the community and various levels of authority, from local leaders to international organisations.

However, *ubuntu* underscores the importance of collective responsibility towards environmental stewardship, advocating for regulating resource exploitation through cooperative and solidary efforts. When juxtaposed with Amartya Sen's Capabilities Approach,[129] *ubuntu* assumes a heightened significance in the realm of environmental law.[130] This juxtaposition elucidates a critical implication: ensuring the survival and equitable access to basic necessities for all individuals becomes non-negotiable. This linkage underscores *ubuntu*'s inherent commitment to promoting the well-being of all humanity and reinforces the imperative of sustainable environmental practices.

The principles of *ubuntu* can be applied to various legal issues surrounding property and resources. For instance, disputes over land use could be approached through the lens of community needs and environmental sustainability. Additionally, *ubuntu* could inform the development of regulations for resource extraction, ensuring such practices benefit the community and minimise environmental damage. By incorporating these considerations, legal frameworks can move beyond a strict focus on individual rights and profits, promoting a more holistic approach to property management.

While *ubuntu* emerges from a specific African context, its core values are relevant to global environmental challenges. The emphasis on collective action and responsible resource use resonates with contemporary climate change and biodiversity loss concerns. Integrating *ubuntu* principles into international environmental law could foster greater cooperation between nations and encourage a shift towards sustainable development practices. This cross-cultural exchange of ideas can enrich legal frameworks for property rights, promoting a more just and ecologically responsible future.

The concept of *ubuntu* prompts a fundamental re-evaluation of our understanding of property rights, particularly in its departure from the prevailing emphasis on exclusion. Sachs J's reflections in *PE Municipality* underscore *ubuntu*'s transformative potential within constitutional frameworks, infusing individual rights with a communitarian ethos. This departure from rigid property arrangements challenges entrenched hierarchies and privileges collective well-being over individual ownership.

Furthermore, *ubuntu*'s holistic ethos extends beyond property rights to encompass environmental stewardship. Within the *ubuntu* framework, the environment is not merely a resource to be exploited but an intrinsic part of the community. This perspective fosters a profound appreciation for the interconnectedness of all living beings and imbues moral value to nature itself.

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[129] Capacities are defined as the capacity for a person to determine their own conception of the 'good life', and to have real freedoms enabling them to achieve this conception. See Amartya Sen, *Development as Freedom* (OUP 1999) and Martha Nussbaum, *Creating Capabilities* (HUP 2011).

[130] Mashele Rapatsa, '*Ubuntu* and the Capabilities Approach: Basic Doctrines for Calibrating and Humanitarian Action' (2016) 9 European Review of Applied 12- 19.

By reframing human-nature relations as symbiotic rather than adversarial, *ubuntu* advocates for a paradigm shift towards sustainable environmental practices rooted in respect and interconnectedness.

In contrast to conventional Western paradigms, which often frame human-environment interactions as zero-sum games driven by self-interest, *ubuntu* promotes collaboration and mutual respect. This collective approach to environmental management recognises that sustainability cannot be achieved through isolated actions but requires concerted efforts and shared responsibility. By prioritising ethical decision-making and inclusivity, *ubuntu* offers a framework for fostering ecological intelligence and promoting harmony between humans and their environment.

Moreover, *ubuntu*'s emphasis on collective agency underscores the need for inclusive decision-making processes in environmental governance. Sustainability initiatives under *ubuntu* are characterised by their participatory nature, involving diverse stakeholders and communities in decision-making processes. This inclusive approach not only enhances the legitimacy of environmental policies but also ensures that they are rooted in the needs and values of local communities.

As a legal concept, *ubuntu* provides a fertile ground for developing innovative environmental laws and policies. By prioritising collective well-being and ethical considerations, *ubuntu*-inspired legal frameworks can pave the way for more equitable and sustainable resource management practices. These legal instruments can incentivise responsible behaviour, discourage environmental degradation, and promote the preservation of ecosystems for future generations.

Ultimately, *ubuntu* offers a compelling vision for a more harmonious relationship between humanity and the environment, one that recognises the interconnectedness of all life forms and prioritises collective well-being over individual gain. As we confront the urgent challenges of environmental degradation and climate change, embracing *ubuntu*'s principles can guide us towards a more sustainable and equitable future.

F. CONCLUDING REMARKS

Umhlaba ubonke, the land belongs to all. This paper articulates a vision for reforming property law inspired by *ubuntu*. It calls for a critical re-evaluation of legal systems to incorporate principles that prioritise intergenerational justice, community well-being, and responsible interactions with the natural world. This reimagined legal framework aims to contribute significantly to the global discourse on environmental justice, proposing a model where legal systems actively support sustainable and equitable relationships with the environment.

This paper posits that *ubuntu*, with its emphasis on community, shared stewardship, and collective responsibility, offers a transformative perspective on

property and property law. By challenging the individualistic and exclusionary notions that currently dominate property rights, *ubuntu* introduces a relational and holistic understanding that prioritises the well-being of both the environment and future generations. This alternative framework underscores the interconnectedness of humans and nature, advocating for sustainable practices and custodial ownership. Although *ubuntu* is rooted in African societies, its principles have universal applicability and relevance, offering valuable insights for addressing global challenges like environmental sustainability and social justice.

The integration of *ubuntu* into property law not only proposes a shift from the exploitative tendencies of individual ownership but also aligns with contemporary movements toward decoloniality. By redefining property through the lens of *ubuntu*, we can dismantle the colonial-capitalistic structures that have historically marginalised communities and exploited resources. This decolonial approach reconceptualises property as a social institution imbued with moral and communal responsibilities, fostering a more equitable and sustainable model of resource management.

DISCUSSION ON THE POSSIBILITY OF VIRTUAL CHARACTERS BEING REGARDED AS LEGAL PERSONS

Xinyu Lyu

A. INTRODUCTION

In recent years, the rapid development of entertainment and cultural industries has significantly increased the commercial value of fictional characters, also referred to as artistic images within works. These characters, particularly those with considerable social influence and public appeal, have become valuable assets for businesses seeking to capitalize on their popularity. The evolution of virtual technology has further transformed the expression of these characters, allowing them to interact with the real world in unprecedented ways. Hatsune Miku, a virtual singer created using voice synthesis software and holographic projection technology, represents a significant milestone in this evolution. The emergence of virtual idols like Hatsune Miku, who engage in real-world activities and gather large fan bases, raises important legal questions about their rights and status.

The primary objective of this paper is to explore whether ACG (Animation, Comics and Games) fictional characters may be recognized as legal persons. To achieve this, the research employs a combination of doctrinal and comparative methodologies. As part of the doctrinal approach, this paper examines existing legal principles, statutes, and case law to formulate an understanding of the extent to which fictional characters are protected under the contemporary legal framework. The comparative approach examines how different jurisdictions address the protection of fictional characters, identifying best practices and potential models for legal reform.

By examining the legal personhood of ACG fictional characters, this paper aims to contribute to the broader discourse on intellectual property rights and the evolving nature of personhood in the digital age. It seeks to provide a framework for understanding the complex interactions between virtual characters and the real world, offering insights into how the law can adapt alongside technological advancements and cultural shifts.

B. BACKGROUND INFORMATION

(1) BACKGROUND

Fictional characters, also referred to as artistic images within works, represent a more marginal concept compared to the work itself. In recent years, with the rapid development of the entertainment and cultural industries, fictional characters have increasingly demonstrated their commercial value. Not all fictional characters hold commercial value; only those with significant social influence and public appeal can be effectively commercialized.[1] Many

[1] Jinpeng Guan, ['On the Intellectual Property Protection of Fictional Characters'] (Master Thesis, Shanxi University 2011) 7

outstanding works have introduced vivid fictional characters that are deeply cherished by their audiences. In response to intensifying market competition, businesses strategically capitalize on the popularity and affinity of these characters by integrating them into the commercial sphere to attract consumers. This is evident in products such as Mickey Mouse dolls and clothing adorned with Snow White designs, where characters are repeatedly leveraged to generate economic benefits.

Simultaneously, alongside the advancement of virtual technology, the form of expression of fictional characters has also undergone tremendous changes. The characters that originally existed in the fictional world of the work, with the help of virtual technology, realized the interaction between the fictional world and the real world. Starting with Hatsune Miku, increasingly realistic virtual characters have emerged in the public sphere, commonly referred to as virtual idols.[2]

Hatsune Miku serves as a prominent example, originating from a voice synthesis software of the same name. As a virtual singer, she held a concert in the real world on 9 March 2010, thereby rendering Hatsune Miku the first virtual idol in the history of human civilization to use semi-holographic (2.5D) projection technology to hold a concert.[3] Starting with this realistic concert, the fictional characters began to break out of the patterns that existed in the works and connected with reality. Since then, numerous virtual idols have emerged, engaging in real-world activities through their virtual representations. Unlike characters from continuous works, these virtual idols often possess only minimal personal background settings. Although the concept of virtual idols predates Hatsune Miku, she represents a significant departure from earlier virtual idols, marking the emergence of what is considered an idealized virtual idol.[4]

As virtual idols entered the market on a larger scale and attracted growing fan bases, controversy ensued. A defining characteristic of virtual idols is their high degree of anthropomorphism, which extends beyond their often lifelike visual designs to encompass their highly humanized modes of activity. In accordance with their character settings, they perform various activities, such as employing holographic projection technology to host personal concerts and leveraging their vast fan bases to serve as ambassadors for well-known brands.[5]

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[2] Hanning Gao, ou xiang ben xu ni:ou xiang gong ye de ji shu ge xin, fen si fu quan yu sheng chan ji zhi [‘Idol is Virtual: Idol Industry's Technological Innovation, Fan Empowerment, and Production Mechanism’] (2019) Media Criticism 74

[3] The Diva That Jumped out of the Monitor! ‘miku‘s Day 39's Giving Day Lunch Concert - Hello, This is Hatsune Miku.~’ Report (1/2) （ITmedia, 17 March 2010 <https://nlab.itmedia.co.jp/games/articles/1003/17/news068.html> accessed 12 September 2024.

[4] Hanning Gao（n 2）

[5] EW AR, Hongyang Tang,“Reality’ virtual idols are about to replace real people!’(Dongxi Entertainment, 15 November 2019) < https://mp.weixin.qq.com/s/BJiuj6JX3ngaCdqsl443zQ > accessed 12 September 2024.

With the advancement of digital technology, companies are increasingly integrating AI into the creation of virtual idols. It is foreseeable that these virtual idols will become even more lifelike, closely resembling real humans. However, despite the rapid development of virtual idols, the existing legal framework remains insufficient to address their unique characteristics and the rights associated with them. Many well-known virtual idols have cultivated substantial fan bases, and for these fans, the experience of interacting with a virtual idol may be perceived as comparable to engaging with a real celebrity.[6] The authenticity of the character has become a secondary concern. Therefore, it is worthwhile to consider whether virtual idols should be granted legal personhood. This raises further questions about whether virtual idols could derive benefits from their performances or creations. Beyond explaining why the law protects the creators of characters, it is also necessary to explore how these protections can be extended to ensure that virtual idols, as well as their creators, are adequately safeguarded within the evolving technological landscape.

(2) CURRENT LEGAL PROTECTION OF FICTITIOUS CHARACTERS AND RESEARCH METHODOLOGY

If you search for 'Mark' on Google, you will find both the real person and the fictional character with the same name appearing in the search results.[7] When a digital camera is used to capture images, its face recognition function locks onto every face, whether of a living person or a fictional character.[8] These phenomena show that from an informatics point of view, humans and fictional characters are the same. However, in terms of legal status, characters are necessarily different from humans. Human beings are subjects of rights, whereas fictional characters are considered objects. Presently, legal protection for such characters primarily falls within the domain of intellectual property rights. As integral components of creative works, the development of character imagery plays a crucial role in a work's success.

(3) CURRENT LEGAL PROTECTION OF FICTITIOUS CHARACTERS

Many countries still use copyright laws to protect fictitious characters, however, the degree of protection differs across jurisdictions. In Japan, the law establishes copyright protection for fictional characters through a series of precedents. They argue that a character is not the work itself; however, when a work is depicted as a visual representation of a person or animal, its copyright extends beyond the fixed expression of the image to include the character's

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[6] Jiahui Liu, 'Virtual Presence, Real Connections: Exploring the Role of Parasocial Relationships in Virtual Idol Fan Community Participation' [2023] Global Media and China 20594364231222976, 4.

[7] Shinichiro Harata, kyarakuta- no houteki tii : 「kyarakuta- no paburisithi ken」 siron ['The Legal Status of Characters : An Attempt to Illustrate 'Character's Right of Publicity''] (2019) vol.17 Information network law review 1

[8] Aoi Ōta, ningen no kao・ kyarakuta- no kao no tiga i to ha : sono kentou kanousei ni tui te ['Discuss the differences between human faces and character faces'] (2020) Summary of the Graduate School of Hosei University 1

overall depiction.[9] The copyright protection of characters in Japanese law is limited to cartoon characters represented by graphics.[10]

In Canada, characters portrayed in visual form could be protected as works of art. The fictional characters in literary works enjoy copyright as the literary works themselves.[11] In the United States, fictional characters are protected by copyright through court precedents, however it is difficult to determine which kind of characters should be protected.[12]In China, the legal method used to protect characters is generally to make them a 'trademark' or 'design' instead of a 'copyright'. Although from the perspective of protecting the function of the character as a trademark and the design, the creator of character obtains some rights, however, this is not the same as the overall right for the character itself.[13]

In general, the protection of fictitious characters in various countries has the following characteristics. First, fictional characters form a distinctive category within copyright law, but they are not considered an independent type of work. Many countries regard visual characters as fine art works, and regard literary characters as part of works.[14] This is the basis for characters to be protected by copyright. Second, copyrightability is an important condition for fictional characters to be protected by copyright. For example, originality and specific forms of expression. Only when a character forms a specific expression, could it break away from the scope of 'ideological content' and become the object of copyright protection. At this point, visual characters are easier to protect than literary characters.[15] Third, the distinct attributes of fictional characters, such as their names, voices, and signature actions, are frequently commercialized because they create strong associations with the character in the minds of consumers. However, using these attributes for commercial purposes does not equate to using the copyrighted elements of the original work. [16]

From the above analysis, it is evident that the copyright protection for fictional characters has its limitations: Characters are not fully covered by copyright protection. Certain defining elements of characters, such as individual names, are not considered specific expressions, and others, like accents, may

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[9] Bin Zhu, 'On the Merchandising Right of Roles' (1998) 1 Chinese and Foreign Law 25

[10] Du Ying, ' Discussion of the Merchandising Right ' (2000) 13 The Collection of Civil and Commercial Law 41

[11] Handong Wu, *Research on Copyright System in Western Countries* (China University of Political Science and Law Press 1999) 62

[12] Yana Lin, Jing Song, mei guo bao hu xu ni jue se de fa lv mo shi ji qi jie jian ['On the Legal Mode of Protection to the Fictional Characters in the USA and Its Reference'] (2003) Journal of Guangxi Institute of Political Science and Law 17

[13] Shinichiro Harata, 'Virtual Character as Legal Person' (Studies in Informatics Shizuoka University, 28 March 2019) 3 <https://doi.org/10.14945/00026379> accessed 18 July 2024.

[14] Handong Wu（n 11） 83

[15] Pan Yu, xu ni jue se de ke zhu zuo quan xing yan jiu ['Research on the Copyright of Fictional Characters'] (Master Thesis, He Bei University 2018) 3

[16] Jie Fan, xu ni jue se shang ye hua quan yi de bao hu mo shi ['On the Protection Model of Merchandising Rights and Interests of Fictional Characters'] (Master Thesis, CASS Graduate School 2018) 3

lack the originality required for copyright protection.[17] Consequently, copyright law is often inadequate in these cases, making it challenging to determine whether a character can be considered a copyrightable subject.

In short, under the modern copyright system, it is difficult to provide the same legal protection for fictional characters as the work itself. Therefore, copyrightability remains a widely-discussed and contentious topic.

C. INTRODUCTION TO FICTIONAL CHARACTERS

In this section, the focus will be on the conceptual framework surrounding fictional characters. The discussion will commence with a comprehensive definition, emphasizing the distinctive attributes of fictional characters, such as their names, visual designs, and personality traits, which contribute to their lasting impact on audiences. Despite their separation from the narrative in which they appear, fictional characters often maintain an intrinsic connection to the work, while simultaneously transcending it in terms of influence and longevity.

This part will also analyze the essential elements that define a fictional character in a legal context, exploring the criteria necessary for their recognition and protection under the law. Furthermore, various classifications of fictional characters will be examined, with particular attention to ACG (animation, comics, and games) fictional characters and virtual idols, which are increasingly prominent in modern media. The interaction between these characters and the real world will be critically analyzed, forming the basis for the subsequent examination of their legal and commercial significance.

(1) DEFINITION OF FICTIONAL CHARACTERS

Usually, character shows distinctive characteristics through artistic elements such as character names, image appearances, and personality traits, which attract readers' attention and even leave a lingering impression in the readers' hearts. Although the characters are separated from the plot, they are in fact closely related to the association and the plot of the work through the impression in the reader's mind. The character exists by relying on the work, nevertheless it never attached to the work. The influence of the character may be higher than the work itself, and its vitality may be longer than the work.

The World Intellectual Property Organization (hereinafter referred to as WIPO) released a report on character merchandising right in 1994. This report defines ‘character’ and ‘character merchandising’. Broadly speaking, the term ‘character’ includes fiction humans, fiction non-humans, and real persons. The first two types are collectively referred to as fictional characters.[18] The WIPO report summarizes all the objects of merchandising rights as ‘character’,

[17] Handong Wu （n 11）54

[18] ‘Character Merchandising – WIPO’ (World Intellectual Property Organization, December 1994) <https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wo_inf_108.pdf> accessed 12 July 2024

including both real and fictional characters, and even other objects of merchandising rights. The fictional characters discussed in this paper correspond to objects like 'fiction character'.

Artefactual theory in literature defines fictional characters as abstract objects that temporarily exist.[19] Characters are among the most essential elements of creative works, and fictional characters, as imagined constructs, do not exist in reality. In Chinese academic discourse, fictional characters are also referred to as artistic images within works. They are artistic constructs with distinct names, personality traits, life backgrounds, and physical appearances, closely intertwined with the storyline. This definition typically encompasses characters, animals, or robots appearing in movies, TV shows, animation, and other media, as well as fictional figures in literary works.[20] Japanese academic circles define fictional characters as animals or robots that appear in manga, TV, film, and animation in a visually perceptible or audibly recognizable form.[21]

As could be seen from the above, regarding 'fictional characters', scholars generally agree that: fictional characters are artistic creation images with unique personalities in works, including visual images created in films, TV, comics, animations, and various literary works expressed through language. Virtual images could be designed as humans, animals, or other images. They often have unique names, identities, appearances, clothing, habitual actions, or mantras. Although fictional characters are derived from the work, they have independent value and can exist independently of other characters and storylines.

(2) ELEMENTS OF FICTIONAL CHARACTERS

To determine the legal status of a fictional character, it is crucial to first define what constitutes a fictional character. Not all image designs can be recognized as fictional characters. Centrally, one must first identify the essential elements that substantiate a fictional character. Three elements are deemed essential for an image design to be legally recognized as a fictional character.

(a) Fictional characters are fictitious and are virtual artistic images created by the author, excluding real characters.

The WIPO report also did not include the representation of real characters in works into the scope of fictional characters. As a manifestation of human imagination, in addition to character images, fictional character images also include various character images created by the author, such as animals and robots. In works, particularly those with a storyline, fictional characters that do not exist in real life are typically created by authors based on their own life experiences and imagination, sometimes even defying real-world logic. In

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[19] Zoltán Vecsey, 'A Representational Account of Fictional Characters' (2015) Analysis and Metaphysics 68

[20] Handong Wu （n 11） 54

[21] Nobuo Monya, Masao Handa, *50 Lectures on Copyright Law* (Qixue Wei tr, Law Publisher 1995) 35

contrast, works featuring real people as main characters, such as biographies, tend to rely on real-world references. With advancements in holographic projection technology[22] in recent years, modern techniques have enabled the analysis and digital reconstruction of real individuals' images, allowing them to be projected onto the stage as three-dimensional (3D)[23] holographic[24] images[25].[26][27] However, the reappearance of images based on real people, even when their original performances are fully recreated using virtual technology, is ultimately a product of the behind-the-scenes technical team. As such, these representations do not qualify as fictional characters.

(b) The character set of the fictional character is complete and coherent.

The complete fictional character image should be composed of three aspects: personality characteristics, plot, and reaction.[28] Personality characteristics are mainly composed of the virtual character's name, appearance description, and character characteristics. The plot refers to the detailed narrative progression of a fictional character within a work. Reactions encompass the character's behaviors in response to various stimuli, including interactions with people, objects, and events.[29] All of these characteristics constitute people's overall cognition and differentiation of characters. Therefore, to be legally recognized as a fictional character, the character's image should be fully described by the author, including a distinct personality, unique characteristics, and vivid plot descriptions. The name of a character is just a code name for a fictitious

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[22] Holographic projection technology is a technology that allows viewers to see 3D virtual characters without wearing 3D glasses. (Weiying Li, *The 3D holographic projection technology based on three-dimensional computer graphics* (IEEE 11 December 2012) <https://ieeexplore.ieee.org/document/6376651>) accessed 12 July 2024

[23] The biggest feature of three-dimensional objects is that they are not plane images, but entities, because they can usually be observed and measured from three different directions of height, length, and width, usually abbreviated as 3D. The 3D virtual character means that the appearance of the character displayed is close to real and natural. (Definition from Collins Dictionary < https://www.collinsdictionary.com/dictionary/english/three-dimensional >) accessed 12 July 2024

[24] Holography is a method of recording light patterns. （Ahmed Elmorshidy, 'Holographic Projection Technology: the World is Changing' (2010) 3 Journal of Telecommunications 104）

[25] Holographic images are the three-dimensional image of these patterns which were recorded reproduced by technology. (Stephen A Benton and V Michael Bove Jr, *Holographic Imaging* (John Wiley & Sons 2008) 9)

[26] At the 2014 Billboard Music Awards ceremony held on May 18, 2014, a holographic image of Michael Jackson was performed at the MGM Grand Garden Arena in Las Vegas, Nevada. （Phil Gallo, 'Michael Jackson Hologram Rocks Billboard Music Awards: Watch & Go Behind the Scenes' (billboard, 18 May 2014) < https://www.billboard.com/dissertations/events/bbma-2014/6092040/michael-jackson-hologram-billboard-music-awards>）accessed 10 July 2024

[27] In 2017, in order to commemorate the 22nd anniversary of the death of singer Teresa Teng, the Japanese program Kin-suma 'resurrected' Teresa Teng on the spot, using holographic projection technology to reproduce the 1986 song singing scene. ('Japan Revives Teresa Teng with Holographic Images'（Dongjian, 28 May 2017 <https://mp.weixin.qq.com/s/esDSXG6MQLdcQRzo5CZXqw>) accessed 16 July 2024

[28] Denglou Wu, lun xu gou ren wu xing xaing de zhi shi chan quan bao hu ['Discuss the Intellectual Property Protection of Fictional Characters'] vol.1 Copyrights (1999）10

[29] Koichi Yoshimura, 'About Legal Protection of Character Products' (2009) vol.62 Patent 63

character and cannot replace a complete character to receive legal protection. At present, the discussion of fictional characters in law often focuses on the discussion of intellectual property rights. Therefore, simple character names in works, characters in pure artworks, or handicrafts could not be protected by copyright law, because they lack one of these three aspects.[30] Personality characteristics, plots, and reactions are important elements for fictional characters to be protected by the law.

(c) The fictional character image is original.

Protected fictional characters must be conceived and created by the author as original works. They must be independently developed and exhibit a certain degree of creativity, thereby excluding pre-existing characters.[31] If there are prior characters, the subsequent characters could not be protected.[32] Therefore, it must be a fictional character conceived by the author based on the elements perceived by his senses, and which is different from the character image created by others. Of course, there are exceptions. Based on the character image that is classified into the public domain, even if someone creates a previous work using this type of character image when another person uses the image of the character again to create a work, it will not infringe on the characters in the previous works.[33]

(3) CLASSIFICATION OF FICTIONAL CHARACTERS

The current classification of fictional characters is roughly divided into four categories, however, the fictional characters discussed in this paper are difficult to classify under the current classification method. Therefore, this research would refer to the general classification and the current development of the type of fictional character, then, based on the strength of the interaction between the character and reality, would make a new classification of fictional characters. This chapter will try to compare and distinguish several representative fictional characters from a new perspective and discuss different categories separately.

(a) GENERAL CLASSIFICATION

The characters in an artwork are certainly created by the author and constitute an expression of the author's thoughts, therefore the author could use different forms to create the characters. Fictional characters are also divided into different types according to their forms of expression and characterization.

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[30] Shaofang Fan, xu ni jue se shang ping hua quan de fa lv bao hu yan jiu ['Research on the Legal Protection of the Commercialization Right of Fictional Characters'] (Master Thesis, China University of Political Science and Law 2016) 11

[31] Tian Lu, mei guo xu ni jue se de ban quan bao hu – jian ping DC man hua su Towle an ['The Copyright Protection of U.S. Virtual Characters——A Comment on the Case of DC Comics v. Towle'] (2016) Chinese Copyright 65

[32] Haijun Lu, lun jue se de ban quan bao hu – yi mei guo de jue se bao hu wei yan jiu shi jiao ['On the Copyright Protection of Characters——A Study on Character Protection in the United States'] （2008）Intellectual Property 43

[33] Pan Yu（n 15）9

Some scholars have classified fictional characters into four categories: pure characters, visual characters, literary characters, and cartoon characters.[34]

Literary characters are constructed through description and plot in novels and plays, relying entirely on language for their depiction. Their visualization depends solely on the reader's imagination, as their form of expression is conveyed through words rather than fixed imagery. Due to the highly subjective nature of this process, character representations can vary significantly among readers, resulting in differing perceptions of the same character within a single novel. Consequently, the physical characteristics of literary characters remain inherently fluid and difficult to define with precision.

Visual characters originate from live-action films and are typically portrayed by real actors in various media, including films, TV series, and online dramas, while generally excluding documentary productions.[35] The classification contains some of the characteristics of literary and cartoon characters. Visual characters, unlike literary characters, have a visible appearance because they are portrayed by real actors in films, TV shows, or theater. This visual representation makes them easier to recognize compared to characters that exist only in text. However, a unique aspect of visual characters is that the same actor can portray multiple different characters, which means the actor's appearance can be associated with various roles. Conversely, the same visual character can be portrayed by different actors over time, each bringing their own interpretation and appearance to the character. This interchangeability adds complexity to the identity of visual characters because their portrayal can vary significantly depending on the actor.

A pure character is a character that stands alone and does not appear in any work. At the present time, countries have different degrees of copyright protection for characters, and characters themselves are generally not protected as subjects of copyright law. [36] Typically, the legal protection of a character relies on the protection of the work to which it belongs. Conversely, a purely independent character that does not originate from any specific work receives relatively weak legal protection or, in some cases, none at all.[37]

Cartoon characters refer to all line paintings expressed in visually simple forms and have a wider range than animation characters.[38] The term refers to a fictional character that exists in a two-dimensional realm[39]. In other words,

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[34] Haijun Lu （n 32）44

[35] Haijun Lu （n 32）45

[36] Yana Lin, Jing Song, 'On the Legal Mode of Protection to the Fictional Characters in the USA and Its Reference'(2003) Journal of Guangxi Institute of Political Science and Law 17

[37] Evidence of this could be found in the US, where the DeCosta case tells of a fictional character created by actor Victor DeCosta called 'Paladin'. The character is not part of any work and is only used in public appearances such as carnival and rodeo. However, the characters appeared in the CBS (Columbia Broadcasting System) television series 'Have Gun Will Travel', including names, physical appearance, characteristics and appearances, and many other elements are very similar with Paladin. The writers claim that the character was original and that the 'shocking similarity' is purely coincidental. In the end, the U.S. Court of Appeals for the First Circuit ruled that the character created by the actor Dexter could not get any legal relief because it was not part of any production, although the character was substantially like that in CBS's TV series. （*Columbia Broadcasting System, Inc. v. DeCosta*, 377 F.2d 315 (1st Cir. 1967)

[38] Shinichiro Harata (n7) 2

[39] Two-dimensions means the world of two-dimensional plane, especially the plane world composed of Animation, Comic and Game. They are also called ACG for short. As a term widely

cartoon characters are fictional characters that exist in animation, comics, and games. Generally known as ACG fictional character[40].

Visual characters and literary characters are no longer within the scope of this paper. Both classifications retain a common feature that is the instability of the character image. Visual characters may be played by different actors. However, an actor's face is not tied exclusively to a particular role. Likewise, a character's image is not restricted to a single actor. Literary characters exist solely through textual descriptions, and their visual representations vary depending on individual interpretations of language. This paper explores the possibility of fictional characters attaining legal personhood. However, characters with identical attire, names, or story backgrounds lack a fixed image and the stability required for uniform legal recognition. As a result, they cannot be regarded as unique "persons" in a legal sense. Therefore, these two types of characters will not be analyzed in the following discussion.

(b) ACG FICTIONAL CHARACTER CLASSIFICATION

Broadly speaking, ACG fictional characters encompass not only those appearing in ACG works but also characters created using similar techniques as cartoon characters. That is, they are depicted through colors and lines and follow similar artistic creation methods.[41] From the method of image design, pure characters are also a type of ACG character, so for the convenience of the following discussion, these two types of characters may be collectively referred to as ACG fictional characters.

In the process of commercialization of virtual characters, three distinct models of commercialization may be identified. The utilization of these models has allowed virtual characters to interact with reality in novel and unprecedented ways. These models are categorized based on the strength of interaction between the characters and the real world, as well as the existence and development modes of virtual idols, a new type of fictional character supported by virtual technology and modern multimedia technology.

The first model concerns pure work-based characters, such as general ACG fictional characters. The classification refers to characters that are not separated from the continuity of the work and may be regarded as non-interactive characters. The first business model innovation is the commercial use of character images. For example, from the 1930s onwards, in order to make full use of the popularity of the character image and create more economic value, Disney Company has authorized some manufacturers to use

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used in online tribal culture, two-dimensions could not only refer to the two-dimensional world created by Animation, Comic and Game, but also refer to the subcultural community formed by ACG enthusiasts, and also refer to the cultural industry chain formed by ACG and related industries. （Yanjun Shao, Yuwang Wang, *Breaking The Wall: Key Words of Network Culture* （Sanlian Bookstore 2018） 7）

[40] Riichi Ushiki, manga kyarakuta- no tyosakuken hogo ['Copyright Protection for Comic and Cartoon Characters (1)－ A Study to Establish Character Right'] (2001) vol.54 Patent 12

[41] Mengmeng Guo, er ci yuan xu ni ou xaing de sheng chan ji qi jie shou xin li ['The production and acceptance of the second dimension virtual idols'] (2019) Media Criticism 16

the cartoon image in their toys and clothing products, or use Marvel's cartoon characters to make movies with real-life interpretation.[42] In this mode, the audience's overall understanding of character and characteristics comes from the promotion and development of the plot of the work. The two-dimensional fictional character is not associated with the three-dimensional world, as the character still only exists in its own story.

Virtual idols are characters that can exist independently of a specific work. One of their defining characteristics is that they may temporarily detach from their original context or function without reliance on an existing work. Another feature is that they interact with the real world in their own name, image, and characteristics. As a result of this, they have considerable popularity in the real world and become virtual idols with fan groups.[43] In the eyes of fans and the public, they are not very different from real human idols. According to the type of interaction, they are divided into two sub-categories.

The second model refers to the semi-interactive virtual idol. This type of character is one that is born from a continuous work, however at the same time it is also separate from the plot of the work to carry out commercial activities in the real world.

For example, Lynn Minmay, the heroine of *The Super Dimension Fortress Macross*, gained widespread popularity as one of the earliest virtual singers in history. Although her voice was provided by a real person, the character itself became a cultural icon. As early as 1982, Japanese record companies released a personal album under the name Lynn Minmay, reinforcing her status as both an animated character and a singer.[44] The enthusiastic animation fans have also set up a fan support club for the character 'Lynn Minmay'.[45] From then on, applying the operating model of the idol industry, packaging characters from ACG works or a certain two-dimensional style character into virtual idol , and publishing albums or publishing photos for them has gradually become the norm in the Japanese ACG industry.[46]

This also led to a second innovation in the commercialization of ACG fictional characters. These characters move beyond the scope of their original works and evolve into virtual idols in the real world, engaging in additional business activities based on the personalities established in their original narratives. Not only experiencing life in the original works but also interacting with people in the real world.

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[42] Shanshan Li, lun ren ge quan shang ping hu ayu xu ni jue se shang ping hua zhi guan lian ji qi bao hu mo shi ['The Connection between Commercialized Identity and Commercialized Fictional Character and Its Protection Mode'] (Master Thesis, Nanchang University 2015) 10

[43] Hongwei Zhan, wang luo xu ni ou xiang ji fen si qun ti ren tong jian gou ['Network Virtual Idols and Fan Groups Identify with the Construction'] (2019) Young journalist 7

[44] Menmen Guo （n 41） 16

[45] xMIKEx, 'The First Generation of Galaxy Singer Lynn Minmay : the Interlacing of the Two-dimensional and Three-dimensional'（ZAZU, 27 August 2019） <https://zazu.cc/talks/17424> 7

[46] Hanning Gao (n 2) 75 accessed 06 May 2024

The third model refers to the fully interactive virtual idol. While they may be thought of as similar to the 'pure character' identified earlier, these idols do not originate in a story-telling work. They are, however, active in the real world under their own name. A fully interactive virtual idol can therefore be considered a character which has a personality, a name, an image, hobbies, etc. and who acts like a real person by living and working in the real world and interacting with people. This type of fictional character can be exemplified by 'Hatsune Miku'. Hatsune Miku was originally released in 2004 by Crypton Future Media as a music creation software utilizing Vocaloid, a singing synthesis technology that enables users to compose music by processing musical notes, lyrics, and vocal outputs.[47] Moreover, Hatsune Miku was the first virtual idol to hold a concert using holographic projection technology.[48]

Although Hatsune Miku is not the world's first virtual idol, Hatsune Miku is still regarded as a representative figure in the virtual idol industry. This is obviously due to the revolutionary breakthrough brought about by technological advancements. Hatsune Miku's rise to popularity may be attributed to two key technological advancements: the development of the VOCALOID speech synthesis engine and the refinement of holographic projection technology. [49] Neither was specifically designed for virtual idols; however, both have been widely adopted in the idol market across various performing arts and creative practices.

For Hatsune Miku, the speech synthesis engine gives her the ability to sing, while holographic projection enables her to assume physical form. When contrasted with her predecessors such as Lin Mingmei and Fujisaki Shiori, Hatsune Miku does not always require real voice actors; however, she can still perform solo concerts. Therefore, she has undoubtedly become the most complete virtual idol with professional ability in history[50], although technically Hatsune Miku is only a sound source library.[51] However, after the developer's anthropomorphic marketing, she is not only a fixed animation image, but also a first-line 'popular singer.' On this basis, a series of virtual idols which use the traditional idol operation mode to carry out activities, have been born and are engaged in various professions.

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[47] Agence France-Presse,'Computer-animated Pop Star Miku Hatsune Takes Japanese Music Scene By Storm.' (The National. Abu Dhabi Media. 14 June 2011) < https://www.thenational.ae/world/asia/computer-animated-pop-star-miku-hatsune-takes-japanese-music-scene-by-storm-1.428613> accessed 10 July 2024

[48] Hanning Gao (n 2) 75

[49] Zeyao Huang, quan xi shi dai ou xaing wu tai de xin sheng – quan xi quan xi tou ying ji shu dui wu tai de ying xiang ['The Rebirth of the Idol Stage in the Holographic Era: An Analysis of the Influence of Holographic Projection Technology on the Stage'] (2018) vol. 4 New Media Research 34

[50] Noboru Saijo, Eita Kiuchi and Yasutaka Ueda, 'double Structure of Real Space and Virtual Space Where Idols Live ~ Match and Dissociation of Character and Idol ~' (2016) vol.26 Bulletin of Edogawa University 199

[51] Anime News Network. 'Hatsune Miku Virtual Idol Performs 'Live'Before 25,000.' (Anime News Network, 23 August 2009) <https://www.animenewsnetwork.com/news/2009-08-23/hatsune-miku-virtual-idol-performs-live-before-25000> accessed 16 July 2024

This raises the question: *Can a character that is initially provided with basic background information and is not part of a continuous narrative still be considered a fictional character?* The answer is affirmative. Virtual idols, although starting with minimal background, develop their completeness through real-time interactions with the world. Their modes of activity often resemble those of real-world idols. By adhering to their initial character settings and responding dynamically to real-world interactions, these virtual idols cultivate their own personality traits, storylines, and behaviors. This continuous engagement allows their character integrity to evolve over time, and the public's perception of their personality becomes more defined with each interaction. Thus, the real-world development and engagement of a virtual idol can be seen as an ongoing narrative that contributes to the character's completeness.

D. DISCUSSION ON THE POSSIBILITY OF ACG FICTIONAL CHARACTERS BEING REGARDED AS LEGAL PERSONS

The previous chapters have introduced and classified fictional characters and provided a new categorization of ACG fictional characters, which will be further discussed in this paper. The primary objective of this paper is to explore whether ACG fictional characters may be recognized as subjects of intellectual property rights. Before delving into this topic, it is essential to determine whether ACG characters are capable of being recognized as legal persons under the law. This involves examining whether these characters can possess certain human rights akin to real people and become subjects of legal rights. Therefore, this chapter focuses on the following two questions:

A. *Does the boundary of the law have the possibility of expansion, and could ACG characters be regarded as possessing legal personality?*

B. *If it is possible, should all ACG characters be granted legal personality?*

(1) THEORETICAL DISCUSSION ON ACG'S FICTIONAL CHARACTERS BEING REGARDED AS LEGAL PERSONS

(a) TREATING ACG FICTIONAL CHARACTERS AS OBJECTS

As identified earlier in the paper, the current legal research on the protection of fictitious characters concentrates on the protection of intellectual property rights. For example, whether a character could be regarded as a work is a classic topic in legal literature. Undoubtedly, pictures and illustrations may be classified as ‘works’ under copyright law. However, a character corresponds to more than a mere picture, as it possesses a name, personality, and a life (albeit, in a hypothetical sense) therefore rendering it a comparatively abstract concept.[52] This means that the author naturally owns the copyright for each

[52] In the case Popeye's tie, the court denied that a single character in the comic could be treat as a copyrighted work. The reason is in the complete comic series, each character drawn corresponds to a copyright-protected comic, therefore, it is impossible to leave the specific

illustration he draws. However, these illustrations only represent one aspect of the character's expression, not the existence of the character itself therefore, the character itself is not necessarily protected by copyright. Similarly, comics, animations, and other artistic creations that depict characters, behaviors, and personalities in a coherent form are considered copyrighted works. However, the individual characters within them are not necessarily granted copyright protection. In other words, even if the author is the person who created the character, the character could not be 'owned' by them. Virtual idols are designed to interact with their audience in real-time and evolve based on ongoing engagement and feedback. Their dynamic and evolving nature means that the character's identity is continually shaped by a wide range of inputs and influences beyond its initial creation. The character becomes a living entity that grows and changes with each interaction, thereby rendering it impossible for the initial creator to maintain exclusive ownership.

In law, there is a clear distinction between subjects and objects: persons are subjects of rights, while things are objects of rights. Things, whether tangible or intangible, can be owned by humans. [53] The fact that an ACG character is not owned by any individual does not exclude it from being considered an object under the law. Objects can be tangible, like physical goods, or intangible, like intellectual property rights. [54] Intellectual property rights, as intangible property rights, demonstrate that it is possible to own property rights over non-physical entities. In legal terms, ownership implies a strong and specific meaning. Modern ownership is characterized by the owner's absolute freedom to use, acquire, and dispose of property. For instance, the right of ownership permits an owner to destroy a universally recognized and valued painting or antique.[55]

(b) TREAT ACG FICTIONAL CHARACTERS AS SUBJECTS

In the previous discussion, the characters were regarded as the object of rights, and their legal status was discussed. The next focus of this paper is to discuss the possibility of treating the character itself as the subject, which possesses the general rights that a natural person has over the character, such as those of ownership, dominance, and the right to obtain benefits. In other words, discuss the possibility of ACG fictional characters having rights and becoming the subject of rights.

What the law defines as a human being is not always clear and universal. For example fertilized eggs, embryos, fetuses, have biological significance in the process of becoming humans. Their genetic makeup corresponds to that of

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comics and treat the character itself as a work. The so-called character or role is an abstract concept, which embodies the specific personality from the concrete expression of continuous comics. Their image is not the specific expression itself, the character itself cannot creatively express thoughts or emotions. （The Supreme Court of Japan， 17 July, 1997 (Civil Case Vol. 51, No. 6, page 2714)

[53] Shinichiro Harata （n 13）2

[54] Riichi Ushiki （n 40）12

[55] Joseph L Sax, *Playing darts with a Rembrandt: Public and private rights in cultural treasures* (University of Michigan Press 2001)

a human being; however, they are not considered human by the law.[56] Therefore, in extreme cases, killing a fetus would not be considered murder, and stealing a fertilized egg in a test tube would not be considered kidnapping. The law does not explicitly define when an individual acquires legal personhood or when such status is lost. Scholars from various countries have many different views on this. At least in Japan and China, the birth and death of a person are not the nodes that determine the qualifications of a person in the legal sense.[57] Whether the object in the discussion is regarded as a person in law could have a decisive influence on its result, however, the boundary on this matter remains ambiguous.

On the other hand, the law could also treat things that are not biological at all as a person. A typical example is a so-called company. A company cannot be a natural person; however, it is regarded as a person under the law. Regarding the conceptual existence of the company as a legal person and owning independent rights and obligations, it is to provide the convenience necessary for various activities in society. In social practice, when the company acts as a legal person for business activities, there is no inconvenience or discomfort in social life.

From the above, we understand that the law does not always recognize biologically obvious humans as persons, and it can also grant legal personhood to non-human ideological entities. In the context of ACG fictional characters, these examples suggest that while it is currently challenging to treat such characters as legal persons based on existing social practices and legal frameworks, it is not entirely outside the realm of possibility. The legal definition of a person can evolve and expand to include new types of entities.

(c) DISCUSSION ON THE TYPES OF ACG FICTIONAL CHARACTERS THAT MAY BE REGARDED AS LEGAL PERSONS

This study argues that conditions must be met for a fictional character to be considered a legal person. Simply put, according to the classification in Chapter II, general ACG fictional characters that do not interact with the real world should not be granted legal personality. The characters that really have the possibility of being recognized as humans are actually ‘virtual idol-type characters’, that is, semi-interactive and fully interactive ACG fictional characters. They are better positioned to acquire such rights as they are not just fictional. On the contrary, they are capable of existing in capacities akin to that of real, human life. This personification does not imply that the virtual idol’s

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[56] Guang’an Chen, lun xu ni yu xian shi mao dun guan xi zhong ren de zhu ti xing jia zhi [‘The Value of Human Subjectivity in the Contradiction between Virtual and Reality'] (2008) Journal of Northeastern University (Social Science Edition) 110

[57] There are various theories about the birth of human beings, such as the beginning of childbirth theory, partial exposure theory, complete exposure theory and independent breathing theory. Regarding human death, death is identified according to the so-called three-symptom theory, however, there are also disputes as to whether ‘brain death’ should be regarded as human death. （Xiang Zhou, tai er sheng ming quan de que ren yu xing fa bao hu [‘Confirmation of the ‘Right to Life’ of the Fetus and the Protection of Criminal Law’] (2012) Law 51）

design closely resembles a real person; rather, it signifies that the form presented appears realistic, thereby, breaching the wall between the two-dimensional and the three-dimensional. For the fan groups of virtual idols, their idol is just one of the celebrities in reality. To explain this point, the forthcoming section will establish OBJ:OBJ.

(2) THE DIFFERENCE BETWEEN GENERAL ACG FICTIONAL CHARACTERS AND VIRTUAL IDOLS

There are many ambiguities and ambiguities between virtual idols and general ACG characters. This paper strives to make an accurate distinction between similar concepts. To exemplify the difference, the famous animation characters Pikachu and Kumamon may be considered. The reason for taking these two as examples is that they are both representative of successful operations in general ACG fictional characters and virtual idols, and they represent the most significant difference between the two types of characters.

Pikachu is a mouse that is capable of generating powerful electricity. [58] Originally, it came into existence as a character in the game Pokémon. As the popularity of the work increased, Pokémon was adapted into comics and animation and the character had a meaningful impact on the commercialization of virtual icons universally. In the past two decades, the copyright owners of Pokémon products represented by Pikachu have earned more than US$90 billion through product sales and derivative licenses, consequently ranking. No. 1 in the category of film, animation, and game. This number is higher than that of Disney's Mickey Mouse ($70 billion) and Star Wars ($65 billion), and more than three times that of Marvel movies ($28 billion).[59]

Kumamon was initially designed as a mascot, and therefore, did not originate as a virtual idol. Mascots must be represented by real people, therefore rendering the mascot's original design an anthropomorphic image.[60] Given Kumamon's rising popularity, he was appointed as a temporary employee of the prefectural government in 2010. Due to his outstanding performance, Kumamon was appointed as Sales Manager and Happiness Manager of Kumamoto prefecture in 2011.[61] Kumamon represents a fusion of anime character design and virtual star branding, fostering regional popularity. It has greatly increased the popularity of Kumamoto Prefecture. It may be argued that Kumamon has appreciably contributed to the local tourism industry, which has experienced prosperity in recent years. The development of

[58] Pokémon Official Homepage, <https://www.pokemon.com/us/pokedex/pikachu>

[59] 'With Revenue Exceeding US$90 Billion, the Road to Success for the First Animation IP Pikachu' < http://money.163.com/19/0522/20/EFQBMS5F002580S6.html >

[60] Yunjing Li, 'Research on Brand Strategy of Featured Towns Based on Representative Mascots'(Master Thesis, Jiangnan University 2019) 7

[61] Kumamon Official Homepage, <https://kumamon-official.jp/default.html>

surrounding industries brought economic benefits of $1.2 billion to the local area within 2 years. [62]

In accordance with formerly clarified rationale, in these two examples, Pikachu is a general ACG fictional character that should not be regarded as a legal person, whereas Kumamon is a virtual idol with the possibility of being regarded as a legal person. The specific reasons would be analyzed as follows:

(a) THE SEPERATION OF REALMS

One notable difference between Pikachu and Kumamon lies in the distinct fictional and real-world contexts they inhabit. Although they are both two-dimensional characters, Pikachu's lively image only exists in games, comics, and animation works. No one is able to interact with Pikachu; in other words, Pikachu is just an actor in Pokémon.[63] The storyline is only able to advance upon Pikachu's engagement with other characters within the fictional Pokémon realm. Therefore, the audience is incapable of interacting with Pikachu in a first-hand capacity. On the contrary, Pikachu only exists in 'another world'.

Kumamon is different. Kumamon's behaviors and actions were designed and planned to ensure seamless interaction with the real world.[64] Kumamon is a virtual character in the real world. As a government worker in Kumamoto Prefecture, he has a dedicated team assigned to the task of posting his daily schedules on social media. The department where he works also has specialized staff to answer calls, and additionally, he is also responsible for sales. At the same time, it must assume the functions that the director of the sales department should perform.[65]

To enhance authenticity, the planning team staged several events involving Kumamon. In 2010, they orchestrated his "disappearance" during a business trip, portraying him as captivated by the allure of the big city. In 2012, they created a storyline about his missing blush, and in 2015, he was "demoted" by the governor of Kumamoto Prefecture due to a failed weight-loss attempt. Each of these incidents followed formal societal procedures, including the organization of press conferences, the formation of special investigation teams, and the referral of cases to police forces.[66] People all over the world could directly participate in and influence Kumamon's activities through the Internet or in reality. In 2014, Kumamon was nominated by netizens to participate in the

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[62] Xinhetian, 'How did Kumamon Become the 'Net Celebrity' Mascot That has Swept the World?'(SocialBeta, 19 January 2016) < https://socialbeta.com/t/how-kumamon-become-the-most-popular-bear>

[63] Sirui Mu, qian xi xu ni ou xaing de ding wei ji qi ta dong man xing xiang de qu bie ['Analysis of the Positioning of Virtual Idols and the Difference from Other Cartoon Images'] (2018) Drama House 89

[64] Sohu News, 'Kumamon's Secret to Bringing Income to the Town' (Sohu News, 9 October 2017) < https://www.sohu.com/a/197070657_247689 >

[65] Kumamon Official Homepage (n 51)

[66] Lingxiao Liu, ji xaing wu zai lv you ping pai tui guang zhong de she ji yu yun yong [' The Design and Application of Mascots in Tourism Brand Promotion.'] (Master Thesis, Qufu Normal University 2019) 20

'ice bucket challenge'.[67] On one hand, these activities have created themes for Kumamon and injected further characteristics into the entity. On the other hand, through positive interaction with the masses, the image of Kumamon has become more prominent, subtly increasing people's belief and awareness that Kumamon is really living in reality.[68] Kumamon like everyone else, living in this world and doing his own work every day. It is only because of this strong interaction with reality that Kumamon is better described as a virtual idol than a virtual character.

(b) DIFFERENT MODES OF BUSINESS ACTIVITY

As an excellent and popular work, Pokémon has created interesting and lively cartoon characters, which are widely loved. The primary profit model for ACG fictional characters, such as Pikachu, extends beyond revenue generated from the original work. Like most cartoon characters, Pikachu's popularity and appeal are leveraged for commercial purposes to attract consumers. This is achieved by licensing the character's image for merchandise production and engaging in promotional activities to generate income.[69] Examples include printing Pikachu-themed clothing, accessories, and dolls.

Kumamon's operating model is completely different. The core of Kumamon's operating method is a high degree of personification. In the initial stage of the design, the designer sought to ensure that Kumamon would appear as real as possible, and thus thoroughly considered the possibility of action when designing the coat, so that it has a feature that is completely different from other mascots: Kumamon could perform fine movements in real situations that many other mascots could not.[70]

Kumamon's popularity is primarily driven by internet communication, with the operation team effectively utilizing social media to maintain a high level of public engagement. As a result, Kumamon resembles a real person by updating Twitter and Facebook daily, sharing his lived experiences, and making frequent media appearances. He has participated in various Japanese television programs, including variety shows, news broadcasts, and even scripted productions. Notable examples include appearances in TV Asahi's "Music Station", Fuji TV's "Mezamashi TV", and NHK's regional programs promoting Kumamoto Prefecture. Additionally, Kumamon has taken part in advertising campaigns and international events in China, such as in Shanghai and Dalian, further expanding his influence beyond Japan.[71] Compared to other mascots, Kumamon is a lively character, which allows the audience to perceive him as a young boy who resides in the real world, who loves to play, who is characteristically timid, thereby rendering him as ordinary as anyone else. His

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[67] Xuefang Rong, 'The Influence of Cute Culture on Brand Character Image' (2020) vol.28 Today's Media 99

[68] Sirui Mu (n 63) 89

[69] Jie Fan, 'On the protection model of commercialized rights and interests of fictional characters' (Master Thesis, CASS Graduate School 2018) 8

[70] Sohu News (n 64)

[71] Xuefang Rong, ke ai wen hua dui ping pai IP de ying xiang ['The Impact of 'Lovely Culture' on Brand Image'] (2020) 28 Jin Media 9

vivid character makes it so that the audience cannot help but overlook the fact that the character is played by the person in the holster. [72]

Both are fictional characters that have generated considerable benefits. In the eyes of the public, Pikachu has always been a likeable character derived from animation, while Kumamon is undoubtedly a virtual idol in the eyes of the public. The key contributors to this difference are the conditions which allow a fictional character to become a virtual idol in accordance with public perception.

(c) CONDITIONS FOR BEING RECOGNISED AS A VIRTUAL IDOL

From the comparison in the previous section, it is clear that the primary difference between general ACG fictional characters and virtual idols lies in their personification, which arises from their interaction with reality. So far, the standard of virtual idols considered in this paper is clear. First, the core concept is, virtual idols are virtual characters designed based on the real world. They have evolved into public figures and have a certain number of fans due to the promotional activities of the planning team. Essentially, the difference may be distinguished in accordance with the following: virtual idols are fictional characters living in the real world, and general ACG fictional characters are characters that exist in fictional stories and fictional world.

Firstly, the background stories of virtual idols are set in the real world. In contrast to other ACG characters, whose designs serve the plot, their narratives are typically developed first, followed by the creation of their character images. [73] The method of operating a virtual idol is more akin to the formulation of a biography. By developing the virtual idol's origin, life experience, personality, hobbies, friends, etc., the virtual idol appears more real and their characteristics are refined.

Secondly, virtual idols need a profession which corresponds to those which truly exist. The choice of this profession needs the potential to evolve into a public figure before it is possible to transform virtual characters into idols. Examples may include singers, designers, writers, actors, etc.

Thirdly, virtual idols have left some traces in the real world, which could be tangible or intangible, such as records, songs created or sung, something designed, certain literary or artistic works created, or have made contributions to a certain cause and achieved certain results or effects.

Fourthly, a virtual idol should maintain some level of interaction or connection with the real world to engage the audience. Even if a virtual character is designed to have a shy personality that avoids direct fan interaction, there should still be small streams of information shared with the public. For example, updates about friendships, workplace experiences, or other everyday moments can help sustain engagement.

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[72] Lingxiao Liu (n 66) 21
[73] Sirui Mu (n 63) 114

Fifthly, virtual idols should have a certain long-term existence. For example, a virtual character that exists only for a project and does not carry out long-term business activities could not form a stable and lasting fan base, therefore, this kind of virtual character should not be recognized as a virtual idol.

If virtual characters that meet the above conditions can be classified as virtual idols, they may also be considered fictitious entities with the potential to attain legal personhood. Once these conditions are further specified, such as the number of fans, works, and public recognition, criteria for evaluating virtual idols' legal person qualification applications could be partially established.

(d) SHOULD VIRTUAL IDOLS HAVE LEGAL PERSONHOOD?

With the advancement of modern technology and the widespread popularity of visual media such as movies and television, the public has gained a more efficient means of entertainment and knowledge acquisition. The traditional process for creating real-life celebrities typically involves several stages: discovery, selection, training, development, branding, and market testing. Initially, talent scouts search for potential stars, selecting individuals with promising qualities. These selected individuals then undergo rigorous training to enhance their skills and develop their persona. After training, they are shaped into marketable personalities through various development strategies. Next, they are branded and packaged to appeal to target audiences. This is followed by market testing, where their appeal and popularity are assessed through smaller-scale public appearances and performances. Those who succeed in market testing gain a certain level of popularity, prompting the company to invest further in their branding and promotion. These stars are then gradually introduced to higher profile performing arts platforms, increasing their visibility and success.[74] With idols, admirers will naturally appear. The growth of celebrities is often accompanied by the expansion of fan groups. Especially in recent years, with the development of new media, the growth of fan groups has constituted a cultural phenomenon that cannot be ignored.

In the traditional star system, idols are independent and unique figures of admiration. Their words, actions, fashion choices, and even lifestyle, covering clothing, food, housing, and transportation, often set trends and are widely emulated by the public. In this form of idol worship, the audiences remain passive receivers, with their aspirations and life goals significantly shaped by their idols. Under this system, where real idols dominate popular culture, the masses play a largely passive role in cultural formation.[75] The emergence of virtual idols has transformed the relationship between idols and the public. It is no longer a dynamic of imitation and emulation; instead, virtual idols are shaped by public creation. Due to their non-uniqueness and reproducibility, everyone

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[74] Zhenzi Qin, dang zhen shi zao yu wan mei – xu ni ou xiang tiao zhan chuan tong ou xaing ['When Reality Meets Perfection-virtual Idols Challenge Traditional Idols'] (2007) Business Manager 83

[75] Shuangfen Wang, xu ni ou xiang wei he shou zhui peng ['Why Are Virtual Idols Popular'] (2019) Shanghai Information Technology 75

has the opportunity to interpret and create their own version of "Hatsune Miku" in their own way.[76]

Virtual idols are virtual characters produced artificially through computer graphics and other means. These virtual characters have met the psychological needs of a large number of two-dimensional netizens and have been loved and sought after by considerable audiences.[77] Although virtual idols do not have specific material carriers in real life, they have a strong fan base, who support them, interact with them and allow them to release albums, organize fan assemblies and large-scale concerts, just like real idols. This kind of three-dimensional fan behavior is gradually becoming common in the two-dimensional world. The wall of dimension does not completely distinguish real idol and virtual idol.[78]

In recent years, the rise of virtual singers, movie stars, models, and presenters has drawn significant attention away from their real-world counterparts, including traditional singers, actors, models, and hosts. Additionally, there is a vast market for derivative products such as posters, toys, theme parks, and video games, all of which contribute to long-term cultural and economic value. These virtual digital stars offer unique advantages over real celebrities and possess immense market potential.[79] With technological advancements, virtual idols will become increasingly capable of performing various tasks. However, if regulations are not implemented in a timely manner, this could lead to market instability and intensified competition.

E. THE STATUS CHANGES OF VIRTUAL CHARACTERS IN LAW MIGHT BE BROUGHT BY THE LEGAL PERSONALITY OF A VIRTUAL IDOL

The above summary of the necessary conditions for being identified as a virtual idol is mainly to elicit the following point of view, whether a virtual character could be regarded as a legal person requires qualification review. If a special department is responsible for the legal personality of the virtual idol, review and registration would protect the well-known character better.

(1) BENEFITS OF HAVING A LEGAL PERSONALITY

As mentioned above, most industries in which virtual idols are engaged fall within the performing arts sector. Virtual idols often take on roles as singers,

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[76] Xu Zhang, cong xu ni zhi zao dao zhen shi xiao san – yi chu yin wei lai wei li lun shu zi ji shu dui dang dai ren de ying xiang ['From Virtual Manufacturing to Real Dissipation: Taking Hatsune Miku as an Example to Discuss the Impact of Digital Technology on Contemporary People'] (2016) Art Corner 15

[77] Leiyu Song, xu ni ou xiang fen si can yu shi wen hua de te zheng yu y iyi ['The Characteristics and Significance of Participatory Culture of Virtual Idol Fans'] (2019) vol. 41 Modern Communication (Journal of Communication University of China) 26

[78] Shuangfen Wang (n 75) 76

[79] Yong Gao, Siwei Ma and Bowen Song, guo nei xu ni zhu bo chan ye lian fa zhan xian zhuang ji qu shi yan jiu ['Research on the Development Status and Trends of Domestic Virtual Anchor Industry Chain'] (2020) vol.6 New Media Research 10

actors, models, or composers. Due to their highly anthropomorphic characteristics, society may struggle to differentiate some virtual idols from real individuals in terms of their image or business scope. Given that corporations can attain legal personhood, it is worth considering whether virtual idols, though currently lacking independent legal status, could be granted similar recognition. Drawing on corporate legal frameworks as a reference may provide a basis for ensuring their stability, intellectual property protection, and long-term commercial viability.

If a virtual idol passes the review, is recognized as a legal person and has an independent personality, that virtual idol could sign a contract, undertake performing arts activities, and become brand spokesperson, all in their own name. Most significantly, their performances might be regarded as similar or equivalent to human performances, which means that virtual idols themselves have the right to be paid independently. From the perspective of the main occupational types of virtual idols, they may mainly benefit from the protection of neighboring rights.

Based on the assumption of a registration system, further reasonable legal considerations can be made. Virtual idols, if granted legal personhood, may own independent assets, receive remuneration, and assume liabilities within defined legal frameworks.

Virtual idols are operated by technicians behind the scenes. As a legal person, as the managers could not maliciously harm the interests of the company, the behind-the-scenes management and planning team should conduct virtual idol activities without abusing the character image and maliciously subverting the character setting.

If the misuse of a virtual idol leads to infringement, the principle of piercing the corporate veil could be applied by analogy. In such cases, liability would fall on the primary individual responsible for managing the virtual idol. However, if the infringement arises from the idol's normal operations, the virtual idol could assume liability under its own name and assets. Conversely, if the virtual idol itself is infringed upon, a legal representative could file a lawsuit on its behalf.

The advantage of this is that no matter how the behind-the-scenes team members change, it might minimize the possibility of inconsistencies in the role images of the virtual idols due to the difference of the behind-the-scenes personnel, and it might also solve part of the current situation that fictional characters are difficult to be protected by law to a certain extent.

(2) DEFECTS OF HAVING LEGAL PERSONALITY

First, the above point of view does not protect all types of fictitious characters. Secondly, in the protection of virtual idols, the scope of protection of this policy is limited to virtual idols that could act as performers, such as singers, actors, and virtual youtubers and so on. On the contrary, virtual idols who seek to

engage with the real world in other capacities may not receive the benefits outlined above.

F. CONCLUSIONS AND FUTURE PROSPECTS

The legal recognition of ACG fictional characters as legal persons would mark a fundamental shift in the understanding of legal personhood and intellectual property rights. This paper's findings suggest that while existing legal frameworks primarily classify fictional characters as objects of rights, there is potential to expand this definition to include characters that engage in significant real-world interactions and exert tangible influence, such as virtual idols. With their dynamic, evolving personas and strong fan communities, virtual idols challenge traditional concepts of authorship, ownership, and liability, underscoring the need for legal reforms to address these complexities.

Granting legal personhood to virtual idols could enhance the protection of their commercial activities, ensure fair compensation for their contributions, and acknowledge their cultural significance. However, it also presents challenges, such as determining the extent of their rights and obligations and addressing the potential impact on the creators behind these characters.

Future research should focus on developing clear criteria for legal personhood, exploring the ethical implications of such recognition, and proposing comprehensive legal frameworks that balance the interests of virtual characters, their creators, and society. As technology continues to advance, the lines between virtual and real entities will blur further, necessitating ongoing legal and academic exploration to ensure that our laws evolve in step with these changes.

Moreover, interdisciplinary collaboration between legal scholars, technologists, and cultural theorists will be essential to fully understand and address the implications of virtual personhood. As virtual idols and other digital entities become increasingly integrated into our daily lives, the need for robust legal frameworks that protect their rights, and the interests of all stakeholders will become more pressing.

In conclusion, this paper underscores the importance of adapting our legal systems to the realities of the digital age. By recognizing the potential for ACG fictional characters to be regarded as legal persons, we take a significant step towards ensuring that our laws remain relevant and effective in an ever-evolving technological landscape.

FROM ‘FREEDOM AFTER SPEECH’ TO ‘FREEDOM OF SPEECH’: HOW DOES A SPOILED CHILD UNDERMINE DEMOCRACY ON A GLOBAL SCALE

Muhammet Derviş Mete[*1]

‘If you're not careful, the newspapers will have you hating the people who are being oppressed and loving the people who are doing the oppressing.’”

- Malcolm X

A. ABSTRACT

In the aftermath of October 7, the world has intensified its focus on Israel's genocidal policies in Palestine. With this issue gaining urgency, legal experts, scholars, and academics are rightly scrutinising whether Israel can be held accountable for war crimes, crimes against humanity, and genocide in international courts. However, the implications of this matter are far more overarching. In this paper, I will examine the impact of the unconditional support that Israel receives—particularly from Western countries, led by the United States— on democracy and the fundamental principle of freedom of speech. In this context, I will argue that the IHRA's definition of anti-Semitism and its so-called illustrative examples are wielded like a Sword of Damocles over those who criticise Israeli governments, demonstrating how this corrupted version of anti-Semitism poses a threat as dangerous as bullets. By analysing real-world cases, I will explore how the concept of Chosen Trauma, introduced by political psychologist Vamik Volkan, is manipulated by Israeli government officials to exploit the Holocaust—one of the greatest tragedies in history—for political purposes. Finally, using real-world examples, I will reveal how specific forms of freedom of speech, such as media and academic freedom, are undermined through censorship, self-censorship, intimidation, and coercion. In an environment where even writing about such a topic is challenging, the aim of this study remains modest: to stand against pressures and threats with the most valuable weapon we possess in the 21st century—freedom of speech—and to encourage colleagues who share similar concerns to do the same.

Keywords: Freedom of Speech, Freedom after Speech, Media Influence, Academic Freedom, Anti-Semitism, IHRA Definition of Anti-Semitism, Chosen Trauma.

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B. INTRODUCTION

According to an old Soviet joke, the difference between the US and Soviet Constitution is questioned. The response follows: The Soviet Constitution guarantees "freedom of speech," while the American Constitution guarantees "freedom after speech." This joke might have been much more amusing and meaningful in the past. However, today, the extent to which "freedom after speech" is protected in liberal democracies has become a highly controversial issue. Students and professors protesting Israel's atrocities, war crimes, and genocide in Palestine through peaceful demonstrations are being forcibly detained and harassed by the police on university campuses.[2] In the media, the slightest criticism of the Israeli government's ruthless policies in Palestine is dismissed by invoking the "anti-Semitism card."

The highly abstract and vague definition of anti-Semitism proposed by the International Holocaust Remembrance Alliance (IHRA), along with the so-called "antisemitic examples" adopted in addition to this definition, foster censorship and self-censorship in both media and academia. In this paper, I aim to illustrate how the "unconditional" support given to Israel by the West threatens the most indispensable principle of democracy—freedom of speech—exacerbates the global erosion of democracy, and normalises the West's double standards, particularly when it comes to Russia and Israel. Furthermore, I will examine how these inconsistent and hypocritical approaches tend to be easily exploited by despotic regimes and how the hard-won achievements of liberal democratic values are rapidly lost due to the unconditional support given to Israel, which acts like a spoiled child.

New York Times columnist Friedman once stated that "Israel today really is behaving like a spoiled child."[3] Despite its human rights violations, the continuous cash and arms aid from the United States and the constant vetoing of sanctions proposals against Israel in the UN Security Council by the U.S. demonstrate that Israel is acting like a spoiled child whose every desire is unconditionally fulfilled and supported.[4] However, a spoiled child never shows signs of satisfaction and gratitude just because all their demands are met unconditionally. They do not hesitate to embarrass their parents at every opportunity. Ultimately, this spoiled child exhibits symptoms of Narcissistic

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[2] Joseph Stepansky, 'US Campus Protests Updates: Police Clear pro-Palestine UCLA Camp' (02 May 2024) <https://www.aljazeera.com/news/liveblog/2024/5/2/us-university-protests-live-police-ucla-pro-palestine-encampment> accessed 21 June 2024.

[3] *The Jerusalem Post*, 'Israel today really is behaving like a spoiled child' (20 October 2010), <https://www.jpost.com/international/israel-today-really-is-behaving-like-a-spoiled-child> accessed 01 July 2024.

[4] When this article was written, U.S. Secretary of State Antony Blinken was busy making a statement filled with irony: "Today we commemorate the 75th Anniversary of the Geneva Conventions of 1949. The United States reaffirms our steadfast commitment to respecting international humanitarian law and mitigating suffering in armed conflict. We call on others to do the same." Perhaps if he had included details about the $20 billion in military aid to Israel, the statement would have been even more meaningful. See, Antony Blinken, <https://x.com/SecBlinken/status/1823122800095457535> accessed 14 August 2024.

Personality Disorder. Spoiled narcissists, who think of no one but themselves, place their own interests above everyone and everything, deluding themselves into believing that everyone around them exists to serve them and support them in whatever they do and say. In the long term, they pose a significant threat to themselves, their indulgent families and surroundings, the society in which they live, and the liberal democratic principles that the entire world has gained through centuries of struggle.

The paper proceeds as follows. In the first section, I will evaluate the IHRA definition of anti-Semitism. Despite lacking legal status, I will explain how this definition, along with the so-called "illustrating examples" accompanying it, has been effectively used to silence and intimidate dissenting views, providing concrete examples. In the next section, I will explore how Israel uses the historical trauma of the Holocaust to downplay the impact of the genocide it currently commits and to shield the Israeli government's brutal and lawless policies. I will also examine how this aligns with Vamik Volkan's concept of "chosen trauma." In the final section, I will analyse how freedom of speech, particularly in media and academic freedom, has been undermined with regard to Israel, especially in Western countries, with a focus on the United States. I will provide concrete examples to show how critiques of Israel are suppressed, leading to the erosion of hard-won freedoms in a bid to appease a spoiled child.

C. NO DEMOCRACY WITHOUT FREE SPEECH

Freedom of speech is a *sine qua non* for democracy. All other fundamental rights and freedoms are directly or indirectly linked to this right, and the protection (or lack thereof) of this right inevitably impacts the exercise of other rights. Without the right to free speech, it is impossible to speak of freedom of the press, academic freedom, artistic freedom, the freedom to develop one's material and moral existence, or the freedom of assembly and protest. Therefore, any blow to this right threatens all fundamental rights and freedoms. No matter how free, fair, and competitive elections may be, regimes where freedom of speech is not safeguarded by effective mechanisms cannot be classified as full democracies. Such regimes can, at best, be termed flawed democracies or, more systematically, 'democracy with adjectives.'[5] International organisations that evaluate the democratic standards of countries, notably Freedom House, speak of a global erosion of democracy.[6] According to these evaluations, the number of full/flawless democracies is regrettably decreasing, while the number of semi-democracies/ hybrid regimes and authoritarian regimes is rising. The failure to acknowledge the impact on one of democracy's most fundamental components, freedom of speech, in the name

[5] To better understand what flawed democracy means, see*:* David Collier and Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1996) 49(3) *World Politics.*

[6] Sarah Repucci and Amy Slipowitz, 'Freedom in the World 2021: Democracy Under Siege', *Freedom House* <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege> accessed 29 July 2024.

of protecting Israel and its interests, is an important indicator that democratic erosion will intensify in the coming years.

Since October 7th, the death toll in Palestine has approached 40,000.[7] International law debates whether these actions meet the criteria for war crimes, crimes against humanity, and genocide.[8] However, Israel's aggressive behaviour, with impunity, the unconditional support given to this country by the West, and the suppression of even the faintest criticisms of Israeli government policies have far-reaching implications and will continue to do so. In this section, I will elucidate why and how freedom of speech is threatened and why it is in great danger. To that end, in the following subsections, I will first explain how Israel frequently resorts to *anti-Semitism card*s to silence critics and cover up its atrocities and how this concept defined by the IHRA, along with the so-called anti-Semitic examples adopts, further exacerbates this misuse.

Subsequently, I will delve into the concept of "chosen trauma," coined by Vamik Volkan, explaining how the historical trauma of a specific group is deliberately exploited and repeatedly invoked by political elites to manipulate public perception, allowing authorities to justify or conceal their unlawful acts. In his work, Volkan does not, of course, fall into the mistake of denying the traumas. On the contrary, he acknowledges how severe and brutal the traumas are, but on the other hand, he observes how political figures have consciously and systematically used these tragedies to cover up their wrongdoings and prevent survivors from recovering.[9] After explaining the abuse of traumas in the context of one of the most brutal tragedies of history, the Holocaust, I will finally demonstrate in the last subsections, through concrete examples and case studies, how specific forms of freedom of speech, particularly media and academic freedom, are under threat in Western countries in particular.

D. ANTI-SEMITISM: A MUCH MORE POWERFUL WEAPON THAN BULLETS

Perhaps I should begin with what I intended to say at the end: the term anti-Semitism is an incorrect choice. That is why I believe that before addressing the issue of anti-Semitism, a conceptual clarification is required. The term "anti-

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[7] Rob Picheta, 'More Than 40,000 Palestinians Have Been Killed in 10 Months Of War In Gaza, Health Ministry Says' (16 August 2024) <https://edition.cnn.com/2024/08/15/middleeast/gaza-death-toll-40000-israel-war-intl/index.html#:~:text=More%20than%2040%2C000%20Palestinians%20have%20been%20killed%20in%20Gaza%20since,10%2Dmonth%2Dold%20conflict> accessed 17 August 2024.

[8] In January 2024, the International Court of Justice found a "plausible" risk that Israel is committing genocide in Gaza. Israeli historian Amos Goldberg believes that "This Is exactly what genocide looks like" and adds that what is happening in Gaza does not need to resemble the Holocaust in order to qualify as a genocide. For a comprehensive analysis, see: Middle East Eye, 'Israel "undoubtedly" committing genocide says Holocaust scholar Amos Goldberg' (29 April 2024) <https://www.middleeasteye.net/news/israel-undoubtedly-committing-genocide-holocaust-scholar-amos-goldberg> accessed 27 June 2024.

[9] Vamik Volkan, 'Transgenerational Transmissions and Chosen Traumas: An Aspect of Large-Group Identity' (2001) 34(1) *Group Analysis* https://doi.org/10.1177/05333160122077730 79–97.

Semitism" is a misnomer because the term "Semite" includes not only Jews but also Arabs. Just as Islamophobia aims to prevent negative stereotyping of Muslims, a more precise term should be used to protect Jews from discrimination and prejudice. Since the concept is misused, it is like fastening the first button incorrectly from the start. Anderson highlights this point, noting that the concept of anti-Semitism is Eurocentric and excludes other Semitic groups, not just Arabs. He observes that this incorrect conceptualisation, introduced by Europeans, stems from: (i) the historical discrimination against Jews by Europeans and (ii) the 'mistaken conflation of Israel with the Jewish people.'[10] If anti-Semitism is intended to protect the Semitic groups in a broad and accurate sense, it would be challenging to find someone more anti-Semitic than the Israeli minister who insulted Palestinians by calling them "human animals."[11] Therefore, I propose to embrace much more accurate concepts, such as "anti-Judaism" or "jewphobia."

As if the incorrect choice of the term were not enough, the definition of anti-Semitism adopted by the IHRA, along with the so-called 'antisemitic examples' it includes, are also misleading. In 2016, the IHRA, a group dedicated to combating Holocaust denial, declared that it had adopted a document called the *Working Definition of Anti-Semitism*.[12] As soon as this document was introduced, it was accepted by Israel, the USA, and some European countries without proper scrutiny. Due to the lack of scrutiny, its adoption by a few European countries has amplified the pressure on government agencies and public bodies to treat criticism of Israel as presumptively anti-Semitic.[13] Although IHRA describes it as a "non-legally binding working definition," due to its ambiguous relationship with the law, it has been given quasi-legal status.[14] It is important to note that no act of Parliament or legislation has specified this document's exact legal authority. The IHRA document was "adopted" via a governmental press release, bypassing a process of democratic deliberation. Despite not being legally ratified, the document has allowed interest groups to prompt action by citing legal precedents.[15] I will refer to specific examples to demonstrate how the adoption of the corrupted definition has caused a chilling effect on critiques of Israel.

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[10] Tim Anderson, 'What's wrong with the IHRA "working definition" of Anti-Semitism?' (2020) *The AltWorld* <https://thealtworld.com/tim_anderson/whats-wrong-with-the-ihra-working-definition-of-anti-semitism> accessed 11 June 2024.

[11] Safaa Kasraoui, 'Israel Defense Minister Calls Palestinians 'Human Animals' Amid Israeli Aggression' (09 October 2023) *Morrocco World News* <https://www.moroccoworldnews.com/2023/10/358170/israel-defense-minister-calls-palestinians-human-animals-amid-israeli-aggression> accessed 24 May 2024.

[12] IHRA, 'Working Definition of Antisemitism' (2016) <https://www.holocaustremembrance.com/working-definition-antisem> accessed 27 May 2024.

[13] Rebecca Ruth Gould, 'Legal Form and Legal Legitimacy: The IHRA Definition of Antisemitism as a Case Study in Censored Speech' (2022) 18(1) *Law, Culture and the Humanities* 155.

[14] Ibid 160-61.

[15] Ibid 161.

First, I will provide the IHRA's, 'working definition of anti-Semitism' along with illustrative examples:

> *Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.*
>
> *To guide IHRA in its work, the following examples may serve as illustrations:*
>
> *Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for "why things go wrong." It is expressed in speech, writing, visual forms, and action, and employs sinister stereotypes and negative character traits.*
>
> *Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:*
>
> 1. *Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.*
> 2. *Making mendacious, dehumanising, demonising, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.*
> 3. *Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.*
> 4. *Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).*
> 5. *Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.*
> 6. *Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.*
> 7. *Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.*

8. *Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.*
9. *Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterise Israel or Israelis.*
10. *Drawing comparisons of contemporary Israeli policy to that of the Nazis.*
11. *Holding Jews collectively responsible for actions of the state of Israel.*[16]

It should be noted that some of these examples are beyond dispute. In other words, actions such as killing someone or supporting their killing solely because they are Jewish (*Example 1*) or applying double standards against someone solely because they are Jewish (*Example 8*), clearly constitute crimes, discrimination, and hate speech. Therefore, it is evident that these actions contain anti-Semitic elements, which are a specific form of discrimination and hate speech, making it pointless to debate them. However, many of the examples put forth by the IHRA are highly problematic and have extraordinarily broadened the scope of anti-Semitism.

To define something is to limit it. With the definition adopted by the IHRA and the subsequent so-called illustrating examples it provided; it aims to completely remove the boundaries drawn by the definition itself.

Another problematic aspect of the IHRA's so-called illustrating examples is that they are contradictory. By emphasising that criticisms of Israel, when compared to criticisms of other countries, are not anti-Semitic, it gives the impression that a clear distinction is being drawn between criticism of Israel and criticism of Judaism. However, most examples are directly related to Israel rather than Judaism. The terminology shifts in the given examples, and at some point, the term Judaism is replaced by the country name. Indeed, more than half of the IHRA examples focus on the state of Israel, revealing the IHRA's priorities and shifting the document away from its intended goal of identifying anti-Jewish racism.[17] This deliberate conflation can easily be seen in the fifth example: "Accusing the Jews as a people, or Israel as a state [,…]." Anderson clarifies that discrimination targets individuals, not nations. Rights are inherently tied to human beings. Consequently, criticism directed at a state should never be mistaken for prejudice or discrimination against its citizens.[18]

In example seven above, while criticising Israel as a *racist endeavour* is considered anti-Semitic and uniquely presents the right to self-determination as a privilege granted only to Israel, it paradoxically states in the following example (*Example 6*) that applying double standards is also anti-Semitic. This

[16] IHRA 'Working Definition of Antisemitism' (n 12)
[17] Anderson, 'What's wrong with the IHRA "working definition" of Anti-Semitism?' (n 10)
[18] Ibid.

contradiction highlights the double standards within the IHRA's own document. The notion that Israel cannot be criticised as a "racist endeavor" is absurd and contradicts the principle of equality before the law cited by the IHRA.[19] Any state engaging in ethnic cleansing and civilian massacres based on racial ideology should be criticised for these crimes, as no state should be immune from criticism.[20] The establishment of Israel through ethnic cleansing is well-documented, and an Israeli civil rights group has identified numerous racist laws.[21]

Another highly controversial example of the IHRA (*Example 10*) does not mention Judaism at all. However, the example, acts as an advocate for Israel, stating that comparing Israeli policies to those of the Nazis is anti-Semitic. Therefore, according to this highly peculiar reference, criticising the policies of the Israeli government—which has killed more than 40,000 civilians since the 7th of October, the majority of whom are women and children, bombed hospitals, attacked UN shelters, turned one of the world's most densely populated areas into an *open-air prison*[22], and systematically subjected Palestinian civilians to hunger and thirst—would be considered anti-Semitic.

Even if the IHRA lowers the threshold for anti-Semitism by claiming that *drawing comparisons between contemporary Israeli policy and that of the Nazis* is anti-Semitic, we should maintain the position that when a state: (i) exhibits racial ideology that dehumanises a distinct race, (ii) conducts massacres based on this ideology, and (iii) engages in systematic ethnic cleansing, comparisons with past fascist regimes, including Nazi Germany, may be justified, as such comparisons can highlight serious crimes and induce shame in their defenders.[23]

I have already mentioned that the examples given in the document contradict each other. Holocaust denial is explicitly defined as anti-Semitic in Example 4 of the IHRA's document, which is not problematic by itself. No sane or minimally conscientious person would deny the Holocaust, one of the greatest atrocities in history. However, when Holocaust denial (*Example 4*) is considered together with Example 10, which states that comparing Israeli

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[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] In 2015, a famous British street artist, Banksy, visited the Gaza Strip to highlight the struggles of Palestinians following the destructive Israeli assault the previous summer. Commenting on the murals he painted around the area, he remarked that "while Gaza is frequently called 'the world's largest open-air prison' due to the severe restrictions on entry and exit, this comparison is unfair to prisons, which don't experience random daily cuts to their electricity and drinking water." See Ilana Feldman, "Gaza as an Open-Air Prison," Middle East Report 275 (Summer 2015). Also See Daisy Wyatt, 'Banksy creates street art in Gaza criticising 'world's largest open-air prison' (26 February 2015) <https://www.independent.co.uk/arts-entertainment/art/news/banksy-creates-street-art-in-gaza-criticising-world-s-largest-openair-prison-10072446.html> accessed 01 July 2024.
[23] Anderson, 'What's wrong with the IHRA "working definition" of Anti-Semitism?' (n 10). Anderson argues that "None of this is unique to Israel, but all elements apply to contemporary Israel, a largely European Jewish colony which, by blocking all possibilities of a contiguous Arab state, has become an apartheid state."

policies to Nazi practices is anti-Semitic, a very interesting picture emerges. The crimes committed by Israel, as mentioned above, are apparent to the entire world. Since we are not allowed to compare these crimes to those of the Nazi regime according to the IHRA definition, the only conclusion left is that the Nazis did not commit the crimes that Israel is currently committing. The IHRA either ignores the war crimes committed by Israel or inadvertently endorses Holocaust denial by refusing to accept the atrocities committed by the Nazis. Either scenario is unacceptable.

Of course, I am aware, as is everyone else, that these crimes were committed by National Socialists. Therefore, I criticise Israel's current human rights violations because they resemble the genocide policies of the Nazis. Those who deny the genocide in Palestine by focusing solely on the number of people killed cannot ignore that committing this crime does not require the murder of six million civilians, as the Nazis did. In the recent Bosnian genocide, fewer than one-third of the civilians killed by Israel in ten months were killed by the Serbs, but this does not change the fact that what happened in Bosnia was still a genocide.

It is no secret that Israel strives to ensure that the Holocaust is the only genocide that comes to mind in international discourse, developing policies that overlook the sufferings of other communities.[24] In other words, Israel is making extraordinary efforts to monopolise genocide claims. Finkelstein, whose family survived the Holocaust and who has been banned from entering Israel due to his criticism of Israeli government policies and advocacy for Palestinian rights, argues that the primary threat to preserving the memory of the victims of Nazism does not arise from Holocaust deniers' distortions, but from prominent individuals who claim to be the protectors of Holocaust memory.[25] Israel's monopoly policy, which involves disregarding the suffering of other societies, might explain why Israel reacts hysterically to accusations that it is committing genocide.

This hysterical approach is also evident in the IHRA document, which deems any comparison of Israel's actions, no matter how grave, to other genocidal regimes as anti-Semitic. This issue is closely related to Example 5 in the IHRA document, which states, "Accusing the Jews as a people, or Israel as a state, of [...] exaggerating the Holocaust" is anti-Semitic. By this declaration, the IHRA implicitly acknowledges the crimes committed by Israel but argues

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[24] See Manfred Gerstenfeld, *The Abuse of Holocaust Memory: Distortions and Responses* (m: The Jerusalem Center for Public Affairs/Anti-Defamation League, 2009); Norman G. Finkelstein, *The Holocaust Industry: Reflections on the Exploitation of Jewish Suffering* (Verso Books, 2015); Yossi Sarid, 'Israel Does Not Have a Monopoly on Suffering' (22 April 2011) Haaretz <https://www.haaretz.com/2011-04-22/ty-article/israel-does-not-have-a-monopoly-on-suffering/0000017f-f59b-d044-adff-f7fbb6630000> accessed 27 May 2024; Associated Press, 'Polish adviser says Israel wants 'monopoly on the Holocaust' (10 February 2018) <https://apnews.com/general-news-d17f8ca8a3af46cca72472e796d43510> accessed 27 May 2024.

[25] Norman G. Finkelstein, *The Holocaust Industry: Reflections on the Exploitation of Jewish Suffering* (Verso Books, 2015).

that these crimes have not reached the level of the Nazis' atrocities. This is why they deem comparing these crimes to be anti-Semitic. No reasonable person today denies that the Holocaust was a catastrophe of such magnitude that it needs no exaggeration. On the contrary, critics question how a community subjected to such immense suffering is now perpetuating or supporting similar genocidal policies in Palestine.

In authoritarian regimes, autocrats create a climate of fear and censorship to suppress dissenting views. The next step is self-censorship, which emerges as a by-product of this fear-driven system, with individuals imposing censorship on themselves without needing further enforcement by authoritarian forces. Today, a similar climate of fear is being fostered by so-called Western liberal democracies employing similar methods. Dissenting opinions are being suppressed through: (i) the distortion of concepts, (ii) the abuse of these concepts, and (iii) the use of past traumas as justification. The latter element will be examined in the following section.

Netanyahu, aware of how powerful an accusation of anti-Semitism can be, attempts to deflect criticism by labelling any negative comments, whether relevant or not, as anti-Semitic if they target his government or threaten his position. For instance, he has labelled groups involved in campus demonstrations in the U.S., including Jewish students and professors, as "anti-Semitic mobs."[26] Netanyahu, pushing the limits of absurdity, compared the accusation that he left the people of Gaza starving to blood libel, referencing IHRA's 9th example— using symbols and images associated with classic anti-Semitism (e.g., claims of Jews killing Jesus or blood libel) to characterise Israel or Israelis— to label his critics as anti-Semitic. He adds, "These false accusations are not levelled against us because of the things we do, but because of the simple fact that we exist."[27]

Political scientist Reuven Hazan from Jerusalem's Hebrew University argues that Netanyahu's rhetoric is a deliberately executed strategy aimed at deflecting criticism of his foreign policy and creating a victim narrative around anti-Semitism. Hazan adds, "This narrative benefits him greatly, absolving him of responsibility."[28] Similar critics underline the salience of this point, arguing that the Prime Minister is exploiting the term excessively to advance his own political goals and to suppress even valid criticism, which could undermine the term's significance as anti-Semitism rises globally. Tom Segev, an Israeli historian, adds a significant caveat, noting that "Not all criticism of Israel is anti-Semitic. When you label it as anti-Semitic hate, you invalidate the criticism and attempt to stifle the discussion."[29]

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[26] Tia Goldenberg, 'Netanyahu Frequently Makes Claims of Antisemitism. Critics Say He's Deflecting from His Own Problems' (29 May 2024) *The Associated Press* <https://apnews.com/article/israel-netanyahu-antisemitism-campus-05ebd71bec931a62f58e7d5f9e93fa19> accessed 21 July 2024.
[27] Ibid.
[28] Ibid.
[29] Ibid.

Given that a prime minister is willing to dilute such a significant issue for the sake of his political career, it would be naïve to expect any sensitivity or prudence from his cabinet on this matter. Yoav Gallant, Israel's defence minister, whom the Court president cited for referring to Palestinians as "human animals" at the beginning of the Israeli offensive, stated, "The International Court of Justice went above and beyond when it granted South Africa's antisemitic request to discuss the claim of genocide in Gaza, and now refuses to reject the petition outright."[30] Similarly, Itamar Ben-Gvir, Israel's far-right national security minister, tweeted, "This court does not seek justice but rather the persecution of the Jewish people […]".[31] Then, the European Union's foreign policy chief, Josep Borrell, responded to the peculiar approach of the Israeli Prime Minister and his ministers—as well as the Israeli cabinet's declaration of the ICC prosecutor as anti-Semitic—by noting that whenever Netanyahu's government encounters something they dislike, they resort to the anti-Semitism card. However, anti-Semitism is not an accusation to be made lightly. "It is too heavy. It is too important."[32]

(1) Holocaust: A Chosen Trauma

It is highly unlikely to find a single society on earth without trauma. For example, Japan's exposure to atomic bombs remains a significant national trauma, with lasting effects to this day. Similarly, in the 1940s, Jews subjected to genocide under Hitler's regime endured one of the greatest traumas in history. More recently, the genocide of Bosnian Muslims in the heart of Europe—under the supervision of UN forces—stands as one of the most shameful episodes of the 20th century and an unforgettable trauma. At the same time, in Rwanda, approximately 800,000 Tutsis were massacred by Hutus within 100 days, marking another profound disgrace of the century.[33]

More recently, the events of 9/11 were a major trauma for the United States. In response, the invasion of Iraq by the United States under the leadership of George Bush, ostensibly due to the possession of mass destruction weapons, resulted in the deaths of approximately half and one million people.[34] This invasion, undoubtedly, inflicted a deep and lasting trauma on the Iraqi people, the effects of which will endure for decades.

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[30] Bethan McKernan, 'Israeli Officials Accuse International Court of Justice of Antisemitic Bias' (26 January 2024) *The Guardian* <https://www.theguardian.com/world/2024/jan/26/israeli-officials-accuse-international-court-of-justice-of-antisemitic-bias> accessed 01 June 2024.
[31] Ibid.
[32] Raf Casert, 'EU-Israel Relations Take Nosedive As Spain, Ireland Set to Formally Recognise a Palestinian State' (27 May 2024) *The Globe and Mail* <https://www.theglobeandmail.com/world/article-eu-israel-relations-take-nosedive-as-spain-ireland-set-to-formally/> accessed 11 June 2024.
[33] Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press, 2008).
[34] Jonathan Steele and Suzanne Goldenberg, 'What is the Real Death Toll in Iraq?' (19 March 2008) *The Guardian* <https://www.theguardian.com/world/2008/mar/19/iraq> accessed 23 July 2024.

While efforts are made to treat trauma, it is equally important to remember the suffering caused by those responsible and, more importantly, to prevent the recurrence of such traumas. A common method is incorporating these traumas into educational curricula, sometimes using indoctrination tools to ensure they are taught and passed down to future generations. Numerous valuable studies in the literature explore this subject; however, I will limit my discussion to freedom of speech.

Unfortunately, these traumas are sometimes exploited in the following ways: (i) as a means for the victims who suffered trauma in the past to cause similar traumas to others in the present; (ii) to justify new victimisations they have caused; or (iii) to minimise reactions to the new traumas they have inflicted. One of the most blatant examples of this is the ongoing massacres carried about by the Israeli government in Palestinian territories, where civilians and combatants are indiscriminately targeted.

The Israeli government, continuing its attacks through methods such as carpet bombing, the use of white phosphorus, and other tactics prohibited by international law, does not hesitate to invoke the Holocaust as a pretext to deflect or at least diminish the impact of criticisms directed at them. They consistently seek to silence their critics by accusing them of being Holocaust deniers.

According to political psychologist Volkan:

> A chosen trauma is one component of identity. The term “chosen trauma” refers to the shared mental representation of a massive trauma that the group's ancestors suffered at the hands of an enemy. When a large group regresses, its chosen trauma is reactivated in order to support the group's threatened identity. This reactivation may have dramatic and destructive consequences. This term refers to the shared mental image of an event in a large group's history in which the group suffered a catastrophic loss, humiliation, and helplessness at the hands of enemies or opponents. The chosen trauma is transmitted from one generation to the next throughout many decades, even centuries. Some political and social leaders may inflame a chosen trauma in order to fuel an entitlement ideology, a shared sense of entitlement to recover what was lost in reality and fantasy during the ancestors' collective trauma and during other shared traumas. Such inflammations create problems in world diplomacy as well as in peaceful co-existence between divided sections within the same country.[35]

The distinguishing feature of *chosen traumas*, as opposed to other traumas, is that political elites selectively use them as powerful tools in policymaking. The resentment and hatred of the community that has experienced these traumas are constantly kept alive. These governments oppose the 3 R's: Rehabilitation, Reconciliation, and Rapprochement. Even when these possibilities are feasible, political elites go to great lengths to thwart

[35] Volkan, ‘Transgenerational Transmissions and Chosen Traumas’ (n 9), 79.

such solutions, as they thrive on resentment, hatred, division, and polarisation. Their political careers depend entirely on the success of this ugly political strategy.

Two important features distinguish the *chosen trauma* of the Jews from others. In other cases, traumatised communities rightly use their trauma to make claims against the societies or groups that inflicted it upon them. The political elites who thrive on these traumas often advocate for the community to remain vigilant against the perpetrators and fight to achieve their legitimate demands.

In the case of Israel, however, Israel does not demand a homeland from Germany as a result of the genocide committed by Hitler's regime. Although there have been demands for reparations and compensation from Germany, the lands Israel currently occupies—Palestine—have no connection to Germany. This is the first distinguishing feature of the chosen trauma in the context of the Holocaust. The second aspect is that Israel is inflicting similar traumas on another group that had no responsibility for the suffering it once endured.

Hundreds of thousands of Israeli dissidents have been taking to the streets to call for the resignation of the Netanyahu government, not only since October 7 but also well before the Hamas attacks began. However, the Netanyahu government is attempting to alleviate its internal political pressure by continuing to invoke accusations of anti-Semitism and Holocaust denial.

It is indeed surprising that Netanyahu has not yet accused Israeli citizens participating in these protests of being anti-Semitic, as Israeli officials believe that having a Jewish identity does not preclude someone from being anti-Semitic. In fact, Jews known for their anti-Zionist stance—even those from Holocaust survivor families—are accused of being anti-Semitic by Israeli governments.

As Gould has pointed out, the IHRA document, which is claimed to have been adopted to protect Jews, is simultaneously used as a tool for persecuting anti-Zionist Jews.[36] Due to the peculiar definition of anti-Semitism embraced by this document, the number of Jewish scholars and activists who experience persecution and victimisation continues to rise.

One of the most glaring and immediate examples of this danger is the expulsion of Moshe Machover from the Labour Party. The Labour Party has significantly expanded the already problematic IHRA definition and determined that even *pejorative speech* constitutes anti-Semitism.[37] Based on the so-called pejorative speech, the Party expelled Machover without specifying which parts

[36] Gould, 'Legal Form and Legal Legitimacy' (n 13) 185.
[37] Labour's Antisemitism Policy <https://labour.org.uk/resources/labours-antisemitism-policy/> accessed 13 July 2024.

of his article, *Anti-Zionism Does Not Equal Anti-Semitism*, published in the *Labour Party Marxists* (LPM) journal, contained anti-Semitic elements.

Mike Cushman, author of *Free Speech on Israel*, describes the paradoxical and tragicomic situation in which the Labour Party finds itself as follows:

> According to the letter, "pejorative language which may cause offence to Jewish people" is antisemitic. Well I find the pejorative language that the Party has used about Professor Machover to be deeply offensive to me as human being but also as a Jew and consequently I demand that all those involved in drawing up and agreeing this letter to expel themselves from the Labour Party forthwith. This demand may have little evidential basis but it has no more and no less than their letter of excommunication.[38]

Although I will address the negative repercussions of these accusations in academia and the media in the next section, I would like to provide an example from academia here to illustrate how the Israeli government effectively uses the anti-Semitism card and Holocaust denial arguments to silence dissidents.

In 2017, Rebecca Ruth Gould faced an investigation initiated by the University of Bristol following complaints that her 2011 article, *Beyond Antisemitism*, contained anti-Semitic and Holocaust denial elements.[39] Sir Eric Pickles MP, the UK's special envoy on post-Holocaust issues and a former Conservative Party chairman, became involved, telling a journalist that the article was "one of the worst cases of Holocaust denial" he had encountered in recent years. He further suggested that its author should "reconsider her position" at the university.[40]

As a result of the investigation, University of Bristol academics who reviewed the text clarified that the manuscript in question did not contain any anti-Semitic elements and that the claims of Holocaust denial were unfounded. On the contrary, these academics noted that the author argued against the political exploitation of the Holocaust, specifically stating that such a significant trauma should not be invoked to legitimise the occupation of Palestine and the mistreatment of Palestinians.[41]

Although those who filed complaints against the author of the aforementioned article failed in their immediate objective, Gould argues that such practices have had a chilling effect not only at the University of Bristol but across the UK. Gould also believes that this example:

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[38] Mike Cushman, 'Guilt by Association is now Labour Party Practice' (5 October 2017) <https://freespeechonisrael.org.uk/machover/#sthash.un7T2VJS.dpbs> accessed by 27 July 2024.
[39] Gould, 'Legal Form and Legal Legitimacy' (n 13) 167.
[40] Ibid 168.
[41] Ibid.

> illustrates the layers of indirect legal coercion that interest groups can bring to bear on institutions by strategically deploying quasi-legal documents and by imputing to such documents the coercive force of the law even in the absence of legal legitimacy (due process, transparency, and equitable application, all of which are entailed in the rule of law).[42]

The fact that the author was investigated for being anti-Semitic ironically serves to convey the very message they intended to communicate throughout the article. In fact, the only way to support the argument put forth in the author's work was to accuse them of anti-Semitism simply for criticising the IHRA's definition. This situation is akin to being imprisoned for claiming that there is no freedom of speech under an authoritarian regime. The only way to counter such criticisms is to ignore them. Efforts to prosecute, intimidate, and silence those who raise criticisms only serve to prove the validity of those critiques.

So, are those who fail to tolerate critiques unaware of this paradox? Of course not–they are fully aware. However, they consciously choose the former option—suppressing these criticisms through pressure tactics—because they see silencing opponents through censorship and self-censorship as more effective than allowing these critiques to spread or risk legitimising them by remaining passive.

Regrettably, accusations of anti-Semitism and Holocaust denial carry significant and undeniable consequences. On one hand, Russia, in its attempt to invade Ukraine, has been subjected to substantial global sanctions. These measures include freezing Russian accounts in European banks and transferring these funds to Ukraine, banning Russian athletes from the Olympics and all sports organisations, excluding Russia from competitions like Eurovision, and imposing many other concrete punitive actions.

On the other hand, in response to global campaigns—led by millions of people, including civil society organisations and world leaders—to criticise Israel's genocidal and occupation policies, the same organisations remain silent and unresponsive. Undoubtedly, the Israeli government’s frequent use of anti-Semitism and Holocaust denial allegations as a trump card plays a significant role in this hypocritical stance.

As the author of this article, I must mention that, before submitting this manuscript for publication, I meticulously reviewed every word to ensure objectivity and sought external evaluation from legal experts to confirm that my manuscript contained no anti-Semitic elements. This process made me acutely aware of how allegations of anti-Semitism and Holocaust denial can lead to self-censorship. This paranoia is precisely the poison that Israel seeks to instil in the hearts and minds of those few who dare to criticise it. Regrettably, Israel’s insidious agenda to foster a culture of self-censorship appears to have largely succeeded, aided by the unconditional support of Western countries—

[42] Ibid.

supposedly the birthplace of liberal democratic values, including *freedom after speech*.

It should be emphasised that these democratic values were not achieved overnight. The struggle to attain them was a bloody battle that lasted for centuries. The United States' First Amendment, which guarantees free speech, is not coincidental in this context. However, at the point we have reached today, the historical struggle for free speech is beginning to lose its meaning. Just a few years ago, the U.S. Congress, in a moment of extreme irrationality, considered passing a bill—supported by both Republicans and the so-called Democratic Party—that would impose heavy sanctions to prevent initiatives criticising Israel's occupation policies and calling for boycotts of companies operating in occupied territories.[43] This bill, known as the Israel Anti-Boycott Act S.720, proposed severe penalties, including up to 20 years of imprisonment and fines of up to one million dollars for those violating the law. Fortunately, a few reasonable politicians, though few in number, openly declared their opposition to the bill, arguing that passing such a law would be equivalent to undermining the right to free speech.[44]

At this juncture, I should clarify that although Israel's efforts at intimidation and suppression have been largely successful, they have also provoked significant backlash, leading to a serious counter-reaction. As a result, the works of those targeted, as well as the victims themselves, are gaining more attention and readership. Indeed, the article you are currently reading was written in response to the anti-Semitism investigation that Gould underwent, which illustrates how such orchestrated smear campaign tactics can ultimately backfire and highlight the counterproductive aspects of the methods that Israel resorts to.

(2) Academia and Media in a Struggle for Survival

The Israel-Palestine issue stands as perhaps the most glaring example of the media's biased and one-sided coverage. Western media outlets, in particular, seem to speak in unison, focusing exclusively on Israel's “right to exist” and “right to self-defence” while completely disregarding the Palestinian people's right to live with dignity and ignoring their right to self-defence and self-determination. As a result of this deliberate, one-sided media campaign, Israel, despite being an occupier and oppressor, continues to pursue its dehumanising policies under the guise of a so-called “right to self-defence” and attempts to legitimise these flagrant human rights violations and atrocities on international platforms. The resulting narrative prioritises the rights of the occupier, while the rights of those whose lives, dignity, and lands are under threat are marginalised. Mainstream media outlets ignore the fact that a legitimate state is expected to act more cautiously than terrorists and to adhere to international law. Imagine

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[43] S.720—Israel Anti-Boycott Act— 115th Congress (2017-2018) <https://www.congress.gov/bill/115th-congress/senate-bill/720> accessed 21 June 2024.
[44] Ben White, ‘Delegitimizing Solidarity: Israel Smears Palestine Advocacy as Anti-Semitic’ (2020) 49(2) *Journal of Palestine Studies*: 65–79.

a state that acts more brutally and lawlessly than the very groups it labels as terrorists. It is unacceptable for countries that benefit from the privileges of statehood to shirk the responsibilities that come with it.

The Western media has unfortunately failed in the face of this brutality, which can hardly be called a *war*. There is an abundance of evidence to support this claim, but due to space and time constraints, I will limit myself to a few examples. One striking case involves Emily Wilder, a young, exceptionally talented, and promising student at Stanford University. She was an active member of Students for Justice in Palestine and Jewish Voice for Peace at Stanford University. Shortly after graduating and starting her job at the Associated Press (AP), she was swiftly terminated due to a smear campaign led by Republicans and alleged violations of AP's social media policies.[45]

Although AP claimed that Wilder was dismissed for failing to comply with the organisation's social media policies, Wilder, who had only worked there for less than three weeks before being fired, never received a specific answer when she inquired about which of her posts had violated these policies. The true reason for her dismissal was her pro-Palestinian stance during her time at Stanford. Anonymous Republican trolls had already crucified her on social media for her support of Palestine, and ultimately, they achieved the outcome they desired.

On May 17, Wilder criticised the media's double standards and hypocritical approach, under the guise of objectivity, with the following words on Twitter: “Using ‘Israel’ but never ‘Palestine’, or ‘war’ but not ‘siege or occupation’ are political choices - yet media makes those exact choices all the time without being flagged as biased.”[46]

Following posts like these, anonymous troll armies initiated a smear campaign, prompting the AP to fire a promising young journalist. This decision was condemned by other reporters working within the same organisation.[47]

Wilder's dismissal not only validated her arguments on how pathetic mainstream media is but also amplified her voice and ideas, bringing them to a much larger audience. Janine Zacharia, who teaches News Reporting at Princeton University and was one of Wilder's professors, remarked that by firing Wilder, the Associated Press essentially confirmed the Republican smear

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[45] David Goldman, ‘AP Explains Why It Fired Emily Wilder for Pro-Palestinian Tweets’ (30 May 2021) *CNN* <https://edition.cnn.com/2021/05/30/media/ap-emily-wilder-firing/index.html> accessed 27 July 2024.

[46] David Greenberg, ‘The War on Objectivity in American Journalism’ (2022) 2(3) *Liberties Journal.*

[47] The journalists criticised the AP: ‘It has left our colleagues—particularly emerging journalists—wondering how we treat our own, what culture we embrace and what values we truly espouse as a company.’ See, *The Guardian*, ‘Associated Press Journalists Condemn Decision to Fire Emily Wilder’ (24 May 2021) <https://www.theguardian.com/media/2021/may/24/associated-press-journalists-emily-wilder-palestinian-advocay#:~:text=She%20started%20as%20a%20news,advocacy%20while%20a%20college%20student> accessed 01 July 2024.

campaign's accusations of the organisation's lack of impartiality. Zacharia pointed out that the issue goes beyond merely firing a young and idealistic journalist just 17 days after she started; it reflects a much deeper problem, undermining both the AP's reputation and the broader principle of press freedom.[48]

It is evident that Israel does not care whether the individuals it perceives as threats are Jewish or not. Even Wilder, who is Jewish herself, was dismissed from her position without a given reason, merely for advocating a non-violent solution.

We have previously discussed how the Israeli government's behaviour exhibits signs of narcissistic personality disorder, where gratitude is a foreign concept. So, how do you think the Associated Press was rewarded for its sycophancy toward Israel? In other words, how did Israel "thank" this media organisation for its service? By dropping a bomb on the AP's headquarters in the conflict zone.

The AP described this attack on its building as “shocking and horrifying.”[49] However, it's hard to argue that the AP is entirely correct in its assessment—while the bombing of a press office by Israel is indeed “horrifying,” it is hardly “shocking.” Israel is a country with no red lines, consistently ignoring the rules and principles of international law, so nothing it does is surprising anymore. The AP may have been shocked by the bombing of its building, but for innocent civilians struggling to survive in Palestine, this incident hardly qualifies as news.

The real question is: Must one experience oppression first-hand to stand against it? After becoming a victim, anyone would express their hatred toward the oppressor. On the other hand, Wilder, true to her character, did not hesitate to criticise Israel for that action, even though Israel bombed the very same media outlet that fired her.

Regrettably, the state of academia is not much better than that of the media. The recent erosion of academic freedom does not stem from a lack of regulations designed to protect researchers. In fact, many European countries have enshrined protections for academic freedom within their constitutions and basic laws.[50] Even in the absence of specific provisions, there is no doubt that academic freedom should be considered part of the broader category of free

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[48] Janine Zacharia, ‘Opinion | The Real Problem With the AP’s Firing of Emily Wilder’ (26 May 2021), *Politico* <https://www.politico.com/news/magazine/2021/05/26/emily-wilder-fired-ap-490892> accessed 29 June 2024.

[49] Josef Federman, ‘”Shocking and horrifying”: Israel destroys AP office in Gaza’ (16 May 2021) <https://apnews.com/article/israel-middle-east-business-israel-palestinian-conflict-fe452147166f55ba5a9d32e6ba8b53d7> accessed 25 June 2024.

[50] Jogchum Vrielink, Paul Lemmens, Stephan Parmentier, ‘Academic Freedom As a Fundamental Right’, (2010), League of European Research Universities (LERU) 5. For example, Article 13 of the Charter of Fundamental Rights of the European Union (Freedom of the arts and sciences) stipulates that every member state is responsible for ensuring academic freedom.

speech. Therefore, the issues that arise are primarily related to the implementation of these protections.

Academic freedom, as an individual right, encompasses a set of interconnected rights for both lecturers and students, primarily focused on their roles as independent seekers of knowledge. These rights include: (i) the freedom to study; (ii) the freedom to teach; (iii) the freedom to conduct research and access information; (iv) the freedom of expression and publication (including the freedom to err); and (v) the right to engage in professional activities beyond their academic employment.[51]

Teaching and academic research contribute to society's physical and mental development by seeking and sharing knowledge and understanding, while also promoting independent thinking and expression among academic staff and students.[52] This mission makes academic freedom indispensable at the tertiary education level in fulfilling these objectives.

However, despite the theoretical framework being quite comprehensive and meticulously developed, significant challenges remain in exercising this right. The Turkish Academy of Sciences (TUBA) has conducted a comprehensive study examining the global challenges to academic freedom and the causes of its erosion.[53]

The report highlights how criticisms of Israel within academia are deliberately conflated with critiques of Judaism, leading to a culture of cancellation, smear campaigns, and pressure against those who speak out. It provides concrete examples of individuals who have lost their jobs or, fearing job loss, have resorted to self-censorship. Furthermore, the report notes that the presidents of some of America's most prestigious universities—Liz Magill of the University of Pennsylvania, Dr. Sally Kornbluth of the Massachusetts Institute of Technology, and Dr. Claudine Gay of Harvard University—were forced to resign in 2023 after being interrogated by Congress for failing to take sufficient and effective measures against anti-Semitism on their campuses, with protests supporting Palestine cited as a reason for the congressional inquiry.[54]

TUBA considers these images as frightening as anti-Semitism itself, observing that the sight of university presidents being questioned by members of Congress evoke a new form of despotism. While anti-Semitic behaviour has rightly been condemned in the past, the rise of a “despotism of anti-Semitism” may be even more concerning.[55] Addressing this issue should therefore be a top priority for the academic community.[56]

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[51] Ibid 9.
[52] Ibid 3.
[53] Turkish Academy of Science, ‘Tuba Report On The Palestinian-Israeli War’ (TUBA-Ankara 2023).
[54] Ibid 34.
[55] Ibid 40.
[56] Ibid 40.

Ultimately, unconditional support for Israel is tarnishing the reputations of these universities—not only by compromising their independence but also by jeopardising their financial stability. In fact, these incidents have led major donors of Israeli origin, particularly in the United States, to withdraw their contributions due to claims of inadequate action against anti-Semitism. Beyond this, Israel is not only committing genocide but also making a deliberate effort to deprive future generations of the education needed to rebuild Palestine.

According to Hans-Christof von Sponeck, the UN Humanitarian Coordinator for Iraq, a new concept— "educide"— was introduced during his speech at the Ghent University Conference in March 2011. This term describes a type of crime, deliberately committed by Nazi Germany and later by the United States during its occupation of Iraq, which involves the mass destruction of educational staff and institutions. Today, Israel is employing similar methods by targeting educational institutions, thereby committing the crime of "educide."

Neve Gordon, an Israeli professor of human rights law, stated that "academia has been destroyed" in Gaza as part of an "educide."[57] Recent data from the Euro-Med Human Rights Monitor reveals that, since Israel began its brutal operations in response to Hamas' attacks on October 7, at least 94 university professors in Gaza have been killed by the Israeli military, along with hundreds of lecturers and thousands of students.[58]

Unable to bomb universities on international platforms, Israel instead uses its political and financial power—rather than military force—to undermine academic freedom. Just like in the media, those who criticise Israel in academia face significant consequences. For example, so-called prestigious publishing institutions become exceedingly meticulous when it comes to Israel-related manuscripts, going to great lengths to find excuses not to publish certain works, even if it means bending or even breaching their own editorial policies.

At this point, I would like to provide two highly controversial examples related to this issue in the US. The Harvard Law Review (HLR) and Columbia Law Review (CLR), considered among America's most prestigious publishing institutions and run by students at these universities, resorted to highly unusual and peculiar methods to avoid publishing the article of a Palestinian student studying at Harvard Law School. The publication of the article titled *Toward Nakba as a Legal Concept* marked Rabea Eghbariah as the first Palestinian legal scholar to appear in CLR.[59] However, just a few hours later—and after several months of extensive revisions—the board of directors took the drastic

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[57] Patrick Jack, '"Educide": Israel's Remorseless Assault on Gaza's Higher Education' <https://bricup.org.uk/article/educide-israels-remorseless-assault-on-gazas-higher-education/> accessed 11 July 2024. For a comprehensive analysis on "educide" see: Rula Alousi, 'Educide: The Genocide of Education: A Case Study on the Impact of Invasion, and Conflict on Education,' (2022) 13(2) *The Business and Management Review*.

[58] Ibid.

[59] Rabea Eghbariah, 'Toward Nakba As a Legal Concept', (2024) 124(4) *Colombia Law Review*.

step of taking the journal's website completely offline, citing concerns about the publication process.[60]

The board was forced to backtrack after students sent a threatening email to a board member, stating they would stop working for the journal if the board's intervention was not reversed.[61] Although the board ultimately republished Eghbariah's article, it implemented two measures of its own. First, while reposting the article, they removed the word “article” from the text, giving the impression that it was more of an ordinary piece than a formal academic article. Second, they added a disclaimer beneath the republished article, claiming that it had not gone through the full review process by all editors, which they argued was a violation of standard procedures.[62] However, editors who spoke with *The Intercept* mentioned that they had never heard of the board previously requesting an article draft to be distributed to the entire membership of CLR.[63]

The second example also involves a piece written by the same author. Despite successfully passing all the necessary stages for publication at the Harvard Law Review, the journal convened an emergency meeting with all its editors and ultimately chose to prevent the publication of this work. Both Shahriari-Parsa and the other lead online editor, Sabrina Ochoa, pointed out that they had never witnessed a piece undergo such intense scrutiny at the Law Review.[64] Shahriari-Parsa clarified that they found no prior instances of articles being withdrawn after completing the standard editorial process.[65] An anonymous editor noted that, according to their research, Israeli scholars were well represented in the magazine, while Palestinians were not. Based on their findings, the editor also stated that there were no previous examples of a publication-ready article being pulled.[66] In his response to the editors, the author of the essay, Eghbariah, wrote: “This is discrimination. Let’s not dance around it — this is also outright censorship. It is dangerous and alarming.”[67]

Another editor explained that the underlying reasons for the editors' stance were fear and concern for their future careers. Harvard has become so politicised that it even displayed photos of pro-Palestinian students on the school's billboards, actions that have tarnished the university's international

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[60] Prem Thakker, ‘Columbia Law Review is Back Online after Students Threatened Work Stoppage Over Palestine Censorship’ (06 June 2024) *The Intercept* <https://theintercept.com/2024/06/06/columbia-law-review-palestine-gaza-rejects/> accessed 27 July 2024.
[61] Ibid.
[62] The whole paragraph written by the Board of Directors of CLR might be checked on <https://columbialawreview.org/wp-content/uploads/2024/06/STATEMENT-FROM-THE-CLR-BOARD-OF-DIRECTORS.pdf>.
[63] Ibid.
[64] Natasha Lennard, ‘Harvard Law Review Editors Vote to Kill Article About Genocide In Gaza’ (21 October 2023) *The Intercept* <https://theintercept.com/2023/11/21/harvard-law-review-gaza-israel/> accessed 23 July 2024.
[65] Ibid.
[66] Ibid.
[67] Ibid.

reputation. Due to these unfortunate policies, the editors feared that if they allowed the article to be published, their own photos might also end up on billboards. However, fear alone does not fully explain this incident. Being an editor at the Harvard Law Review is a highly effective platform for advancing one's legal and political career. For example, considering that Barack Obama once served as the president of the journal, it is clear that the publication offers extraordinary networking opportunities, connecting editors to top law firms, Supreme Court justices, and politicians.[68] Therefore, it is hard to dismiss the significant role of both fear and career aspirations in the controversial decision of the magazine.

That is why only five editors dared to rebel against this corrupt system, refusing to be complicit and casting dissenting votes. They made it clear that "this unprecedented decision threatens academic freedom and perpetuates the suppression of Palestinian voices."[69] The others, however, chose to compromise the rules and principles of the journal they work for in order to avoid jeopardising their "promising" career prospects. When individuals prioritise their careers over principles while serving in their positions, one can only imagine what they might be willing to sacrifice to attain or maintain the positions they aspire to. The concessions they made and their stance on this matter alone demonstrate that they do not deserve the careers they seek and are not individuals of true merit. Alternatively, it might be that in the U.S., such a path is indeed necessary for a successful career, and they have simply chosen to play by the rules of the game. Perhaps it is best to leave it to the reader to judge the merit of those who compromise their principles for the sake of a bright career.

As the dissenting editors pointed out, these incidents not only threaten academic freedom but also raise questions about the true extent of university independence. It is a widely held belief that universities must be autonomous to uphold academic freedom. In countries where universities are state-funded, with academics essentially considered state employees due to government-funded salaries, there is a traditional view that such universities cannot be fully independent. However, the issue of Israel has highlighted that the independence of universities relying on donations from private institutions, corporations, and global giants is also at risk—perhaps even more severely and significantly than state-funded universities. The decision by institutions that have donated hundreds of millions of dollars to America's prestigious universities to cut or suspend their donations, allegedly due to insufficient efforts to combat anti-Semitism, is a matter that requires detailed investigation. Additionally, it raises the question of whether the criteria used by organisations that rank universities—including various parameters—consider academic freedom. If they do, it is also worth exploring how the dismissal or threat of dismissal of anti-Israel academics might affect these universities' rankings, a topic that itself warrants further study.

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[68] Ibid.
[69] Ibid.

E. CONCLUDING REMARKS

This work was written during the period when Israel continued its massacres in Palestine. The question of whether addressing urgent issues—such as Israel's violations of international law, the assessment of its actions as genocide, war crimes, or crimes against humanity, and the prosecution of Israeli governments by international courts—should be the primary focus has also weighed heavily on my mind.

However, the existence of scholars who, despite intense pressure from the West—especially from the United States—have produced significant works on these matters, along with the realisation that examining the consequences of compromising free speech to satisfy the whims of a spoiled child in so-called democratic countries—where crimes of occupation and genocide are freely committed and supported, yet cannot be openly discussed—may be just as important as addressing the crime of genocide itself, led to the emergence of this paper.

Frankly, the Western media's censorship policies—justified by claims of “sensitivity”—which resort to methods of threat and intimidation to prevent their employees from speaking out on these issues, coupled with the emergence of similar corruption in academia, have prompted this work to pursue a modest goal. This goal is not to introduce new ideas but rather to encourage and support those who continue to fight against the pressure on free speech, urging them never to give up and to inspire similar efforts in the future.

No one, including staunch Israeli supporters, can do more harm to Jews and Israel than Israel itself. And no one has contributed more to the spread of anti-Semitism and anti-Semitic sentiments than the Israeli government. In an age where concealing information is nearly impossible—where videos of assaults on Palestinian prisoners circulate and the shattered bodies of infants, as well as bombed schools and hospitals, are visible—there is neither a need nor a justification for anyone to post anti-Semitic content that would only serve to benefit Israel. There is no need because Israel, through its own crimes, is already self-destructing. People have begun to question how the descendants of those who endured one of history's greatest atrocities, over the past ten months and in full view of the world, could inflict similar suffering on others. It is also unjustifiable because sharing anti-Semitic content not only constitutes an act of discrimination but also does a grave injustice to those Jews who speak out against Israel's oppression and, unfortunately, bear the consequences of doing so.

Unfortunately, by remaining silent or even supporting these actions, the West has lost significant leverage. Israel's genocide has raised the threshold for violence and its legitimisation to unprecedented levels. From now on, the reactions of so-called democratic Western countries to human rights violations in different parts of the world will carry little weight or significance in the international community.

Authoritarian regimes such as China, North Korea, Russia, and Venezuela now have a tragic and traumatic case to reference in response to potential criticisms of their acts of violence and human rights abuses: Israel's genocidal policies. The West's reaction to scenarios like the imprisonment of dissenting journalists by these despots—once considered a red line in the West—will lose all meaning. In a time when journalists killed by Israel are dismissed as “collateral damage,” any response from the West to the imprisonment of journalists will be seen mere hypocrisy and double standards, rendering it meaningless. This massacre and genocide, which can hardly even be called a war, is a harbinger of even worse days to come. Sadly, we will all witness this together.

I began this study with an old Soviet joke, and now I would like to conclude with another. A Soviet citizen, after examining the menu in a restaurant for some time, places his order. The waiter apologises and says that the dish is not available. When the customer orders something else, the waiter gives the same response. After a while, frustrated that nothing he wants is available, the customer exclaims, “I thought you were giving me a menu, but it turns out you handed me a constitution!” Indeed, at first glance, it is often difficult to distinguish between the constitutions of authoritarian and democratic regimes. The key difference lies in how effectively these seemingly impressive documents protect their citizens' fundamental rights and freedoms. Authoritarian constitutions promise much but deliver little to their people. The liberal democracies we see today are the result of hard-fought battles, with freedom of speech at the forefront. Without freedom of expression, safeguarding other liberties becomes impossible. Will Western societies, in their efforts to satisfy the whims of a spoiled child, realise that they are gradually losing the hard-won gains achieved through centuries of struggle? Before it is too late, will they foresee the risk of their constitutions becoming indistinguishable from those of the authoritarian regimes in practice? These are not questions that can be easily answered; of course, time will eventually provide us with the answers. However, irrespective of the answers, the damage has already been done. Even as things stand now, substantial effort will be needed to mend the harm repair the harm that has been done.