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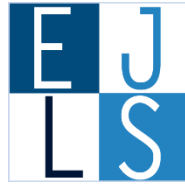
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THE “GIFT” OF FEEDBACK

Michael Widdowson 

In February 2024, the European Journal of Legal Studies (EJLS) worked on a presentation entitled “Responding to Peer Reviewers” for the Editing a Law Journal Course at the European University Institute. During this presentation, we advised EUI Law researchers and fellows on the ideal ways to respond to peer review feedback. While preparing for this presentation, we learned more about the significance of feedback and how it should not be taken for granted. We came across a quote by Jim Trinka and Les Wallace describing feedback in the following terms:¹

Feedback is a gift. Ideas are the currency of our next success. Let people see you value both feedback and ideas.

At the EJLS, we have seen that feedback may provoke strong emotions. Sometimes, feedback given during the review process appears to be incorrectly viewed as a personal attack rather than constructive comments destined to improve the submission. Sadly, this may be a psychologically natural response in many human beings.

At the EJLS, feedback during the review process is vital to ensuring that we maintain high-quality publications throughout our journal. When feedback is given, we do not want any of our valued authors to view it as a personal attack against them. We want feedback to be viewed as a ‘gift’ designed to enhance the author’s publication and give the author useful new information

* Michael Widdowson is Editor-in-Chief of the European Journal of Legal Studies and PhD researcher at the European University Institute in Florence. I would like to thank Professors Sarah Nouwen and Gráinne de Búrca for the opportunity to present our “Responding to Peer Reviewers” presentation and acknowledge the invaluable insights of my fellow co-presenter, EJLS Managing Editor Carolina Paulesu.

¹ Jim Trinka and Les Wallace, *A Legacy of 21st Century Leadership* (iUniverse 2007), 8.

to enrich future scholarly contributions. Through understanding the psychological effects of feedback, this editorial seeks to redefine the perception of feedback.

One of the most important rewards that one may receive in everyday life is feedback. This is no exception in academic publications like the European Journal of Legal Studies. However, one may ask, what is feedback, and why is it so important? The answer to both questions can be uncovered by unpacking the dictionary definition of feedback.

Feedback is defined as ‘helpful information or criticism that is given to someone to say what can be done to improve a performance, product, etc.’.² To apply this general definition in more specific terms to academic journals, feedback is comments made during the review process to improve the article. These comments can be provided at any point during the review process. Such feedback is designed to achieve two principal objectives. These are:

- 1) To ensure a high-quality issue is published
- 2) To assist the author

Firstly, the feedback will create a high-quality issue fit for publication. If issues are noticed in the referencing, argumentation or spelling, punctuation and grammar during the review process, those must be corrected to ensure a high-quality publication. In addition, feedback from our expert peer reviewers ensures that more substantive issues, such as inaccuracies in the article’s content, can be corrected. This leads to the second and more substantive goal of assisting the author. Constructive feedback received during the review process is helpful as it opens the author to new perspectives on the approaches in their article. New perspectives given by peer reviewers versed in the author’s field may assist the author in enhancing the article's overall argument and the quality of the publication. Much like a

² The Britannica Dictionary ‘Feedback’ (*Encyclopaedia Britannica*, 2024)
< <https://www.britannica.com/dictionary/feedback> > accessed 1.08.2024.

spring flower, this feedback blooms into many immensely helpful elements over the long term. These elements can be viewed through the lens of a cycle. First, the article is submitted by the author. Second, the feedback is given, and the new perspective of the article is delivered to the author. Once the original article has been published, the author may write future articles based on the original article's feedback, restarting the same feedback cycle. This results in further publications, likely resulting in the amelioration of the author's academic career. This cycle can be summarised in **Figure 1** across the page.



Figure 1: The cycle of feedback

Constructive feedback is immensely beneficial in academic journals, conferences, and all walks of life. Due to how helpful it is for everybody to receive feedback, one should avoid the natural emotional response to such comments. Despite what our emotions may tell us, the vast majority of feedback given is not a means to reject, exclude, or personally attack the feedback receiver. Feedback is designed as a two-way discourse between the feedback giver and the feedback receiver with the good intention of improving the feedback receiver's work.

In academia, it is necessary to challenge the negative perspective of feedback. One way to do this is by understanding the human psychology behind receiving feedback. According to psychological research, there is an overlap between physical pain and the emotions one may experience from receipt of critical feedback.³ This results from social pain, defined as pain arising from social exclusion, rejection, or loss.⁴ Critical feedback may trigger social pain as the feedback given may be perceived as a threat against the integrity of one's own social self.⁵ A 2011 study by Paolo Riva, James Wirth, and Kipling Williams shows that the experience of such social pain results in decreased self-esteem and increased aggression.⁶

Understanding human psychology gives us a greater understanding of the pain which feedback may inadvertently inflict. From the feedback receiver's perspective, the feedback is often viewed as a necessary evil during the review process. This reflection of the feedback receiver's perspective gives us the necessary tools to redefine feedback into a more positive notion. One of the best ways to redefine feedback is to consider it as a gift, as viewed by Trinkka and Wallace, and apply this perspective to academic journals.⁷ Much like a bearer of present gifting an item to a receiving party, the feedback giver effectively gifts their perspectives and knowledge to the receiver. The intent of both the present bearer and the feedback receiver is to enrich the other party through gifts. In the case of the feedback giver, they intend to

³ Geoff MacDonald and Mark R Leary, 'Why Does Social Exclusion Hurt? The Relationship Between Social and Physical Pain' (2005) 131 *Psychological Bulletin*, 202

⁴ Geoff MacDonald and Lauri A Jensen-Campbell, *Social Pain: Neuropsychological and Health Implications of Loss and Exclusion* (American Psychological Association 2011).

⁵ Laura J Ferris and others, 'Feeling Hurt: Revisiting the Relationship Between Social and Physical Pain' (2019) 23 *Review of General Psychology* 320, 325.

⁶ Paolo Riva, James Wirth and Kipling Williams, 'The Consequences of Pain: The Social and Physical Pain Overlap on Psychological Responses' (2011) 41 *European Journal of Social Psychology* 681.

⁷ Trinkka and Wallace (n 1).

gift new knowledge and perspectives to improve the receiver's work. Much like a bad gift, sometimes this feedback is unhelpful and can be ignored. However, in most cases, the feedback may be of good quality and, as discussed earlier, may immensely benefit the receiver's future prospects. Therefore, it is desirable for everyone to view feedback as a figurative gift of valuable knowledge, expertise and perspectives.

At the EJLS, we value feedback's positive impact on improving the quality of our publications. Through our intensive double-blind peer review process, we can further improve the quality of potentially great articles through peer review feedback. We are indeed very grateful for our pool of peer reviewers, who enable us to improve our publications through their expert knowledge. Further quality improvements are also often made to these articles through the latter stages of review. Indeed, feedback given during the Editor-in-Chief or Executive Editor review has often resulted in the author improving the content of their article, thinking about their work from a different perspective, or even inspiring them to write new articles based on the feedback given. Furthermore, as part of our commitment to assist emerging scholars, our Managing Editors will always provide detailed feedback to authors if their article has been rejected at the desk review stage. Occasionally, instead of an outright rejection, we may encourage authors to use our Managing Editor's feedback to resubmit a revised version of their article.

However, sometimes, the feedback received may be too harsh and counterproductive. During the review process, we check all peer review reports before they are sent out to the authors. If any feedback is deemed to be unreasonably harsh or appears to attack the author in a personal way, we will not send out the report to the author. It is indeed true that all feedback can be viewed as a gift, but not all gifts are good. Good feedback is comparable to being given a valuable tulip; bad feedback is comparable to being given deadly nightshade.

Finally, feedback is vastly important to the functioning of the EJLS. As Editor-in-Chief, feedback is actively encouraged from all members of our Executive and Editorial Boards. This ensures that the direction of the journal is in line with the desires of the wider EJLS community and not solely in line with the desires of a select few.

IN THIS ISSUE

Through the feedback of our Editorial Board, we are excited to bring you an ultra-high-quality issue with a wide array of varied articles. This issue contains one shorter New Voices articles, three longer General Articles, and a book review. Our New Voices article is written by **Enikő Krajnyák**, who argues for high-level institutions to help represent future generations through the climate crisis. The first of our General Articles is written by **Anna Shtefan**, who provides an overview and proposes improvements on the different European laws protecting the freedom of panorama. Our second General Article, by **Roberto Talenti**, critically analyses the modern-day concept of sustainable development by international institutions. The final General Article, by **Kaleigh Campbell**, examines the different interpretations of the protection of cultural property by the European Court of Human Rights concerning Article 10 and Article 1 Protocol 1 rights. Our issue is brought to a close with a book review by **Selcukhan Ünekbaş**, who reviews Despoina Mantzari's book *On Courts, Regulators and the Scrutiny of Economic Evidence*.

CHANGING OF THE GUARD

Since the publication of our last issue, we have welcomed in some new Executive Board members and sadly said goodbye to others. We said thank you and farewell to our Managing Editor, **Livia Hinz**. To take her place we are delighted to welcome **Miguel Mota Delgado** as our new Managing Editor. We are also delighted to welcome **Irina Muñoz Ibarra** to the position of Head of Section of Legal Theory. I would like to take this

opportunity to personally thank all of the Executive Board members for the hard work and dedication they have placed into getting this issue published. I also wanted to thank once again our expert peer reviewers for the valuable feedback they have given to our authors, ensuring that the EJLS maintains its high standards.

THE VOICE OF FUTURE GENERATIONS: INSTITUTIONAL REPRESENTATION, LESSONS LEARNED AND THE WAY FORWARD

Enikő Krajnyák 

Climate change is inherently an intergenerational issue, and different strategies have been developed in order to channel future generations' perspectives in climate-related decision-making processes. These strategies include youth-led strategic cases, which, at the same time pose significant challenges to the existing legal framework, mainly relating to establishing standing before courts, duties of the present generation, and proving the causal connection between a human rights violation and the impacts of climate change. Such dilemmas, however, should not hinder endeavors to channel intergenerational equity in legislation and jurisdiction. This study argues that a possible solution for the representation of future generations could be realized through high-level specialized institutions that have the power to influence decisions at domestic, regional, and international levels. The study also aims to evaluate precedent-setting examples from the practice of future generations' institutions and reflect on the lessons that higher-level institutions could learn from these practices.

Keywords: intergenerational justice; the rights of future generations; future generations' institutions

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I. INTRODUCTION

Intergenerational justice plays a crucial role in contemporary endeavors to protect the environment and mitigate and adapt to climate change.¹ However, the inclusion of a future-generations-perspective in decision-making processes² may raise several questions on theoretical and practical levels. Establishing standing before courts, defining the needs and arguably the ‘rights’ of future generations, and assigning duties to the present generation are among the most thrilling legal challenges in this field. These questions have been addressed in recently emerging youth-led climate litigation cases, which aim to enforce the intergenerational perspective through court decisions in order to provide a liveable planet for the

¹ Julie H. Albers, ‘Human Rights and Climate Change: Protecting the Right to Life of Individuals of Present and Future Generations’ (2021) 28 *Security and Human Rights* 113, 136–137.

² In this context, environmental decision-making is interpreted as decision-making in Principle 10 of the Rio Declaration on Environment and Development, namely, it entails all forms of decision-making relating to the environment at the national and supranational levels of setting the legislative and regulatory framework. See: Jonas Ebbesson, ‘Principle 10. Public Participation’ in Jorge E. Viñuales (ed), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press 2015) 287, 291–292.

generations to come by ordering States³ and non-State actors⁴ to comply with the goals undertaken in the Paris Agreement.⁵

The present study argues that – parallel to climate change litigation efforts, which receive significant attention in contemporary legal scholarship – another potential solution for the representation of future generations could be found in high-level specialized institutions that have the power to influence decisions at domestic, regional, and international levels, such as the institutions mentioned in the UN Secretary General’s report from 2013.⁶ The report proposed several ideas for the institutionalization of the representation of future generations at the international level and presented certain institutions that operate at the domestic level that could serve as role models for the establishment of similar institutions at both domestic and international levels. The fact that the institutional protection of future generations is a currently evolving field in the international sphere also holds great potential for future developments: their competencies, scope of action, as well as their potential role in human rights-based climate change litigation

³ See, for instance *Urgenda Foundation v State of the Netherlands* ECLI:NL:HR:2019:2007 (NL 2019) or *Neubauer et al v Germany*, Case no. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (BVerfG 2021). See also Jacqueline Peel and Rebekkah Markey-Towler, ‘Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases’ (2021) 8 *German Law Journal* 1484.

⁴ See: *Milieudéfensie et al v. Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339 (NL 2021). See also Annalisa Savaresi and Juan Auz, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 *Climate Law* 244.

⁵ In this context, litigants tend to refer to the violation of Article 2(1)(a) of the Paris Agreement, which envisions the goal of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.

⁶ Report of the Secretary-General, ‘Intergenerational solidarity and the needs of future generations’ (2013) A/68/322.

are some of the most fascinating development directions of future generations' institutions.

This paper reflects on ongoing efforts at the international level to establish a normative and institutional framework for future generations and evaluates the insights that could be drawn from existing domestic institutions to contribute to creating an institutional framework at the UN level. The paper is structured as follows. The second section discusses the theoretical foundations of intergenerational equity and its recognition in international law, reflecting on current initiatives at the UN level to establish an institutional framework for future generations. The third section is dedicated to the already existing good practices at the domestic level and suggests further areas of development, concluding on how a bottom-up structured institutional representation of future generations could contribute to enforcing a future-generations-perspective in decision-making processes. Section four summarizes the key lessons derived from the institutional examples discussed and reflects on their relevance for international-level institutions to be set up in the future.

II. THE THEORY OF INTERGENERATIONAL EQUITY AND ITS RECOGNITION IN INTERNATIONAL LAW

The recognition of the importance of protecting the natural environment for the future has been an inherent part of international environmental law from the first stages of its development.⁷ In parallel, the theory of intergenerational equity was developed by Edith Brown Weiss in 1989, and

⁷ See, for instance, the Preambles of the International Convention for the Regulation of Whaling and the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Article 2(5)(c) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; the Preamble of the Convention on the Conservation of Migratory Species of Wild Animals; Article 4 of the Convention for the Protection of the World Cultural and Natural Heritage; and Principle 1 of the Stockholm Declaration.

subsequently.⁸ According to her concept, each generation holds the planet on trust and is obliged to bequeath it to future generations in at least as good conditions as they received it. The theory of intergenerational equity is grounded on three principles: options, quality, and access. First, the principle of comparable options requires the conservation of options and the diversity of natural resources so that future generations can use them to satisfy their own values. Second, the principle of comparable quality proposes that the quality of the environment should be comparable to that which has been enjoyed by previous generations. And finally, the principle of comparable access means non-discriminatory access among generations to the Earth and its resources.⁹ Each generation is therefore both a trustee for the planet with obligations to preserve it and a beneficiary with rights to use it. This dynamic is expressed through ‘planetary obligations’ and ‘planetary rights’, which stems from each generation’s position as part of the intertemporal entity of humans on this planet.¹⁰

The doctrine of intergenerational equity proposed by Brown Weiss was not developed merely as a conceptual framework but as a call for action,¹¹ aiming to address the problems of unsustainable development and environmental degradation and induce future-oriented decision-making. However, it should be borne in mind that up until now the doctrine has had limited recognition in international law: there is no binding international treaty that incorporates intergenerational equity, though it is reflected in some non-binding international documents, and it also received some support from the

⁸ Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers, Inc. 1989).

⁹ Edith Brown Weiss, ‘Climate Change, Intergenerational Equity, and International Law’ (2008) 9 *Vermont Journal of Environmental Law* 615, 616–617. See also Edith Brown Weiss, ‘In Fairness to Future Generations and Sustainable Development’ (1992) 1 *American University International Law Review* 19, 22–23.

¹⁰ Edith Brown Weiss, ‘Our Rights and Obligations to Future Generations for the Environment’ (1990) 84 *American Journal of International Law* 198, 202.

¹¹ Richard Falk, Preface to Weiss, *In Fairness to Future Generations* (n 7) xxiii.

International Court of Justice (ICJ), mainly in dissenting and concurring opinions.¹²

Notwithstanding that intergenerational equity is not enforceable under binding international legal instruments, the doctrine certainly influenced the development of international environmental law. While treaties adopted before the development of the theory of intergenerational equity tended to include reference to future generations in the confines of the preamble,¹³ the documents adopted at the 1992 UN Conference on Environment and Development embraced care for future generations in their operative provisions.¹⁴ Principle 3 of the Rio Declaration on Environment and Development which provides that ‘the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’, rather serves as a guiding principle for States to preserve the environment for the benefit of future generations.¹⁵ Furthermore, Article 6 of the Convention on Biological Diversity requires parties to develop plans or programmes for the conservation and sustainable use of biological diversity, in which context ‘sustainable use’ refers to the use of biological diversity in a way that maintains its potential to meet the needs and aspirations of present and future generations. Among the principles listed in Article 3, the UN Framework Convention on Climate Change

¹² Intergenerational equity and care for future generations was accentuated by Judge Christopher Weeramantry in his dissenting opinion to the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) ICJ Reports 1996, 233–234; and in his separate opinion to the Gabčíkovo–Nagymaros Project (Judgment) ICJ Reports 1997, 110. For a detailed overview on the reception of intergenerational equity at the ICJ, see Lynda M. Collins, ‘Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance’ (2004) 1 Dalhousie Law Journal 74, 127–129.

¹³ See above (n 6).

¹⁴ See Principle 3 of the Rio Declaration on Environment and Development; Articles 2 and 6 of the Convention on Biological Diversity; Article 3 of the UNFCCC.

¹⁵ Jane-Anstee Wedderburn, ‘Giving a Voice to Future Generations: Intergenerational Equity, Representatives of Generations to Come, and the Challenge of Planetary Rights’ (2014) 1 Australian Journal of Environmental Law 37, 45.

(UNFCCC) provides that ‘the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities’, which, similarly to the Rio Declaration and the Convention on Biological Diversity, puts emphasis on the benefit of future generations as a guiding principle, without assigning planetary rights and obligations.¹⁶

Furthermore, a more comprehensive commitment to the rights of future generations was expressed in the 1997 UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, which declares the responsibility of the present generations to ensure that ‘the needs and interests of present and future generations are fully safeguarded’ and requires present generations to ensure that future generations are not exposed to pollution which may endanger their health or existence, to preserve natural resources for future generations, and to take into account possible consequences for future generations of major projects before they are carried out.¹⁷ The Declaration thus provides (non-enforceable) obligations for the present generations but does not go so far as to grant rights to future generations, in contrast with its predecessor, the draft Bill of Rights for Future Generations.¹⁸

¹⁶ It should be noted that the inclusion of the principles set out in Article 3 of the UNFCCC did not receive unanimous support from the States Parties. The United States, for instance, successfully advocated for changes to this article, in order to limit its legal implications. See Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18 *Yale Journal of International Law* 451, 501.

¹⁷ Articles 1 and 5 of the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations.

¹⁸ Article 1 of the Cousteau Society, *Bill of Rights for Future Generations* (1990): ‘Future Generations have a right to an uncontaminated and undamaged Earth and to its enjoyment as the ground of human history, of culture, and of the social bonds that make each generation and individual a member of one human family.’

It could be concluded that the international legal documents discussed above did not incorporate the doctrine of intergenerational equity in its entirety, but rather some elements of it. For instance, the 2015 Paris Agreement attempts to embrace the doctrine, by providing that ‘Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, [...] and intergenerational equity.’¹⁹ While still a preambular reference,²⁰ declaring obligations on intergenerational equity reflects a commitment of the international community²¹ to recognize the doctrine in the context of climate change.

Moreover, there are continuous and ongoing endeavors to adopt a Declaration on Future Generations, as proposed by the Secretary-General of the UN in their Report ‘Our Common Agenda’ in 2021. The report, building on the constitutional protection of future generations and the practice of domestic courts, suggested these efforts to be consolidated in the form of a declaration that could build on the above-mentioned UNESCO Declaration and elaborate on the rights and obligations of present and future generations.²² The Netherlands and Fiji played a leading role in the

¹⁹ Preamble, Recital 12 of the Paris Agreement.

²⁰ Although the preamble may not be capable of creating rights or obligations on its own, it certainly determines the interpretation of the operative provisions, meaning that parties should recognize an obligation to comply with their respective obligations when carrying out climate-change-related actions under the Paris Agreement. See Benoit Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6 *Climate Law* 109, 113–114.

²¹ The Paris Agreement enjoys widespread support. As of October 2023, 195 parties to the UNFCCC are parties to the Paris Agreement. See UN – Climate Change, ‘Paris Agreement – Status of Ratification’ <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed 26 October 2023.

²² ‘Our Common Agenda – Report of the Secretary General’ (UN 2021) <<https://www.un.org/en/common-agenda>> accessed 26 October 2023.

preparation process and submitted an Elements Paper to the UN General Assembly.²³

In the meantime, on 4 May 2023, the High-Level Committee on Programmes adopted a set of common principles for the UN system to serve as a basis for a shared understanding of the concept of future generations and intergenerational equity.²⁴ The Common Principles on Future Generations also builds upon the findings of the Maastricht Principles on the Human Rights of Future Generations, which is an expert document signed on 3 February 2023 by current and former members of international and regional human rights treaty bodies and special rapporteurs of the UN Human Rights Council. The Maastricht Principles attempt to give a definition to future generations – those generations that do not yet exist but will exist and who will inherit the Earth, including persons, groups, and Peoples – as reflected in the Common Principles. The Maastricht Principles represent a first attempt to elaborate on the implications of regarding future generations as holders of human rights under international law, and they aim at contributing to the normative and institutional reforms required to effectively protect the human rights of the upcoming generations.²⁵

Notwithstanding the fact that none of these documents is binding, they could serve as a starting point to raise intergenerational equity to the level of customary law, with the parallel support of adjudicative bodies, especially the ICJ. As mentioned above, the ICJ did not incorporate the doctrine of intergenerational equity either, yet judges tended to build on it in their

²³ General Assembly of the UN, ‘Declaration on Future Generations’ <<https://www.un.org/pga/76/2022/09/12/general-assembly-declaration-on-future-generations-pga-letter/>> accessed 26 October 2023.

²⁴ ‘The Maastricht Principles on the Human Rights of Future Generations’ <<https://www.rightsoffuturegenerations.org/>> accessed 26 October 2023.

²⁵ Ana María Suárez Franco and Sandra Liebenberg, ‘The Maastricht Principles on the Human Rights of Future Generations’ in Hansjörg Lanz and Jens Martens (eds), *Spotlight on Global Multilateralism: Perspectives on the Future of International Cooperation in Times of Multiple Crises* (Global Policy Forum Europe 2023) 62–63.

dissenting or concurring opinions. The currently pending Request for Advisory Opinion on the Obligation of States in respect of Climate Change²⁶ may provide an opportunity for the Court to elaborate its opinion on States' obligations towards future generations and the legal consequences arising therefrom with respect to present and future generations, and provide a comprehensive overview on planetary rights and obligations.²⁷

Parallel to this development, there have been endeavors to enforce the intergenerational perspective through contentious cases before human rights adjudicative bodies, however, these cases may encounter significant challenges due to the strict admissibility criteria.²⁸ Thus, procedural hurdles in human rights litigation underscore the need to develop alternative ways to incorporate intergenerational equity into decision-making processes.

²⁶ Obligations of States in respect of Climate Change (Request for Advisory Opinion) (2023) <<https://www.icj-cij.org/case/187/request-advisory-opinion>> accessed 20 March 2024.

²⁷ On the potential impact of the pending advisory opinion, see Jacques Hartmann, Margaretha Wewerinke-Singh and Ayan Garg, 'The advisory proceedings on climate change before the International Court of Justice' (2023) 102 Questions of International Law 23; see also Margaretha Wewerinke-Singh, Julian Aguon and Julie Hunter, 'Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill/Nijhoff 2021) 393.

²⁸ See, for instance, *Sacchi and Others v. Argentina and Others* CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, CRC/C/88/D/108/2019 (UN CRC, 22 September 2021); and *Duarte Agostinho and Others v. Portugal and Others* App no 39371/20 (ECtHR, 9 April 2024). See also Elizabeth Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) 11/2 Transnational Environmental Law 263; Corina Heri, 'On the Duarte Agostinho Decision' (Verfassungsblog, 15 April, 2024) <<https://verfassungsblog.de/on-the-duarte-agostinho-decision/>> accessed 15 May 2024.

III. INSTITUTIONAL REPRESENTATION OF FUTURE GENERATIONS: PRECEDENT-SETTING EXAMPLES

Therefore, I propose that a viable way for the representation of the interests of future generations could be realized through high-level specialized institutions that have the power to influence decisions at national and international levels. The importance of the issue was pointed out in the UN Secretary General's report from 2013, which proposed several ideas for the institutionalization of the representation of future generations at the international level. These included a High Commissioner for Future Generations, a Special Envoy of the UN Secretary-General for future generations to address intergenerational solidarity and the needs of future generations as a recurring agenda item in the high-level political forum, and inter-agency coordination concerning the needs of future generations.²⁹ Among these proposals, special attention shall be dedicated to the establishment of a High Commissioner for Future Generations who, according to the report, could help to address the long-term consequences of present-day actions by drawing attention to future impacts in tangible, non-abstract terms and by supporting the integration of sustainability into planning government decisions. As presented above, there are ongoing efforts to implement these proposals within the UN.

A high-level institution dedicated to the protection of future generations – as pointed out also in the 2013 report – could be based on the already functioning national institutions specialized in protecting their interests and needs. The report examined certain national institutions as outstanding examples of the institutional protection of future generations which could serve as a model for the establishment of a similar institution at the international level.³⁰ The following paragraphs aim at rethinking the role of domestic institutions set out in the report in light of the recent developments

²⁹ Report of the Secretary-General (n 5) 62–67.

³⁰ Report of the Secretary-General (n 5) 39–48.

in climate change law and litigation and pointing out how they could contribute to the enforcement of intergenerational justice in decision-making processes.

The office of the Parliamentary Commissioner for the Environment in New Zealand was one of the first institutions to embrace the protection of the environment. Taking into account that the office was established in 1986 – not long before the issue of sustainable development appeared on the agenda of the UN Conferences – the needs of future generations were originally not explicitly addressed by the Parliamentary Commissioner,³¹ but it is apparent from its documents that from its perspective concerns for future generations and the environment are intertwined.³² The primary role of the Commissioner is investigative, but he may also provide the Parliament with advice and briefings – for instance, he had a major role in the adoption of the Climate Change Response (Zero Carbon) Amendment Act of 2019³³ –, present his work to the public and respond to public concerns. The role of the Parliamentary Commissioner in connection with the adoption of the Zero Carbon Amendment shows that the institution has the means and the power to shape climate policy directly if there is a political will to embrace the issue.

³¹ Jonathan Boston, 'Parliamentary Commissioner for the Environment, New Zealand' in Marie-Claire Cordonier Segger, Marcel Szabó and Alexandra R. Harrington (eds), *Intergenerational Justice in Sustainable Development Treaty Implementation* (Cambridge University Press 2021) 434.

³² See Parliamentary Commissioner for the Environment, 'Creating Our Future: Sustainable Development for New Zealand' (2002) <<https://pce.parliament.nz/publications/archive/1997-2006/creating-our-future-sustainable-development-for-new-zealand/>> accessed 10 April 2024.

³³ See Parliamentary Commissioner for the Environment, 'Stepping stones to Paris and beyond: Climate change, progress, and predictability' (2017) <<https://pce.parliament.nz/publications/stepping-stones-to-paris-and-beyond-climate-change-progress-and-predictability/>> accessed 10 April 2024.

The Finnish Committee for the Future was established in 1993 and has a relatively limited role, given that it does not have the powers and rights of an ombudsman, but it serves as a Think Tank for future, science and technology policy. This shows that the mandate of the Committee extends well beyond environmental sustainability and the protection of future generations. The Committee may issue a report on long-term future prospects and the Government's targets and adopt statements, draft submissions to other committees of the Parliament, discuss issues pertaining to future development factors, and analyse research regarding the future.³⁴ The role of the Committee in addressing intergenerational justice is not explicitly defined and it is, thus, difficult to determine whether it had a role in the adoption of the Climate Act (423/2022), which is now being challenged by climate litigation.³⁵

The position of the Canadian Commissioner of the Environment and Sustainable Development was established in 1995. The office is embedded within the Office of the Auditor General and mainly issues reports on assessing whether departments of the Federal Government are meeting their sustainable development objectives for air, biodiversity, climate change, environmental assessment, land, toxins, water, industry, and Sustainable Development Goals (SDGs).³⁶ Similar to the scope of the Parliamentary Commissioner in New Zealand, future generations are not specifically defined in the work of the Canadian Commissioner. However, its dedication to sustainable development may indirectly embrace a certain level of concern

³⁴ Paula Tiihonen, 'Power over Coming Generations: Finland' in Cordonier Segger et al (n 30) 401.

³⁵ *Finnish Association for Nature Conservation and Greenpeace v Finland* (pending). See Climate Change Litigation Database <<http://climatecasechart.com/non-us-case/finnish-association-for-nature-conservation-and-greenpeace-v-finland/>> accessed 10 April 2024.

³⁶ See, for instance, Commissioner of the Environment and Sustainable Development Reports from the years 2018, 2019, 2020, 2021, 2022 <https://www.oag-bvg.gc.ca/internet/english/parl_lp_e_901.html> accessed 10 April 2024.

toward the interests of future generations.³⁷ The role of the Commissioner in connection with climate change is also significant: besides monitoring the implementation of federal laws and policies, the Office may also respond to citizens' environmental petitions and bring them to the attention of federal ministers. For instance, petition no. 471 ('Greenhouse gas emissions in Canada, monitoring, reporting, and climate action') requests information from the Federal Government about the implementation, possible impacts, and timelines of the regulations to combat greenhouse gas emissions.³⁸ This example suggests that the Canadian Commissioner has a significant role in transferring citizens' claims to respective government bodies, also in connection with climate change.

The Israeli Parliament, the Knesset created the Commission on Future Generations with a Knesset Commissioner for Future Generations in 2001. The main function of the Commission was to assess bills with particular relevance for future generations, to demand information from state agencies, and to issue recommendations on matters relevant for future generations. In practice, the Commissioner had strong power in the decision-making process: the fact that it claimed the right to issue an informed opinion even when the Knesset was bound by law to make a decision within a given timeframe effectively led to the Commission having informal veto power over law-making. Furthermore, one of the key powers of the Commission was to request a 'reasonable time' from parliamentary committees to collect data and prepare evaluations on certain bills or secondary legislation which could even require committee chairs to delay their discussion to allow this. Needless to say, this arrangement endowed the Commissioner with a strong bargaining position which he did not hesitate to maintain. The first Commissioner's term ended in 2006, and in 2007, the Parliament abolished

³⁷ David Wright and James McKenzie, 'Canadian Commissioner of the Environment and Sustainable Development' in Cordonier Segger et al (n 30) 465.

³⁸ Office of the Auditor General of Canada, 'Petition no. 471 (Greenhouse gas emissions in Canada, monitoring, reporting, and climate action)' <https://www.oag-bvg.gc.ca/internet/English/pet_471_e_44220.html> accessed 10 April 2024.

the Commission. Apart from the high cost of its operation, the fear that the Commission had received too much authority to interfere with the work of the Knesset certainly contributed to the dissolution of the entity.³⁹ This example is certainly a lesson suggesting that a delicate balance should be struck between the competencies of future generations advocates and political bodies when defining the scope of their influence.

Furthermore, in 2007, the Hungarian Parliament established the office of the Parliamentary Commissioner for Future Generations or the Ombudsman for Future Generations. Following the adoption of the new constitution, the Fundamental Law in 2011, it continued to operate within the institution of the Commissioner for Fundamental Rights as one of the two Deputies of the Commissioner. The position of the Deputy Commissioner for Future Generations or Advocate for Future Generations primarily and expressly represents the interests of future generations. One of the strongest powers of the Advocate is its influence on the Constitutional Court practice. The most striking example of the involvement of the Advocate with the work of the Constitutional Court is certainly tangible in Decision no. 14/2020 (VII.6.) given that the proceeding was initiated by the Commissioner upon the request of the Advocate in connection with forest protection. In addition to finding a violation of the prohibition of non-derogation and thus the values of the Fundamental Law, the Constitutional Court affirmed that the natural and cultural values stipulated in Article P (1) of the Hungarian Fundamental Law⁴⁰ shall be protected per se for future generations, even if against the

³⁹ Shlomo Shoham and Friederike Kurre, 'Institutions for a Sustainable Future: The Former Israeli Commission for Future Generations' in Cordonier Segger et al (n 30) 336–339.

⁴⁰ Article P (1) of the Hungarian Fundamental Law reads as follows: 'Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.'

actual economic interest of current generations.⁴¹ Furthermore, thanks to the knowledge-sharing opportunity at the Network of Institutions for Future Generations,⁴² the idea of granting legal personhood to Lake Balaton,⁴³ the largest lake in Central Europe, was clearly inspired by the successful initiative concerning the Whanganui River in New Zealand.⁴⁴

In addition, the Welsh Commissioner for Sustainable Futures mentioned in the 2013 report was replaced in 2015 by the currently operating Future Generations Commissioner for Wales. Based on the Well-Being of Future Generations (Wales) Act adopted in 2015, the new Commissioner may provide advice or assistance to a public body (including advice on climate change), encourage best practices, undertake the necessary research, and publish regular reports and recommendations.⁴⁵ The Welsh model is considered to be a leading example to protect future generations, as Wales is the only country in the world to have put the UN's SDGs into statute,⁴⁶ requiring public bodies to set well-being objectives and reach them in accordance with the sustainable development principle. The Commissioner may conduct a review of the long-term impacts of the public bodies'

⁴¹ Decision no. 14/2020 (VII.6.) Constitutional Court of Hungary [35].

⁴² The Network was established and is coordinated by the Hungarian Advocate for Future Generations. See: <<https://futureroundtable.org/en/web/network-of-institutions-for-future-generations>> accessed 10 April 2024.

⁴³ Commissioner for Fundamental Rights, '2018 Report' B/4398 367.

⁴⁴ In 2017, the Whanganui river in New Zealand was the first river to receive the status of a legal person. This act also recognizes the spiritual attachment of the indigenous Maori people to the river. This approach expresses respect towards the value of the natural resource and aims at preventing irreversible pollution in the future. See Matthias Kramm, 'When a River Becomes a Person' (2020) 4 *Journal of Human Development and Capabilities* 307.

⁴⁵ Well-Being of Future Generations (Wales) Act 2015, [17]–[24].

⁴⁶ 'Wales leading the way with Future Generations Legislation – UN plans to adopt Welsh Approach' <<https://www.futuregenerations.wales/news/wales-leading-the-way-with-future-generations-legislation-un-plans-to-adopt-welsh-approach/>> accessed 10 April 2023.

activities in connection with safeguarding the interests of future generations. The fact that the obligation of public bodies to follow the recommendations of the Commissioner is set out in the Well-Being of Future Generations (Wales) Act shows the important role of the institution in enforcing intergenerational justice in the country.

Furthermore, the Norwegian Ombudsman for Children was established in 1981 as the world's first ombudsperson for children. Although the Norwegian Ombudsman for Children does not expressly advocate for future generations, as her main duty is to ensure the proper implementation of the Convention on the Rights of the Child, recent constitutional developments in Norway⁴⁷ have certainly created significant room for the Ombudsman to act in support of future generations as well.⁴⁸ In my view, the fact that the Norwegian Ombudsman for Children, who is expressly advocating for children, was analysed in the 2013 report of the UN Secretary-General also proves the strong interlinkage between advocating for children and for future generations. Furthermore, draft general comment no. 26 to the Convention on the Rights of the Child, which was adopted at the 93rd session of the Committee on the Rights of the Child,⁴⁹ also represents a firm standpoint on the interrelation of the two issues, stating that “[d]iscussions of future generations should take into account the rights of children who are

⁴⁷ As a result of a series of amendments starting in 2014, the Norwegian Constitution was amended with two provisions of particular interest concerning the rights of children: the duty to create conditions that facilitate the child's development, including adequate economic, social, and health conditions (article 104) and the right to education (article 109), which are strongly linked to sustainable development and thus future generations.

⁴⁸ Ole Kristian Fauchald and Elisabeth Gording Stang, 'Norway: Norwegian Ombudsman for Children' in Cordonier Segger et al (n 30) 358–362.

⁴⁹ Committee on the Rights of the Child, 'General comment No. 26 on children's rights and the environment, with a special focus on climate change', CRC/C/GC/26.

already present on this planet and those constantly arriving.”⁵⁰ The adoption of this general comment was ground-breaking, not only for clarifying States’ obligations under the Convention on the Rights of the Child on climate change,⁵¹ but it for enhancing children’s perspectives in discussing intergenerational equity.⁵² These development directions may imply that children’s representatives, such as the Norwegian Ombudsman for Children, have a legal basis to advocate for future generations as well. Furthermore, it is worth mentioning that the Hungarian Advocate for Future Generations also provided input for drafting the general comment, along with other national human rights institutions, States, regional organizations, UN agencies, civil society organizations, academics, and children and adolescent groups.⁵³

Finally, the German Parliamentary Advisory Council on Sustainable Development merits mention, which was established in 2009 to serve as the advocate of long-term responsibility. The Council is integrated within the parliamentary system and its main task is to monitor compatibility with the National Sustainability Strategy. For this purpose, the Council may adopt recommendations and carry out an evaluation of the sustainability impact assessment. The latter encompasses four areas which are strongly related to the protection of future generations: (a) fairness between generations; (b)

⁵⁰ Committee on the Rights of the Child, ‘Draft general comment No. 26’ II.A.12. See <<https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>> accessed 10 April 2024.

⁵¹ Angeliki Papantoniou, *Children and the Environment* (Brill 2022) 73.

⁵² Enikő Krajnyák, ‘The Development of the UN CRC’s Approach to Children and Climate Change: Any Impact on the Future of Youth-led Climate Litigation?’ (2024) 8/1 *Católica Law Review* 61, 71–73.

⁵³ UN CRC, ‘Call for comments on the draft general comment on children’s rights and the environment with a special focus on climate change’ (22 August 2023). See <<https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>> accessed 10 May 2024.

social cohesion; (c) quality of life; and (d) international responsibility.⁵⁴ On the one hand, the strength of the Council lies in its clear-cut role in the legislative procedure and its effective contribution to the institutionalization of sustainability. On the other, the fact that the Council functions in the framework of the parliamentary work shows the political vulnerability of the institution and the formalistic role of the Council in the legislative process.⁵⁵

IV. CONCLUDING REMARKS: WHAT COULD BE LEARNT FROM DOMESTIC INSTITUTIONS?

Although the moral responsibility toward future generations is recognized by international conventions, national constitutions, and non-binding instruments, the practical enforcement of their needs and interests seems difficult under the current legal regime. The representation of people not born yet may raise certain concerns, such as the uncertainty of defining their preferences, the lack of concrete claims and claimants, and the separation of rights and obligations in legal relationships. But these dilemmas should not hinder the endeavors to include a future-generations-perspective in decision-making.

Although climate change litigation has enjoyed a degree of success in a growing number of cases, which, in my opinion, may be one way to enforce the rights of future generations, other solutions are needed to ensure the implementation of intergenerational equity. One alternative solution, which does not question the power of climate litigation, nor does it exclude the use of this solution in the future, could lie in the institutional representation from a bottom-up approach. Until the establishment of a High Commissioner or a similar international institution for the protection of future generations,

⁵⁴ Franz Reimer, 'Institutions for a Sustainable Future: The German Parliamentary Advisory Council on Sustainable Development' in Cordonier Segger et al (n 30) 391–394.

⁵⁵ *ibid* 385–387.

the creation of more and more national institutions and their close cooperation could certainly provide a solution as a first step.

This institutional protection, however, is also a currently evolving field in the international sphere and numerous questions arise also in relation to their establishment and future. Defining their scope of action, institutional structure, and relationship to political bodies, as well as the potential role of advocates in youth-led environmental litigations, are certainly challenging issues for the legal sphere, which require solving if the interests of future generations are to be enforced in practice.

Institutional examples at the domestic level may offer valuable lessons for the creation of an international institution as well. The institutions discussed above show that they could serve as a platform for engaging with civil society and science, which, at the UN level could be extended to other international institutions, governments, and other UN agencies, and may also function as a global-level think tank to research and promote best practices at domestic levels. Examples include the recognition of the legal personhood of the Whanganui river, or the contribution of the Hungarian and Norwegian Ombudsmen to the preparation of general comment no. 26 to the Convention on the Rights of the Child. The latter example also indicates that, although an international representative of future generations may not propose new hard laws in the UN, they may contribute to the development of soft instruments that can nevertheless channel intergenerational equity into the interpretation of the already existing human rights or environmental instruments, such as general comments to human rights treaties, reports and guidance. Furthermore, as the Hungarian example suggests, the institution could also influence the practice of various forums: while the Hungarian Ombudsman has the potential to contribute to the development of the Constitutional Court's practice, the international representative could also participate in the proceedings before international adjudicative bodies, including regional human rights courts, the ICJ, and other forums through advocates or third-party interveners.

While domestic institutions can be influential at the domestic level, and sometimes also at the international level, an international-level representative of future generations, such as a Special Envoy or a High Commissioner for Future Generations, would provide a more systematized action at the global level. This representative would have the means to consult with and facilitate cooperation between various stakeholders, including civil society, international institutions and organizations, national ombudsmen, States, scholarship and other groups, in order to enhance the involvement of future generations' perspectives in international environmental decision-making processes. Nonetheless, as the example of the Israeli Commissioner suggests, such a position may face political pressure, especially in the global context. That is why a compromise solution should be found which places emphasis on soft powers: namely agenda-setting, capacity-building, and awareness-raising to balance between present and future generations' interests.

FREEDOM OF PANORAMA IN THE EU: MAIN FEATURES AND HIDDEN SIDES

Anna Shtefan 

The rule of freedom of panorama only applies to works permanently placed in public places. The concepts of a public place and the permanent location of work in such a place are usually not clearly defined in the legislation of the EU Member States which gives rise to disputes about the framework of permissible behaviour of the users. In addition, there are several issues that the legislation is silent about, while the courts have to determine whether the creation of the image of the work falls under the characteristics of freedom of panorama. Do the persons who create the image also have to be in a public place; do they have the right to use any additional equipment that allows seeing the work other than standing on the ground; do they have the right to make any changes to the image of the work? This article explores the meaning of public space and the relationship between the permanent and temporary location of work in a public place. This article also considers the hidden sides of freedom of panorama and suggests ways to improve its legal regulation in order to make its exercise less controversial and more efficient.

Keywords: freedom of panorama; EU copyright; copyright exceptions; public place; permanent location

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I. INTRODUCTION

Freedom of panorama is a rule that allows the free creation and use of images of works permanently located in public spaces without the author's consent. Within the Law of the European Union, freedom of panorama is laid out in Article 3 of the InfoSoc Directive.¹ According to Art. 5(3)(h) Member States may provide exceptions or limitations to the exclusive reproduction right of works.² These can be works of architecture or sculptures permanently located in public places.³ This rule is formulated in a general form, leaving a broad margin of discretion for the Member States to determine the

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society ("InfoSoc Directive").

² Article 5(3)(h) InfoSoc Directive.

³ Ibid.

boundaries of their legislation.⁴ As a result, there has been great disagreement among the EU Member States in defining the list of works covered by freedom of panorama, as well as outlining the permitted usage of artwork photographs. Regardless of these differences, freedom of panorama always applies to artworks permanently located in public places.

However, the concept of a public place is not always clear. In many EU Member States,⁵ the law simply refers to a ‘public place’ without specifying further what this means. Without legal guidance, it can be difficult for users to determine whether a specific place is public. It is also not always obvious if the artwork in a public place could be considered as being permanent. For example, if a sculpture is made of unstable material, could it be considered a permanent installation if it only lasted a week due to gale-force winds? In many countries, statues dedicated to figures of totalitarian regimes that were previously on public display for many decades have been now demolished. Does the demolition of such monuments mean that their placement in public space was temporary? These are two separate examples, but they both show that it may be difficult to qualify the main features of freedom of panorama.

In addition, there are several hidden aspects to the freedom of panorama rule not mentioned in written law. They are primarily found in the case law of

⁴ See: Anna Shtefan, ‘Freedom of Panorama: The EU Experience’ (2019) 11 *European Journal of Legal Studies* 13, 17.

⁵ See: Austria: Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz 1936, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 244/2021), Art. 54(1)(5); Belgium: Code de droit économique (mis à jour le 21 avril 2022), Art. XI.190(2/1); Finland: Tekijänoikeuslaki 8.7.1961/404 (sellaisena kuin se on muutettuna asetuksella 18.11.2016/972), Art. 25a; Ireland: Copyright and Related Rights Act, 2000 (Amended in 2023), S 93; Lithuania: Law on Copyright and Related Rights (n 22); Malta: Copyright Act, 2000 (Chapter 415, as amended up to Act No. VIII of 2011), Art. 9(1)(p); Portugal: Código do Direito de Autor e dos Direitos Conexos (aprovado pelo Decreto-Lei n.º 63/85 de 14 de março de 1985, e alterado até ao Decreto-Lei n.º 9/2021 de 29 de janeiro de 2021), Art. 75(2)(q).

Germany, France, and Spain but may also affect the interpretation of freedom of panorama in other Member States. Firstly, does it matter where the user is located when taking a photograph or creating a painting of the work? Does this place also have to be public, or can the user be on their balcony or in another private place? Secondly, can the person creating the image use additional tools, such as a ladder or a drone, to capture images from angles that would otherwise be impossible? Thirdly, does the user have the right to edit their image of the work? For example, could they make a different background around the work or add or remove some elements next to the image of the work? On the one hand, these aspects relate to the creative expression of users over their image of an artwork permanently located in a public place. On the other hand, this creative expression is based on the use of another author's work within the framework of copyright exceptions and limitations. These exceptions and limitations may limit the choice of methods and means of creating the image of the work.

When such questions arise in practice, it is difficult for both users and courts to find answers. The legal rules on freedom of panorama in most EU Member States do not provide any guidance on how the user can or should act. In Germany, the *Bundesgerichtshof* has concluded that a photograph of a building facing a public road does not meet the conditions of freedom of panorama if it was taken while the photographer was not in a public place.⁶ The German Federal Court has also concluded that the use of aids, such as a ladder, is not permitted under freedom of panorama.⁷ However, the grounds for such conclusions are unclear, as such restrictions are not contained in the

⁶ BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus, mwN. <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=27285&pos=0&anz=1>> accessed 5 December 2023.

⁷ BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund. <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=78753&pos=0&anz=1>> accessed 5 December 2023.

legislation. Most of the issues raised above are rarely addressed in doctrine and the rule of freedom of panorama therefore remains difficult to apply.

In this article, I provide an exhaustive description of the concept of a ‘public place’ and argue that if access to a place is limited to certain working hours or requires the purchase of an entrance ticket, such a place still falls within the ‘public place’ category. This enables us to distinguish which locations are covered by the freedom of panorama rule.

I shall also define ‘permanently located’, and I will conclude that an artwork is ‘permanently located’ if it is intended to remain in the public space for an indefinite period of time or a period that constitutes a significant part of the work's existence. Upon investigating the issue of the location of the image creator, I justify that this should not be relevant so long as the image reflects the part of the work that can be legally visible to the public. This also applies to using additional tools to create an image, such as a ladder or a tripod. When discussing the possibility of making changes to the image of the work, I suggest that the work must be depicted realistically and cannot be altered in any way. Some minor changes to the environment around the work may be permissible so long as they do not alter the general perception of the work. Regarding accompanying an image of the work with text, I argue that the image may contain: the name or pseudonym of the author, the title of the work, the year of its creation, the name of the street, city, and country where the work is located. However, other inscriptions on the image contradict the free use of works principle. In this article, I suggest improvements to the freedom of panorama rule to take into account the interests of users without harming the interests of authors.

II. THE MAIN FEATURES OF FREEDOM OF PANORAMA IN THE EU

Freedom of panorama forms part of copyright exceptions and limitations. These define the content of permitted behaviour and users of artworks in a permanent location and in a public space. This, accordingly, requires

clarification of what place is considered public (1) and what it means to be permanently located in such a place (2).

1. Public places in terms of the rule of freedom of panorama

There are many definitions of the concept of a public place focusing on different aspects – social, political, psychological, and other. In general, public places are places that ‘exist outside the home and workplace that are generally accessible by members of the public’.⁸ These are places where ‘social interactions, sense of belonging, collective memories, and shared identities occur’.⁹ The term ‘public’ has been interpreted by the CJEU as referring to an indefinite number of persons in general.¹⁰ In a broad sense, a public place is a location where a potentially unlimited number of people, unconnected by affiliation with a family circle, workgroup, or any other group with a common interest, may have access. Public places contain a random and undefined number of people visiting at the same or at different times. In general, public places are not only streets and other open-air places, but can also be train stations, airports, theatres, restaurants, and stores. In other words, it is any place that the public can lawfully visit.

The recognition of a place as public should not be influenced by whether access requires prior registration, entrance fees, or other actions to be taken into account. Based on the definition of the term “public” given by the CJEU, a place must be public in nature. In other words, it should allow for

⁸ Jacinta Francis, Billie Giles-Corti, Lisa Wood, and Matthew Knuiiman, ‘Creating sense of community: The role of public space’ (2012) 32 *Journal of Environmental Psychology* 401, 402.

⁹ Luca M. Visconti et al., ‘Street Art, Sweet Art? Reclaiming the “Public” in Public Place’ (2010) 37 *Journal of Consumer Research* 511, 513.

¹⁰ Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* ECLI:EU:C:2016:379, paras 41-43.

the presence of many different people, regardless of whether or not there are entry fees and whether it is only open to visitors during certain hours.

When access to a public place is limited by working hours or the requirement to purchase a ticket for entry, this affects the application of the freedom of panorama rule. Unauthorized entry into such a place makes it illegal to remain and conduct any activity there. If a person creates an image of a work while unlawfully in a public place, the freedom of panorama cannot be applied to such an image. The laws of the Member States do not mention this aspect, but copyright exceptions and limitations do generally define that user behavior combined with illegal activities will not be permissible. As such, freedom of panorama can only apply to cases of lawful presence in a public place.

Limited access to a public place raises the question of how constant or regular the access to such a place must be to fall under the rule of freedom of panorama. Undoubtedly, when a park or public facility has a certain operating schedule, such a place is open to the public during its opening hours. When a place is private and public access is limited, works located in such places should not be subject to freedom of panorama. It is possible to imagine a case where a collector periodically opens their private collection on their private property to the public. Although the public may be temporarily present at this site, the site itself and the artworks there are private and not accessible to the public most of the time.

When it comes to freedom of panorama, the notion of public space becomes especially important since it determines whether a work can be freely used. Some EU Member States have proposed a list of outdoor public places, which includes streets, plazas, parks, and public roads.¹¹ Such lists are often non-

¹¹ Bulgaria: Закон за авторското право и сродните му права (ДВ, бр. 56/1993, с изменениями по състоянию на 13.12.2019 г.), Art. 24(7); Croatia: Copyright and Related Rights Act (OG No. 111/2021), Art. 204(1); Czech Republic: Zákon č. 121/2000 Sb. ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s

exhaustive. In Spain, for example, freedom of panorama applies to works permanently located in parks, streets, squares or other public places.¹² In this regard, the Provincial Court of Madrid noted that this list is approximate and expresses a general concept that semantically corresponds to all places that are essentially public roads.¹³ In the laws of France¹⁴ and Hungary,¹⁵ it is directly stated that freedom of panorama covers only streets, i.e. public places in open space. In contrast, in Ireland it is allowed to freely use works that are permanently placed not only on the streets, but also in premises open to the public.¹⁶

Although these approaches differ somewhat, they at least allow for a more or less precise definition of what can be considered a public place. In many other Member States, the public place is indicated as such without explaining its content, which makes it difficult to understand the limits of freedom of panorama. According to the law of Finland, freedom of panorama applies to

práveu autorským a o změně některých zákonů (autorský zákon) (ve znění zákona č. 429/2022 Sb.), Art. 33(1); Germany: Act on Copyright and Related Rights (Copyright Act, as amended up to Act of June 23, 2021), Art. 59(1); Poland: Ustawa dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (zmieniona ustawa z dnia 13 lutego 2020 r), Art. 33(1); Slovenia: Copyright and Related Rights Act (Official Gazette of the Republic of Slovenia, No. 21/95 of April 14, 1995, as amended up to October 26, 2022), Art. 55(1).

¹² Spain: Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes (aprobado por el Real Decreto Legislativo N° 1/1996 de 12 de abril de 1996, y modificado por el Real Decreto-ley N° 6/2022, de 29 de marzo de 2022), Art. 35(2)

¹³ SAP M 11756/2014 – ECLI:ES:APM:2014:11756, 16/06/2014. <<https://www.poderjudicial.es/search/AN/openDocument/d94bc0be785a7364/20141007>> accessed 5 December 2023.

¹⁴ France: Code de la propriété intellectuelle, Art. L122- 5(10).

¹⁵ Hungary: 1999. évi LXXVI. törvény a szerzői jogról (Hatályos: 2020.06.18.-tól), Art. 68(1).

¹⁶ Ireland: Copyright and Related Rights Act (n 5).

works permanently located in or in close proximity to a public place.¹⁷ This could potentially include works in private yards near public roads. Portuguese law does not provide examples of public places;¹⁸ this served as a basis for the conclusion that freedom of panorama in Portugal ‘clearly includes public interiors’.¹⁹ However, such an interpretation cannot be general and universal for all states that do not explain the essence and types of public places. For example, the law of Lithuania does not have an interpretation of a public place and at the same time explicitly states that freedom of panorama does not apply to exhibitions and museums.²⁰

Each state has discretion in deciding this issue, especially since the InfoSoc Directive also does not define public places. In addition, in case of a legal conflict, a court may apply the three-step test of the Berne Convention to determine whether the actual use of the work is consistent with the nature of the exceptions and limitations.²¹ However, the law needs to specify exactly where the work should be located so that the convention can be freely used. This problem is highlighted by Julien Cabay who states, ‘the

¹⁷ Finland: Tekijänoikeuslaki (n 5).

¹⁸ Portugal: Código do Direito de Autor e dos Direitos Conexos (n 5).

¹⁹ Teresa Nobre, ‘Best Case Scenarios for Copyright: Freedom of Panorama, Parody, Education, and Quotation’ (2016). <https://www.academia.edu/33280311/Best_Case_Scenarios_for_Copyright_Freedom_of_Panorama_Parody_Education_and_Quotation> accessed 5 December 2023.

²⁰ Lithuania: Law on Copyright and Related Rights (n 5).

²¹ Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979, Art. 9(2): ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

broad scope of the exception may be limited in its interpretation, especially by application of the three-step test'.²²

Freedom of panorama is an exception to the general rule that the author or other copyright holder can permit others to use publicly displayed works. According to the Universal Declaration of Human Rights, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.²³ It follows that the introduction of cases of free use of works is implemented in such a way as to restrict the rights of authors only insofar as there is a real need for this due to the legislative guarantees of other rights, freedoms and interests. Therefore, the author or other rightsholder should have a clear overview of how their copyright is limited, and users, for their part, must clearly understand the limits of permissible behaviour.

In my view, the definition of a public place as a publicly accessible place in an open space is appropriate. It allows not to list examples of such places (streets, parks, roads, etc.) and creates a fairly clear idea of them. It also improves the understanding of works covered by freedom of panorama when the law does not contain an exhaustive list of such works. In sum, pointing only to outdoor public places is more consistent with the essence of freedom of panorama, since a panorama is a general view of a particular area, not an interior. In addition, interior design is subject to change, and the user does not always know whether a particular work will be placed in the interior permanently or temporarily. Obviously, there is no reason to

²² Julien Cabay, 'La Liberté de Panorama: Entre Brouillard et Poudre Aux Yeux' (2016) 5(6) *Auteurs & Media* 383, 387-388 (« la portée large de l'exception peut se trouver limitée dans le cadre de son interprétation, spécialement par application du test des trois étapes »).

²³ Article 29(2) Universal Declaration of Human Rights, proclaimed on 10 December 1948.

expect that all Member States will adopt this approach. However, it would be appropriate to at least clarify which places belong to the public and whether freedom of panorama covers the interiors of public buildings. If the wording of the public place is abstract, it complicates the application of freedom of panorama and makes the meaning of this rule uncertain.

2. Permanent location of works in public places

The freedom of panorama regime applies only to works that are permanently displayed in public places. Conversely, the temporary presence of a work in a public place withdraws such a work from the scope of freedom of panorama. The fourth plinth on Trafalgar Square in central London exemplifies this relationship. About 200 years ago, statues and sculptures were placed on the other three pedestals and have remained there ever since. The fourth plinth was intended for an equestrian statue of William IV, which was not completed due to lack of funds. For over 150 years, the plinth's fate was the subject of debate until, in 1998, the Royal Society for the Encouragement of Arts, Manufactures and Commerce commissioned three contemporary sculptures to be placed temporarily on this plinth. This idea was a success, and later, the pedestal began to be used for the temporary display of modern works of art. The terms of their placement vary; on average, one and a half to two years.²⁴ Therefore, while the statues and sculptures on the other three pedestals are permanently placed in public space, the works on the fourth plinth do not have this characteristic.

The main criterion of the concept of 'permanent location' is the primary purpose of placing the work in a public space for an indefinite period of time. In the words of Adrian Niewęglowski, the rule of freedom of panorama applies 'if an item is placed in a public space in a way that can

²⁴ Katey Goodwin, 'Lists of London: Fourth Plinth' <<https://artuk.org/discover/curations/lists-of-london-fourth-plinth>> accessed 5 December 2023.

usually be treated as a decision to leave it permanently'.²⁵ Therefore, it should not be a factor whether the work is available for perception 24 hours a day or can be seen only under certain circumstances. For example, the illumination of the Eiffel Tower can only be seen at night, but it has been on the tower continuously since the installation of the lighting effects, and at least the approximate date of its possible removal is unknown.²⁶ In contrast, if the work appears in a public place for a predetermined period of time when the subsequent removal of the work from this place is immediately foreseen, such placement is temporary.

Many works have a relatively short existence and gradually deteriorate due to the instability of the materials used to create them (chalk, sand, snow, ice, fresh flowers, etc.). According to the Supreme Court of Spain, such works are born with a call to ephemeral rather than perennial life.²⁷ When such a work is displayed in a public place, it is apparent that it will remain there for a relatively short period of time. Nevertheless, the relatively short natural existence of a work does not mean that its placement in a public space is necessarily temporary. Even monumental objects made of durable materials that could continue to hold its shape for centuries can be destroyed by natural phenomena such as earthquakes. Therefore, the permanent location of a work in a public place is determined not by the durability of the material used to create the work, but by the primary purpose of placing the work in a public place for an indefinite period of time.

²⁵ Adrian Niewęglowski, *Prawo Autorskie. Komentarz* (Wolters Kluwer 2021) 403.

²⁶ The Eiffel Tower, built in 1889, is already in the public domain, so from a copyright perspective, images of it can be freely created and used. However, the illumination on the Eiffel Tower is a protected work, thus, the image of the illumination can only be freely used in accordance with the conditions of freedom of panorama in France.

²⁷ STS 6958/2006 – ECLI:ES:TS:2006:6958, 1082/2006, 6.11.2006. <<https://www.poderjudicial.es/search/AN/openDocument/3a22a652b74fd0f2/20061214>> accessed 5 December 2023.

In some Member States, freedom of panorama applies directly to works created for the purpose being permanently installed in public places.²⁸ This approach seems successful because it eliminates the doubt as to whether a work that has had a short ‘life’ but has ‘lived’ all or a significant part of it in a public place falls under freedom of panorama. In other states, such conclusions were made by courts. For example, the Tribunal of Paris, in the case of graffiti on the wall of a building, emphasized that the permanent nature of its presence in a public place is undeniable since it cannot be removed without certain work, at least painting.²⁹ Although the paint may gradually fade in the sunlight and be washed away by natural precipitation, which means that graffiti will eventually disappear, it remains in a public place throughout its natural existence. The Federal Court of Justice of Germany was even more specific in the *Verhüllter Reichstag* case, noting that the characteristic of ‘permanent’ must be determined by the intent of the rightsholder. A work of art installed in a public place for its entire life is there permanently, even if that life is limited by the material it is made of. In this case, the rightsholder dedicated the work to the public by locating it in a public place for the entire period of the natural existence of the work. However, the situation changes when the rightsholder limits the public display to a period shorter than the natural life of the work. In this case, the work is not in a public place permanently, but only temporarily dedicated to the public. It makes no difference whether the work continues to exist

²⁸ Austria: Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (n 5); Belgium: Code de droit économique (n 5); Lithuania: Law on Copyright and Related Rights (n 5); Malta: Copyright Act (n 5); The Netherlands: Auteurswet 1912, Art. 18; Portugal: Código do Direito de Autor e dos Direitos Conexos (n 5).

²⁹ TJ Paris, 21 janv. 2021, n° 20/08482. Lire en ligne. <<https://www.doctrine.fr/d/TJ/Paris/2021/U62471CB202613F31B0CF>> accessed 5 December 2023.

after it has been withdrawn or whether it was destroyed in the process of its withdrawal.³⁰

Thus, the permanent nature of a work located in a public place is determined by the purpose of its placement in the public space. The work is permanently located in a public place if it was made accessible to the public for an undefined period of time or a period that constitutes a significant part of the natural existence of the work. From the same standpoint, it is advisable to address cases where the destruction of the work was the result of deliberate actions that were not known at the time of the exhibition. For example, an emergency building that is unreasonably expensive or difficult to repair may be demolished by the decision of a competent authority or the destruction of works may be the result of an act of terrorism, sabotage, or armed aggression. In many countries, monuments to persons who were once considered prominent figures but were later recognized as dictators have been removed from streets and squares. According to Jonathan Barrett, ‘the fate of the Communist era statues of Marx, Lenin and Stalin indicate the most monumental of sculptures may not, in fact, be permanent’.³¹ It is difficult to agree with this statement since such statues were intended to be placed in a public space and would have continued to be there if no unplanned action had been taken in advance that led to their destruction or dismantling.³² Accordingly, the entire time that such a work is displayed in a public space should be considered as a permanent location in a public place.

³⁰ BGH, I ZR 102/99 (KG), 2002 – Verhüllter Reichstag. <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=23154&pos=0&anz=1>> accessed 5 December 2023.

³¹ Jonathan Barrett, ‘Time to Look Again? Copyright and Freedom of Panorama’ (2017) 48(2) *Victoria University of Wellington Law Review* 261, 270.

³² The problem of dismantling, damaging and destroying works of art is very important in the context of both copyright to such works and compliance with legislation in the field of culture and cultural heritage protection, as well as

If a work was displayed in a public place for some time and then transferred either to an inaccessible institution or to a private collection, then the work's initial location in a public place should be taken into account. If a work is initially displayed for an undefined period of time, and the decision to remove the work from a public place was made under the influence of new circumstances, such cases should be qualified as the permanent placement of artwork in a public place for the entire time that it was there.

However, in practice, the opposite is also true. In this regard, there is the example of the Eiffel Tower that was built in mid-1889 as a temporary construction and planned to be dismantled 20 years after completion. In other words, it was initially placed in the public space for a long, but limited and known period of time. Under the influence of circumstances, the Eiffel Tower was eventually not dismantled and turned into a work that is permanently located in a public place. Thus, if freedom of panorama had existed in France at the time, the Eiffel Tower would not have been subject to it until the decision was made that the Tower would remain in the place where it was built for the unknown period of time.

Freedom of panorama does not mean the work must be exclusively stationary and always located in the same place. It is possible to imagine a

protection of property rights. Except in extraordinary circumstances, such as protests or armed hostilities that lead to unforeseeable destruction, decisions to dismantle or destroy works of art should be reasonable and made in accordance with the procedure established by law. Damage to or destruction of works of art initiated by an individual(s) is recognised as a criminal offence in many countries and cannot be justified by freedom of expression or disagreement with the existence of such a work. Even when the monument is dedicated to a controversial historical figure, according to the Court of Appeal in *Attorney general's reference no 1 of 2022* [2022] EWCA Crim 1259, the debate about the fate of such a monument had to be resolved through appropriate legal channels, irrespective of evidence that those channels were thought to have been slow or inefficient, and not by what might be described as a form of criminal self-help. See: *Attorney general's reference no 1 of 2022* [2022] EWCA Crim 1259.

case where a sculpture was created in honour of a certain event, installed in a particular public place where the festivities took place and then moved to another public place after they were over. There is also the possibility of redeveloping and reconstructing the areas so that the sculptures and other works placed on them can be moved to other areas. In this regard, the Federal Court of Justice of Germany in the *AIDA Kussmund* case noted that the law does not require that the work is permanently located in a certain place. A work within the meaning of the law is on public roads, streets or squares if it changes its location and the various places where the work is located are public places.³³ That is, changing the geographical coordinates of the location of the work does not affect the qualification of this work as being permanently displayed in a public place if all these places are open to the public.

When a work is briefly removed from the public space for objective reasons and later becomes available to the public again, such cases should not be considered as a non-permanent presence of the work in a public place. One example is, if a statue needs restoration and moves to a private workshop before subsequently returning to the place of its original installation or another public location. However, there is a question about works occasionally outside public spaces. This refers to images painted on the surface of vehicles that periodically or regularly disappear from public view while the vehicle is in private or inaccessible to the public area.³⁴

Clarification in this regard was provided by the Federal Court of Justice of Germany in the aforementioned *AIDA Kussmund* case. Among other things, the court noted that an image of ‘kissing lips’ found on the nose and sides of a cruise ship could be protected by freedom of panorama. Even though the ship could sometimes be hidden away from public view, it was often visible

³³ BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

³⁴ See, i.e., the artworks of Ukrainian artist Olena Spodina who has been creating paintings on cars and motorcycles since the beginning of 2000 <<https://www.mukachevo.net/ua/news/view/56446>> accessed 5 December 2023.

to the public when docked at port or during its voyage. It is not important that the ‘kissing lips’ image changes location with the cruise ship. The decisive factor is that the work is printed onto the cruise ship in accordance with its purpose in various public places for a more extensive period of time. The fact that the ship can temporarily be in areas inaccessible to the public – for example, at a shipyard – does not prevent the application of Article 59 of the German Copyright and Related Rights Act (freedom of panorama).³⁵

However, what if the vehicle on which the work is displayed is kept in a private garage or other place inaccessible to the public most of the time? Should it be considered that the work is temporarily in a public place? It seems that in such cases, it is inappropriate to compare the duration of the vehicle's public and private location. Vehicles are intended for movement on public roads on land, in water and in the air. In each case, the intended use of the vehicle is carried out in a place open to other persons; therefore, the nature of such use is public. By applying the work to the surface of a vehicle, the owner understands and expects that this work will be visible to others while the vehicle is in a public place. This can be equated to the permanent locating of a work in a public place that is covered by freedom of panorama.

In sum, the qualification of permanent location of a work in a public place should not cause difficulties. The lack of legislative specificity concerning the relation between the permanent and temporary location of a work in the public space is, to some extent, compensated for by the conclusions of judicial practice. In France and Germany, the courts have successfully interpreted this relationship. However, in other states, where there are no such judgements yet, the issue of understanding the permanent location of a work in a public place remains more acute. Therefore, it is advisable to provide clear definitions of this concept in legislation.

III. THE HIDDEN SIDES OF FREEDOM OF PANORAMA

When creating images of works that are permanently displayed in public places, users may strive for a certain creative expression. This may involve

³⁵ BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

capturing work from an atypical angle, requiring the use of a tool to photograph an image. Creative expression may prompt the user to add or remove something from the image. To implement their ideas, the user can choose a filter that will brighten the photo or otherwise change its natural colours or apply a certain inscription to the image of the work.

All these actions may seem permissible because the copyright laws usually do not mention them and, therefore, do not prohibit them. However, the judicial practice of some EU Member States has developed certain criteria that limit users' activities within the freedom of panorama. These issues have not been addressed in academic publications. This is perhaps because there are only a few judgments in local judicial practice with no pan-European force. Therefore, further research will mainly rely on the provisions of legislation and judgments, as no academic publications have highlighted these issues. However, the question of how freely the user's creative choice can be expressed is worth discussing, as it directly affects the scope of the freedom of panorama rule. On the one hand, it may more clearly explain to users the opportunities they have when creating and using images of works permanently located in public places. On the other hand, an analysis of the hidden aspects of freedom of panorama in court practice – where the creator of the image should be located (1); whether they can use a ladder or other aids (2); whether they can make changes to the image of the work (3); or add a title or description to the image of the work (4) – may contribute to the development of a more reasonable approach to the legal qualification of such cases.

1. Location of the person who creates the image of the work

The location of the work that falls under freedom of panorama is more or less clear, while the laws do not specify the permitted location of the image creator. The absence of such specifications may be perceived as meaning that the user can stay in any place from where the work is visible. Since the location of the work, not the user, is relevant for the qualification of freedom

of panorama, it is logical to consider that an image of a work that is permanently located in a public place may be created from a private balcony or courtyard from where the work can be seen. However, the case law of some Member States has concluded that the image creator must also be located in a public place.

A well-known case in this context is the *Hundertwasser-Haus* case, where the subject of consideration was a photograph of an architectural work taken from the private balcony of another house. The Federal Court of Justice of Germany noted that the purpose of establishing freedom of panorama is to allow the public to see what they can see with their own eyes from the street in the form of a painting, drawing, photograph or film.³⁶ The purposes of legal regulation do not include cases when, for example, a photograph captures a view from a place inaccessible to the general public. If the building captured can be seen by the wider public only from a certain angle, there is no need to extend exceptions and limitations to images in which a completely different angle is chosen. Freedom of panorama does not justify photographing a building's courtyard facing a public street or square. Similarly, aerial photography is not permitted, at least because it shows parts of the building that are not visible from the road, street or square.³⁷

In a case in Spain, a dispute arose over the image of a house built on a rock. Part of this house can be seen from the public road, while the photo shows another part that faces the side of the abyss under the rock. The defendant argued that such a picture could have been taken from the sea or air, which are public places, and therefore the rule of freedom of panorama should be applied to this case.³⁸ The local court of Madrid rejected these arguments and noted that the rock on which the house is built is not by a public road where pedestrians and vehicles can move. Although the building is located near a public road, capturing the image in question from the road would have been

³⁶ BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus (n 6).

³⁷ BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus (n 6).

³⁸ SAP M 11756/2014 – ECLI:ES:APM:2014:11756 (n 13).

impossible. The sea and airspace do not fall under the concept of a public highway, although they are spaces belonging to the public.³⁹

In both cases, the courts applied the attribute of being located in a public place to both the piece of work and the user in the absence of such reservations in the written laws of Spain and Germany. In addition, the local court of Madrid narrowly interpreted the scope of public roads, excluding waterways, even though the photographer could theoretically be in a boat on the water that is not a private water reservoir, which can also be considered a public highway. It is interesting to note that three years later, the Federal Court of Justice of Germany, in the above-mentioned *AIDA Kussmund* case, referred to seas, territorial waters, and other waterways as public places covered by freedom of panorama.⁴⁰ This once again reminds us how important it is to define in the legislation which places are public, since not only users but also courts can interpret them differently.

So, what is the basis for the conclusion that freedom of panorama requires the image creator to be in a public location? The only rational explanation can be found in the *Hundertwasser-Haus* case where freedom of panorama does not justify capturing the courtyard of buildings which are not visible to the general public.⁴¹ Indeed, the purpose of freedom of panorama is to allow the reproduction of a view of the work that can be reproduced by many different persons. Therefore, I support the idea that the image should only represent the part of the work that can be seen by the majority of the general public. This shall not, however, apply to the angle of the image, such as a top view, so long as the image shows only the publicly visible parts of the work.

In my opinion, there are reasons to discuss the restriction of the location of the person who creates the image. Considering that neither the

³⁹ SAP M 11756/2014 – ECLI:ES:APM:2014:11756 (n 13).

⁴⁰ BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

⁴¹ BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus (n 6).

InfoSoc Directive nor the national legislation indicates where this person should be located, it seems that it is more appropriate to consider the content of the image rather than the place from which it was taken as a reference point. The fact that a building or monument looks different from the third-floor window or roof than from the ground should not necessarily prevent the application of freedom of panorama. If the image presents the work from a different perspective but contains only the publicly accessible part of the work that others can see from a certain public place, such an image is unlikely to contradict the purpose of freedom of panorama or harm the interests of the author of the depicted work.

2. Means that can be used in the creating of the image of the work

Creating an image always requires specific tools, such as paint and brushes or a camera. The rule of freedom of panorama includes the use of such means because without them it is, in principle, impossible to reproduce the work. However, the situation is not so clear with auxiliary equipment that allows the user to change the angle of the image or take it from the air.

The provisions of the national legislation of the EU Member States neither permit nor expressly prohibit the use of such assistive devices. The only example that may be an exception to the previous thesis is the law of France. Article L122-5(10) of the *Code de la propriété intellectuelle* only allows for the reproduction of works permanently displayed in public places to be carried out by individuals.⁴² On the one hand, this may mean that the creation of the image should be carried out directly by a person and not by a technical device controlled by a person from a distance. Therefore, this could put drone images outside the scope of freedom of panorama in France. On the other hand, this provision can be literally interpreted that the creation and use of images of works is allowed only to individuals, not legal entities, regardless of the means used to reproduce the work. The French

⁴² France: Code de la propriété intellectuelle (n 14).

jurisprudence still needs to clarify this issue, while in some other jurisdictions, the courts have expressed some considerations in this regard.

The Federal Court of Justice of Germany decided that the use of ladders is not covered by freedom of panorama. According to the court, the purpose of the freedom of panorama provision does not apply to images taken with the help of special means (e.g., ladders) to overcome existing obstacles (e.g., hedges). Such views on the work are not part of the street scene perceived by the broad public.⁴³ In the case considered by the local court of Madrid, the image of the building was obtained using a drone. The court has decided that the use of this image requires the permission of the author or other rightsholder since the content of the freedom of panorama provision does not imply that the image can be created using more or less complex procedures.⁴⁴

In these examples, the rule of freedom of panorama is given a somewhat narrower meaning compared to the way it is formulated in the laws of Spain and Germany. In the legislative provisions of these states, there is no list of permitted or prohibited methods of creating an image, and it is not established that the reproduction of a work can only be carried out directly by an individual. However, freedom of panorama is positioned by courts in connection with technologically simple solutions that are available to many members of society and do not require additional effort.

Compared to these approaches, there is a judgement of the Frankfurt am Main Regional Court that presents an entirely different view on this issue. The case concerned an aerial photo of the bridge taken in the air using a drone. The court decided that this image corresponds to the content of freedom of panorama under German law and noted that each rule, including exceptions, must be interpreted correctly and in accordance with its plain meaning. The limited interpretation that the public can perceive the work

⁴³ BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

⁴⁴ SAP M 11756/2014 – ECLI:ES:APM:2014:11756 (n 13).

with little effort or assistance does not follow from the wording used in Article 5(3)(h) of the InfoSoc Directive. The only decisive factor is that the work is located in a public place. The InfoSoc Directive does not regulate the place from which the work should be viewed, nor does it contain any restriction that the use of auxiliary means should be excluded. This fact should be used to interpret the German standard for implementing the freedom of panorama provision. Considering the current developments, these considerations are even more applicable. Therefore, it is not clear why freedom of panorama takes place when the work can be seen from the water but not when the work can be seen from the air.⁴⁵ There are no objective reasons for such inequality; in particular, it does not follow the InfoSoc Directive.⁴⁶

These findings seem important. Indeed, the InfoSoc Directive does not contain any criteria used in the case law of Germany and Spain to determine whether the user's actions comply with the provision on freedom of panorama. Given the absence of such criteria in national legislation, there is the question of what precisely guided the courts in their conclusions that freedom of panorama allows only the simplest solutions that do not include the use of a ladder or drone to overcome an obstacle. Apart from France, where the use of drones is potentially not covered by freedom of panorama, the laws of other Member States do not restrict the use of any means to create an image of a work. The courts do not have the power to impose such restrictions on their own and should not give the rule of freedom of panorama a meaning that is not provided for by law. Therefore, the mere fact of creating an image should not be subject to differential treatment depending on whether it was made from the ground, standing on a ladder,

⁴⁵ Here, the Court refers to the 'AIDA Kussmund' case cited above, in which the Federal Court of Justice of Germany concluded that when a cruise ship is on the high seas, territorial waters, sea waterways and seaports, it is located in a public place to the extent that it is visible from these waters.

⁴⁶ [LG Frankfurt am Main](https://openjur.de/u/2321628.html), Urteil vom 25.11.2020 – 2-06 O 136/20. <<https://openjur.de/u/2321628.html>> accessed 5 December 2023.

from the water, or from the air. If the image embodies a work that is permanently located in a public place, and the image shows that part of the work can be seen from the public place, this should be sufficient to recognize that the creation of this image meets the conditions of freedom of panorama.

3. Possibility to make changes to the image of the reproduced work

Within the framework of copyright exceptions and limitations, the processing of a work is allowed when it comes to creating a parody and caricature, while all other cases do not involve any modification of the work. Freedom of panorama implies that the work should be depicted as it stands in a public place. This is directly specified in the laws of Belgium and the Netherlands.⁴⁷ In Germany, there is a separate rule that contains a general prohibition to remake works used under the regime of exceptions and limitations, including freedom of panorama. For works of visual art and photographic works, it is allowed to change the work to another size and make such changes as entail the process used for reproduction.⁴⁸ This means the author may reduce or increase the scale of the image but must not make the work look different from its original form of expression.

The Higher Regional Court of Cologne expressed an interesting opinion that Article 62(3) of the German copyright law covers all forms of photographic reproduction corresponding as closely as possible to the appearance of the work located on a public street and the use of only those tools that belong to the usual technologies in the creation of such images. This includes selecting a part of the work and affecting the brightness, colour, and contrast values of the image by setting the focal length and exposure time and any zoom in or out. Conversely, the use of tools such as colour filters and subsequent retouching is unacceptable, as it changes the appearance of the street fragment and the realistic perception of the work beyond a technically unavoidable extent that is no longer caused by the

⁴⁷ Belgium: Code de droit économique (n 5) and The Netherlands: Auteurswet (n 28).

⁴⁸ Germany: Act on Copyright and Related Rights (n 11).

process of reproduction. This is because these processes present the viewer with a reality that is largely falsified, unlike reproduction through painting or graphics, where more significant changes are understood and expected by the audience.⁴⁹ The photo should convey the appearance of the work as accurately as possible and not have such a deviation from reality that the work in the image is perceived differently than it can be perceived visually in the place of its location. The depiction of the work by drawing or graphics may allow for more deviations from reality but the work should look realistic.

In the legislation of the other Member States, there is no direct prohibition of processing the work within the rule of freedom of panorama. At the same time, the rule of freedom of panorama is, in most cases, formulated as the right of users to reproduce works located permanently in public places. Despite some differences in the interpretation of the term ‘reproduction’, its use is not accidental, as it emphasizes that the image of the work must be created in the original condition as the work exists. The free use of the work within the framework of freedom of panorama does not allow any modification in the image of the work, the introduction of new elements into the image of the work, or the removal of any parts of the work: the user must create an image of the work that is true to its original appearance.

However, the question remains whether other objects located near the work, such as a fence, plants, buildings, or sculptures that are a permanent part of the cityscape but were not the purpose of the reproduction, can be changed in the image. On the one hand, such elements are secondary to the object of reproduction. Removing them from the image does not violate the conditions of freedom of panorama if the work to which the image is dedicated retains its realistic appearance. On the other hand, such elements form a certain environment where the public perceives the work in its location, and if the removal of these elements changes the perception of the

⁴⁹ [OLG Köln](https://openjur.de/u/536357.html), Urteil vom 09.03.2012 – 6 U 193/11. <<https://openjur.de/u/536357.html>> accessed 5 December 2023.

work in the image, it can be considered to be an overstepping of the freedom of panorama.

There can be no single universal answer to this question, and in each case, it will depend on the context. It is reasonable to think that freedom of panorama cannot allow such a change in the environment around the work that the work would not look and be perceived realistically. Likewise, changing the image around the work to a completely different area, such as a desert, a seaside, a street, or a square in another city, would contradict the purpose of freedom of panorama. However, when the objects around the work are blurred in a photo editor so that the attention is entirely focused on the work, this may not always be considered a violation of the conditions of freedom of panorama. Instead, in some Member States, freedom of panorama implies the depiction of a more or less general view of a certain area.⁵⁰ This applies when no single work is the central element of the composition and the main purpose of reproduction is not commercial. Within such restrictions, the preservation of the environment around the image of the work may be important to ensure the legitimate use of the image of the work.

Regarding the elements that are not a permanent part of the cityscape, the removal or addition of such elements may be carried out at the discretion of the image creator. This is especially important when a person draws a view of a specific area and adds other objects that express a particular creative idea along with a realistic image of the work. The only requirement should be the realism of such elements in relation to the location of the reproduced work; thus, such elements may appear near the work at a certain time or season. The representation next to the work of a mermaid or a flying saucer

⁵⁰ Denmark: The Consolidated Act on Copyright (Consolidate Act No. 1144 of October 23, 2014), Art. 24(2); Estonia: Copyright Act (consolidated text of January 1, 2023), Art. 20-1; Finland: Tekijänoikeuslaki (n 5); Lithuania: Law on Copyright and Related Rights (n 5); Romania: Lege nr. 8 din 14 martie 1996 privind dreptul de autor si drepturile conexe (modificată până la Legea nr. 69/2022), Art. 35(1)(f).

with aliens is likely to be qualified as an action that does not meet the conditions of freedom of panorama.

Consequently, the reproduced work may not be subjected to any alteration. While some changes in the environment around the work may be allowed, it should generally maintain the perception of the reproduced work in line with the perception in the real world.

4. Possibility to add text to the image of the reproduced work

A separate issue that may arise when using images of works permanently situated in public places is the possibility of adding inscriptions to the image. No Member State legislation mentions this aspect, although such cases occur in practice.

In particular, in June 2017, the street artist Christian Guémy, working under the pseudonym C215, found that the image of his mural painted on a building in Paris was used as a banner on the Twitter account of the political party ‘En Marche!’. The name of the party, ‘En Marche!’, was applied over the image of the mural. The artist categorically denied the legitimacy of such use, as the addition of the slogan could give the public the false impression that he was part of the movement. After the artist appealed to the leadership of the movement, the image with the inscription was removed from the Twitter account.⁵¹ This conflict was settled without applying to the court, although it would be interesting to analyse the arguments that would be used by the court in this case.

Freedom of panorama does not allow for the possibility of supplementing the work with any elements that cannot naturally appear in the environment in which the work is located. The only inscription on the image of the work

⁵¹ Romain Herreros, ‘L’artiste C215 dénonce les “menaces” d’En marche après avoir demandé de ne pas utiliser son oeuvre’ (2017). <https://www.huffingtonpost.fr/2017/06/05/c215-en-marche-paris13_a_22126222/> accessed 5 December 2023.

that does not contradict the principles of free use of works is the name or pseudonym of the author, the title of the work, the year of its creation, and the name of the street, city, or country where the work is located. Any other inscriptions have no connection with the work and its author and therefore the application of such inscriptions is not justified. Even absolutely neutral texts, such as "summer in Paris", cannot be added to the image of the work at the user's discretion, as the concept of reproduction of the work does not cover this. Moreover, placing in the image of the work the logo, name or any other symbols of a political movement, party, or any other organization, may cause misleading impressions about the author. These misleading impressions may damage the author's reputation.

Therefore, even though the creation and use of the image of the work within the framework of freedom of panorama are carried out without the permission of the author or another rightsholder, the application of any third-party inscriptions on this image is not an element of permissible user behaviour. Although the laws of the Member States do not explicitly prohibit adding third-party text to an image, this does go beyond the scope of reproduction of the work.

IV. CONCLUSION

In the EU, freedom of panorama has many different variations, but all of them are united by two indispensable conditions: the work must (i) be permanently displayed (ii) in a public place. These key characteristics are not sufficiently clearly defined in the laws and can negatively affect both authors or other rightsholders who do not fully understand the boundaries of their rights. Users who do not have comprehensive instructions on what they are allowed to do are also negatively affected by the lack of clear legal definitions. In particular, this refers to specifying which places are public and whether outdoor areas or certain types of indoor premises are also covered. I support the approach that freedom of panorama applies only to outdoor public spaces; however, this may still leave room for debate whether all

outdoor public places, such as cemeteries, fall within the scope of freedom of panorama.⁵² Also, in several Member States, users have demonstrated a failure to understand the concept of the permanent location of a work in a public place. On the basis of the above discussion, I suggest that the law should directly specify that a work is permanently located in a public place if it is intended to be in such a place for an indefinite period or a period that constitutes a substantial part of the natural life of the work.

In the case law of some Member States, freedom of panorama has been placed in a framework which is not expressly provided for by law. In some cases, the courts of Spain and Germany have concluded that the creation of the image of the work must be carried out while the user is in a public place, and the image must express the appearance of the work visible to the general public. Also, in some cases, the courts have ruled that users are not allowed to use additional equipment to create images, although the law does not impose any clear restrictions in this regard. I suggest abandoning this framework because the only aspect relevant for the qualification of freedom of panorama is the permanent location of the work in a public place.

I fully agree that the image should include only those parts of the work that are visible from public places, while creating an image of a courtyard or other parts of the work that are closed to the public should not be allowed under the free use of works. However, if the image embodies publicly accessible parts of the work, it should not matter whether the image was created by a person from a private balcony, or elsewhere and what means were used to create the image. Such an expanded approach will not harm the interests of the author, will not limit the possibility of the normal use of the work, and will not negatively impact other protected rights, freedoms, and interests; in particular, it will not interfere with the privacy of others. At the same time, this will increase opportunities for the creative self-realization of users and will promote the dissemination of information.

⁵² Adrian Nowakowski (n 25) 403.

EXPLORING THE CONCEPT OF SUSTAINABLE DEVELOPMENT: A NON-SCIENTIFIC, GROWTH-ORIENTED, AND ANTHROPOCENTRIC ONTOLOGY NORMALISED IN INTERNATIONAL LAW?

Roberto Talenti 

References to sustainable development as an objective, goal, principle, or narrative are pervasive in law and policy documents at domestic, regional, and international levels. Nevertheless, the concept of sustainable development remains elusive due to, inter alia, the lack of clear definition for effective implementation, and the ongoing challenge of assessing its inherent sustainability. Against this background, this work aims at understanding to what extent the reliance on problematic conceptualisations of sustainable development has been progressively and aprioristically normalised in international law documents. Through documentary analysis, this work simultaneously clarifies why the concept of sustainable development is problematic and verifies its process of normalisation. Indeed, while tracing the origins of sustainable development, it sheds light upon the non-scientifically grounded ontology underpinning it and provides reflections upon the interests that its normalisation in law might serve. Findings reveal that while sustainability emerged from scholarly works, development and sustainable development largely originated from and crystallised in law and policy documents, reflecting the short-term interests of dominant actors. The study concludes that the reliance on the non-scientific, growth-oriented, and anthropocentric conceptualization of sustainable development might be inherently unsustainable. Meanwhile, traces of an alternative ‘pure sustainability’ paradigm continue sprouting in scholarly literature, and this opens some room for hope for a possible change.

Keywords: sustainability; development; sustainable development; documentary analysis; economic growth; pure sustainability paradigm

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I. SUSTAINABLE DEVELOPMENT: NOT SUCH A STRAIGHTFORWARD CONCEPT

The concept of sustainable development, underpinned by the paradigm of never-ending (but somehow ‘green’) economic growth, is nowadays mainly conceived as the result of the combination of seventeen Sustainable Development Goals (SDGs), and it finds large acceptance in most political, economic, but also university institutions worldwide.¹ Nevertheless, concerns have long been raised about the nature or theoretical soundness of the sustainable development concept.² Indeed, as far as its nature is concerned, sustainable development remains a fuzzy creature, referred to not only as a concept, but also as a goal, a principle, a context, and a narrative.³ To maintain the most possibly neutral position, this article will mainly refer to sustainable development as a concept.

¹ Jason Hickel, Giorgos Kallis, ‘Is Green Growth Possible?’ (2020) 25 *New Political Economy* 469.

² An outstanding analysis of the legal status of the concept of sustainable development has been provided in Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’ in Alan Boyle & David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford 1999). According to Lowe, ‘the argument that the concept of sustainable development is now a binding norm of international law in the sense of the ‘normative logic’ of traditional international law as reflected in Article 38(1) of the Statute of the International Court of Justice is not sustainable’, 21.

³ Look at, *inter alia*, Juan Telleria and Jorge Garcia-Arias, ‘The Fantasmatic Narrative of “Sustainable Development”: A Political Analysis of the 2030 Global Development Agenda’ [2022] 40 *Politics and Space* 241; Matthew Humphreys, *Sustainable Development in the European Union - A General Principle* (Routledge 2018); United Nations, Paris Agreement (2015) Art.2(1); UN General Assembly, ‘Transforming our world : the 2030 Agenda for Sustainable Development’ (2015), A/RES/70/1; International Court of Justice, *Gabcikovo-Nagymaros* [1997], par.14 refers to the ‘concept of sustainable development’; Gro Harlem Brundtland, ‘Our Common Future: Report of the World Commission on Environment and Development’ [1987], UN-Document A/42/427.

Existing literature already provides a picture of the political role played by the concept of sustainable development, and describes how this concept has been used to legitimise neoliberal and capitalist interests.⁴ Moreover, the historical and philosophical processes driving the mutation of the concept of sustainable development have been tackled, and the weakness of its theoretical basis have been highlighted.⁵ Nonetheless, scholars have not engaged in providing an analysis of sustainable development and its two constitutive elements (sustainability and development) which asks questions of its empirical solidity and how its underlying ontology has been normalized in international law.⁶

⁴ Sara Lorenzini, *Global Development A Cold War History* (Princeton University Press 2019); Jason Hickel, 'The Contradiction of the Sustainable Development Goals: Growth Versus Ecology on a Finite Planet' (2019) 27 *Sustainable Development* 873; Lynley Tulloch, 'On Science, Ecology and Environmentalism' (2013) 11 *Policy Futures in Education* 100; Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Routledge 2008); Carlos Castro, 'Sustainable Development - Mainstream and Critical Perspectives' (2003) 17 *Organization & Environment* 195.

⁵ Ben Purvis, Yong Mao, Darren Robinson, 'Three pillars of sustainability: in search of conceptual origins' (2018) 14 *Sustainability Science* 681; Iris Borowy, *Defining Sustainable Development for Our Common Future* (Routledge 2014); Jeremy Caradonna, *Sustainability: A History* (Oxford University Press 2014); Jacobus Du Pisani, 'Sustainable development – historical roots of the concept' [2006] 3 *Environmental Sciences* 83.

⁶ The underlying ontology of a concept, paradigm, or theory refers to the foundational understanding, conceptualization, and representation of reality upon which the concept, paradigm, or theory is built. The adopted ontology determines what the concept, paradigm, or theory considers as reality and what it excludes or overlooks. For more information about the need to reform the anthropocentric ontological structure upon which environmental law is built, look at: Emille Boulot and Joshua Sterlin, 'Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human' (2021) 12 *Transnational Environmental Law* 277.

To fill this research gap,⁷ and to enrich the critical literature on sustainable development, the present study will try to understand to what extent a problematic conceptualisation of sustainable development, along with its underlying ontology, has emerged and been normalised in international law documents. This firstly requires clarifying why the concept of sustainable development is indeed problematic and, secondly, accounting for its entrenchment in international law while reflecting upon its consequences. Undoubtedly, a comprehensive examination of this kind would fall outside the scope of a scholarly article. Therefore, to simultaneously clarify why the concept of sustainable development is problematic and to make an initial, non-comprehensive assessment of its normalization in international law documents, this work will assess the concept of sustainable development through documentary analysis.

Indeed, documentary analysis permits granular assessment of the specific wording adopted in pivotal legal, policy, and scholarly documents that have shaped the conceptualisation of sustainability, development, and sustainable development since their early origin. It reconstructs these concepts while incorporating scientific and economic findings and keeping track of the materialisation, normalisation, and crystallization of political and economic interests within legal documents, all beneath the guise of sustainable development.⁸ This allows us to track the process of change undertaken by

⁷ While legal scholars such as Lowe (n 2), Bosselmann (n 4), Humphreys (n 3), along with Louis J Kotzé and Sam Adelman, 'Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope' (2023) 34(2) *Law and Critique* 227; Edoardo Chiti, 'Verso una sostenibilità plurale?' (2021) 25(3) *Rivista Quadrimestrale di Diritto dell'Ambiente* 130; Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 *European Journal of International Law* 377, and Louis B Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 *The Harvard International Law Journal* 424, have critically analysed the concept of sustainable development, none has approached it from the angle described above.

⁸ Aimee Grant, *Doing Excellent Social Research with Documents* (Routledge 2019).

this increasingly problematic concept, while shedding light on its entrenchment in international law documents and facilitating reflection upon the normalisation of its non-scientific-based ontology. However, such a deeper level of analysis comes at the cost of comprehensiveness. Documents for analysis will be selected based on their relevance in both policy and scholarly contexts, as well as their impact on public opinion or governmental action. Although this criterion is not based on a strict metric, it explains, *inter alia*, the decision to exclude case law from the analysis.⁹

The nature of this work is strongly interdisciplinary. While its findings are expected to stimulate discussion among scholars across various disciplines, its primary objective is nonetheless to contribute to legal scholarship. In fact, while the role of law as an instrument of crystallisation of worldviews and maintenance of power needs to be recognized,¹⁰ critical assessments of the concept of sustainable development have been scarce in legal research.¹¹ Thus, the fundamental contribution of this work is to enrich the legal literature debunking sustainable development, while providing arguments

⁹ As Verschuuren points out, despite the increasing role that the concept of sustainable development plays in courts, up until now ‘all cases have been decided by relying on more specific principles’. Moreover, in the Sofia Guiding Statements, the International Law Association underlines that there is, in the international jurisprudence, ‘a continued and genuine reluctance to formalise a distinctive legal status’ for sustainable development. Look at Jonathan Verschuuren, ‘The growing significance of the principle of sustainable development as a legal norm’ in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2016); International Law Association, Resolution No. 7/2012, Statement n.1. Undoubtedly, the reluctance of courts to take a clear stance on this matter highlights the inherent challenges in defining and operationalising the concept of sustainable development, warranting further investigation.

¹⁰ David Kennedy, Martti Koskenniemi, *Of Law and the World* (Harvard University Press 2023); Martti Koskenniemi, ‘International law in the world of ideas’ in James Crawford & Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge University Press 2013).

¹¹ See n 7.

for both law scholars and lawmakers to move away from the non-scientific, growth-oriented, and anthropocentric sustainable development ontological box. Furthermore, this work could stimulate reflection on the pivotal role that scientific, rather than purely political, institutional apparatuses might (and should) play in shaping the theoretical foundations of legal and governance frameworks. Doing so will hopefully foster momentum for the theorisation of science-based legal ontologies, thus laying the groundwork for a genuinely sustainable international legal regime.

This work is structured as follows. The second section (II) will trace the history of the concept of sustainability by differentiating between two generations of sustainability documents. Section three (III) will focus on the genesis and spread of the currently mainstream conceptualization of development. Afterwards, section four (IV) will analyse the concept of sustainable development, giving due regard to its process of dilution and fragmentation. Section five (V) will highlight the main findings of this research. Finally, section six (VI) will reflect upon the features that new concepts, alternative to sustainable development and based on science rather than on the aim to pursue dominant parties' short-term interests, might present.

II. THE EMERGENCE OF SUSTAINABILITY: A SHORT CONCEPTUAL HISTORY

The relationship between a word and the meaning it reflects is not set in stone. As this section will elucidate, sustainability concerns emerged long before the term 'sustainability' was coined. Furthermore, the word 'sustainability' ended up assuming two similar, but anyway different meanings over time. This allows to identify two different generations of sustainability.

1. *The first generation of sustainability*

The word ‘sustainability’ comes from the composition of the Latin words *sub* plus *-tenere* and can be translated as to ‘hold up’, ‘to endure’.¹² Accordingly, the concept of sustainability reflects ‘the quality of being able to continue over a period of time’,¹³ and it is indeed translated in French with the word *durabilité*.

Given that we live in a world that is characterised by humans’ reliance on the consumption of limited resources, it is not surprising that sustainability issues have always affected humanity. As a matter of fact, it is possible to identify traces of sustainability concerns in ancient history.¹⁴

Different historical periods and geographical contexts have been characterised by concerns about the scarcity of different resources, and up until the modern age, at least in Europe, sustainability concerns mainly related to timber scarcity. Scholars such as Hughes and Thirgood shed light on the impact of ‘deforestation, erosion, and forest management [already at the times of] Ancient Greece and Rome’, while 17th-century writer John Evelyn warned about the risks arising from the loss of forests and the consequent lack of timber.¹⁵ Afterwards, it was always with the aim of addressing timber scarcities that Hans von Carlowitz, in his well-known *Sylvicultura Oeconomica*, coined the German word ‘*nachhaltigkeit*’

¹² Online Etymology Dictionary, ‘Sustainable’ <<https://www.etymonline.com/word/sustainable>> accessed 24 January 2023.

¹⁴ Most notably, in the Asian tradition (e.g., in Laozi’s *Daodejing* and in the Hindu manuscript, *The Laws of Manu*), and in the Western tradition (e.g., in Plato’s *Politeia*).

¹⁵ Donald Hughes and Jeremy Thirgood, ‘Deforestation, Erosion, and Forest Management in Ancient Greece and Rome’ (1982) 26 *Journal of Forest History* 2; John Evelyn, *Sylva, or, A discourse of forest-trees, and the propagation of timber in His Majesties dominions* (J. Martyn and J. Allestry, 1670).

(sustainability), to refer to the way in which the cultivation of timber should be practiced.¹⁶

Another relevant contribution comes from Thomas Malthus' *Essay on the Principle of Population*.¹⁷ In this work, the English economist witnessed the absolute scarcity of natural resources that, provided what he deems to be a human tendency to expand consumption, necessarily leads to a 'Malthusian Catastrophe'.¹⁸ What is particularly interesting about Malthus' work is the focus on food, as well as the economist's intuition about the necessity, for humans, to establish balanced relationships between food production and consumption patterns. From this point of view, it can be stated that Malthus has, to some extent, anticipated the topics addressed almost two hundred years later in Lester Brown's *Building a Sustainable Society*.¹⁹ In fact, Brown will also warn about the dangers of food 'demand [that] exceeds sustainable yields of biological systems'.²⁰ Nevertheless, one of the main limitations of Malthus' approach stands in his adherence to a considerable degree of determinism, which brings him to conclude that there is no way of preventing Malthusian Catastrophes.

Over the 19th and early 20th Centuries, the original attention on timber and food scarcity were replaced by a new focus on coal and oil, as they had become the new main energy sources.²¹ One work that clearly reflects the understanding of sustainability as a response to resource scarcity is *The limits*

¹⁶ Hans Von Carlowitz, *Sylvicultura Oeconomica* (Johann Friedrich Braun, 1713).

¹⁷ Thomas Malthus, *Essay on the principle of population as it affects the future improvement of society* (J. Johnson, 1798).

¹⁸ A Malthusian Catastrophe is a situation in which population growth surpasses the Earth's capacity to sustain it, leading to resource scarcity, famine, and societal collapse.

¹⁹ Lester Brown, *Building a Sustainable Society* (W. W. Norton & Company 1981) 6.

²⁰ *ibid* 6.

²¹ James Akins, 'The Oil Crisis: This Time the Wolf Is Here' (1973) *Foreign Affairs* <<https://www.foreignaffairs.com/middle-east/oil-crisis>> accessed 2 February 2023; Stanley Jevons, *The Coal Question* (Macmillan and Co. 1865).

of the Earth, written in 1953 by Henry Osborn.²² In this work, the US conservationist sheds new light on the problematic correlation between fixed resources on the Earth and increasing number of people.

As this subsection has clarified, the etymology of the term ‘sustainability’ reflects an early effort to address issues related to resource scarcity. Accordingly, it can be asserted that ‘sustainability concerns’ emerged in ancient times and were further developed as scholars from various disciplines began to explore the limitations of human activity on Earth and the negative consequences of exceeding the boundaries of ‘sustainability’. Nevertheless, in this early phase, ‘sustainability’ still did not imply anything different from the efficient administration of resources. The first generation of sustainability documents merely focuses on resource consumption, thus disregarding the broader issue of environmental degradation. Moreover, at this stage, sustainability is characterised by a strongly anthropocentric approach, as it does not conceive of nature as a subject endowed with intrinsic value, but rather as an object which shall be appropriately administered for the benefit of humans.²³ Finally, the first generation of sustainability, while focusing on the material scarcity generated by the limits of the Earth, never focused on the ‘artificial scarcity’ generated by the (already back then) dominant growth-oriented, capitalist economy.²⁴ Indeed, as Kallis pointed out, ‘capitalism cannot operate under conditions of

²² Henry Osborn, *The Limits of the Earth* (Little, Brown and Company 1953) 17.

²³ This study acknowledges that animist views, implying an ‘ontology of inter-being’, were prevalent in human cultures throughout history. However, this passage notes that, until the mid-20th century, eco-centric visions were not reflected in the first generation of sustainability discourses. For more information, look at, Jason Hickel, *Less is More* (Windmill Books 2021) 64.

²⁴ This study acknowledges that, as Bookchin stated ‘capitalism can no more be “persuaded” to limit growth than a human being can be “persuaded” to stop breathing’. This implies that any critique of growth-oriented economies inherently extends to a critique of capitalist economies. See Murray Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (Elèuthera 2017) 262.

abundance'.²⁵ Therefore, Hickel observes, 'scarcity had to be *created*' to justify an economic system based on eternal expansion.²⁶

Acknowledging that the condition of scarcity that humanity experiences is not entirely exogenous to humans, but also the product of a human artefact (*i.e.* the voracious capitalist economy) is a crucial insight. Indeed, this implies that, contrary to what Malthus claimed, sustainability concerns can actually be addressed, and sustainability could be achieved, provided we undertake, among other things, a rethinking of the economic systems we live in.

A new approach to sustainability, both eco-centric and system-oriented, will materialise, since the second half of the 20th Century, into a second generation of sustainability. This new generation emerged also as a consequence of the insights coming from disciplines such as ecology and ecological economics from the late 19th and early 20th Century.²⁷

2. *The second generation of sustainability*

Advancements in hard sciences strongly enlarged scholarly awareness of the complex equilibrium that ties humans to nature.²⁸ This awareness spread across various disciplines and, in the latter half of the 20th century, synergies between ecological findings and economic studies led to the emergence of the first works ascribable to the realm of ecological economics. Examples of early work in ecological economics work include William Kapp's *The Social*

²⁵ Giorgios Kallis, *Limits: Why Malthus Was Wrong and Why Environmentalists Should Care* (Stanford Briefs 2019) 66.

²⁶ Hickel (n 22) 232.

²⁷ Purvis et al. (n 5).

²⁸ These advancements include Ernst Haeckel's coinage, in 1866, of the German word *oekologie* (in English 'ecology'), Charles Elton's first reference to 'food chain' and Eugene Odum's adoption of a systematic approach to the analysis of ecology. Look at: Charles Elton, *Animal Ecology* (The Macmillan Company 1927); Eugene Odum, *Fundamentals of Ecology* (Saunders 1953).

Cost of Private Enterprise,²⁹ and Nicholas Georgescu-Roegen's *The Entropy Law and the Economic Process*.³⁰

Kapp claimed, in contrast with mainstream environmental economists, that it is structurally impossible to internalize negative socio-environmental externalities of enterprises within the existing competitive and profit maximization-oriented economic system. Roegen's work emblematically revolves around the concept of entropy and it contends that classical economic models, which often assume infinite resources and perpetual growth, are incompatible with the second law of thermodynamics.³¹ The works by Kapp and Roegen represent a clear example of critique to the mainstream competitive and growth-oriented economic system. Moreover, they contributed to bridging the gap between scientific knowledge of the natural world and the evaluation of the 'sustainability' of different forms of socio-economic organizations.

A few years later, in 1962, the biologist Rachel Carson published *Silent Spring*.³² Considered one of the early promoters of the contemporary environmental movement, *Silent Spring* focuses on the detrimental effect of the indiscriminate use of pesticides. Carson's work is not solely directed to field experts, and it paved the way to the second generation of sustainability conceptualizations. Despite never mentioning 'sustainability', *Silent Spring* has undoubtedly pioneered a new mode of conceiving the sustainability issue. Indeed, it is not only endowed with warnings on the importance of

²⁹ William Kapp, *The Social Cost of Private Enterprises* (Hannah Institute for the History of Medicine 1950).

³⁰ Georgescu-Roegen, *The Entropy Law and the Economic Process* (Harvard University Press 1971).

³¹ The second law of thermodynamics states that the total entropy (i.e. level of disorder) of an isolated system always increases over time or remains constant in ideal cases. According to Roegen, a growth-oriented economy is incompatible with the entropy law because it inherently involves processes that increase entropy by transforming valuable, low-entropy resources into high-entropy waste.

³² Rachel Carson, *Silent Spring* (Houghton Mifflin 1962).

limiting human impact on the natural environment but it is also embedded with references to ‘ecology’ and the recognition of the intrinsic value of nature. In Carson’s book, it is the ‘beauty’ of nature,³³ not its monetized economic value, that is to be framed as a central point of concern. This emerges, *inter alia*, when she states that

there is a steadily growing chorus of outraged protest about the disfigurement of once beautiful roadsides by chemical sprays, which substitute a sere expanse of brown, withered vegetation for the beauty of fern and wildflower, of native shrubs adorned with blossom or berry.³⁴

What is also relevant about *Silent Spring* is the attention dedicated to the inter-generational issue. As Carson observes, ‘the new generations suffer for the poisoning of their parents’, but ‘future generations are unlikely to condone our lack of prudent concern for the integrity of the natural world that supports all life’.³⁵

Ten years later, the publication of three documents marked a turning point in the history of the conceptualization of sustainability. Firstly, in 1972, *A Blueprint for Survival* was published by The Ecologist.³⁶ This document, explicitly supported by more than thirty scholars, has strongly reshaped the entire sustainability discourse. It was one of the first environmentalist publications adopting a blatantly critical posture against the industrial, economic-growth-oriented forms of society. This is evident in the very first statement of the article, positing that ‘the principal defect of the industrial way of life with its ethos of expansion is that it is not sustainable’.³⁷ In line with Carson’s work, *A Blueprint for Survival* is strongly grounded on the findings of the ecological sciences. It is particularly careful about the intergenerational issue and neatly distinguishes between the negative

³³ *ibid* 14.

³⁴ *ibid* 44.

³⁵ *ibid* 15, 23.

³⁶ The Ecologist, *A Blueprint for Survival* (Penguin Special 1972).

³⁷ *ibid* 2.

consequences arising from the exhaustion of natural resources and the disruption of ecosystems. For example, one passage in the publication states:

[r]adical change is both necessary and inevitable because the present increases in human numbers and per capita consumption, by disrupting ecosystems and depleting resources, are undermining the very foundations of survival.³⁸

The greatest innovations brought about by *A Blueprint for Survival* are the mainstreaming of the word ‘sustainable’ and the concern about growth. While the authors mainly link the word ‘sustainable’ to society and agricultural methods, they relate concerns about growth primarily to the environmental risk arising from an increasing population, rising consumption, and production growth.³⁹ In the authors’ words: ‘[i]ndefinite growth of whatever type cannot be sustained by finite resources. This is the nub of the environmental predicament’.⁴⁰

The incompatibility between sustainability and growth is also the keystone of another 1972 work, *The Limits To Growth*.⁴¹ This publication takes up and further deepens many of the issues raised in *A Blueprint for Survival*. Moreover, having been commissioned by the Club of Rome,⁴² the work represents, in Ulrich Grober’s view,⁴³ the first appearance of the sustainability discourse on the global stage. In line with previous ‘sustainability’ works, *The Limits To Growth* is built upon the awareness of the necessity to limit human impact on Earth, and it aims at identifying a model allowing the

³⁸ *ibid.*

³⁹ *ibid* 6 and 9.

⁴⁰ *ibid* 3.

⁴¹ Donella Meadows, Dennis Meadows, Jorgen Randers, William Behrens, *The Limits to Growth* (Universe Books 1972).

⁴² As its official website states, ‘[t]he Club of Rome is a platform of diverse thought leaders who identify holistic solutions to complex global issues and promote policy initiatives and action to enable humanity to emerge from multiple planetary emergencies’. <<https://www.clubofrome.org/about-us/>> accessed 17 February 2023.

⁴³ Ulrich Grober, *Sustainability: A Cultural History* (Green Books 2012).

establishment of a sustainable economic and ecological system. Importantly, in the work published by the Club of Rome, the critique to the growth-oriented economic system is even stronger and deeper than in previous works. Economic growth here is not only framed as incompatible with environmental protection but also as *alternative* to the maintenance of ecological and social sustainability.⁴⁴ As the authors assert:

⁴⁴ Meadows et al. (n 48). The impossibility to decouple economic growth from environmental damage, as well as the weak correlation between global economic growth and human wellbeing have not only been reinforced in subsequent editions of the book (see *The Limits to Growth: The 30-Year Update* (Chelsea Green Pub 2004)), but also in separated and more recent works as Oliver de Schutter, ‘Eradicating poverty beyond growth’ [2024] UN Document A/HRC/56/61; European Parliamentary Research Service, ‘Beyond Growth - Pathways towards sustainable prosperity in the EU’ [2023]; Aljoša Slameršak, Giorgos Kallis, Daniel O’Neill, and Jason Hickel, ‘Post-growth: A Viable Path to Limiting Global Warming to 1.5°C’ (2023) 6 *One Earth* 458; Federico Savini, ‘Post-Growth, Degrowth, the Doughnut, and Circular Economy: A Short Guide for Policymakers’ (2023) 7 *Journal of City Climate Policy and Economy* 22; Lorenzo Fioramonti, Luca Coscieme, Robert Costanza, Ida Kubiszewski, Katherine Trebeck, Stewart Wallis, Debra Roberts, Lars Mortensen, Kate Pickett, Richard Wilkinson, Kristín Ragnarsdóttir, Jacqueline McGlade, Hunter Lovins, Roberto De Vogli, ‘Wellbeing Economy: An Effective Paradigm to Mainstream Post-growth Policies?’ (2022) 192 *Ecological Economics* 107260; Éloi Laurent, ‘Going Beyond Growth to Social-ecological Well-being’ (2022) 101 *Ekonomiaz* 57; European Environmental Agency, ‘Growth without Economic Growth’ [2021] <<https://www.eea.europa.eu/publications/growth-without-economic-growth>> accessed 2 March 2023; Joan Moranta, Cati Torres, Ivan Murray, Manuel Hidalgo, Hilmar Hinz, and Adam Gouraguine, ‘Transcending Capitalism: Growth Strategies for Biodiversity Conservation’ [2021] 35 *Conservation Biology* 1246; Hickel (n 22); Helmut Haberl, Dominik Wiedenhofer, Doris Virág, Gerald Kalt, Barbara Plank, Paul Brockway, Tomer Fishman, Daniel Hausknost, Fridolin Krausmann, Bartholomäus Leon-Gruchalski, Andreas Mayer, Melanie Pichler, Anke Schaffartzik, Tania Sousa, Jan Streeck, Felix Creutzig, ‘A Systematic Review of the Evidence on Decoupling of GDP, Resource Emissions, Part II: Synthesizing the

[i]f the present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years. [...] It is possible to alter these growth trends and to establish a condition of ecological and economic stability that is sustainable far into the future.⁴⁵

A third document which was published in 1972 and which is worth mentioning in this context, is the Stockholm Declaration on the Human Environment (hereinafter the 1972 Declaration or the Stockholm Declaration). In fact, the Declaration of 1972 was among the earliest soft-law instruments based on sustainability concerns. Notably, the Declaration recognizes the importance of limiting the impact of human action on Earth which, if ‘heedlessly applied, [...] can do incalculable harm to human beings

Insights’ (2020) 15 *Environmental Research Letters* 065003; Giorgos Kallis, Vasilis Kostakis, Steffen Lange, Barbara Muraca, Susan Paulson, Matthias Schmelzer, ‘Research on Degrowth’ (2018) 43 *Annual Review of Environment and Resources* 291; Timothée Parrique, Jonathan Barth, François Briens, Christian Kerschner, Alejo Kraus-Polk, Anna Kuokkanen, Joachim Spangenberg, *Decoupling Debunked: Evidence and Arguments Against Green Growth as a Sole Strategy for Sustainability* (European Environmental Bureau 2019); Hickel, Kallis (n 1); Hickel (n 4); Kate Raworth, *Doughnut Economics* (Chelsea Green Publishing 2017); Anitra Nelson and Rico Lie, *Green Growth: Ideology, Political Economy, and the Alternatives* (Routledge 2016); James Ward, Paul Sutton, Adrian Werner, Robert Costanza, Steve Mohr, Craig Simmons, ‘Is Decoupling GDP Growth from Environmental Impact Possible?’ (2016) 11 *PLOS ONE* e0159270 ; Giacomo D’Alisa, Federico Demaria, Giorgos Kallis, *Degrowth: A Vocabulary for a New Era* (Routledge 2015); Tim Jackson, *Prosperity without Growth? The Transition to a Sustainable Economy* (Earthscan 2009); Serge Latouche, *Le pari de la décroissance* (Fayard 2006). Importantly, these studies acknowledge the necessity for less industrialized countries to achieve certain levels of growth. However, they demonstrate that the correlation between GDP growth and human well-being reaches a saturation point relatively quickly. Consequently, the relentless pursuit of GDP growth in most industrialized nations, and its adoption as a global policy objective, is associated with escalating environmental degradation and increasing social inequalities.

⁴⁵ *ibid* 23.

and the human environment'.⁴⁶ Furthermore, it borrows the focus on the role of ecosystems and the adoption of the intergenerational perspective from the sustainability discourse.⁴⁷

Despite this, the approach of the 1972 Declaration remains closer to the 'development' than to the 'sustainability' strain, for reasons which will be better addressed in the following section. At this stage, it will suffice to identify two caveats. First, being the earliest legal (instead of scholarly) document addressing sustainability concerns, the Stockholm Declaration 'was based on a complex preparatory process, during which agreement was reached among the major groups of countries'.⁴⁸ Therefore, it emerged as a synthesis of the political interests of States interacting at the UN level and, differently from sustainability documents, it was not the result of a process of interaction among (at least formally) neutral researchers. Secondly, and as a consequence, the content of the Stockholm Declaration is only indirectly linked to the sustainability discourse. It never explicitly refers to sustainability, and it dogmatically presents economic development, understood as economic growth, as the main solution to both poverty and environmental degradation.

The first generation of sustainability documents was characterized by a remarkably anthropocentric approach, a focus on resource depletion, and an acritical acceptance of the existing economic system. By contrast, the second generation presents a focus on ecological elements, a distinction between environmental pollution and natural resource depletion, and a bold critique against growth-based economic systems. Crucially, this new interpretation of sustainability upholds a very specific ontology, emphasizing consideration for future generations and recognizing the inherent conflict between a

⁴⁶ Report of the U.N. Conference on the Human Environment, from the U.N. Conference in Stockholm, Sweden [Stockholm Declaration] (Stockholm, 16 June 1972) Statement 3.

⁴⁷ *ibid* Principle 2.

⁴⁸ Sohn (n 7) 424.

growth-oriented society and a ‘sustainable society’. Still, in line with the first generation of sustainability documents, the second flourished in the realm of scholarly works while remaining quite apart from political institutional environments.

III. THE ORIGINS OF DEVELOPMENT

The origins of the concept of development deserve investigation, as well as the different meanings that this word assumed over time. After tracing the imperialist roots of the concept, this section will focus on the development narrative adopted by the US since the onset of the Cold War, it will refer to the crisis that the concept of development experienced during the 1970s, and to its subsequent search for new legitimacy.

1. Progress, civilization, and development until the establishment of the UNDP

The concept of development has more recent origins than the concept of ‘sustainability’ and this also emerges when looking at its etymology. In fact, the word development comes from the Old French (16th Century) *desveloper*, composed of *des-* (undo) and *voloper* (wrap up) which originally meant, according to the *Online Etymology Dictionary*, ‘unfurl, unveil, show, make visible’.⁴⁹ Interestingly, while the concept of *substinere* (to endure, to last over time) was intuitively applicable to the field of natural resource administration, the same can hardly be said about the concept of *desveloper*. In turn, the Old French word could find room for application in the realm of politics, even more when applied to narratives aimed at justifying some political action in the name of an ideal, mission or goal which will indeed ‘unveil’ or ‘make itself visible’ just at the end of a process.

While the concept of development was mainstreamed in the realm of politics in the aftermath of the Second World War, its roots can already be found in

⁴⁹ Online Etymology Dictionary, ‘Develop’ <<https://www.etymonline.com/word/developer>> accessed 18 March 2023.

older concepts such as progress and civilization.⁵⁰ Undoubtedly, both the narratives on progress and civilization entail a linear conceptualization of time, as well as the claimed necessity to adopt allegedly neutral (technological and institutional) instruments and values to trigger a progression towards a future which is supposedly better for all. Both narratives on progress and civilization, Du Pisani argued, have their origin in the Hebrew and Christian ideals of salvation.⁵¹ Indeed, with the secularization of European societies taking place during the Modern Age, the ideal of salvation through revelation has been replaced by the ideal of salvation through science.⁵² This led von Wright to state that the idea of progress is nothing more than ‘a secularized heir to the Christian ideal of salvation’.⁵³ And a peculiar conceptualization of progress, declined in terms of industrial and technological advancement, lead to the emergence of the capitalist culture.⁵⁴

The exaltation of progress was reinforced by the long tradition of Western self-identification and self-positioning on the top of a cultural, political, and civilization hierarchy. In particular, the Western rhetoric on civilization tended to frame as civilized any industrialized society glorifying the values of scientific and technological progress in the name of the achievement of an ever-increasing material wellbeing. At the same time, any society refusing the abovementioned values was framed as uncivil, savage, and

⁵⁰ See Lorenzini (n 4).

⁵¹ Du Pisani (n 5).

⁵² Umberto Galimberti, *Il Tramonto dell'Occidente* (Feltrinelli Editore 2005).

⁵³ Georg Henrik von Wright, ‘Progress: Fact and Fiction’ in Arnold Burgen , Peter McLaughlin, Jürgen Mittelstraß (eds) *The Idea of Progress* (Walter de Gruyter 1997) 5.

⁵⁴ The capitalist culture is characterized by what Fraser calls the ‘stark division between the two realms’,⁵⁴ i.e. the realm of economy, conceived as the realm of creative and beneficial human action, and the realm of nature, reduced to a realm of self-replenishing stuff. See Nancy Fraser, ‘Climates of Capital: For a Trans-Environmental Eco-Socialism’ (2019) 116 *New Left Review* 5.

therefore in need of help. This specific mindset led Jules Ferry to describe ‘colonization as a political duty the superior races had toward inferior ones, particularly in the promotion of science and progress’.⁵⁵ Furthermore, Rudyard Kipling argued in his poem ‘The White Man’s Burden’ that ‘Americans [had] to take up the burden of civilization, even though this meant being hated by subject peoples’.⁵⁶ Nonetheless, as Gandhi put it, in contrast to the alleged superiority of the West, ‘this civilization takes note neither of morality nor of religion, [it solely] seeks to increase bodily comforts, and it fails miserably even in doing so’.⁵⁷

Having in mind the political and cultural roots from which the concept of development emerged, according to Lorenzini, it was ‘only after 1945 [that] economic growth [became] crucial in developed countries and economic development a fundamental political goal’.⁵⁸ With the outbreak of the Cold War, different narratives on development emerged, and newly independent countries found themselves forced to adhere to specific development models.⁵⁹ It was ultimately the liberal US-led development model that prevailed and globally spread at the end of the Short Century.⁶⁰ Indeed, while initially entrenched in international agreements predominantly involving the Western Bloc, this model persisted beyond the Cold War era, and paved

⁵⁵ Lorenzini (n 4) 10.

⁵⁶ *ibid.*

⁵⁷ Mahatma Karamchand Gandhi, *Hind Swaraj or Indian Home Rule* (Jitendra T. Desai 1938) 34.

⁵⁸ Lorenzini (n 4) 9.

⁵⁹ *ibid.*

⁶⁰ While the history of liberalism is complex and multifaceted, it is important to note that the core tenets of liberalism align closely with those of capitalism. They include strong anthropocentrism, the centrality of private property, and the advocacy for market deregulation.

the way for adopting liberal development models even in former socialist states.⁶¹

One of the first blatant manifestations of the liberal idea of development can be found in the inaugural speech of US President Henry Truman in 1949. After framing the US as ‘pre-eminent among nations in the development of industrial and scientific techniques’, Truman stated, ‘events have brought our American democracy to new influence and new responsibilities’.⁶² In this context, the US President launched the famous Point Four, asserting that the US should ‘foster capital investment in areas needing development’, where people live ‘in conditions approaching misery’, and whose ‘economic life is primitive and stagnant’.⁶³

Truman’s discourse is not only a perfect example of how the US narrative on development has tended to self-rank its own system of production at the top of an allegedly objective and linear process of human improvement, but it also highlights the parallel between development, economic development, and economic growth.

Indeed, in Truman’s words, the US has a duty to ‘embark on a bold new program [...] for the improvement and growth of underdeveloped areas’; this should be done in order to ‘increase the industrial activity in other nations’.⁶⁴ Thus, while ‘development’ was typically reduced to ‘economic development’, as Purvis et al. observe, ‘from the 1950s, “economic development” became almost synonymous with “economic growth”, which in turn had become a major goal of Western economic policy’.⁶⁵ Notably, in his discourse, Truman also states that, while ‘the material resources which

⁶¹ For example, agreements establishing the World Bank, the International Monetary Fund, and the General Agreement on Tariffs and Trade.

⁶² Henry Truman, ‘Inaugural Address’ (1949) <<https://www.trumanlibrary.gov/library/public-papers/19/inaugural-address>> accessed 12 April 2023.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ Purvis et al. (n 5) 4.

[the US] can afford to use for assistance of other peoples are limited, [...] imponderable resources in technical knowledge are constantly growing and are inexhaustible'.⁶⁶ Such a passage is emblematic, as it manifests absolute faith in the capacity of technology and human rationality to overcome the limits of the Earth. It thus provides a basis for the optimistic conceptualization of the relationship between economic growth and nature which will become the leitmotif of the concept of sustainable development.

In line with Truman's discourse is Walt Rostow's *The Stages of Economic Growth – A Non-Communist Manifesto*.⁶⁷ Defined by Lorenzini as 'the Bible' of Modernization theory,⁶⁸ Rostow's work was published in 1959, when he was serving as speechwriter to President Eisenhower. In his work, the US economist claimed the existence of five stages of growth, which would lead 'traditional societies' to turn into 'high-mass consumption societies'.⁶⁹ Such a type of society firstly materialised, according to Rostow, in the US of the 1920s, and it is characterised by the appearance of 'not only new leading sectors but also vast commitments to build new social overhead capital and commercial centres'.⁷⁰

Finally, it is relevant to mention both the UN General Assembly (UNGA) Resolutions 1710 of 1961 and 2029 of 1965, which established the UN Development Decade and the UN Development Programme (UNDP). Indeed, these are among the first international legal documents allowing the mainstreaming of the US development model at the UN level. Unsurprisingly, these Resolutions received some criticism from socialist countries (which were promoting their own narrative on development).⁷¹

⁶⁶ Truman (n 56) 4.

⁶⁷ Walt Rostow, 'The Stages of Economic Growth: A Non-Communist Manifesto' (1959) 12 *The Economic History Review* 1.

⁶⁸ Lorenzini (n 4) 60.

⁶⁹ Rostow (n 79) 11.

⁷⁰ *ibid* 11.

⁷¹ Lorenzini (n 4).

Most notably, Mr. Makeev, representative of the USSR at the UNGA in 1965, when justifying the reasons for abstaining from Resolution 2029, stated that:

[b]right horizons and extraordinary prospects for the future have been mentioned. We are not inclined to share such enthusiasm *a priori*. We see as yet no cause for these panegyrics. [...] If the Development Programme proceeds in the same way, then we shall have nothing good to say about the development programme either.⁷²

Interestingly, none of these UN documents really provide any explicit definition of development, while they both maintain and globally spread the equation between development, economic development, and growth. Specifically, the 1961 Resolution designates the UN Development Decade as a ten-year-long initiative aimed at accelerating ‘progress towards self-sustaining growth of the economy of the individual nations [...] so as to attain in each under-developed country a substantial increase in the rate of growth’.⁷³ Afterwards, the 1965 Resolution launches the UNDP ‘to support and supplement the national efforts of developing countries in solving the most important problems of their economic development, including industrial development’.⁷⁴ It appears, then, that there is little room in UN assistance programmes for application in any realm of development which is not explicitly economic.

The concept of development has traditionally played a political role, which can be inferred, *inter alia*, by looking at the nature of the documents enshrining it. Unlike those elaborating on the concept of ‘sustainability’, development documents mainly belong to the political sphere. The US narrative tended to equate development to economic development and growth. This has put the US system of production and consumption at the apex of a development hierarchy, and it has promised that any society will

⁷² UNGA, ‘1383rd Plenary Meeting - Official Records’ (1965) at 15.

⁷³ A/RES/1710 (XVI 1961) para 1.

⁷⁴ A/RES/2029 (XX 1965) preamble.

achieve the status of ‘high mass consumption society’ once having followed the ‘five stages of growth’. Nonetheless, while narrating this story, the concept of development remained silent on the ecological impacts of both growing natural resource exploitation and environmental degradation.

2. The first crisis of development and the search for a new identity

As it was the case for the history of ‘sustainability’, the 1970s also represented a turning point for the history of ‘development’.

Firstly, the reaction to the US and the USSR’s developmental attitude was reflected by the unprecedented activism of so-called ‘developing’ states. Since the 1950s, these states strived to find autonomy in the international arena and worked to create their own interpretation of development. This led to the organization of the Bandung Conference in 1955, the creation of the Group of 77 in 1962, the beginning of the so-called African Decade in the 1960s, and the launch of the ‘Declaration on the Establishment of a New International Economic Order’ in 1974.⁷⁵ These events surely represent ambitious, though not completely successful, efforts from the ‘periphery of the World’ to take distances from mainstream narratives on development.⁷⁶ On the one hand, neo-Marxist scholars such as Immanuel Wallerstein and Vijay Prashad underline that the process started in Bandung ultimately failed to emancipate historically dominated countries from historically dominant ones, as it failed to successfully tackle the capitalist structures of the

⁷⁵ A/RES/3201 (S-VI 1974).

⁷⁶ The distinction between states positioned in the ‘centre’, ‘periphery’, and ‘semi-periphery’ of the global economy has been elaborated by Immanuel Wallerstein in the context of World System Theory. This theory considers the global economic system as a global social system, in which industrialized capitalist states from the centre, to maintain their position of domination and pursue the path of capital accumulation, need to extract resources from peripheral states, thus condemning them to a position of exploitation and subalternity. For more information, look at Immanuel Wallerstein, *The Modern World-System* (Academic Press 1974).

international economic system favouring the interests of the Global North.⁷⁷ On the other hand, the Bandung process played, as a minimum, a significant symbolic role. It became clear that less industrialized countries had taken awareness of their historical condition of subjugation, and were reclaiming a new position in world politics, trying to turn, at least in theory, from objects to subjects of development policies.

Furthermore, since the early 1970s, the ‘sustainability’ discourse has played a role in shaping the conceptualization of ‘development’. During the 1970s, the explosion of two global energy crises and the non-materialisation of the promised benefits of economic growth-based development plans in less industrialized countries led to publications contesting the traditional conceptualization of development.⁷⁸ As the Frankfurt School philosopher Erich Fromm observed in his book *To Have or To Be*, the ‘Great Promise of unlimited progress’ had failed as it was understood that:

- a) Unrestricted satisfaction of all desires is not conducive to well-being; [...]
- b) Economic progress has remained restricted to the rich nations, and the gap between rich and poor nations has ever widened.
- c) Technical progress itself has created ecological dangers and the dangers of nuclear war, either or both of which may put an end to all civilization and possibly to all life.⁷⁹

Having become clear that the US development model was not the only possible one, and that developmental and environmental considerations could no longer be addressed as two impermeable and independent dimensions, the Stockholm Declaration has served as a springboard to rebrand the concept of development. Back in 1973, scholars such as Sohn enthusiastically described the 1972 Declaration as ‘the most successful

⁷⁷ *ibid*; Vijay Prashad, *The Darker Nations: A People's History of the Third World* (The New Press 2007).

⁷⁸ Tulloch (n 4); Purvis et al. (n 5).

⁷⁹ Erich Fromm, *To Have or to Be* (Continuum 1976) 2.

international conference held in recent years'.⁸⁰ Indeed, the Declaration attempts to resolve the ontological divide between the development and sustainability dimensions, as it affirms that: '[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world', and that 'Man's capability to transform his surroundings, if [...] wrongly or heedlessly applied [...] can do incalculable harm to human beings and the human environment'.⁸¹ These two passages are undoubtedly relevant, as they both frame the well-being of people and economic development as dependent on the (human) environment and, most importantly, recognize that human action can negatively affect the environment.

However, the Stockholm Declaration remains a development-oriented document, and this clearly emerges, *inter alia*, from Statement 4, stating that 'in the developing countries most of the environmental problems are caused by under-development'.⁸² Such a passage not only showcase the 1972 Declaration's undue focus on developing countries' environmental problems,⁸³ but it also aprioristically frames development as a remedy to environmental issues. In this regard, it is Sohn himself who admits that the statement presents:

an increased emphasis on development in the sentences relating to the industrialized countries. Instead of urging them to provide a speedy solution of the pollution problems at home, the new text stresses the need to help the developing countries to reduce the gap between them and the developed countries.⁸⁴

⁸⁰ Sohn (n 7) 423.

⁸¹ Stockholm Declaration (n 40) Statements 2-3.

⁸² *ibid* Statement 4.

⁸³ And this in the 1970s, when the vast majority of environmental pollution was caused by so-called 'developed' countries.

⁸⁴ Sohn (n 7) 444.

This approach of the 1972 Declaration is reinforced in further passages such as Principle 8, stating that '[e]conomic and social development is essential for ensuring a [...] working environment for man'. Similarly, Principle 9 affirms that '[e]nvironmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development'.⁸⁵

For the sake of thoroughness, the 1986 UN Declaration on the Right to Development should be mentioned (hereinafter the Development Declaration or the 1986 Declaration).⁸⁶ This declaration represents the first legal document recognizing (although in a non-binding fashion) a human right to development. Despite having been produced more than ten years after the Stockholm Declaration, the Development Declaration adopts a more traditional approach, especially when it comes to framing the relationship between development and sustainability. Indeed, the Development Declaration does not reference sustainability, future generations, or the environment. While this return to the roots of the concept of development could be seen as a backwards step, it could also be interpreted as the result of the creation of a declaration whose establishment was mainly in the interests of less industrialized countries and was therefore not a part of the Western effort to reshape and update its narrative on development. Importantly, just one year after the passage of the 1986 Declaration, the UN will openly embrace a new narrative on development, termed sustainable development, which will more strongly echo the approach of the 1972 Declaration.

The 1970s represented a crucial decade for the history of both sustainability and development. The important changes taking place in this period can be summarised in two phases. On the one hand, the publication of works such as *A Blueprint for Survival* and *The Limits to Growth* brought the sustainability discourse further than ever from the development discourse. They shed light

⁸⁵ *ibid* Principles 8-9.

⁸⁶ Declaration on the Right to Development (4 December 1986) UNGA RES 41/128.

on the conflict between environmental protection and any conceptualization of development intended as economic growth. On the other hand, the adoption of the Stockholm Declaration can be interpreted as an effort made by the development strain to get closer to the sustainability issue. This soft-law document, however, while adopting a more comprehensive and environmentally concerned approach, strongly relies on a techno-optimistic and growth-oriented attitude. While the 1972 Declaration raises concerns about the environmental consequences of headless human activities, it simultaneously presents development itself as the solution to environmental degradation. The portrayal of development, primarily framed as economic growth, as a remedy for environmental problems foreshadows the conceptual framework that will underlie the emergence of sustainable development.

IV. FROM DEVELOPMENT TO SUSTAINABLE DEVELOPMENT

The process of rebranding development culminates in the making of the concept of ‘sustainable development’. As well as the Stockholm Declaration’s conceptualisation of development, sustainable development focuses on social and environmental issues, while presenting economic development, intended as economic growth, as a solution to both. However, the meaning of sustainable development also changed over time. This section will highlight both its progressive departure from environmental considerations, and the process of fragmentation and dilution it undertook.

1. The emergence of sustainable development and its first appearance on the international stage

Like the concept of development, sustainable development has its own relevant ancestors, most notably, the concepts of sustainable society and eco-development. Along with sustainable development, both of these concepts start by acknowledging the dangers of environmental degradation and

identifying the characteristics that the social and economic systems should incorporate to avoid environmental catastrophe.

Quite in line with the sustainability strain, the 1980 work *Building a Sustainable Society* by the agronomist Lester Brown focuses on the importance of avoiding ecological dangers.⁸⁷ This work expresses concerns for future generations and focuses on the identification of those features which societies require to be truly sustainable. In this regard, Brown is quite clear in stating that

economic stresses have their roots in environmental deterioration and resource scarcities [which are] indicators of unsustainability, [and] evidence that humanity cannot continue on the current path.⁸⁸

Indeed, in line with Meadows et al., Brown believes that abandoning the continuous pursuit of economic growth is a crucial step towards the realization of a sustainable society. He asserts that ‘sustainability rather than endless growth [should be conceived] as a goal’,⁸⁹ therefore framing sustainability and growth as two alternative options rather than as one unified goal. However, he also optimistically forecasts that ‘once policymakers recognize that the economic choice is often between growth and sustainability, growth is likely to subside in importance as a policy goal’.⁹⁰ His forecast has yet to materialise.

The concept of eco-development, for its part, was coined by the Secretary General of the Stockholm Conference of the Human Environment, Maurice Strong.⁹¹ It has been further elaborated and mainstreamed in works such as *Stratégies de l'écodéveloppement* by economist Ignacy Sachs.⁹² Unlike sustainable society and sustainable development, the concept of eco-

⁸⁷ Lester Brown, *Building a Sustainable Society* (W. W. Norton & Company 1981).

⁸⁸ *ibid* 146.

⁸⁹ *ibid* 309.

⁹⁰ *ibid* 128.

⁹¹ See Koula Mellos, *Perspectives on Ecology* (Palgrave Macmillan 1988).

⁹² Ignacy Sachs, *Stratégies de l'écodéveloppement* (Éditions de l'Atelier 1980).

development was coined by a businessman, before being elaborated upon by scholars. As the term itself suggests, eco-development gravitates around the concept of development. Hence, it comes without surprise that eco-development lacks a firm opposition between sustainable society and an economic system based on perpetual growth. Nonetheless, the concept of eco-development remains far from the US's traditionally paternalistic and capitalist-oriented definition of development. This is apparent as eco-development manifests as 'a critique of economic concentration and political centralisation on the global level and above all a programme of economic and political decentralisation'.⁹³

Against this background, the first explicit reference to sustainable development appears neither in a scholarly work nor in multilateral UN documents. As pointed out by Peter Sand, first references to sustainable development 'began to appear in treaties in the 1980s', while the 'principle' of sustainable development was first mentioned in the 1992 European Economic Area (EEA) Agreement.⁹⁴ Still, the first document having a global reach and referring to sustainable development is the World Conservation Strategy – Living Resource Conservation for Sustainable Development, published in 1980 (hereinafter the 1980 Strategy) by the International Union for the Conservation of Nature (IUCN). This policy document, while already referring to sustainable development in its subtitle, does not provide any definition of sustainable development. Furthermore, the 1980 Strategy frames sustainable development both as a self-standing objective to be achieved 'through the conservation of living resources',⁹⁵ and as a means for the achievement of 'living resource conservation'.⁹⁶ Nonetheless, whether it is an aim or a means, it appears that sustainable development is directly

⁹³ Mellos (n 83) 60.

⁹⁴ Peter Sand, 'Towards Sustainable Development in Scandinavian Treaty Practice' (1993) 3 *Yearbook of European Environmental Law* 252.

⁹⁵ IUCN, *World Conservation Strategy - Living Resource Conservation for Sustainable Development* (IUCN 1980) 4.

⁹⁶ *ibid* 6.

related to resource conservation and, by extension, to the environmental dimension.

In line with the sustainability discourse, the 1980 Strategy underscores the necessity to acknowledge the Earth's limited resources, as well as the importance of both safeguarding ecosystems and accounting for the needs of future generations. Furthermore, it recognizes the need to 'integrate conservation with development', thus providing guidelines for the implementation of sustainable development.⁹⁷ In this regard, sustainable development is conceived as that kind of development which is not 'inflexible and needlessly destructive' and, therefore, does not cause environmental damage and does not impair nature conservation.⁹⁸ It follows that the 1980 Strategy recognizes the fundamental role of the environmental dimension, as well as the main 'contribution of living resource conservation to human survival'.⁹⁹

However, the 1980 Strategy mainly refers to the environment as a 'resource', and it frames development and conservation as 'equally necessary for our survival'.¹⁰⁰ Furthermore, in a similar fashion to the Stockholm Declaration, the IUCN document states that 'much habitat destruction and overexploitation of living resources by individuals, communities and nations in the developing world is a response to relative poverty'. Hence, the document continues, 'it is as necessary for conservation as it is for development that [...] trade be liberalized' and that 'economic and social growth be accelerated'.¹⁰¹ Therefore, in line with the 1972 Declaration, the 1980 Strategy mainly focuses on environmental destruction taking place in developing countries, and it presents the liberal receipt of growth and trade liberalization as the solution to both environmental and societal problems.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid.* 4.

¹⁰⁰ *ibid.* 8.

¹⁰¹ *ibid.* 54.

Evidently, the 1980 Strategy overlooks that most global pollution was (and still is) caused by Western countries who drive environmental degradation, *inter alia*, through global investment and trade in the name of growth and development.¹⁰² Instead, the IUCN document establishes a win-win ontology in which economic development, intended as economic growth, will be beneficial for achieving human well-being and provide a solution to overriding environmental issues.

2. The mainstreaming at the UN level: from an instrument for the pursuit of environmental conservation to an objective concerned with human beings

The concept of sustainable development first appeared at the UN level in 1987 through the publication of the ‘Our Common Future’ Report, also known as the Brundtland Report, from the name of the Special Commissioner who worked on it.¹⁰³ Similar to the IUCN Strategy, the Brundtland Report frames sustainable development both as an objective and as a means.¹⁰⁴ However, while the IUCN Strategy framed sustainable development as a means for achieving environmental conservation (as well as an objective to be achieved through resource conservation), the Brundtland Report underscores that the objective of sustainable development is both poverty eradication and environmental protection. Specifically, the Report states that, ‘the satisfaction of human needs and aspirations [and not environmental protection] is the major objective of

¹⁰² Christian Dorningera, Alf Hornborg, David J. Absona, Henrik von Wehrdena, Anke Schaffartzikd, Stefan Giljumf, John-Oliver Englera, Robert L. Feller, Klaus Hubacekh, Hanspeter Wieland, ‘Global patterns of ecologically unequal exchange: Implications for sustainability in the 21st century’ (2021) 179 *Ecological Economics* 106824.

¹⁰³ The World Commission on Environment and Development, also known as Brundtland Commission (from Gro Harlem Brundtland, chairperson of the Commission) was established in 1983 through UNGA Resolution 38/161.

¹⁰⁴ Sustainable development is framed as an objective, *inter alia*, in Brundtland (n 3) 12.

development'.¹⁰⁵ This marks a departure from the original, purely environmental focus of sustainable development.

Importantly, the Brundtland Report provides the first and still mainstream definition of sustainable development. It is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.¹⁰⁶ Thus, at the cost of anthropocentrism, the report turns the inter-generational approach into a cornerstone of the sustainable development discourse. The report also relies on intra-generational equality, as it states that 'sustainable development requires meeting the basic needs of all'.¹⁰⁷ Lastly, and in line with the traditional 'sustainability' strain, the Brundtland Report acknowledges, at least by façade, the importance of limiting human impact on Earth, as it affirms that 'the concept of sustainable development does imply limits'.¹⁰⁸ However, the Report continues, 'not absolute limits, but limitations imposed by the present state of technology and social organization'.¹⁰⁹ Therefore, the Report manifests absolute faith in human progress, and in particular in the capacity of 'technology and social organization' to 'make way for a new era of economic growth'.¹¹⁰

In line with the assumptions underpinning both the Stockholm Declaration and the IUCN Strategy, the report frames economic growth as the panacea for economic, environmental, and social issues by stating that:

'If large parts of the developing world are to avert economic, social, and environmental catastrophes, it is essential that global economic growth be revitalized. In practical terms, this means more rapid economic growth in both industrial and developing countries, freer market access for the

¹⁰⁵ *ibid* 37. Emphasis on the lack of environmental focus has been put in brackets.

¹⁰⁶ *ibid* 37.

¹⁰⁷ *ibid* 15.

¹⁰⁸ *ibid*.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*.

products of developing countries, lower interest rates, greater technology transfer, and significantly larger capital flows'.¹¹¹

Evidently, beyond equating development to economic growth, the report preaches 'sustainable development' as the solution to the evils arising, *inter alia*, from both environmental degradation and poverty. However, the document does not provide any evidence that efficiency gains brought about by technological innovation will be sufficient to halt environmental degradation. Similarly, it offers no proof of the necessity (or at least adequacy) of pursuing economic growth, in both industrial and developing countries, to achieve poverty eradication and environmental protection. This allows scholars as Castro and Purvis et al. to mark the Report's approach as blatantly ideological.¹¹²

The Brundtland definition of sustainable development surely had the fortune of appearing on the international stage at a particularly favourable historical juncture. Indeed, with the fall of the Berlin Wall in 1989 and with the implosion of the USSR in 1991, the states-sponsored ideological competition between the liberal and communist conceptualizations of development had come to an end. With the end of the Cold War, the liberal US-led idea of development could easily spread at the planetary level, even in parts of the globe that were formerly part of the Soviet bloc.

In this post-Cold War context, the Earth Conference on Environment and Development took place in Rio. As Castro observes, this Conference 'counted on the participation of most of the nation-states on earth, the majority of which were governed by elites committed to the neoliberal agenda'.¹¹³ The Rio Conference gave birth to several relevant legal documents. However, due to limited space, this research will specifically focus on the Rio Declaration, which, being the homologous of the Stockholm Declaration of 1972 but having been produced after the

¹¹¹ *ibid* 66.

¹¹² Castro (n 4); Purvis et al. (n 5).

¹¹³ *ibid* 197.

publication of the Brundtland Report, strongly contributed to reshaping the concept of sustainable development.

While the 1992 Declaration does not provide any new definition of sustainable development, this soft-law document underscores the relevance of the intergenerational approach,¹¹⁴ and highlights the importance of involving women, young people, and indigenous communities in the path towards sustainable development.¹¹⁵ Under Principle 7, it also recognizes that so-called ‘developed countries’ bear special responsibilities ‘in view of the pressures their societies place on the global environment’.¹¹⁶ It therefore recognizes, for the first time in a UN document, that allegedly developed countries are the most responsible for environmental degradation. Nonetheless, the Rio Declaration never questions the economic-growth-oriented conception of sustainable development. On the contrary, it frames economic growth as being complementary to sustainable development. This clearly emerges from Principle 12, which affirms that ‘states should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries’.¹¹⁷

Another novelty introduced by the Rio Declaration can be found in Principle 1, stating that ‘human beings are at the centre of concerns for sustainable development’.¹¹⁸ Therefore, while the IUCN Strategy put Sustainable Development in relation to environmental conservation, and the Brundtland Report framed sustainable development as an objective to be pursued mainly for eradicating poverty, but also for the benefit of the environment, the Rio Declaration clearly frames sustainable development as an objective gravitating around human beings. By doing so, the Declaration

¹¹⁴ United Nations Rio Declaration on Environment and Development (13 June 1992), 31 I.L.M. 874 (1992) Principle 3.

¹¹⁵ *ibid* Principles 20–22.

¹¹⁶ *ibid* Principle 7.

¹¹⁷ *ibid* Principle 12.

¹¹⁸ *ibid* Principle 1.

shifts the focus away from environmental protection while relegating it to an ‘integral part of the development process’.¹¹⁹ The Rio conceptualization of sustainable development, then, quite clearly presents sustainable development as the heir of traditional development while inheriting very little from the concept of sustainability. Environmental protection, which must be addressed through ‘economic growth and sustainable development’, is only instrumental for the benefit of humans.¹²⁰ Environmental protection has been explicitly turned into a part of the development process, at the centre of which there are human beings and no longer the preservation of natural ecosystems and life on Earth.

Evidently, two main features characterise the concept of sustainable development during its first phase of mainstreaming at the UN level. Firstly, ‘sustainable development’ has been generated in (and reshaped by) international institutions rather than in independent scholarly works. Thus, as it was the case for development, and differently from sustainability, the conceptualization of sustainable development emerges from the mediation of political actors’ interests, and it is not the output of politically independent and theoretically solid research works. Secondly, the concept of sustainable development is consistently underpinned by the belief (not grounded in scientific research) that development (equated to economic development and, by itself, to economic growth) is not only compatible but essential to achieving sustainability. The problems arising from the establishment of this ontology, normalised also in subsequent version of the sustainable development concept, will be better discussed in the following sub-section.

At this point, it is important to highlight two main changes that the concept of sustainable development experienced during its first twelve years of existence. Firstly, over time, sustainable development has been increasingly framed less as a means and more as a self-standing objective. Importantly, becoming an aim in itself, sustainable development enhances the strength of

¹¹⁹ *ibid* Principle 4.

¹²⁰ *ibid* Principle 12.

the its own rhetoric, and it can justify a stronger involvement of ‘developed’ states in the domestic affairs of ‘less-developed’ ones. Secondly, this subsection has noted how the sustainable development discourse started to shift its focus towards human well-being in the Brundtland Report, and it ended up with the Rio Declaration’s view that human beings, rather than nature, are the main object of concern for sustainable development. This shift led to the gradual de-prioritization of environmental protections and prioritisation of a ‘development process’ aimed at improving human well-being through the means of economic growth. This brought scholars such as Tulloch to claim that documents such as the Brundtland Report and the Rio Declaration transformed sustainability ‘from a marginal counter-hegemonic radical movement into a platform for legitimating neoliberal universalising project’.¹²¹

3. Towards fragmentation: amidst pillars and goals

Despite its progressive distancing from the environmental focus and its theoretical weakness, until the end of the 20th Century, sustainable development was framed as a unitary concept. This is to say that, during the ‘90s, sustainable development was conceived as a comprehensive concept that different actors had to pursue by taking account of the complex (though optimistically framed) set of relationships tying environmental, social, and economic elements. However, such an approach was about to change at the dawn of the new millennium.

Indeed, in 2002, the Johannesburg Declaration on Sustainable Development framed the three ‘pillars of sustainable development’.¹²² These pillars were categorised as economic development, social development and

¹²¹ Tulloch (n 4) 108.

¹²² Report of the World Summit on Sustainable Development, from the U.N. Conference in Johannesburg, South Africa [Johannesburg Declaration] (Johannesburg, 4 September 2002) Annex.

environmental protection.¹²³ Interestingly, it was in this document that environmental protection was first conceived as just one of three (and more precisely as the third) pillars of sustainable development. Moreover, two pillars out of three do not refer to sustainability but solely to development. Crucially, the 2002 Declaration describes the three pillars of sustainable development as ‘mutually reinforcing’, and it thus contributes to the enhancement of the ontological artefact framing economic development, social development, and environmental protection as positively interacting with each other.¹²⁴ However, according to Purvis et al, ‘one problematic facet of this conceptualisation is its lack of theoretical development’.¹²⁵ In fact, despite having been presented by the UN as a paradigmatic truth, no proof of the solidity nor the achievability of the alleged synergy between the economic, social, and environmental dimensions has ever emerged from the literature. Again, in the words of Purvis et al.,

The depiction of the economic pillar in terms of an economic growth goal, placed on equal footing with social and environmental factors, despite the wealth of critical literature, can be seen as an embodiment of the ideological win–win scenario of sustainable growth.¹²⁶

Having this in mind, it is possible to identify two consequences arising out of this mutually reinforcing-pillars conceptualization. Firstly, it leaves no room for identifying balancing instruments,¹²⁷ as it remains ontologically blind to trade-offs among economic, social, and environmental interests. This situation, though, is particularly problematic. Indeed, as Chiti observes, ‘the balancing of diverse and potentially divergent public interests’ is

¹²³ *ibid.*

¹²⁴ *ibid* Annex.

¹²⁵ Purvis et al. (n 5) 6.

¹²⁶ *ibid* 12.

¹²⁷ I.e. legal or policy instruments aimed at adequately balancing economic, social, and environmental stakes.

essential for implementing a transition towards sustainability.¹²⁸ Secondly, the three-pillars conceptualization finally dismantles the once unitary understanding of sustainable development. In fact, until 2002, any actor who wanted to pursue sustainable development had to pass along the way of environmental considerations. By contrast, from Johannesburg onwards, three mutually reinforcing pillars of sustainable development exist, so that the enhancement of any of them would logically represent a way towards the pursuit of the overall sustainable development objective.

The fragmentation of sustainable development, however, reached its apex in 2015 when the UN General Assembly adopted the '2030 Agenda for Sustainable Development'. Being an heir of the Millennium Declaration, the 2030 Agenda further increases the number of goals (from eight to seventeen) and explicitly labels the goals as 'Sustainable Development Goals'.¹²⁹ It is crucial to observe that naming any goal as a 'Sustainable Development Goal' constitutes a major step in the process of dilution and dissembling of the concept of sustainable development. Indeed, putting the 'sustainable development' label on any single goal brings to the emergence of seventeen different declinations of sustainable development.

The framing of the '2030 Agenda' confirms the distancing of sustainable development from the originally dominant environmental concern. Indeed, with wording that is strongly reminiscent of Principle 1 in the Rio Declaration, the Preamble of the '2030 Agenda' states that 'eradicating poverty [...] is the greatest global challenge and an indispensable requirement for sustainable development'.¹³⁰ While this phrasing stresses the importance ascribed to the social dimension, its lack of references to the environment also confirms the departure from the original priority attributed to environmental conservation. Lastly, the ancillary role of the

¹²⁸ Edoardo Chiti, 'Managing the Ecological Transition of the EU: The European Green Deal as A Regulatory Process' (2022) 59 *Common Market Law Review*, 16.

¹²⁹ UN General Assembly (n 3).

¹³⁰ *ibid* Preamble.

environmental dimension also emerges from the analysis of the SDGs list. Indeed, out of seventeen Sustainable Development Goals, only three are fully devoted to nature protection, and have been formally put on the same footage of goals as Goal 8, on economic growth, and Goal 9 on infrastructures and industrialization. Moreover, the positioning of environmental goals at the lower end of the list (i.e. goals number 13, 14 and 15) may suggest a further marginalization of their centrality in the overall framework.

Another feature of the ‘2030 Agenda’ stands in its depiction of all seventeen SDGs as ‘integrated and indivisible’.¹³¹ Therefore, the Agenda frames objectives such as, for instance, global economic growth (goal 8) and life on land (goal 15), as ‘linked to each other and interdependent’.¹³² However, even in this case, the alleged interdependence among the elements composing sustainable development is aprioristically recognized as a dogmatic truth, and it is not backed by any kind of empirical evidence.

Moreover, as it is built around the belief that there should be a continuous improvement of all targets enshrined in each SDGs, the ‘2030 Agenda’ relies on a progressive conceptualization of time and history, which blatantly echoes the traditional development rhetoric. Simultaneously, the Agenda inherits very little from the equilibrium-oriented sustainability model, and this contributes to explaining the reasons behind its incapacity to acknowledge the existence of tensions among different SDGs.

Finally, the 21st Century has brought to an unprecedented fragmentation of the once unitary concept of sustainable development. This process, which materialised into the identification, in international law documents, of sustainable development pillars and goals, led to a further distancing of sustainable development from the once central environmental concern. Furthermore, moving on the same trajectory travelled by the (once

¹³¹ *ibid.*

¹³² *ibid* Declaration.

development, and then) sustainable development concept since 1972, both the ‘Johannesburg Declaration’ and the ‘2030 Agenda’ equate development to economic development. This form of development must be achieved through perpetual economic growth which, by itself, will allegedly settle environmental and social problems for the benefit of all humans. Nonetheless, the reliance on such as stark as shaky assumptions poses incredibly high risks. In fact, if the belief in the synergic relationship between different Sustainable Development Goals (which has already been starkly criticised by several scholars) will prove to be misplaced,¹³³ environmental degradation, biodiversity loss, climate change, as well as all social goals that the Agenda 2030 claims to prioritize, will be irretrievably exacerbated in the effort to pursue the panacea of eternal economic growth.

V. THE ANALYSIS RESULTS: TWO FINDINGS AND TWO REFLECTIONS ON THEIR CONSEQUENCES

After tracing back and analysing the documents making the history of concepts such as sustainability, development, and sustainable development, this research has noted that a problematic conceptualisation of both sustainable development and its underlying ontology has emerged and been normalised in international law and policy documents. This assertion arises from two primary findings, which prompt reflection upon their consequences.

First, it has been observed that, differently from sustainability documents, which emerged from the work of scholars and researchers, almost all relevant works contributing to the making and reshaping of the concepts of development and, most importantly, sustainable development, have emerged from institutional apparatuses of political nature, and crystallised in

¹³³ Hickel (n 4). The conflict between economic growth on the one hand, and environmental and social protection on the other, has been outlined in a plethora of works. See n 46.

international law and policy documents. This simple information not only showcases that international legal documents have played a pivotal role in mainstreaming and normalising sustainable development. It also suggests that its very theorization was the result of a process of mediation of political stakes and not the outcome of a scientifically driven dialogue.

Second, linked to the peculiar institutional origin of the concept of sustainable development is its lack of theoretical grounding. As a matter of fact, the creation of a politically acceptable narrative on sustainable development has been prioritised over considerations about its adherence to material reality. As this study pointed out, the concept of sustainable development, while progressively downplaying the centrality of the environmental dimension, has always been anchored to the assumption that a somewhat environmentally-sound economic development, declined in terms of global and perpetual economic growth, will lead to a progressive solution to environmental problems, as well as to the eradication of poverty. Nonetheless, the assumption that perpetual and global economic growth can be driver of both environmental and social recovery has poor theoretical basis, and it has been starkly criticized by several scholars and research institutions.¹³⁴

Therefore, instead of reflecting the findings of ‘best available scientific knowledge’,¹³⁵ the concept of sustainable development seems to legitimise, justify, and normalise the currently growth-oriented economic system serving the economic and political interests of dominant international actors. In fact, with its persistent depiction of economic growth as necessary for improving both social wellbeing and environmental protection, the sustainable development ontology seems to be instrumental for the

¹³⁴ *Supra* n 46.

¹³⁵ The Preamble of the Paris Agreement (2015) states that the ‘response to the urgent threat of climate change’ needs to be based on ‘best available scientific knowledge’.

mystification of what the UN Special Rapporteur on extreme poverty De Schutter calls ‘the ideology of growthism’.¹³⁶

It follows that that the concept of sustainable development is built on shaky grounds, and this generates, by itself, two main consequences. First, the normalisation of its assumptions in international law documents, by imposing its underlying ontology, precludes relevant actors (i.e. policymakers, judicial institutions, NGOs, enterprises, scholars, etc.) from grasping the existing tensions between the wide range of environmental, social, and economic interests in place. As a consequence, it prevents not only the adoption, but even the active search for those balancing instruments over which it would be necessary to rely in order to make political, judicial, and economic choices in a sustainability-oriented system. Second, despite being an heir to the concept of development, ‘sustainable development’ has to a large extent substituted the sustainability concept, and it has led several either *façade* or genuine environmentalist subjects towards the, at best theoretically weak if not fallacious, path of green growth pursuit and SDGs achievement. Should for this reason be deduced that the sustainability concept has irretrievably succumbed to the sustainable development one?

VI. THE DEFINITIVE OVERTHROW OF SUSTAINABILITY ON BEHALF OF SUSTAINABLE DEVELOPMENT?

In the author’s view, the sustainability paradigm did not go extinct, and it was not completely absorbed by the sustainable development concept, despite the auspices of the (sustainable) development proponents. Indeed, insights from hard sciences,¹³⁷ while being largely ignored by legislators and

¹³⁶ De Schutter (n 46) 1.

¹³⁷ Will Steffen, Katherine Richardson, Johan Rockström, Sarah Cornell, Ingo Fetzer, Elena Bennett, Reinette Biggs, Stephen Carpenter, Wim De Vries, Cynthia De Wit, Carl Folke, Dieter Gerten, Jens Heinke, Georgina Mace, Linn Persson, Veerabhadran Ramanathan, Belinda Reyers, ‘Planetary Boundaries: Guiding Human

policymakers, continue underscoring the importance of maintaining an ecosystem-approach, they highlight the insurmountable limits posed to human action by the very existence of Planetary Boundaries, prove the impossibility of reconciling environmental protection with the paradigm of infinite economic growth, and ultimately manifest the existence (and resistance) of a sustainability paradigm which is alternative to the sustainable development one.

Furthermore, legal scholarship has not been completely impermeable to the sustainability push coming from the realm of scientific research. Indeed, while Bosselmann, already in 2009, argued in favour of a ‘sustainability principle’, which shall be based on the centrality of the ecological dimension,¹³⁸ Ross discussed about ‘ecological sustainability’, that is alternative to ‘the early interpretations of sustainable development [which] fail to address either the fact that there are limits to the earth’s resilience or our cultural and moral failure to curb our consumption’.¹³⁹ The idea of grounding legal regimes on ‘systems-based ecological boundaries’ is also the core tenet of ecological law.¹⁴⁰ This thriving discipline, initiated by scholars such as Garver, Anker, and Maloney, draws from the insights of ecological

Development on a Changing Planet’ [2015] 347 *Science* 736; Linn Persson, Bethanie Carney Almroth, Christopher Collins, Sarah Cornell, Cynthia de Wit, Miriam L. Diamond, Peter Fantke, Martin Hassellöv, Matthew MacLeod, Morten Ryberg, Peter Jørgensen, Patricia Villarrubia-Gómez, Zhanyun Wang, Michael Zwicky Hauschild, ‘Outside the Safe Operating Space of the Planetary Boundary for Novel Entities’ (2013) 110 *PNAS* 6348; William Clark, ‘Sustainability Science: A Room of Its Own’ (2007) 104 *PNAS* 19300; Paul Crutzen and Eugene Stoermer, ‘The “Anthropocene”’ (2000) 41 *Global Change Newsletter* 17.

¹³⁸ Bosselmann (n 4).

¹³⁹ Andrea Ross, ‘Modern Interpretations of Sustainable Development’ (2009) 36 *Journal of Law and Society* 33.

¹⁴⁰ Geoffrey Garver, ‘The Rule of Ecological Law: The Legal Complement to Degrowth Economics’ [2013] 5 *Sustainability* 317.

economics. It emphasizes the ‘primacy of ecological integrity’ and underlines that ‘global ecological limits constrain the economic and social spheres’.¹⁴¹

Afterwards, it was Chiti to identify ‘sustainability of ecosystems’ as one of the goals which should be introduced at the EU level for the realization of the European Green Deal. As the scholar points out, however, such a change in the EU framework is potentially problematic as it opens the room for conflicts between ‘sustainable development, on the one hand, [and] ecological primacy, on the other’.¹⁴² Finally, Kotzé and Adelman reflected upon the possibility of mainstreaming the concept of ‘*buen vivir*’, i.e. ‘an indigenous onto-epistemology that could offer an alternative to sustainable development’ by substituting developmental universalistic attitude with polycentrism, anthropocentrism with biocentrism, and Cartesian social-nature dualism with a deification of *Pachamama* (i.e. Mother Earth).¹⁴³

Despite the variety of names and shapes under which the abovementioned concepts materialised, they all embody what might be called a ‘pure sustainability’ paradigm. This paradigm, being alternative to sustainable development and based on a scientifically grounded ontology, acknowledges the impossibility to decouple economic growth from environmental degradation, the unnecessary to pursue perpetual global economic growth in order to satisfy basic human needs, and coherently puts ecological primacy as the central element of any policy which has the potential to affect the natural environment. The ‘pure sustainability’ paradigm, to be reinforced through further theorisation in scholarly works, might play a role in the process of substitution of the sustainable development concept. Indeed, it might lead the action of public regulators in the formation of new laws and policies, it could inspire the work of courts

¹⁴¹ *ibid* 319. See, *inter alia*, Kirsten Anker, Peter D. Burdon, Geoffrey Garver, Michelle Maloney, Carla Sbert, *From Environmental to Ecological Law* (Routledge 2021).

¹⁴² Chiti (n 120) 18.

¹⁴³ Kotzé, Adelman (n 7) 239.

while formalizing standardized judicial instrument, and it might give rise to the establishment of a pure sustainability principle.

It would be naïve to disregard the difficulty that the mainstreaming of the pure sustainability paradigm would imply, especially if one considers that the sustainability discourse has traditionally been disregarded by political stakeholders. Nevertheless, if this has historically been the rule, as advocating for pure sustainability has long been politically inconvenient (since it implied high costs for present generations with the benefit of future generations), this might no longer be the case. Indeed, it may be time to understand that yesterday's tomorrow is today. What has always been referred to as the future generation which will pay the cost of unwise (in)actions is the currently young generation, i.e. the generation of those who will likely be alive in 2100 and will directly suffer, among the other things, the consequences of living in a World populated by over 10 billion people, whose seas may have fifty times more microplastics than nowadays, in which 27% of vertebrate biodiversity got lost, and where global average temperatures are 2.7°C above the pre-industrial level.¹⁴⁴ Day by day, the cost of inaction goes higher, as well as the benefits of action, even when referred to the short-term. This might make the call into question of the sustainable development concept politically acceptable and could lead to the emergence of legal documents

¹⁴⁴ Max Roser, Lucas Rodés-Guirao, 'Future Population Growth' (2019) *Our World in Data* <<https://ourworldindata.org/future-population-growth#licence>> accessed 1 May 2023; World Economic Forum, 'Ocean plastic pollution threatens marine extinction says new study' (2022) <<https://www.weforum.org/agenda/2022/02/extinction-threat-ocean-plastic-pollution/>> accessed 20 April 2023; European Commission, Joint Research Centre 'Ecosystems might lose 27% of vertebrate diversity by 2100' (2022) <https://joint-research-centre.ec.europa.eu/jrc-news/ecosystems-might-lose-27-vertebrate-diversity-2100-2022-12-16_en> accessed 20 April 2023; Alves Bruna, 'Global warming projections by 2100, by scenario' (2023) <<https://www.statista.com/statistics/1278800/global-temperature-increase-by-scenario/#:~:text=Based%20on%20policies%20and%20actions,2.7%20degrees%20Celsius%20in%202100>> accessed 19 April 2023.

finally relying on a pure sustainability paradigm. In this context, there will be huge room for law and governance scholars to investigate over the best ways for defining, mainstreaming, and operationalizing the pure sustainability paradigm.

**CONFLICTING CLAIMS:
THE INTERESTS OF STATES IN CULTURAL PROPERTY AND THE RIGHTS
OF INDIVIDUALS AT THE EUROPEAN COURT OF HUMAN RIGHTS**

Kaleigh Campbell *

The European Convention on Human Rights (ECHR) does not contain a dedicated right to own, alter, use, or acquire cultural property. However, the European Court of Human Rights (ECtHR) has heard multiple cases that directly consider these issues. This article taxonomizes these cases into five categories. The first four categories deal with violations of Article 1 of Protocol 1, protecting the rights of individuals to peacefully enjoy their possessions. The fifth group of cases deals with violations of Article 10, which protects the right to freedom of expression. This article then examines the jurisprudence of the ECtHR to establish if the ECtHR recognizes cultural property as being distinct from regular property, if this recognition impacts its decision-making process and, correspondingly, how the ECtHR mediates the intersection of the rights of individuals and the interests of states to cultural property. These examinations support the arguments that the ECtHR does and should continue to recognize cultural property and account for its unique nature in its decision-making process. However, this article also demonstrates that the ECtHR considers the value of cultural property far less in cases dealing with violations of Article 10. In terms of balancing interests and rights, this analysis supports two conclusions. Firstly, in cases concerning the right to peacefully enjoy property, the ECtHR adopts a balanced approach. Secondly, in cases dealing with the right to freedom of expression, the ECtHR has upheld individuals' rights to freedom of expression over state interests in protecting cultural property.

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I. INTERSECTING INTERESTS AND RIGHTS IN CONFLICTING CLAIMS

In John Merryman's seminal article *Two Ways of Thinking About Cultural Property*, he contends that cultural property can be thought of as either 'components of a common human culture' or as part of a 'national cultural heritage.'¹ In evaluating these conceptions, Merryman identifies that these perspectives can be found in existing international cultural heritage law.² Notwithstanding the fact that his conceptualizations were fundamental to the scholarship, his dichotomous characterization has come into question.³ The criticisms of Merryman's approach are grounded in the belief that there are more than two ways of thinking about cultural property. One such way that Merryman neglected to acknowledge, and that this article emphasizes, is cultural property as property that is privately owned or valued by individuals or communities. In acknowledging this third way of thinking about cultural property, it becomes apparent that there is not just an

¹ John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80:4 *American Journal of International Law* 831, 831-832.

² In 'Two Ways of Thinking About Cultural Property,' Merryman identifies that the 'cultural nationalism' is exemplified in the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. He categorizes the *1970 UNESCO Convention* as such because the *1970 Convention* grants states a 'special interest' in cultural property, implies that cultural property has a national character regardless of its location or ownership and 'legitimizes national export controls and demands for the repatriation of cultural property.' Merryman further argues that 'cultural internationalism' is exemplified in the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* as it adopts the view that cultural property, whatever its state of origin or current location, is a component of 'a common human culture.'

³ For a recent commentary on Merryman's conceptualizations of cultural property, see Alexander A Bauer, 'New Ways of Thinking About Cultural Property' (2007) 31:3 *Fordham International Law Journal* 690; Lucas Lixinski, 'A Third Way of Thinking about Cultural Property' (2019) 44:2 *Brooklyn Journal of International Law* 563.

intersection between national and international interests in cultural property but also between these interests and the rights of individuals.

The intersection between individual rights and state interests has been discussed to a certain extent in the context of international cultural heritage law, specifically the *1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Property*.⁴ However, the *1995 UNIDROIT Convention* only applies to stolen and illegally exported cultural property; it does not govern other key issues often associated with the intersection of individual rights and state interests, such as the expropriation of property. In addition, there is a dearth of scholarship on this intersection in regional international law, especially in the European Court of Human Rights (ECtHR) context. This article addresses these issues by closely considering the jurisprudence of the ECtHR in which the Court has had to navigate the conflicting rights of individuals and the interests of states to protect, own, alter, use, and acquire cultural property.⁵ The Court's decisions on these issues involving cultural property are taxonomized into five categories. These categories consist of:

⁴ See, e.g. Nina R Lenzner, 'The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention' (1994) 15:3 *University of Pennsylvania Journal of International Business Law* 469; Lyndel Prott, *Commentary on the 1995 UNIDROIT Convention* (2nd edn, Institute of Law and Art 2001); Irini A Stamatoudi, 'Restitution of Stolen and Illegally Exported Cultural Property Under the UNIDROIT Convention' in Paul LC Torremans (ed), *Legal Convergence in the Enlarged Europe of the New Millennium* (Brill 2000).

⁵ In accordance with Article 33 of the European Convention on Human Rights (ECHR), the European Court of Human Rights can also hear inter-state cases that are brought by the High Contracting Parties. Though the Court has jurisdiction over inter-state cases, they account for less than 1% of the judgements issued. To date, there have been no inter-state cases involving cultural property. However, there are circumstances under which a High Contracting Party (HCP) could bring a claim against another HCP for a breach of the ECHR relating to cultural property. For instance, HCP A could theoretically bring a claim under Article 1 of Protocol 1

1. Cases dealing with states' pre-emptive rights to cultural property,
2. State expropriation of cultural property without compensation,
3. State expropriation of cultural property with compensation,
4. State-imposed impediments to the peaceful enjoyment of cultural property, and
5. Cases dealing with the intersection between state protection of cultural property and the right to freedom of expression.

By examining these categories, the article reveals that the ECtHR recognizes cultural property as being distinct from non-cultural property and that the recognition influences how the Court balances the rights of individuals and the interests of states. The examinations support the arguments that the ECtHR does and should continue to recognize cultural property as distinct from non-cultural property and that the recognition of cultural property as such influences various stages of its decision-making process. However, the article also demonstrates that the ECtHR considers the value of cultural property far less in cases dealing with violations of Article 10. In terms of balancing interests and rights, this analysis supports the conclusion that in cases concerning the right to peaceful enjoyment of property, the ECtHR adopts a balanced approach to mediating these intersecting claims. Further, in cases dealing with freedom of expression, the ECtHR has upheld individuals' rights over state interests.

The support provided for these arguments is presented as follows: Part II defines cultural property and briefly describes its value to individuals, communities, and states. Further, it identifies the challenge that cultural

against HCP B for interfering with a citizen of HCP A's right to the peaceful enjoyment of property. For a complete discussion on inter-state cases at the European Court of Human Rights, see Isabella Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill 2018).

property presents to traditional conceptions of property. In doing so, it illustrates why the ECtHR should recognize cultural property as distinct from traditional property. Part III examines the jurisprudence of the ECtHR that deals with cultural property and claims between individuals and states. The first four categories of cases deal with violations of Article 1 of Protocol 1 to the ECHR, which protects an individual's right to peaceful enjoyment of their possessions. The fifth group of cases deals with violations of Article 10 of the ECHR, which protects the right to freedom of expression. Each examination describes the facts and evaluates how the ECtHR balances claims. Part IV synthesizes the findings from the analyses and presents concluding remarks.

II. DISTINGUISHING CULTURAL PROPERTY

In legal scholarship, it is widely noted that the owner of property has the right to exclude others from using or interfering with their use of that property.⁶ In fact, Thomas M Merrill went so far as to claim that the right to exclude is '*sine qua non* of property law.'⁷ However, the nature of certain categories of property brings this belief into question. Cultural property is one of such categories. There are numerous academic and legal definitions

⁶ Jerry L Anderson, 'Comparative Perspectives on Property Rights: The Right to Exclude' (2006) 54:4 *Journal of Legal Education* 539; Shyamkrishna Balganes, 'Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions' (2008) 31:2 *Harvard Journal of Law & Public Policy* 593; Jace C Gatewood, 'The Evolution of the Right to Exclude – More than a Property Right, A Privacy Right' (2013) 32:3 *Mississippi College Law Review* 448; Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58:3 *University of Toronto Law Journal* 275; Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77:4 *Nebraska Law Review* 730; James Penner, *The Idea of Property Law* (Oxford University Press 2000) 71; James Y Stern, '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).

⁷ Merrill (n 6) 730.

of cultural property.⁸ In this article, cultural property is defined as tangible property that, for religious or secular grounds, is of importance for archeology, prehistory, history, literature, art, or science.⁹ This definition incorporates a wide scope of property that includes traditional art objects, such as paintings, as well as antiquities and property relating to history, like manuscripts and buildings.

There are several reasons why cultural property challenges the basic assumption that the owner of property has the right to exclude. The root of this challenge lies in the intangible value of cultural property. This intangible value of cultural property is grounded in the relationship between people and the relevant property. Patty Gerstenblith identifies that the intangible value of cultural property is established through different relationships to the property, which can include living amongst the property, being the descendants of those who created the property, or having religious or cultural affinity to the property.¹⁰ For instance, if one turns to the familiar case of the Elgin Marbles, it has long been argued that the Elgin Marbles

⁸ See, e.g. Yahaya Ahmad, 'The Scope and Definitions of Heritage: From Tangible to Intangible' (2006) 12:3 *International Journal of Heritage Studies* 292; Janet Blake, 'On Defining the Cultural Heritage' (2000) 49:1 *International & Comparative Law Quarterly* 61; Tatiana Flessas, 'Cultural Property Defined, and Redefined as Nietzschean Aphorism' (2003) 24:3 *Cardozo Law Review* 1067; Manlio Frigo, 'Cultural Property v Cultural Heritage: A "Battle of Concepts" in International Law' (2004) 86:854 *International Review of the Red Cross* 367; Lyndel V Prott and Patrick J O'Keefe, "Cultural Heritage' or 'Cultural Property'" (1992) 1:2 *International Journal of Cultural Property* 307; Marilena Vecco, 'A Definition of Cultural Heritage: From the Tangible to the Intangible' (2010) 11:3 *Journal of Cultural Heritage* 321.

⁹ This is adapted from the definition provided in Article 1 of the *1970 UNESCO Convention* which has received widespread accession and ratification from Council of Europe Members.

¹⁰ Patty Gerstenblith, 'Protecting Cultural Heritage: The Ties Between People and Places' in James Cuno and Thomas G Weiss (eds), *Cultural Heritage and Mass Atrocities* (Getty Publications 2022) 364.

ought to be returned to Greece because of the cultural and relational value of the Elgin Marbles to Greece and Greek people.¹¹

The recognition of the intangible value of cultural property is not limited to the academic sphere. In fact, the most significant challenge to the traditional notion of property arises from the international realization and codification of the right of non-owners, such as the Greek people in the case mentioned above, to access and enjoy cultural property.¹² This right is comprised in large part of the ‘right of individuals and communities to, *inter alia*, know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage’.¹³ The existence of these rights present a compelling legal dilemma whereby cultural property is often owned by private parties or

¹¹ Robert Browning, ‘The Case for the Return of the Parthenon Marbles’ (1984) 36:1 *Museum International* 38; Timothy Caron, ‘The Application of International Law, Morality, and Public Policy to the Elgin Marble Dispute’ (2017) 3:1 *Baku State University Law Review* 1; Emanuel J Comino, ‘The Case for the Return of the Parthenon Marbles’ in Elizabeth Close, George Couvalis, George Frazis, Maria Palaktsoglou, Michael Tsianikas (eds), *Greek Research in Australia: Proceedings of the Seventh Biennial International Conference of Greek Studies, Flinders University, June 2007* (Flinders University 2009); Christopher Hitchens, *The Parthenon Marble: The Case for Reunification* (Verso Books 2016); Elizabeth Marlowe, ‘From Exceptionalism to Solidarity: The Rhetoric of the Case for the Parthenon Sculptures Return’ (2022) 41 *Cardozo Arts & Entertainment Law Journal* 125; Michael J Reppas II, ‘The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the Elgin Marbles Must be Returned to Greece’ (1999) 9 *Fordham Intellectual Property, Media & Entertainment Law Journal* 911; Geoffrey Robertson, *Who Owns History?: Elgin’s Loot and the Case for Returning Plundered Treasures* (Biteback Publishing 2020).

¹² In a landmark report, the United Nations Human Rights Council’s Independent Expert in the Field of Cultural Rights investigated the extent to which this right is codified in international human rights law and affirmed that this right does indeed have a legal basis in several codified international rights, including the right to take part in cultural life, and the right of members of minorities to enjoy their own culture.

¹³ Farida Shaheed, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed* (A/HRC/17/38) para 79.

states, yet access to or use of such property is a protected right of a particular group, state, and in some instances, humankind. In such cases, upholding the traditional right of an owner renders it ostensible that another's right to access to and enjoyment of cultural property will be violated. In recognition of the relational value of cultural property, this article adopts the position that the ECtHR, as an institution designed to protect human rights, must recognize and cogitate on the unique nature of cultural property in its balancing and decision-making process.

III. INTERSECTIONS AND CONFLICTS IN THE CASE LAW OF THE ECtHR

Part I identifies that there is no provision in the ECHR devoted to individuals' rights to access and enjoy cultural property, nor a provision that considers state interests in protecting cultural property. Notwithstanding this, the ECtHR has had to mediate numerous cases that deal with these issues. In the absence of a dedicated provision, two articles have been invoked in these cases. These are Article 1 of Protocol 1 and Article 10 of the ECHR. This section introduces these articles, describes the rights protected under them, and examines how the Court has interpreted their invocation in cases involving cultural property.

1. Claims Under Article 1 of Protocol 1: Cultural Property and Peaceful Enjoyment

Article 1 of Protocol 1 to the ECHR is the most invoked provision at the ECtHR in claims involving cultural property. This is because Article 1 of Protocol 1 is the sole provision in the Convention dedicated specifically to the right to property.¹⁴ Article 1(1) of Protocol 1 codifies the right that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions' and that '[n]o one shall be deprived of his possessions except in

¹⁴ Article 14 of the ECHR and Article 1 of Protocol 12 to the ECHR protect individuals and states from discrimination on various grounds, including property, but do not specifically deal with the right to possess property.

the public interest and subject to the conditions provided for by law and by the general principles of international law.¹⁵ Article 1(2) further stipulates that Article 1(1) shall not ‘impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...’¹⁶

In cases involving cultural property, the ECtHR applies a successive approach to determine if Article 1 of Protocol 1 has been violated. First, the Court assesses if the protected right has been interfered with.¹⁷ In all cases examined in this article, the Court accepts that an interference has occurred. Second, the Court determines if the interference was justified, which requires that (1) it was permitted by law and (2) that the interference pursued a legitimate aim in the public interest. In all cases, the Court found that the interferences were prescribed by law. This is because the states in question often have domestic legislation governing the trade and ownership of cultural property, conservation requirements, or general protective measures. Further, to determine if it pursued a legitimate aim, the Court largely refers to its existing case law. As later revealed, the Court adopts the view that the protection of cultural property is a legitimate aim for interfering with an individual’s right.

Lastly, the ECtHR must judge if the interference was proportionate by way of applying the fair balance test.¹⁸ This objective test considers the balance ‘between the demands of the general interests of the community and the

¹⁵ *European Convention on Human Rights* art 1(1) p1 [ECHR]. At the time of writing in April 2024, all 46 members of the Council of Europe were signatories to the Convention, following the cessation of Russia’s membership in 2022.

¹⁶ *ibid* art 1(2) p1.

¹⁷ ECtHR, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property* (31 August 2022) <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 3 June 2023, 19 [Guide on Article 1].

¹⁸ *ibid* 30.

requirements of the protection of the individual's fundamental rights.¹⁹ In this phase, the Court must evaluate and weigh numerous facts of the case to rule if a balance has been struck. If a balance is not achieved, the state will be said to have violated the applicant's right under Article 1 of Protocol 1. Throughout Part III.1 A-D, this article examines the invocation of Article 1 of Protocol 1 across four kinds of cases involving cultural property. The categories are **(A)** cases involving pre-emptive rights to purchase cultural property, **(B)** cases considering expropriation of cultural property without compensation, **(C)** cases considering expropriation of cultural property with compensation, and **(D)** cases that deal with state-imposed impediments to the peaceful enjoyment of cultural property. The following sub-sections analyze the approach to Article 1 Protocol 1 claims in the categories identified above.

A. Pre-Emptive Rights to Purchase Cultural Property

To protect cultural property and increase its accessibility to the public, states often enact domestic legislation. This legislation aims to regulate the sale of cultural property and ensure that property of significance remains within certain geographic boundaries. The latter enables the property in question to be accessible to those with strong cultural connections to it.²⁰ One mechanism used to achieve these goals is the provision of pre-emptive rights to states. In this context, a pre-emptive right grants the state the power 'to acquire a certain object to the detriment of another making an identical

¹⁹ In this analysis, the Court weighs numerous factors and is not restricted by a bounded list.

²⁰ For example, see Marie Cornu, 'Museum Pre-Emption Rights Under French Law' (2006) 11:2 *Art Antiquity and Law* 155; Marie-Sophie de Clippele and Lucie Lambrecht, 'Art Law & Balances. Increased Protection of Cultural Heritage Law vs. Private Ownership: Towards Clash or Balance' (2015) 22:2-3 *International Journal of Cultural Property* 259.

claim'.²¹ For instance, as the cases below demonstrate, even if a private seller secures a purchaser, they must inform the state of the potential sale, and it is at that point the state can interfere and exercise its pre-emptive right. In doing so, the state can override the arranged sale and purchase the property from the seller. Hitherto, the ECtHR has heard three cases in which a state has exercised its pre-emptive rights: *Beyeler v Italy*,²² *Buonomo Gärber and Others v Italy*,²³ and *Ruspoli Morenes v Spain*.²⁴ In each of these cases, the Court recognized cultural property, however, it was not consistent in upholding either individual rights or state interests.

The first case that the ECtHR heard on this issue was *Beyeler* which was centred around Vincent van Gogh's painting *Portrait of a Young Peasant*. The painting was declared 'a work of historical and artistic interest' by the Italian government, which granted the Italian Ministry of Cultural Heritage a right of pre-emption over the work. In 1977, the painting was sold to the applicant through an intermediary who did not disclose that they were acting in such a capacity. The seller notified the Italian government of the sale, and the Ministry declared that the painting was not of sufficient interest for it to exercise its pre-emptive right to purchase. In 1988, Beyeler sought to sell the painting and informed the Italian government. In response, the Ministry claimed that they were not informed that he was the owner and wanted to exercise its pre-emptive right to purchase the painting at the 1977 sale price. Beyeler contended that selling the painting at such a price would violate his right under Article 1 of Protocol 1.

The Court agreed that an interference occurred and had been permitted by law. Next, the ECtHR sought to determine if the aim of the interference was legitimate. Significantly, following the Court's recognition of the painting

²¹ José Luís Bonifácio Ramos, 'Preference or Pre-Emption Right for Cultural Property' (2022) 15:2 Journal of Politics and Law 32.

²² App No 33202/96 (ECtHR, 5 January 2000) [*Beyeler*].

²³ App No 63783/00 (ECtHR, 20 May 2003) [*Buonomo Gärber*].

²⁴ App No 28979/07 (ECtHR, 28 June 2011) [*Ruspoli Morenes*].

as cultural property, for the first time, it found that ‘the control by [Italy] of the market in the works of art is a legitimate aim for the purposes of protecting a country’s cultural and artistic heritage.’²⁵ The Court went even further and identified that, even though the painting had not been created by an Italian artist, ‘in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture.’²⁶ In deeming the aim of the interference legitimate, the Court then assessed if a fair balance had been struck and held that the disproportionate burden on the applicant meant that a fair balance had not been struck. This examination of *Beyeler* is pertinent for two reasons. Firstly, it was the first time that the Court recognized the intangible value of cultural property and factored it into its decision-making process. Secondly, it illustrates that even when state protection occurs in the general interest, under certain circumstances, the Court is willing to uphold an individual’s right.

The second case that the Court heard involving a pre-emptive right was *Buonomo Gärber* which concerned the ownership of the medieval Firmiano Castle. Like the painting in *Beyeler*, the Castle was classified by the Italian government as a building of historical and artistic interest. In 1994, the Castle was in the process of being sold to a private company. The Autonomous Province of Bolzano–Alto Adige proceeded to exercise its right of pre-emption and made payment available to the applicants. The applicants claimed that after the Province’s acquisition, the Firmiano Castle was not used for cultural purposes. Consequently, the applicants sought to have the pre-emption decree nullified. The Administrative Court dismissed the action, and on appeal, the Council of the State affirmed the Administrative Court’s holding.

²⁵ *Beyeler* (n 22) para 112.

²⁶ *ibid* para 113.

In response, the applicants brought their claim to the ECtHR. In its assessment of *Buonomo Gärber*, the Court acknowledged that its examination must be done in light of the standards set in *Beyeler*. The Court accepted that an interference had occurred and, once again, that it was lawful. In evaluating if the Province's exercising of its pre-emptive right was done in the legitimate public interest, the ECtHR followed its logic in *Beyeler*. It thus held that government control over a market in the interest of protecting cultural property constituted a legitimate aim. It then moved to consider if a fair balance had been struck. Despite the cultural significance of the Firmiano Castle, the Court reasoned that because the applicants were compensated sufficiently in a timely manner, the expropriation struck a fair balance, and the applicants were not disproportionately burdened. These factors resulted in the finding that no violation of Article 1 of Protocol 1 occurred. Like *Beyeler*, this case illustrates the Court's recognition of cultural property and demonstrates how it is factored into the legitimate aim phase of the three-step test. Further, *Buonomo Gärber* reveals that the outcome of pre-emptive right cases is largely dependent on the fair balance test.

Nearly a decade after *Beyeler* and *Buonomo Gärber*, the ECtHR heard *Ruspoli Morenes*. In this case, the applicants sought to sell Francisco de Goya's painting *La Condesa de Chinchón* and correspondingly notified the Spanish government of their intention. Upon receiving notice, Spain decided to exercise its right of pre-emption and purchase the painting. The applicants transferred the painting, but Spain failed to pay the required installments on time. The applicants thus pursued domestic legal avenues, and while awaiting results, the Spanish government paid the original price of the painting. The Spanish National Court later dismissed their claims because of a Spanish law that permitted the government to pay installments over an extended period. The applicants appealed, but the Supreme Court upheld the decision.

Following the Supreme Court's decision, the applicants submitted a claim to the ECtHR. Specifically, the applicants complained that the price of the

painting should have been revised to account for accruing interest due to the late payments. The Court commenced by finding that an interference had occurred and that it had indeed been lawful. In assessing if Spain's aim was legitimate, the ECtHR drew on its justifications in *Beyeler* and *Buonomo Gärber* and affirmed its previous holdings that the protection of cultural property is a legitimate aim. Lastly, the Court had to decide if a fair balance had been struck. It relied on Spain's National Historic Heritage Act and held that the absence of a price adjustment provision rendered it unreasonable that the applicants could have expected a price adjustment to occur. Therefore, the Court concluded that a fair balance had been struck and no violation had occurred. This case is significant as it further affirms the Court's recognition of cultural property and its importance in the legitimate aim phase of its decision-making process, as well as the substantial bearing of the fair balance test in determining the outcome of the case.

Overall, from the Court's jurisprudence in this area, three conclusions can be drawn about the Court's handling of pre-emptive rights cases. First, it shows that the Court recognizes cultural property and that this recognition has a subsequent impact on the Court's assessment of whether the interference pursued a legitimate aim. Second, the Court confidently asserted and endorsed in all three cases that the state protection of cultural property is a legitimate aim. Third, the examination revealed that the Court relies heavily on the fair balance test to balance individuals' rights to property and states' interest in exercising their pre-emptive rights in pursuit of protecting cultural property.

B. Expropriation of Cultural Property without Compensation

The second group of cases are those in which cultural property has been expropriated by states without compensation. To date, the ECtHR has heard two cases that confront this issue: *Catholic Archdiocese of Alba Iulia v*

*Romania*²⁷ and *Waldemar Nowakowski v Poland*.²⁸ In both cases, the ECtHR accepted that an interference occurred. However, it did not consistently find that the expropriation served a legitimate aim. Nonetheless, the Court found that a violation occurred and, in its determination, factored in the intangible value of the cultural property in both cases. In *Catholic Archdiocese of Alba Iulia* this consideration occurred in the Court's determination of a legitimate aim, and in *Waldemar Nowakowski*, this consideration factored into its application of the fair balance test.

In *Catholic Archdiocese of Alba Iulia*, the proceedings concerned the Batthyaneum Library, established in 1798 by Bishop Ignác Batthyány to hold his expansive collection of rare books.²⁹ The Library was later donated to the Catholic Church of Alba Iulia. In 1961, a judgment was issued that the Library belonged to the Romanian state. In 1998, this judgment was overridden by an emergency order requiring the return of the Library and its contents.³⁰ However, neither the Library nor its contents had been returned at the time that the claim to the ECtHR had been filed. The applicant alleged that their Article 1 of Protocol 1 right had been violated.

²⁷ App No 33003/03 (ECtHR, 25 September 2012) [*Catholic Archdiocese of Alba Iulia*].

²⁸ App No 55167/11 (ECtHR, 22 July 2014) [*Waldemar Nowakowski*].

²⁹ Elena Tîrziman, 'The Special Collections of the National Library of Romania' (2014) 4:38 *Śląski Kwartalnik Naukowy* 10, 10; Elena Tîrziman, 'Library: It's Basic Role in the Protection and Valorization of Written Documentary Heritage' (2020) 7 *Revue des Sciences Humaines* 3, 11-12.

³⁰ The Batthyaneum Library is in Transylvania, Romania. Transylvania belonged to Hungary prior to the First World War but was transferred to Romania in 1920. As a result of the Hungarian ownership, much of Romania's Hungarian minority resides in this area. In 1947, under the leadership of the Communist Party, Romania ordered the nationalization of several assets in Transylvania. In 1947, much of Transylvania was owned by the Hungarian churches, including the Library. For a discussion of minority churches and property rights in Romania, see Beáta Huszka, 'Restitutio Interruptus: Minority Churches, Property Rights and Europeanisation in Romania' (2023) 75:9 *Europe-Asia Studies* 1453.

On the merits, the Court found that Romania did not have a legitimate justification for neglecting to return the Library and was in violation of the emergency restitution order.³¹ In its determination as to whether Romania was pursuing a legitimate aim in withholding the Library, the Court explicitly referred to the Library as heritage and emphasized that the significant cultural value of the Library exacerbated the illegitimacy of Romania's withholding of the Library. In finding that Romania was not pursuing a legitimate aim, the ECtHR unanimously decided that there had been a violation of the applicant's right under Article 1 of Protocol 1.

The subsequent case the Court heard concerning expropriation without compensation was *Waldemar Nowakowski*. The case of *Waldemar Nowakowski* concerned a significant collection of antique arms and weapons that the applicant, a decorated veteran, had collected. Over 200 objects were confiscated from Nowakowski in accordance with Polish law. The permanent confiscation of 171 objects was later ordered by a district court and upheld by a regional court. In response, the applicant brought his case to ECtHR and argued the confiscation violated Article 1 of Protocol 1.

Following the Court's determination that the confiscation constituted an interference and occurred in pursuit of a legitimate aim, it then applied the fair balance test. In doing so, the Court recognized the object as cultural property and factored it into its adjudication of the fair balance test. First, the Court identified that the domestic courts had been aware of the historical value of the objects and emphasized that the non-pecuniary value played a role in their determinations. However, the Court emphasized that despite recognizing the cultural value to the public, the domestic courts failed to consider the non-pecuniary value of the collection to the applicant. In consideration of the non-pecuniary value to the applicant and his personal circumstances, the Court found that a fair balance had not occurred and that his right had been violated.

³¹ *Catholic Archdiocese of Alba Iulia* (n 27) para 96.

This holding is consistent with its earlier decision in *Catholic Archdiocese of Alba Iulia*. However, these conclusions were drawn at differing steps of the Court's deliberations. While the fair balance test was applied in *Waldemar Nowakowski*, the Court did not use the formal test in *Catholic Archdiocese of Alba Iulia*. Instead, the ECtHR came to the outright conclusion at the legitimate aim phase that because of the significant cultural value of the Library, Romania's withholding did not occur in pursuit of a legitimate aim. Though it is less pronounced than in pre-emptive rights cases, in these two cases, the ECtHR recognizes the distinct value of cultural property at various points in its decision-making process, including the legitimate aim phase and the fair balance test.

C. Expropriation of Cultural Property with Compensation

In contrast to the cases in the previous group, this section analyzes cases in which the applicants have (to varying extents) been compensated for the expropriation of a cultural object. The ECtHR has decided on three cases that have pointedly dealt with this issue: *Debelianovi v Bulgaria*,³² *Kozacioğlu v Turkey*,³³ and *Bogdel v Lithuania*.³⁴

The first case was *Debelianovi v Bulgaria*, which is regarded as one of the most significant cases involving cultural property that the Court has heard.³⁵ This case concerns a home purchased by the applicants' father in Koprivshtitsa. The home was expropriated by the Bulgarian government, and economic compensation, as well as an alternative house, were given to the applicants' father in return. The expropriated home was later transformed into a museum and designated as cultural property. In 1992, new legislation permitting the restitution of expropriated cultural property was passed.

³² App No 61951/00 (ECtHR, 27 November 2008) [*Debelianovi*].

³³ App No 2334/03 (ECtHR, 19 February 2009) [*Kozacioğlu*].

³⁴ App No 41248/06 (ECtHR, 23 November 2013) [*Bogdel*].

³⁵ Rita Matulionyte, 'Cultural Heritage and Public Interest versus Private Rights: A Struggle for a Balanced Approach in Lithuania' (2014) 5:2 *Journal on Legal and Economic Issues of Central Europe* 70.

Consequently, the applicants applied for the expropriation to be annulled. However, a domestic court ruled that the conditions for restitution were not present. This decision was appealed and deemed inadmissible by the Bulgarian Supreme Court. In 1994, Bulgaria announced a moratorium on restitution of expropriated cultural property and provided that the moratorium would end upon the adoption of new laws pertaining to cultural property.

Following additional legal attempts, the applicant submitted their case to the ECtHR and argued that the indefinite moratorium on restitution constituted a violation of their right under Article 1 of Protocol 1. The Court accepted that the indefinite moratorium amounted to an interference and found that it had been prescribed by law. The Court then examined whether the aim of the interference was legitimate. Like in *Beyeler*, the Court recognized the building as cultural property and reasoned that because the objective of the interference was to protect cultural property, it was legitimate. In its deliberation, the Court affirmed that the legitimacy of this aim is derived from the ‘essential value’ of cultural property to society.³⁶ Finally, the Court had to determine if a fair balance had been struck. To do so, the Court evaluated the interests of both parties and cited several reasons to support its conclusion that the interference did not strike a fair balance. Ultimately, the Court decided unanimously that a violation had occurred on the grounds that a fair balance had not been struck. Akin to previously discussed cases, *Debelianovi* further affirms that the Court recognizes cultural property as distinct and incorporates this consideration into its decision-making process. This is exemplified in the Court’s evaluation of the legitimacy of the state’s aim.

The second case that the Court heard on this issue was *Kozacioğlu*. In *Kozacioğlu*, the applicant purchased a building of architectural significance, which was later classified as a ‘cultural asset’ in accordance with Turkish

³⁶ *Debelianovi* (n 32) para 54.

law.³⁷ The applicant's building was thus included in a project that sought to protect the urban environment.³⁸ In 2000, an executive order was issued for the expropriation of the applicant's building for the purpose of the remediation project. Following a series of contested valuations, the Turkish government paid Kozacıoğlu for his building, but the valuation did not account for the historical value of the building. This was the direct result of Turkish law prohibiting economic valuations to account for the non-pecuniary value of cultural property.

In 2002, Kozacıoğlu filed a complaint to the ECtHR that his rights under Article 1 of Protocol 1 had been interfered with and that there had been a violation of his right protected by Article 6.³⁹ The Court's Grand Chamber accepted that an interference had occurred and that the interference was lawful. In recognition of the building as cultural property, the Grand Chamber affirmed its previous holdings that the protection of cultural property is a legitimate aim that justifies a state expropriating a cultural object. Lastly, the Grand Chamber had to examine if the deprivation of Kozacıoğlu's building struck a fair balance. The Court found that the valuation process imposed by Turkey, which prohibits the consideration of historical and architectural features, grants the state a clear and unfair advantage over individual owners of cultural property. The Court further stipulated that in cases involving the acquisition of cultural property, proportionality can only be achieved if 'to a reasonable degree' the specific features of a building are accounted for in the valuation process.⁴⁰ Since these features were not accounted for in the valuation of Kozacıoğlu's building, the Grand Chamber found that there had been a violation of Article 1 of Protocol 1.

³⁷ *Kozacıoğlu* (n 33) para 11.

³⁸ *ibid* paras 9-11.

³⁹ Article 6 of the ECHR entitles everyone the right 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

⁴⁰ *Kozacıoğlu* (n 33) para 72.

The holding in *Kozacıoğlu* is important for four reasons. First, it follows the previous jurisprudence in which the Court recognized cultural property at the legitimate aim phase. Second, it once again demonstrates how the case outcome hangs in the balance of the Court's application of the fair balance test. Third, it establishes a new standard for the valuation of cultural property in the jurisprudence of the ECtHR. Fourth, prior to *Kozacıoğlu*, there were no cases involving cultural property had reached the Grand Chamber, the highest level of the ECtHR.

The most recent case that the Court has dealt with regarding the expropriation of cultural property with compensation is *Bogdel v Lithuania*. *Bogdel* concerned a plot of land leased to the applicants to build a kiosk. The plot of land was located at the entrance of the Trakai castle in the old town and was inherited by Bogdel's heirs, who obtained permission to convert the kiosk into a café. Following the conversion, an investigation prompted by public commentaries revealed that Bogdel had purchased the plot in violation of numerous domestic laws aimed at protecting national heritage. For this reason, the Trakai District Council annulled its decision to approve the conversion and increase the size of the plot. Following suit, the Head of the Vilnius County Administration requested that the Trakai District Court annul the original sale of the plot to Bogdel. The District Court found that because the authorities had sold the plot in breach of domestic law, the original agreement of sale was null and void.

In response, the applicants contended that the deprivation of their land violated their rights under Article 1 of Protocol 1. The Court found that an interference had occurred and that it was lawful. It then went on to determine if the interference occurred in the public interest. As established in previous cases, the ECtHR held that the protection of cultural heritage constitutes a legitimate aim. Lastly, it assessed if a fair balance was struck between the rights of the applicants and the general interest of the public. Predicated on the fact that the applicants had been compensated for the expropriation of the plot of land and its contents, the Court found that a fair

balance had been struck. The ECtHR then concluded that no violation of Article 1 of Protocol 1 had occurred. Following the pattern established in previous cases, in *Bogdel*, the main recognition of cultural property occurred at the legitimate aim phase, and the outcome of the case relied on the fair balance test.

Similar to cases involving pre-emptive rights, the comparison of *Debelianovi*, *Kozacioğlu*, and *Bogdel* reveals that the ECtHR does not consistently prioritize the interest of states or the rights of individuals when cultural property is expropriated with compensation. The variance in the Court's balancing is predominantly attributed to the fair balance test. This was first evident in *Debelianovi*, in which the Court specifically noted that the interference constituted a violation because of its failure to respect a fair balance between the general interest and the rights of the applicants.

In addition to affirming the significant role of the fair balance test, another principle that can be extrapolated from *Debelianovi* and *Kozacioğlu* is that, in order for applicants' rights to surmount those of the state, mere compensation does not suffice on its own. Instead, these two cases render it clear that for the Court to deem that a fair balance has occurred, sufficient compensation must be paid to the applicants based on the value of the expropriated property. This finding is further corroborated in *Bogdel*, in which the Court relied on the fair balance test to determine if a violation had occurred and concluded that a fair balance had been struck on the grounds that the applicants had been fairly compensated for the expropriated property.

D. Impediments to the Peaceful Enjoyment of Cultural Property

The final group of Article 1 of Protocol 1 cases are those in which there have been state-imposed impediments to the peaceful enjoyment of cultural property. Thus far, the Court has addressed four of these cases, all of which are examined in this section. These cases are further subdivided into two categories: those that deal with impediments to developing land and those

that deal more generally with impediments to the use of property. The first three cases fall into the former, and the last case into the latter.

The first case the ECtHR heard on state-imposed development restrictions was *Potomska and Potomski v Poland*.⁴¹ This case concerned land purchased by the applicants. The land, the site of a Jewish Cemetery, was added to the register of historic monuments after the applicants had completed the purchase. Consequently, the applicants could not develop without a permit. The applicants consulted with authorities, and upon the rejection of their request to have the plot expropriated with compensation, the applicants brought their case to the ECtHR. The applicants alleged that the development restrictions constituted a violation of their Article 1 of Protocol 1 rights. The government did not dispute the fact that an interference had occurred.

Thus, the Court began its application of the three-step test. It held that the interference was lawful and once again recognized cultural property in determining the legitimacy of the government's aim. The Court held that the Polish government's objective of protecting cultural heritage constituted a legitimate aim and further affirmed that where cultural heritage issues are concerned, states have 'a wide margin of discretion as to what is 'in accordance with the general interest.'"⁴² The Court then had to determine if a fair balance occurred. The Court's evaluation of this considered various factors, including the length of the interference, the uncertainty of the situation, and whether the restrictive measures were in place prior to the applicant's acquisition of the property. In this case, the Court adopted the position that if the protective measures had not been in place prior to the applicant's acquisition, a fair balance could not have been struck. In weighing all of the factors, the Court held that applicants 'had to bear an excessive burden' and found that Poland had violated the applicants' rights

⁴¹ App No 33949/05 (ECtHR, 29 March 2011) [*Potomska and Potomski*].

⁴² *ibid* para 67.

protected under Article 1 of Protocol 1.⁴³ As in pre-emptive rights cases, *Potomska and Potomski* illustrates that when the Court recognizes cultural property and factors it into the legitimate aim phase of the three-step test, it has an impact on the Court's decision-making process.

Soon after *Potomska and Potomski*, the ECtHR heard *Matas v Croatia*, which dealt with a similar set of facts.⁴⁴ In *Matas*, the applicant bought an unrestricted building from the government. The Split Department for the Conservation of Cultural Heritage ordered that 'preventative protective measures' were to be applied to the applicant's building while the cultural value of the applicant's building was being evaluated.⁴⁵ The 'preventative protective measures' were in place for over seven years when it was declared that the applicant's building should not, in fact, 'be registered as an object of cultural heritage'.⁴⁶ *Matas* lodged several domestic legal complaints, all of which were dismissed. *Matas* then applied to the ECtHR, claiming a violation of his Article 1 of Protocol 1 right. The Croatian government admitted its interference with *Matas*' right which resulted in the Court commencing its three-step test to determine if a violation had occurred.

The Court found that the interference had been prescribed by law, and later, citing its decision in *Potomska and Potomski*, the ECtHR accepted that the building constituted cultural property and maintained that the protection of cultural heritage was a legitimate aim. The Court then went to assess if a fair balance was struck. Like in *Potomska and Potomski*, the Court considered various factors and adopted the view that a fair balance could not have been achieved if the state-imposed measures did not exist at the time of acquisition. Thus, the Court found that a violation had indeed occurred. Similar to *Potomska and Potomski*, *Matas* affirms that the Court's recognition of cultural property, specifically when determining if the interference

⁴³ *Potomska and Potomski* (n 41) paras 78-80.

⁴⁴ App No 40581/12 (ECtHR, 4 October 2016) [*Matas*].

⁴⁵ *ibid* para 7.

⁴⁶ *ibid* para 15.

occurred in pursuit of a legitimate aim, has an impact on its decision-making process.

The most recent case on this point is *Kristiana Ltd. v Lithuania*.⁴⁷ In 2000, Kristina Ltd. purchased buildings previously used for military purposes in Curonian Spit National Park. Curonian National Park was listed on UNESCO's Tentative World Heritage List at the time of purchase and was later inscribed on the UNESCO World Heritage List. Following their purchase, Kristina Ltd. made several requests to alter and restore the buildings, all of which were dismissed on the grounds that the buildings were in a special protected area. In 2006, Lithuanian authorities declared that the buildings would need to be demolished as part of an environmental remediation project in the National Park. Kristina Ltd. continued to submit planning requests following the 2006 declaration, but once again, they were all rejected. In response, Kristina Ltd. pursued various legal channels, all of which resulted in their cases being dismissed.

Consequently, Kristina Ltd. applied to the ECtHR, claiming that its rights under Article 1 of Protocol 1 had been violated. The Court agreed that a violation had occurred and determined that it was prescribed in accordance with domestic law. Like in *Potomska and Potomski*, the Court recognized the National Park as immovable cultural property and found that the conservation of cultural heritage was a legitimate aim. Moreover, the Court highlighted that the government's aim was further legitimized by the designation of the surrounding environment as a UNESCO World Heritage Site. Lastly, the Court had to determine if a fair balance had been struck. In doing so, it focused on two key factors. First, whether Kristina Ltd. 'knew – or should have reasonably known – about the restrictions on the property, or possible future restrictions.'⁴⁸ Second, the Court considered if Kristina Ltd. had sufficient opportunities in front of domestic authorities to challenge the restrictions on their buildings. The Court found that because of the

⁴⁷ App No 36183/13 (ECtHR, 6 February 2018) [*Kristiana Ltd.*].

⁴⁸ *ibid* para 108.

surrounding land's designation as a Tentative World Heritage Site and a National Park at the time of purchase it was reasonable that the applicant knew about potential restrictions on the property. Therefore, a fair balance had indeed been struck, and no violation had occurred. The Court's resolution in *Kristina Ltd.* further substantiates the argument that the Court's recognition of cultural property has an impact on its decision-making process.

Overall, in cases dealing with state-imported restrictions on development, the Court has come to differing conclusions on whether the rights of individuals or the interest of the state in protecting cultural property ought to be upheld. This is evident in the comparison of the Court's holdings in *Potomska and Potomski* and *Kristiana Ltd.* In the former, the Court upheld the rights of the applicants, and in the latter, the interest of the state. Akin to the findings in the previous sections, a closer evaluation of these three cases reveals that the Court came to these determinations because of the application of the fair balance test. In *Potomska and Potomski* and *Matas*, the Court established that if the state had not imposed measures prior to the applicants' acquisition of the land, a fair balance had not been struck. Contrarily, in *Kristiana Ltd.*, the Court established that if the applicants were aware of the cultural significance of the land or property and the state-imposed restrictions pre-dated the applicant's purchase, it is probable that the Court would find that a fair balance had been achieved.

In contrast to the previous cases, the final case, *Albert Fürst von Thurn und Taxis v Germany*, does not concern development restrictions.⁴⁹ Instead, *Fürst von Thurn und Taxis* deals with the peaceful use of property impeded by laws enacted by the Nazi government that were in force after the end of the Nazi era. In *Fürst von Thurn und Taxis*, the applicant owned a historically significant library and archives. In 1943, the collection was placed under the administration supervision of the German state. In accordance with a law enacted by the Nazi government, Fürst von Thurn und Taxis, as well as his

⁴⁹ App No 26367/10 (ECtHR, 14 May 2013) [*Fürst von Thurn und Taxis*].

successors, were required to obtain permission before altering or moving anything in the collection. In 2002, Fürst von Thurn und Taxis commenced legal proceedings with the German court to have the restrictions lifted. His attempts were unsuccessful because the lower courts and the Federal Constitutional Court held that the Nazi-era restrictions had been imposed in the public interest.

In 2010, Fürst von Thurn und Taxis applied to the ECtHR, claiming that his right under Article 1 of Protocol 1 had been violated. The Court accepted that an interference had occurred and had been prescribed by law. Fürst von Thurn und Taxis did not dispute that the interference pursued a legitimate aim, and the Court moved to determine if a fair balance was struck between the general interest in protecting cultural property and the applicant's right to the peaceful enjoyment of property. The Court gave three reasons to justify its conclusion that a fair balance had been achieved. First, the Court found it was reasonable that cultural property is subject to the supervision of state professionals. Second, the Court reasoned that since being placed under supervision, the applicant had never been denied authorization to make use of his property. Thus, the Court did not accept that Fürst von Thurn und Taxis had been 'completely deprived' of making use of his property. Third, it found that the interference was reasonable considering the significance of the property that Fürst von Thurn und Taxis was expected to keep them in 'orderly condition,' irrespective of the cost of doing so. Correspondingly, the Court held that there had been no violation of Article 1 of Protocol 1.

Though *Albert Fürst von Thurn und Taxis* is the sole case where the Court addresses this issue, two conclusions can be drawn regarding its handling of these conflicting claims. The first conclusion being that the fair balance test, as in most cases, has a fundamental role in determining the outcome of the case. Secondly, similar to *Kristiana Ltd.*, the holding in *Albert Fürst von Thurn und Taxis* suggests that if in such cases there are pre-existing state-imposed measures aimed at protecting the cultural property in question, the Court is

likely to find that a fair balance has been struck and that a violation of Article 1 of Protocol 1 has not occurred.

2. Claims Under Article 10: Cultural Property and Freedom of Expression

In addition to hearing claims under Article 1 of Protocol 1, the ECtHR has also heard cases under Article 10 of the ECHR that address the balancing of individual rights and state interests. Article 10 broadly protects an individual's right to freedom of expression and provides that the right to freedom of expression includes 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.⁵⁰ Further, Article 10(2) limits the exercises of the freedoms protected under Article 10(1) by stipulating that such rights 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, (...) for the protection of the reputation or rights of others.'⁵¹

In order to determine if Article 10 has been violated, the ECtHR must first determine if the applicant's right has been subject to interference. If an interference has occurred, the Court operationalizes a three-step test to evaluate if it amounts to a violation of the applicant's right.⁵² The first two steps are identical to the test for Article 1 of Protocol 1 cases. However, the third step differs in that it requires the Court to evaluate if the interference is necessary in a democratic society.⁵³ To determine this, the Court has to assess if the interference was 'proportionate to the legitimate aim pursued.'⁵⁴ This determination is grounded upon 'all the circumstances of the case' and

⁵⁰ ECHR (n 15) art 10(1).

⁵¹ ECHR (n 15) art 10(2).

⁵² ECtHR, *Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression* (31 August 2022) <https://www.echr.coe.int/documents/guide_art_10_eng.pdf> accessed 8 June 2023, 20.

⁵³ *ibid* 23.

⁵⁴ *ibid*.

is predicated on the Court's case law.⁵⁵ Examples of criteria that the Court might use to make this determination are the nature and severity of the sanctions and whether the interference happened using the least restrictive measure.⁵⁶ In sum, if the interference is lawful, legitimate, and necessary in a democratic society, it will be said that a violation did not occur and vice versa. Though the text of Article 10 has been critiqued for its complexity and the ECtHR's incohesive interpretations of Article 10 have been well documented, in cases involving cultural property, the Court's understanding and application of Article 10 has been consistent.⁵⁷ The subsequent section demonstrates this claim.

The relationship between cultural property and the right to freedom of expression is fraught with complicated questions of ethics, politics, human rights, and historical interpretation.⁵⁸ The tensions arising from these questions have been turned from words to actions around the globe as countless monuments have been either defaced or destroyed. In fact, historian Peter Monteath identified that 'the destruction of images and monuments – tends to come in waves, and we are in the middle of a tsunami.'⁵⁹ In the midst of this tsunami, the ECtHR has heard three cases in which it had to mediate individuals' rights to deface public monuments by

⁵⁵ *ibid.*

⁵⁶ *ibid.* 24.

⁵⁷ Jean-Francois Flauss, 'The European Court of Human Rights and the Freedom of Expression' (2009) 84:3 *Indiana Law Journal* 809.

⁵⁸ For a synthesis of the debates surrounding the preservation of contentious monuments, see Anna Brus, Michi Knecht, and Martin Zillinger, 'Iconoclasm and the Restitution Debate' (2020) 10:3 *HAU: Journal of Ethnographic Theory* 707.

⁵⁹ Peter Monteath, 'Iconoclasm – The Destruction of Images and Monuments – Tend to Come in Waves, and We are in the Middle of a Tsunami' (*The Adelaide Review*, 17 August 2020) <<https://www.adelaidereview.com.au/latest/opinion/2020/08/17/the-shock-of-the-old/>> accessed 9 June 2023.

way of freedom of expression and states' interest in protecting cultural property.

The first time that the ECtHR dealt with this issue was *Murat Vural v Turkey*.⁶⁰ *Murat Vural* involved a series of statues of Atatürk, the founder and first president of the Republic of Turkey. In 2005, the applicant poured paint on a statue of Atatürk. In the following months, he also poured paint on four additional statues of Atatürk in various locations. Upon his arrest, the applicant told the authorities that he carried out his actions because 'he resented Atatürk and (...) expressed his resentment by pouring paint on the statues.'⁶¹ In consequence, the applicant was charged with violating the Law on Offences Committed Against Atatürk, which provides special protections for property memorializing Atatürk. He was later found guilty and sentenced to 22 years in prison. Following the introduction of a new domestic law concerning the execution of prison sentences, he was released from prison.

Notwithstanding his release, the applicant submitted to the ECtHR claiming that several of his rights under the ECHR had been violated, one being his right to freedom of expression under Article 10(1). In response to his claims, Turkey argued the applicant had committed several acts of vandalism and further maintained that it was not the applicant's expression of opinion that was penalized but rather the means through which he expressed his opinion of Atatürk that were punishable. This argument led the Court to affirm that 'Article 10 (...) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.'⁶² Subsequently, the Court held that the applicant's act was indeed protected under Article 10(1) and his right had been interfered with by the Turkish government.

⁶⁰ App No 9540/07 (ECtHR, 21 October 2015) [*Murat Vural*].

⁶¹ *ibid* para 10.

⁶² *ibid* para 44.

In assessing if the interference was justified, the Court had to determine if it was prescribed by law, done in pursuit of a legitimate aim, and necessary in a democratic society. Without dispute, the Court found that the interference had been prescribed by law and that the interference pursued the legitimate aim of protecting the rights and reputation of others, specifically Atatürk. In terms of the democratic necessity of the interference, the Court concluded that ‘the penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore not ‘necessary in a democratic society.’⁶³ As a result of these findings, the ECtHR concluded that Murat Vural’s right to freedom of expression protected under Article 10 of the ECHR had been violated by the Turkish government.

The second case in which the ECtHR had to mediate the relevant conflicting claims was *Handzhiyski v Bulgaria*.⁶⁴ *Handzhiyski* was centered around a statute of Dimitar Blagoev, the founder of the Bulgarian Social Democratic Party. In 2013, the statute of Blagoev was defaced by an unknown person and ‘painted in red and white to resemble Santa Claus.’⁶⁵ The applicant later went to the statue and attached a ‘Santa Claus cap on its head and a red sack at its feet.’⁶⁶ The applicant was arrested on suspicion of violating Article 325(1) of the Bulgarian Criminal Code, which prohibits hooliganism. The applicant claimed that his act was not a violation of the Criminal Code and argued that his modifications to the statute were within his constitutional right to ‘express his protest against the government.’⁶⁷ The Blagoevgrad District Court held that the applicant was guilty, and he was fined. The applicant appealed this decision, but the Blagoevgrad Regional Court affirmed the District Court’s holding.

⁶³ *Murat Vural* (n 60) para 68.

⁶⁴ App No 10783/14 (ECtHR, 6 April 2021) [*Handzhiyski*].

⁶⁵ *ibid* para 7.

⁶⁶ *ibid* para 10.

⁶⁷ *ibid* para 10.

In response to the Regional Court's holding, the applicant brought his case to the ECtHR. The applicant claimed that his rights guaranteed under Article 10 of the ECHR had been violated. In contrast, the Bulgarian government argued that 'the applicant had been found guilty for desecrating a monument rather than for ... voicing his political views.'⁶⁸ In its assessment of the merits, the ECtHR found that the applicant's conviction was based on his act of expression within the meaning of Article 10(1) of the ECHR. Consequently, the Court did not question that his conviction constituted an interference with his right to freedom of expression.

The ECtHR then applied the three-step test. While the Court readily accepted that the interference was prescribed by law and done in pursuit of a legitimate aim, it had to engage in a more sophisticated analysis to establish if the interference constituted a democratic necessity. In doing so, the ECtHR highlighted that '[p]ublic monuments are frequently physically unique and form part of a society's cultural heritage.'⁶⁹ The Court went on to state that '[m]easures (...) designed to dissuade acts, which can destroy [public monuments] (...) may therefore be regarded as "necessary in a democratic society", however legitimate the motives which may have inspired such acts.'⁷⁰ In contempt of this, the Court posited that since Handzhiyski did not inflict permanent damage to the monument, it was not a democratic necessity to penalize his actions. Therefore, the ECtHR held that a breach of Article 10 had occurred.

The third case that the Court has dealt with on this point is *Genov and Sarbinska v Bulgaria*.⁷¹ The case of *Genov and Sarbinska* concerns the defacing of a 'partisan' monument in front of the office of the Bulgarian Socialist Party.⁷² In 2013, the applicants, Genov and Sarbinska, were arrested for

⁶⁸ *ibid* para 44.

⁶⁹ *Handzhiyski* (n 64) para 53.

⁷⁰ *ibid*.

⁷¹ App No 52358/15 (ECtHR, 30 November 2021) [*Genov and Sarbinska*].

⁷² *ibid* paras 13-17.

spray-painting the partisan monument. At trial, the District Court held that the painting of the monument was a clear ‘non-verbal expression of political views,’ which was the right of the applicants under Article 10 of the ECHR and Article 39 of the Bulgarian Constitution. Subsequently, Bulgaria appealed the decision. On appeal, the Sofia City Court found that the applicants were guilty and that Bulgaria’s response did not amount to a violation of the ECHR or the Bulgarian Criminal Code. In lieu of criminal penalties, the City Court fined the applicants the minimum fixed amount.

In response to the City Court’s holding, the applicants brought the case to the ECtHR, alleging that Bulgaria had violated their rights under Article 10. The Court accepted that the arrest and fining of the applicants had amounted to an interference with their rights and thus had to evaluate if the interference was prescribed by law and necessary for a democratic society. Though the ECtHR found that the interference was prescribed by law and pursued with a legitimate aim, it found that the interference was unnecessary for a democratic society. The Court recognized that while ‘the general public have an interest in preserving cultural heritage (...) there [was], however, no indication that the interference sought to protect specifically the property rights of the monument’s owner.’⁷³ Since the spray-painting of the monument was categorized as a visual impairment that could be reversed, the ECtHR concluded that Bulgaria had unjustly interfered with the applicant’s rights under Article 10.

In comparison to the cases brought under Article 1 of Protocol 1, the position of the Court on the mediation of individuals’ rights to freedom of expression and the state’s interest in protecting cultural property is clear. This is apparent from the Court’s holdings in *Murat Vural*, *Handzhiyski*, and *Genov and Sarbinska*. In all of these cases, the Court found that a violation of the ECHR had occurred due to states interfering with individuals’ rights to freedom of expression. In all of these cases, these violations occurred as a result of the relevant states attempting to protect their cultural heritage by

⁷³ *ibid* paras 68–69.

way of penalization. In consideration of this, it is imperative to further evaluate the reasoning of the Court and the process by which it came to these conclusions.

As identified above, once the Court has established that an interference has occurred, it applies a three-step test to establish if it constitutes a violation of Article 10. Similar to the findings in pre-emptive rights cases, in all three of the cases, the Court did not dispute that the interferences were prescribed by law. Further, in all three cases, the ECtHR accepted that the interferences occurred in pursuit of a legitimate aim. Therefore, the determination of the violation relied on the Court's decision at the third stage of the test, which evaluates whether the interference was necessary for a democratic society. While the Court did not discuss this in detail in *Murat Vural*, in *Handzhiyski* and *Genov and Sarbinska*, the Court grappled with the idea that the protection of cultural property was in the general interest of the public. Despite this consideration, in both cases, the Court found that the penalties imposed for the protection of cultural property were not necessary for a democratic society. It did, however, find that the right to freedom of expression was, thus illustrating the Court's prioritization of individual rights over the state protection of cultural property in these cases.

IV. CONCLUSIONS

This article has highlighted how cultural property challenges one of the basic assumptions of property law: that the owner of property has the right to exclude others from interfering or using the property in question. This challenge arises from the notion that cultural property has a unique relational or intangible value, which, in some instances, grants rights to non-owners, including states, communities, and humankind as a whole.⁷⁴ In the absence

⁷⁴ Janet E Blake, *International Cultural Heritage Law* (Oxford University Press 2015); Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press 2014); John H Merryman, 'The Public Interest in Cultural Property'

of a provision dedicated to cultural property, this article has sought to ameliorate the state of knowledge on the ECtHR's approach to dealing with cases involving cultural property. This article has put forth the contention that the ECtHR, as an international institution dedicated to the safeguarding of human rights, does and should continue considering the non-pecuniary value of cultural property in its decision-making process. A principal example is the Court's explicit recognition of the 'essential value' of cultural property to society in Article 1 of Protocol 1 cases.⁷⁵

Additionally, this article has comprehensively examined the ECtHR's approach to mediating the intersections and conflicts between the rights of individuals and the interests of states to protect, own, alter, use, and acquire cultural property to determine if the Court's recognition of the value of cultural property has a bearing on its decision-making process. Specifically, this article has analyzed two intersections. These are the intersection between the rights of individuals to the peaceful enjoyment of property and states' interest in the protection of cultural property and the intersection between the rights of individuals to freedom of expression and states' interest in the protection of cultural property. The findings from these analyses can be synthesized as follows.

1. Claims Under Article 1 of Protocol 1

Part III.1 examined four categories of cases under Article 1 of Protocol 1. First, it evaluated cases involving the pre-emptive right of states to purchase cultural property. In these cases, the Court recognized cultural property as distinct in determining whether the interference pursued a legitimate aim.

(1989) 77 California Law Review 339; Salvador Muñoz Viñas, *A Theory of Cultural Property: Beyond the Intangible* (Routledge 2023); Prott and O'Keefe (n 8); Helaine Silverman and D Fairchild Ruggles, *Cultural Heritage and Human Rights* (Springer 2007). *Contra* Eric A Posner, 'the International Protection of Cultural Property: Some Skeptical Observations' (2007) 8:1 Chicago Journal of International Law 213.

⁷⁵ See, for example, *Debelianov* (n 32) at para 54, *Bogdel* (n 34) para 60 and *Kozacıoğlu* (n 33) para 54.

This recognition is often used to justify state interference with individual rights. The assessment of these cases also highlighted the significance of the fair balance test and its impact on case outcomes.

Second, it looked at cases where cultural property was expropriated by the state without compensation. In these cases, the Court clearly and consistently upheld the rights of individuals to receive compensation for expropriated cultural property. Like in pre-emptive rights cases, the Court incorporated its recognition of the value of cultural property in determining whether such interferences pursued a legitimate aim.

Third, it analyzed cases where cultural property was expropriated by the state with compensation. These cases affirmed the significance of the fair balance test and identified that for a fair balance to occur, the compensation given to the applicant must account for the non-pecuniary value of the cultural object. The Court's direct recognition of the intangible value of the cultural property in these cases serves as key evidence to advance the main argument in this article.

Fourth, this article investigated four cases concerning state-imposed impediments to the peaceful enjoyment of property. In cases that dealt with development restrictions, the Court explicitly acknowledged the 'essential value' of cultural property to society and its development. This acknowledgment was made in the Court's assessment of the legitimacy of the aim and was emphasized in the application of the fair balance test. Finally, in the case concerning a general impediment to the peaceful enjoyment of property, the Court's recognition of the intangible value of the cultural property took place during the legitimate aim phase and was used to justify state interference with the applicant's right.

2. Claims Under Article 10

Part III.2 examined the Court's approach to cases dealing with the intersection of individuals' rights to freedom of expression and the state protection of cultural property. Dissimilar to the Court's variation of

holdings across the other categories, in all three cases involving this intersection, the Court upheld the applicant's right to freedom of speech over the state's interest in protecting cultural property.

Though the Court was consistent in its balancing of rights, it did not consistently recognize the intangible value of the cultural property in question. In fact, in *Murat Vural*, the Court did not even note that the statute in question was cultural property. Since *Murat Vural*, it can be inferred that the Court has become increasingly willing to recognize cultural property as distinct in Article 10 claims. Two aspects of the Court's deliberation in *Handzhiyski* and *Genov and Sarbinska* support this. First, unlike in *Murat Vural*, the Court recognized and defined the monuments in *Handzhiyski* and *Genov and Sarbinska* as cultural property. Second, the designation of the monuments as cultural property resulted in the Court factoring the cultural value of the monuments in its assessment of whether it was necessary in a democratic society.

3. Concluding Remarks

This article has demonstrated that although it is clear the ECtHR was not created with the intention of mediating intersecting and conflicting claims involving cultural property, the Court has been presented with several cases in which it has had to do so. Remarkably, the findings in this article reveal that irrespective of the absence of a dedicated provision, the ECtHR is willing to recognize cultural property as distinct from general property in its decision-making process. This is particularly true in claims under Article 1 of Protocol 1 and is becoming apparent in claims under Article 10. Moreover, this article illustrates that the Court's recognition of cultural property as such has a noticeable impact on its decision-making process and balancing of state interests and individual rights. In terms of balancing interests and rights, this analysis supports the conclusion that in cases concerning the right to peaceful enjoyment of property, the ECtHR adopts

a balanced approach. Contrastingly, in cases dealing with the right to freedom of expression, the ECtHR has upheld individuals' rights to freedom of expression over state interests in protecting cultural property.

**THE RULE OF THE LEAST IMPERFECT: A REVIEW OF DESPOINA
MANTZARI, COURTS, REGULATORS, AND THE SCRUTINY OF ECONOMIC
EVIDENCE
(OUP 2022)**

Selçukhan Ünekbaş* 

In this timely book, Dr. Despoina Mantzari tackles a prominent question in regulation: how do generalist courts handle the decisions of specialist decision-makers?¹ Markets require decision-makers to engage with expert knowledge. While regulators are institutionally structured to handle this task, the same cannot be said about generalist courts. As Mantzari puts it, there is an ‘epistemic asymmetry’ between courts and regulators in tackling complex economic matters.² As such, judicial control presents many challenges for the error-correction function of adjudication. The book exposes and addresses these challenges by analyzing regulatory decisions and the corresponding systems of judicial review in the utilities sector. The book essentially claims that ‘the least imperfect’ institution should interpret and decide on economic evidence, turning the question into one of relative institutional competencies. Unless a specialist court is established, expert agencies are generally better-situated (‘less imperfect’) to analyze economic evidence. In such a setting, generalist courts ensure legality of decisions by assessing whether regulators conform to principles of rationality or due process.

Mantzari’s book is an impressive display of interdisciplinary legal research. The author should be commended for skillfully combining insights from

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¹ Despoina Mantzari, *Courts, Regulators, and the Scrutiny of Economic Evidence* (OUP 2022).

² *Ibid* 187.

philosophy, economics, and political theory with legal analysis. Indeed, the book achieves more than what it advertises. Even though Mantzari only looks at UK and US law, her arguments can be extended to EU law as well. Similarly, although she deals with utilities regulation, readers of competition or public procurement law will find much relevant information within the book's pages.

Comprised of eight chapters, Mantzari's book comprehensively unpacks the use of economic evidence in regulation. After a brief introduction, in Chapter II we understand what is so special about economic evidence. After all, courts engage with information from many disciplines. Mantzari argues that economics occupies a special place in regulation and adjudication because of two reasons. First, whilst courts struggle with all types of expert knowledge, economic evidence is special because it serves both a descriptive and a prescriptive purpose. Unlike natural sciences, economics not only explains, but it also advocates.³ Second, this 'dual dimension' of economics is known to influence regulatory design. Many regulations are built upon economic insights, including utilities, antitrust, and even criminal law. For instance, in competition law proceedings, economic evidence gives substance to open-ended legal provisions. Anything can be a 'restraint of trade', but what constitutes an illegal restraint of trade usually turns upon economic knowledge. This is another reason why economic evidence deserves careful attention.⁴

The next four chapters substantively address how courts and regulators examine economic evidence. An important discussion awaits readers in Chapter IV, where Mantzari challenges the oft-cited claim that regulation is a technocratic enterprise. It is true, concedes Mantzari, that regulators

³ For example, economic analysis can study the effects of minimum wage legislation on employment. This would be a descriptive analysis. However, these studies may also generate policy prescriptions, such as introducing a cap on minimum wage to curb unemployment.

⁴ Mantzari (n 1) 15.

heavily engage with economic evidence. However, the book goes deeper to expose the discretionary power of experts. Not only are regulators constrained by rationality and due process considerations (‘thin legality’), but they are also affected by institutional, ideational, and structural factors.⁵ Importantly, regulators make decisions within the context of the broad political and economic setting prevailing in their jurisdiction. These structural constraints may “[...] downplay the pursuit of economic efficiency in favor of non-economic and non-competition law values that have infused the regulatory objectives, such as that of affordability, especially when regulators exercise operational discretion”.⁶ By acknowledging that expert regulators possess significant discretion, especially in interpreting evidence, Mantzari recognizes that economic analysis is not infallible.⁷ Contrary to views that brand economic analysis as unambiguous, the book asserts that regulatory decisions cannot escape discretion and politics completely.⁸

Chapters V and VI delve deeper into the reception of economic evidence by judges via two case studies. In reviewing the US system, Mantzari describes how judicial review of economic evidence has increasingly dwindled in intensity from an intense “hard look” review into a “thin legality” assessment. The main reason for this trend is the judiciary’s belief in the relative advantages of institutional competence that regulators possess over courts, together with the system of internal checks established by agencies. By contrast, some courts, like the Competition Appeals Tribunal, have been

⁵ Mantzari (n 1) 70.

⁶ Mantzari (n 1) 87.

⁷ Alan J Devlin and Michael S Jacobs, ‘Antitrust Divergence and the Limits of Economics’ (2010) 104 *Northwestern University Law Review* 253.

⁸ Herbert Hovenkamp, ‘Antitrust Policy After Chicago’ (1985) 84 *Michigan Law Review* 214; Eleanor M Fox, ‘The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window’ (1986) 61 *New York University Law Review* 554.

established specifically with such institutional considerations in mind, which allows for a more detailed review of economic evidence.

In the UK, regulators' assessment of economic evidence is subject to 'external' checks through the court system, which features specialized tribunals.⁹ Specialist courts like the Competition Appeals Tribunal (CAT) carry out reviews not only of legality, but also of appropriateness ('merits review'). By contrast, US regulators are subject to internal reviews of legality through an administrative law judge. The US system still houses external review, but the federal courts typically defer to agencies' interpretation of economic evidence. This is because federal courts place trust in the internal review of legality the agencies go through.¹⁰ Mantzari's descriptions are useful and informative. That said, recent developments initiated by some US regulators may disturb the status quo. For example, the Federal Trade Commission (FTC) has lately adopted a more aggressive enforcement program. The current FTC leadership takes bold actions in an effort to reorient the application of antitrust law. Many enforcement actions taken by the FTC do not fit completely within the boundaries of existing law. This produces clashes with the administrative law judges. In some cases, the FTC decided to ignore or overrule the points raised by its own internal review system.¹¹ A possible consequence of this trend could be greater scrutiny by federal courts over FTC decisions in future.¹²

⁹ Mantzari (n 1) 30.

¹⁰ Ibid 38-45. US courts' deference to regulatory agencies is known as the "Chevron doctrine". See, *Chevron Inc. v. Natural Resources Defence Council* [1984] 467 U.S. 837.

¹¹ The internal review system of the FTC has already been criticized for ineffectiveness. See Maureen K Ohlhausen, 'Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?' (2016) 12(4) *Journal of Competition Law & Economics* 623.

¹² As a corollary, some scholars argue that the Supreme Court may overrule *Chevron*. See, Amy Hove, 'Supreme Court likely to discard *Chevron*' (*SCOTUS Blog*, 17 January 2024) <<https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/>> accessed 4 April 2024.

An important contribution of the book lies in its relevance to contemporary issues of regulation. One is the problem of digital markets. These markets display peculiarities that make regulation especially challenging, such as data-driven scale economies and powerful network effects resulting in winner-takes-most scenarios.¹³ Consequently, jurisdictions seeking to regulate digital markets look for alternatives to traditional regulatory tools. For example, the EU complements competition enforcement with the Digital Markets Act (DMA). The DMA entails specific rules for powerful players in digital markets (“gatekeepers”) to ensure those markets remain fair and contestable. The DMA has attracted significant commentary since its inception.¹⁴

While Mantzari addresses neither competition law nor digital markets, her book promises to enrich the discussion in both fields. The main premise of the book is illustrative. Because of epistemic asymmetries and relative advantages in institutional competence, judges often defer to agency decisions in regulation.¹⁵ That said, one area where courts can meaningfully constrain regulatory decisions is “thick legality”. This can be done, for instance, by assuring that enforcers properly respect procedural rights. Mantzari’s argument ties well with recent developments in EU competition law. Procedural due diligence in EU competition law has grown in importance. EU Courts view protecting the procedural rights of defendants

¹³ Filippo Lancieri and Patricia Sakowski, ‘Competition in Digital Markets: A Review of Expert Reports’ (2021) 26 *Stanford Journal of Law, Business & Finance* 65.

¹⁴ See, e.g., Pablo Ibanez Colomo, ‘The Draft Digital Markets Act: A Legal and Institutional Analysis’ (2021) 12 *Journal of European Competition Law & Practice* 561; Pierre Larouche and Alexandre de Streel, ‘The European Digital Markets Act: A Revolution Grounded on Traditions’ (2021) 12 *Journal of European Competition Law & Practice* 542.

¹⁵ Although there certainly have been cases where courts asserted epistemological superiority over enforcers in matters of economic expertise. For a clear exposition in EU law, see David J Gerber, ‘Courts as Economic Experts in European Merger Law’ in Hawk (ed), *International Antitrust Law and Policy* (Juris Publishing 2004).

as an appropriate intrusion into a regulator's margin of discretion. One can observe that EU judicial review functions as a procedural guarantor in competition cases. The scope of this function not only incorporates fundamental rights protection, but it also reaches substantive questions of law as well.¹⁶ For example, grounding competition enforcement on the as-efficient competitor concept is often viewed as the pinnacle of the 'more economic approach' in EU competition law. This is usually taken as the main message of the *Intel* judgment.¹⁷ But that judgment can just as easily be construed as protecting the defendants' rights of defense.¹⁸ Thus, as Mantzari argues, courts can (and do) exercise meaningful judicial review without venturing deep into economic theory.

In closing, the book identifies two challenges for the treatment of economic evidence in the future: the growing use of new economic theories and technological change. Mantzari argues that behavioral economics is poised to challenge decision-making in agencies and courts.¹⁹ Behavioral economics relaxes the rationality assumption of neoclassical economics, thereby increasing the complexity of regulatory law when used. Similarly, the shift from industrial to informational modes of economic growth is bound to introduce 'new disciplinary communities' into regulation.²⁰

¹⁶ Case C-694/20 P *Orde van Vlaamse Balies* [2022] OJ C35/6; Case C-693/20 P *Intermarché Casino Achats* ECLI:EU:C:2023:172.

¹⁷ Case C-413/14 P *Intel Corporation* ECLI:EU:C:2017:632.

¹⁸ James S Venit, 'The judgment of the European Court of Justice in *Intel v Commission*: A Procedural Answer to a Substantive Question?' (2017) 13(2) *European Competition Journal* 172.

¹⁹ See generally, Maria de Campos, *Behavioral Economics and Regulation* (Routledge 2023); James Cooper & William Kovacic, 'Behavioral economics: implications for regulatory behavior' (2012) 41 *Journal of Regulatory Economics* 41; Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin 2009).

²⁰ Mantzari (n 1) 205.

It can be argued that the two challenges are not separate, but actually represent trends feeding off each other. Accelerating technological change may require new models and theories to be explained. Similarly, to account for technological developments, regulators may need to develop new tools to measure and identify innovation. Such novelties are likely to recalibrate the reception and review of economic evidence. Mantzari's book can help address these challenges by demonstrating the limits of discretion, the importance of institutional design, and the proper reach of judicial review in complex matters.