Volume 17
Issue 2
Winter 2026

European Journal of Legal Studies

www.ejls.eui.eu

Website: https://sites.eui.eu/european-journal-of-legal-studies

Submissions

The European Journal of Legal Studies invites submissions of General Articles and New Voices Articles on a rolling basis in the fields of comparative law, European law, international law, and legal theory. The Journal is committed to the promotion of linguistic diversity and accepts submissions in any language, subject to the competence of the editorial board. The EJLS is committed to double-blind peer review. We therefore ask authors to ensure that their submissions include an anonymised version, together with a title page in a separate file containing identifying information. We invite authors to consult our Style Guide and Author Guidelines, which are available at https://sites.eui.eu/european-journal-of-legal-studies/submissions.

All submissions should be sent to: submissions.ejls@eui.eu.

Published 19 March 2026
Catalogue no.: QM-AZ-26-001-EN-N
ISSN: 1973-2937

EUI DEPARTMENT OF LAW

European Journal of Legal Studies
Vol. 17 No. 2 (Winter 2026)

Table of Contents

LAW BEYOND LINEAR PROGRESS: TRANSFORMATION, RUPTURE, AND REENGAGEMENT

Aikaterini Koinaki* and Dimitris Panousos†

I. INTRODUCTION

Editorials offer an opportunity to reflect on a given debate with respect to the contributions contained in the issue. Usually, this involves presenting each article individually, highlighting its field and its novelty or contribution to the relevant discourse. Reading the articles in this issue, however, we decided to resist this rather straightforward approach. Although the contributions span diverse areas – ranging from environmental law and international human rights to European Union (EU) law and the law of treaties – a purely descriptive overview seemed insufficient to capture what ultimately connects them: legal continuity and rupture, and how these are conducive to legal transformation.

While finalizing this issue, a recurring set of shared concerns emerged across otherwise diverse legal contexts. In its own way, each contribution interrogates how law changes when its foundational assumptions are (re-)negotiated or unsettled. Thus, instead of depicting legal development as a linear process, the articles reveal instances of disruption, re-interpretation, and re-engagement with law and legal processes. They all converge on the topic of legal transformation, which appears not as a singular event or a clearly defined directional movement, but as an ongoing process.

* Aikaterini Koinaki (ejls@eui.eu) is the Editor-in-Chief of the European Journal of Legal Studies and a PhD Researcher at the Law Department of the European University Institute. ORCID ID: 0009-0002-2780-4036.

† Dimitris Panousos (Dimitris.Panousos@eui.eu) is the outgoing Editor-in-Chief of the European Journal of Legal Studies and a PhD Researcher at the Law Department of the European University Institute. ORCID ID: 0009-0009-3455-5593.

Mindful of their common threads, we suggest reading the contributions not as unrelated interventions, but through the lens of legal transformation. Law not only upholds normative expectations but also has the power to transform social phenomena.[1] As demonstrated by the articles in this issue, legal transformation and societal change are not always linear processes. They happen at different rates, and their impact varies over time. Sometimes, their effects are evinced instantly. Other times, transformation takes longer to be seen.

Arguably, a narrative of progress accompanies or underlies scholarship exploring change and legal transformation. Whether framed as the expansion of rights,[2] the deepening of international cooperation,[3] or the gradual rationalization of governance, law has frequently been imagined as advancing along a certain trajectory. Sometimes this trajectory is coherent and expected to lead to a certain change.[4] Other times, legal progress occurs

[1] See Poul F Kjaer, 'What Is Transformative Law?' (2022) 1 European Law Open 760, 778 describing transformative law as an emerging approach in law that views law as a 'form-giving' exercise with substantial, social and temporal dimensions, extending beyond purely reactive or reflective conceptions of law.

[2] Moria Paz, 'The Illusion of Progress: Rethinking Human Rights and the Legal Regulation of Mobility' (2024) 118 American Journal of International Law Unbound 203; Robert Y. Jennings, 'The Progress of International Law' (1958) 34 British Yearbook of International Law 334.

[3] Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens 1964); Edward McWhinney et al., *From Coexistence to Cooperation: International Law and the Organization in the Post-Cold War Era* (Kluwer Academic Publishers 1991).

[4] The European Court of Human Rights (ECtHR), for example, has progressively expanded the right to private life to address technological developments. In *Case of Big Brother Watch and Others v. The United Kingdom* App Nos 58170/13, 62322/14 and 24960/15 (ECtHR, 25 May 2021), the ECtHR held that the UK's interception of communications and data acquisitions of intelligence from service providers violated the applicants' right to privacy because they lacked sufficient safeguards. This decision reflects the ongoing adaptation of the meaning of privacy to new

in a more exceptional, instantaneous, or unexpected way.[5] Recent developments across multiple legal domains increasingly challenge the assumption of progress following a coherent trajectory. For instance, can the story of gradual law reform fit comfortably with ecological crises that question anthropocentric legal categories?[6]

Even the most common practice in academia, that of describing the law, plays a role in the process of legal transformation within society.[7] Attempting to break away from a mere description of the law, the authors in this issue trace legal transformation, the factors that facilitate or hinder it, the different actors involved in its processes, and the conditions under which it occurs. They do so by examining different instances of legal continuity and rupture, questioning the narratives of law's linear progress within societies, and examining how contemporary legal orders are (re)shaped through dialogue, negotiation, critique, or rupture. Ultimately, they invite readers to reflect on the evolving ways in which law responds to change, uncertainty, contestation, and authority.

Hence, the contributions assembled in this issue suggest that contemporary legal transformation is better understood as non-linear and plural. Change emerges through contestation as much as through consensus, re-

surveillance technologies, illustrating a coherent trajectory in response to evolving contexts.

[5] See, for instance, Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law' (1965) 23 Indiana Journal of International Law 36

[6] See generally Peter D. Burdon and James Martel (eds), *The Routledge Handbook of Law and the Anthropocene* (Routledge 2023) which frames the Anthropocene as a systemic crisis challenging conventional legal categories and linear narratives of legal progress. See also, *Obligations of States in Respect of Climate Change, Advisory Opinion, I.C.J. Reports 2025* emphasizing the responsibility of States to mitigate climate change, illustrating how ecological crises demand accelerated and transformative legal responses.

[7] Vincent Forray, *Décrire le droit… et le transformer: essai sur la décriture du droit* (Dalloz 2017).

interpretation, innovation, and sometimes withdrawal or resistance rather than integration. Taken together, the articles of the issue trace different modalities through which law adapts when its own promises of universality and stability are called into question.

II. Transforming the Foundations of Legal Subjectivity

The issue opens with the contribution of Giada Giacomini and Francesca Ceresa Gastaldo, who address transformation at the most foundational level, questioning who or what may be recognized as a subject of law. Their article on 'Critical Approaches to Rights of Nature' revisits a framework often presented as a paradigmatic response to the ecological crisis. Instead of accepting prevailing narratives that frame the recognition of nature as a legal subject to be inherently eco-centric or decolonial, the authors critically examine the conceptual tensions and political assumptions underlying such claims.

The authors critique the Rights of Nature framework, questioning the universality and emancipatory character that the relevant discourse assigns to it. Giacomini and Gastaldo challenge the normative assumptions surrounding Rights of Nature and examine the contested relationship between the latter and indigenous worldviews. Instead of merely celebrating the transformation that Rights of Nature may bring, they interrogate and contrast the discourse's foundational assumptions; thus, examining the conditions under which transformation itself is constructed. In doing so, they demonstrate that even legal projects that are often presented as transformative are, in reality, incomplete, tend to oversimplify complex processes, or neglect important theoretical divergences.

By challenging the foundational premises of the Rights of Nature and how legal transformation is framed, this contribution calls for a more critical engagement with how we approach rights and transformation related to environmental protection, ultimately presenting transformation and progress as contingent on the narratives and contexts that surround them.

III. Temporal Rupture and Its Challenge to Progress

While the previous article challenged the Rights of Nature's framing as a transformative legal framework and its related discourse aiming at ecological preservation, the following article grapples with the forces that contest and disrupt established norms of international law and human rights.

In 'Temporal Ruptures in International Human Rights: Authoritarian Populism and a View of Critical Re-engagement from the Philippines', Ruby Rosselle Tugade probes the themes of historicity and time, exploring the temporal dimensions of discussions regarding the human rights project. The author grounds the analysis in 21st-century populism, using Rodrigo Duterte's authoritarian populism in the Philippines as a case study. Analyzing the attacks of Duterte's populist rhetoric on human rights institutions and their progressive promise, Tugade contends that authoritarian populism disrupts the linear progress expected of international law and human rights law. Given the disruption in the linear way one would assume law unfolds, the author suggests that, to re-engage with human rights, one should first recognize law's historical contingency and the fractures in its linear progress. These fractures are, after all, the result of competing projects: an internationalist vision of shared norms and human rights on the one hand, and a domestic-oriented populist, authoritarian political project on the other. It is by recognizing this clash of interests and projects, as well as their temporal effects in the transformative prospects of human rights law, that one may re-engage with it and sketch a reparative path towards progress.

Through the article, Tugade demonstrates that resistance to international norms begins locally, as a populist project, but is then exported internationally, resisting the assumptions for a progressive transformation of law over time. Today, the added value of the author's analysis is more pertinent than ever. The Republic of the Philippines withdrew from the

Rome Statute in 2019.[8] In 2025, Duterte was arrested under an International Criminal Court (ICC) warrant for having allegedly committed crimes against humanity on the territory of the Philippines in the context of his administration's 'war on drugs' campaign.[9] The confirmation of charges hearing before the ICC took place in late February 2026.[10] The complicated relationship of the Philippines with the ICC can be viewed as an example of temporal disruption caused by the country's strongmen, in line with Tugade's analysis. By examining the populist regime's challenge to international human rights law norms, this article provides a useful lens for understanding the broader implications of such temporal disruptions. Importantly, the author does not simply advocate for a return to the traditional assumptions or narratives of progress. Tugade offers, instead, a suggestion for reparative re-engagement with international human rights

[8] International Criminal Court, Press Release 'ICC Statement on the Philippines' Notice of Withdrawal from the Rome Statute: The System of Essential Safeguards' (ICC, 20 March 2018) <www.icc-cpi.int/news/icc-statement-philippines-notice-withdrawal-state-participation-rome-statute-system-essential> accessed 11 March 2026.

[9] See Situation in the Republic of the Philippines, Decision on the Prosecutor's request for authorisation of an investigation - Warrant of Arrest for Mr Rodrigo Roa Duterte (ICC-01/21-83, Pre-Trial Chamber I, 26 January 2023) <www.icc-cpi.int/court-record/icc-01/21-83> accessed 10 March 2026; International Criminal Court, Press Release 'ICC Appeals Chamber confirms Decision on the review of Mr Duterte's detention' (ICC, 6 March 2026) <www.icc-cpi.int/news/icc-appeals-chamber-confirms-decision-review-mr-dutertes-detention> accessed 7 March 2026.

[10] International Criminal Court, Media Advisory 'Duterte case: Confirmation of Charges hearing to open on 23 February 2026 – Practical Information' (ICC, 28 January 2026) <www.icc-cpi.int/news/duterte-case-confirmation-charges-hearing-open-23-february-2026-practical-information> accessed 7 March 2026; Amnesty International, Philippines: Duterte confirmation of charges hearing a crucial opportunity for justice (Amnesty International, 20 February 2026) <www.amnesty.org/en/latest/news/2026/02/philippines-duterte-confirmation-of-charges-hearing-a-crucial-opportunity-for-justice/> accessed 7 March 2026.

law, acknowledging uncertainty and discontinuity as conditions under which law is transformed over time.

This account reveals something fundamental: sometimes, transformation occurs from moments that lay bare the shaky foundations of law's conventional historical narrative, forcing us to recognize that the ways we understand progress are quite fragile.

IV. Reorienting Legal Projects Through Considerations of Justice

While the previous contributions explore the destabilizing forces of populism and rights of nature on legal regimes, in 'Mainstreaming Climate and Energy Justice: The EU Climate and Energy Package Revisited' Kim Fyhr examines how considerations of justice catalyzed the convergence of EU climate and energy law, leading to a change within the EU.

True, legal transformation oftentimes happens through disruption of the status quo, contestation, or rupture. Other times, the forms and sources of change in law tend to remain out of sight or are forgotten. Based on this premise, the author revisits the processes that led to the adoption of the EU Climate and Energy Package (CAEP), to explore the early preparatory phase of the CAEP against the backdrop of justice considerations. Focusing on the preparatory work for the CAEP, Fyhr takes us behind the scenes of the negotiations. By doing so, the author shines light on something often overlooked in discussions about the package: how the push for climate and energy justice by the actors involved in the instrument's design fueled its creation.

Through the lens of the preparatory documents for CAEP, Fyhr analyzes the positions of the actors involved in its deliberations, such as the European Council, the European Commission, and the European Parliament. The author reveals how these contributions played a key role in gradually reorienting the EU's normative commitments in the field of climate and

energy justice, thereby driving a paradigm change. This unprecedented introduction of climate and energy justice concerns propelled the EU's policy and provided impetus for integrating such considerations into its legislative processes. This, the author asserts, not only widened the scope and introduced certain targets in the subsequent relevant legal instruments, but also contributed to intergenerational justice, functioning as a model for subsequent legislative packages such as the European Green Deal and the 'Fit for 55' package.

All things considered, Fyhr's contribution adds to the discussion on legal transformation and change by demonstrating how this may occur from within the institutions. As opposed to approaches that argue for 'throwing rocks' from the outside of an institution and creating ruptures in order to achieve change and normative reorientation, the author unravels how the different objectives and justice concerns of those participating in the legal design of the CAEP served as a catalyst for integration and regulatory innovation. In this sense, by managing to redefine the institutional priorities, those who designed the CAEP not only transformed the legal field on climate and energy justice, but also shaped the discussion for years to come.

V. Renegotiating Commitment in International Law

In 'The African States' Practice of Withdrawal in the Light of International Law of Treaties', Luigi Zuccari offers a nuanced perspective of how African states strategically withdraw from treaties, not in order to completely disengage with international law and their obligations under it, but in order to renegotiate the conditions under which they participate in the international legal order. Thus, the article offers a distinct lens through which to examine legal transformation and push for societal change by examining the Global South's disengagement with a legal instrument to renegotiate its commitments.

Zuccari provides an alternative narrative, aiming to correct the existing literature on treaty withdrawal, which underexplores the practices of African

states. The author traces the historical trajectory of treaty withdrawal and analyzes the relevant rules of the Vienna Convention on the Law of Treaties. He then uses this analysis as a critical benchmark against which he evaluates the treaty withdrawal practices of African States. It is through these practices of treaty withdrawal, the author explains, that African States aim to revisit their relationships with the international community.

Contrary to assumptions of rejection of international law, Zuccari focuses on how African States use treaty withdrawal as a negotiating tool to contest the inherited structures of inequality and colonialism. Especially with respect to treaties of colonial past, a distinctive regional identity surfaces in the practice of African States. Through their collective withdrawal, States contest the forms of legal imperialism and challenge the structural limits of the law of treaties. In other words, they use treaty withdrawal to shake off their shackles.

By attempting to renegotiate their treaty commitments, Zuccari argues, African States call for the completion of a circle of societal change and legal transformation that remained unfinished. While decolonization and self-determination indeed occurred, the legal chains the former imposed on States remained; serving as a reminder that States cannot fully reclaim their sovereignty until the change in their societies and international relations is accompanied by structural legal transformation. Read alongside the preceding articles, Zuccari's piece ultimately reinforces the narrative that progress is achieved through the revision of legal instruments and the obligations occurring thereunder.

VI. The Transformative Potential of Judicial Dialogue

The issue closes with a more subtle yet significant path to legal transformation, the practices through which legal meaning is shaped through judicial dialogue and cooperation. In 'Revisiting the Deliberative Potential of Judicial Dialogue: The Subtle Influences of National Courts in the Article 267 TFEU Preliminary Reference Mechanism', Filip Vlček and

Marek Pivoda explore the dynamics of the EU's judicial system. The authors revisit the preliminary reference procedure provided under Article 267 of the Treaty on the Functioning of the European Union (TFEU), questioning the accounts that portray the relationship between national courts and the Court of Justice of the European Union (CJEU) as largely hierarchical or monologic.

Vlček and Pivoda critique the narratives that present the interaction between the CJEU and national courts as monodirectional. Traditional narratives of judicial hierarchy within the EU fail to fully capture the complexities and multidimensional nature underlying the procedure under Article 267 of the TFEU. Such narratives limit one's understanding of the national courts' agency and their potential to shape the dialogue on the points of law they refer to the CJEU for clarification. The authors invite us to reimagine a true dialogue, suggesting a novel communicative discourse model. The suggested model, they argue, aligns with a participatory and deliberative reading of Article 267 of the TFEU, further shedding light on the subtle capacity of national courts to influence the development of EU law. According to the authors, this subtle influence is exerted by national courts through agenda-setting, systemic signaling, and jurisprudential contestation.

Legal transformation here does not appear as rupture or reform, but as a gradual process emerging from communicative interaction within a multi-level judicial architecture. Through the emphasis it places on the capacity of national courts to subtly shape EU law through their preliminary references, the authors offer a reading of the procedure that enhances the democratic legitimacy of the EU's judicial system.

This perspective offers a fitting conclusion to the trajectory traced throughout the issue. Having moved from foundational critiques and temporal disruptions to structural renegotiations, the issue closes with an account of law's capacity to evolve through judicial dialogue, quietly yet persistently reshaping legal orders from within.

VII. Concluding Remarks

From the destabilizing forces of time, authoritarian populism, and ecological crises to the dynamic interplay of institutions in shaping EU law, the contributions of this issue collectively underscore the ever-evolving character of law. They underscore that law neither exists in the abstract nor is it a stone tablet. It is a living organism, contingent on its environment, and shaped by human objectives.

Read together, the articles also reveal the different paths for legal transformation. The authors highlight different stages at which legal change can occur, as well as the different pathways one can follow to promote it. In this sense, a subtle roadmap to legal transformation underlies the entire issue, as the different pieces account for the variations in actors, forms, time, and processes through which change occurs.

A final reflection concerns the broader context in which the discussions on legal transformation unfold. Contemporary debates on international law increasingly take place against the backdrop of an ongoing crisis of the international legal order, marked by regional or unilateral responses to global challenges.[11] These tensions lead us to question whether the trajectory of law, and international law in particular, continues to follow this progressive path that dominated during the twentieth century.[12] Yet, arguably, legal orders have always been shaped by moments of disruption and

[11] See Linda Kinstler, 'Are We Witnessing the Death of International Law?' *The Guardian* (26 June 2025) <www.theguardian.com/law/2025/jun/26/are-we-witnessing-the-death-of-international-law> accessed 13 March 2026.

[12] See Oona A Hathaway and Scott J Shapiro, 'Might Unmakes Right: The Catastrophic Collapse of Norms Against the Use of Force' (2025) 104 *Foreign Affairs* <www.foreignaffairs.com/united-states/might-unmakes-right-hathaway-shapiro> accessed 13 March 2026.

renegotiation.[13]

Seen through this lens, these tensions may not simply signal regression, but rather another phase in the ongoing renegotiation of legal norms. What this issue's contributions suggest, however, is that legal transformation does not always occur through the prevalence of a single authoritative narrative. The prevalence of certain narratives or interpretations over others is, indeed, one possibility. In other cases, though, transformation occurs through the interaction of multiple voices, each advancing competing interpretations of law's meaning and purpose. In this vein, legal transformation may be seen as less dependent on the dominance of a single vision of progress, relying more on a polyphonic dialogue through which law continuously redefines itself.

VIII. CHANGES IN EJLS

At the start of the academic year 2025/2026, several changes occurred in the composition of the Executive Board. From November 2025, we welcomed three new Executive Editors: Charlotte Baxmann, Marlies Hofmann, and Anamika Kundu. In addition, Arianna Abitante and Lala Darchinova joined the EJLS as Heads of Sections for Comparative Law and Legal Theory, respectively. Finally, Aikaterini Koinaki, former Executive Editor, has now assumed the position of Editor-in-Chief.

These transitions also meant bidding farewell to members of our previous Executive Board. We extend our heartfelt thanks to Irina Muñoz Ibarra (former Head of Section for Legal Theory) and Dimitris Panousos (former Editor-in-Chief) for their invaluable contributions during their time at the EJLS. We wish them all the very best in their future endeavors.

[13] See Oona A. Hathaway and Scott. J. Shapiro, 'International Law and its Transformation Through the Outlawry of War' (2019) 95(1) International Affairs 45 who argue that the decision to outlaw war in 1928 altered the structure of international law, replacing a system that once permitted conquest with one that formally prohibits the use of force as a means of enforcing legal claims.

Finally, we would like to thank all the anonymous reviewers involved in this issue, whose careful and constructive feedback has been invaluable in shaping these articles. We also warmly thank the members of the Executive Board for their dedication and hard work throughout the editorial process.

CRITICAL APPROACHES TO RIGHTS OF NATURE

Giada Giacomini* and Francesca Ceresa Gastaldo**

The Rights of Nature (RoN) framework is often presented as a transformative legal paradigm that addresses the ecological crisis by recognising natural entities as legal subjects. However, this dominant narrative tends to oversimplify and universalise RoN, overlooking its diverse interpretations and applications. This article critically examines the theoretical and practical dimensions of RoN, questioning their assumed Indigenous roots, eco-centric nature, and decolonial potential. Through a comparative analysis of global legal experiences and a discussion of eco-centric versus non-centered approaches, the paper offers a more nuanced reading of RoN compared to recent scholarship - one that integrates Indigenous perspectives without reducing them to mere rhetorical justifications. Ultimately, it examines alternative frameworks grounded in ecological responsibility, the duty of care, and the concept of nonuse, proposing a critical pathway toward a more equitable and pluralistic approach to environmental governance.

Keywords: Rights of Nature; ecocentrism; decoloniality; Indigenous epistemologies; ecological governance; ecological responsibility; legal pluralism; environmental justice

* Lecturer in Law, School of Criminology, Politics and Law, University of Hull, UK (ORCID ID 0000-0002-3618-4011). Parts of the research presented in this paper were also conducted at the European University Institute, Max Weber Programme, during the 2022/2023 academic year. Giada Giacomini has contributed to sections III.2, IV and V.

** PhD candidate, Department of Law, University of Genoa, Italy (ORCID ID 0009-0003-4683-9549). Francesca Ceresa Gastaldo has contributed to sections I, II and III.1.

TABLE OF CONTENTS

I. INTRODUCTION

The Rights of Nature (RoN) have emerged as a prominent legal and philosophical framework aimed at addressing the ecological crisis by recognizing natural entities, such as rivers, forests, and mountains, as legal subjects with enforceable rights. Once considered a radical idea, RoN have now been incorporated into the legal systems of several countries, including Ecuador, Bolivia, New Zealand, and India, while inspiring similar proposals

in Europe and beyond.[1] The concept is often presented as a holistic, eco-centric paradigm with roots in Indigenous worldviews and a departure from the anthropocentric foundations of Western legal systems.[2]

This paper offers a critical review of the conceptual, legal, and practical dimensions of RoN as they have been presented in academic and policy-oriented literature. Rather than proposing a singular theoretical or normative model, the paper interrogates how RoN have been framed, justified, and operationalized across contexts. It focuses on recurring assumptions that often go unexamined in RoN scholarship and advocacy, seeking to clarify some of the conceptual tensions that underlie these debates. In doing so, the paper aims to make an original contribution by consolidating and critically analysing the diverse and often fragmented body of literature on RoN. It highlights the complexity of the RoN framework and challenges its portrayal as a unitary, universally applicable model.

The paper also underscores the need to engage more critically with three particularly underexplored dimensions: the role and representation of Indigenous worldviews, the theoretical dichotomy between anthropocentrism and ecocentrism, and the actual legal implications of RoN in practice. By unpacking these dimensions, the review exposes areas where

[1] Cfr. Constitución de la República del Ecuador 2008; Ley de Derechos de la Madre Tierra No 71/2010; Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien No 300/2012 (Bolivia); *Mohd V Salim v State of Uttarakhand and Others* Writ Petition (PIL) No 126/2014 (20 March 2017); *Lalit Miglani v State of Uttarakhand and Others* Writ Petition (PIL) No 140 (30 March 2017); Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Tūhoe Claims Settlement Act 2014.

[2] On the eco-centric paradigm, see Satish C Shastri, 'Environmental Ethics: Anthropocentric to Eco-centric Approach — A Paradigm Shift' (2013) 55(4) Journal of the Indian Law Institute 522. On the interlinkage between Indigenous cosmologies and RoN see Erin O'Donnell, Anne Poelina, Alessandro Pelizzon and Cristy Clark, 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' (2020) 9 Transnational Environmental Law 403.

RoN discourse has tended to oversimplify or obscure deeper normative and political tensions.

The paper is structured into four main sections, each addressing a key area of critique. The first section examines the dominant historical narrative of RoN, particularly its frequent attribution to Earth Jurisprudence and Christopher Stone. It draws attention to the marginalisation of non-Western and Indigenous intellectual traditions within this genealogy. The second section investigates conceptual ambiguities and misinterpretations, including the assumption that RoN is inherently eco-centric and carries intrinsic decolonial potential. The third section examines the contested relationship between RoN and Indigenous worldviews, problematising common claims of Indigenous inspiration and cautioning against the essentialisation of Indigenous knowledge. The fourth section contrasts eco-centric theories with non-centered ecological approaches, providing a theoretical lens that transcends binary thinking in environmental law and ethics.

Through this critical review, the paper contributes to current debates by foregrounding the pluralism, contestation, and context-dependence that shape RoN scholarship and practice. In challenging monolithic interpretations, it calls for a more reflective, interdisciplinary, and situated approach to understanding the Rights of Nature as both a legal innovation and a socio-political construct.

The significance of this paper lies in its timely critical intervention. As RoN move from the margins of legal thought into constitutional and statutory law, the need for conceptual clarity and critical reflection becomes urgent. This paper addresses that need by interrogating the narratives, assumptions, and omissions that shape the field, and by situating RoN within a broader, pluralistic, and decolonial conversation about environmental law and justice.

II. The Problematization of RoN

RoN have rapidly moved from the margins of legal theory to the global legal stage. Rivers, forests, glaciers, and even 'Mother Earth' have been recognized as legal subjects in multiple jurisdictions, often portrayed as evidence of a paradigmatic shift away from Western anthropocentric law. RoN are frequently presented as a holistic, eco-centric, and even decolonial alternative capable of addressing the environmental crisis.[3] Yet, despite their widespread diffusion, the meaning and implications of RoN remain deeply contested. The tendency to frame them as a coherent and unified paradigm risks obscuring the political, cultural, and legal differences that shape how RoN are interpreted and implemented in practice.

This section, along with part of the third, presents a critical literature review that lays the conceptual foundations for the arguments developed in the subsequent sections. It engages with influential scholarship on the Rights of Nature, particularly the work of Mihnea Tănăsescu, whose analysis challenges the normative assumptions underpinning dominant RoN narratives. Building on these insights, the section revisits the commonly accepted historical account of RoN (§2.1) and critically examines the characteristics typically attributed to them (§2.2).

[3] In environmental legal and ethical theory, 'holistic' approaches conceive nature as a whole encompassing human beings, in opposition to individualistic and anthropocentric theories that posit humans as ontologically prior to nature; see Attilio Pisanò, *Diritti deumanizzati: animali, ambiente, generazioni future, specie umana* (Giuffrè 2012); Silvana Castignone, *Nuovi diritti e nuovi soggetti. Appunti di bioetica e biodiritto* (ECIG 1996). Eco-centric theories place life, understood in a holistic sense, at the centre of law and morality and attribute value to ecological totalities rather than individual organisms; see Laura Palazzani, *Introduzione alla biogiuridica* (Giappichelli 2002). Since their initial development, the Rights of Nature have also been presented as a decolonial and transformative response to the environmental crisis; see David Richard Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017).

1. The common history of RoN

In 'Understanding the Rights of Nature: A Critical Introduction', political philosopher Mihnea Tănăsescu observes that a widely circulated 'standard' or 'orthodox' narrative of RoN has taken hold.[4] According to this account, the Rights of Nature are presented as a universal legal response to the ecological crisis.[5] 'Nature' is treated as a homogeneous subject, while RoN are depicted as the natural legal realization of Earth Jurisprudence principles, Christopher Stone's theories, and elements drawn – often without distinction – from Indigenous philosophies and worldviews.[6]

To challenge this abstract narrative, it is helpful to begin by unpacking the various intellectual traditions commonly grouped under the umbrella of RoN.

Earth Jurisprudence is a legal and philosophical framework that explicitly declares its inspiration from Indigenous cosmologies as well as from strands of European and North American environmental thought developed in the 1960s and 1970s.[7] According to Thomas Berry and later authors such as Godofredo Stutzin, Cormac Cullinan, and David Boyd, humans are only one component of a broader 'Earth Community', governed by universal principles to which human law should conform. Nature and its elements are

[4] Mihnea Tănăsescu, *Understanding the Rights of Nature: A Critical Introduction* (transcript Verlag 2022).

[5] ibid 19 and 15: 'rights of nature orthodoxy' is 'a view of these rights as inherently positive constructions (or, at worst, benign) that are going to save "the environment" from rapacious "humans"'.

[6] Christopher D Stone (ed), 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450.

[7] See, for example, Aldo Leopold, *A Sand County Almanac and Sketches Here and There* (Oxford University Press 1972); Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movement. A Summary' (1973) 16 Inquiry: An Interdisciplinary Journal of Philosophy 95; James E. Lovelock, *Gaia: A New Look at Life on Earth* (2nd edition, Oxford University Press 2016).

understood to possess inherent rights, including the right to exist, to have a habitat, and to fulfil their role in the renewal of the Earth Community.[8]

Proponents of Earth Jurisprudence argue that recognizing the Rights of Nature would help transform Western legal systems and cultures, which they regard as rooted in anthropocentric and dualistic worldviews derived from Judeo-Christian traditions and Cartesian philosophy. By replacing the legal classification of nature as an 'object' with that of a 'subject,' they contend that law could foster a broader cultural shift toward ecocentrism.

Although Earth Jurisprudence presents itself as inspired by non-Western philosophies, it remains largely a product of Western-produced theories. This is particularly relevant given that its eco-centric and holistic elements are often attributed to Indigenous worldviews, a point that will be revisited later.

Another foundational reference frequently cited in RoN scholarship is Christopher Stone's 1972 article 'Should Trees Have Standing? Toward Legal Rights for Natural Objects'.[9] Written in response to Sierra Club v. Morton, it argued that natural entities could be granted legal standing to sue, allowing human representatives to act on their behalf and thereby overcoming the limitations imposed by restrictive standing rules. Although the majority of the court rejected this idea, Justice William O. Douglas

[8] See Thomas Berry, *The Great Work: Our Way into the Future* (Crown 1999); Thomas Berry, *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club Books 2006). See also Godofredo Stutzin, 'Un imperativo ecológico: reconocer los derechos de la naturaleza' (1984) 1 Ambiente y Desarrollo 97, 103; Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green 2011); David Richard Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017). Stutzin conceives nature as an interconnected and dynamic whole whose totality is more than the sum of its parts and represents the principle of life itself; Berry argues that the Earth Community entails inherent rights of nature, including the rights to exist, to habitat, and to fulfil its role in the renewal of that community.

[9] Stone, 'Should Trees Have Standing?' (n 6), cit.; Christopher D. Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (Oxford University Press 2010).

famously adopted Stone's arguments in his dissenting opinion, contributing to their diffusion.[10]

Stone's work is often credited with bridging the gap between theory and practice by making the RoN legally conceivable. Decades later, his ideas influenced early municipal recognitions of RoN, such as the 2006 Sewage Sludge Ordinance in Tamaqua Borough, Pennsylvania, often described as the first US law to recognize legal rights for nature.[11] From there, RoN spread rapidly across jurisdictions worldwide.

This success story, however, gives rise to several misunderstandings that call for closer examination.[12]

2. RoN misunderstandings

RoN are commonly described as the outcome of Christopher Stone's proposal to grant standing to nature, combined with Earth Jurisprudence's eco-centric philosophy, and its claimed Indigenous inspiration. Yet the broad category of RoN encompasses a wide range of legal experiences that differ significantly in form and implications.

In Ecuador, Bolivia, and the Universal Declaration of the Rights of Mother Earth (UDRME), the subject of rights is conceived as a general entity encompassing all living beings. In contrast, in countries such as Colombia, India, and New Zealand, specific natural entities—rivers, forests, and

[10] *Sierra Club v Morton* 405 US 727 (1972).

[11] Tamaqua Borough Ordinance No 612/2006 (Schuylkill County, Pennsylvania).

[12] The story of RoN is here defined as 'successful' in relation to the great expansion that RoN norms had not only at an advocacy level, but also in formal legal systems: as Kauffman and Martin note, 'the saliency of RoN and Earth jurisprudence norms has increased dramatically over the last fifteen years. By January 2021 there were at least 215 existing or pending RoN legal provisions in twenty-seven countries': Craig Kauffman and Pamela Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (The MIT Press 2021) 187.

mountains—are recognized as legal subjects, sometimes without a precise specification of the rights attributed to them.[13]

Acknowledging these differences is essential for at least two reasons. First, the challenges they raise are not uniform. Granting legal personality to specific ecosystems does not necessarily raise issues different from those associated with other legal fictions, such as corporations. By contrast, constitutional models that enshrine RoN as fundamental rights raise complex philosophical questions concerning the definition of nature, the identification of its interests, and the risk of naturalistic fallacies.[14]

---

[13] Constitución de la República del Ecuador 2008, arts 10 and 70–74; Ley de Derechos de la Madre Tierra No 71/2010; Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien No 300/2012 (Bolivia); Universal Declaration of the Rights of Mother Earth (adopted 22 April 2010, Cochabamba, Bolivia) <https://www.garn.org/universal-declaration-for-the-rights-of-mother-earth/> accessed 22 January 2026; *Sentencia T-622/16* 'Río Atrato' (Corte Constitucional de Colombia); *STC4360-2018* (Corte Suprema de Justicia de Colombia); *STC3872-2020* (Corte Suprema de Justicia de Colombia); *Mohd V Salim v State of Uttarakhand and Others* Writ Petition (PIL) No 126/2014 (20 March 2017); *Lalit Miglani v State of Uttarakhand and Others* Writ Petition (PIL) No 140/2017 (30 March 2017); Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Te Urewera Act 2014.

[14] On the definition of nature, see Pisanò, *Diritti deumanizzati* (n 3); Jan Darpo, 'Can Nature Get It Right? A Study on Rights of Nature in the European Context | Think Tank | European Parliament' (2021) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)689328> accessed 22 January 2026; Julien Bétaille, 'Rights of Nature: Why it Might Not Save the Entire World' (2019) 16 Journal for European Environmental & Planning Law 1. On the identification of interests, see Stefano Rodotà, 'Nuovi soggetti, nuovi diritti, nuovi conflitti' in Francesco Giuseppe Pizzetti and Michele Rosti (eds), *Soggetti, diritti, conflitti: percorsi di ridefinizione* (Giuffrè 2007). On the risk of naturalistic fallacies, see Bruno Celano, Dialettica della giustificazione pratica. Saggio sulla legge di Hume (Giappichelli 1994); Gaetano Carcaterra, *Il problema della fallacia naturalistica. La derivazione del dover essere dall'essere* (Giuffrè 1969); Paolo Comanducci, *Assaggi di metaetica due* (Giappichelli 1998); Andrea Porciello, *Filosofia dell'ambiente. Ontologia, etica, diritto* (Carocci 2022).

Second, these differences have significant legal and theoretical implications. Scholars such as Visa Kurki, Craig Kauffman, and Pamela Martin distinguish between a 'rights-based', model, which attributes unique rights to Nature as a whole, and a 'legal personhood' model, which extends the rights and liabilities of legal persons to specific ecosystems.[15]

However, in defining RoN, Kauffman and Martin ultimately describe them as the 'legal philosophy of Earth Jurisprudence' and the 'legal provisions that codify it', thereby treating both legal personhood and rights-based cases as expressions of a single transnational movement rooted in Earth Jurisprudence.[16]

This assumption of unity becomes problematic when one considers the theoretical divergence between Earth Jurisprudence and Christopher Stone's work. Earth Jurisprudence is grounded in natural law: Berry and Cullinan explicitly argue that rights exist independently of human recognition and that human law must conform to the 'Great Jurisprudence' of the universe.[17]

[15] Visa AJ Kurki, 'Can Nature Hold Rights? It's Not as Easy as You Think' (2022) 11 Transnational Environmental Law 525, 538; Kauffman and Martin, *The Politics of Rights of Nature* (n 12) 15.

[16] Ibid 12; Craig M Kauffman and Pamela L Martin, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand' (2018) 18 Global Environmental Politics 43. Many other authors do not cast doubt on the overall 'unity' of the RoN theories and cases under the theory of Earth Jurisprudence; amongst others, Boyd, *The Rights of Nature* (n 3); Peter D Burdon, 'Earth Rights: The Theory' (21 February 2011); Alberto Acosta and Esperanza Martínez (eds), *La naturaleza con derechos: de la filosofía y la política* (1. ed, Abya Yala 2011).

[17] Thomas Berry holds that, by virtue of their existence, nature and all elements of the Earth's Community possess rights. Cullinan pushes this claim further, maintaining that 'human jurisprudence must be subsidiary to the Great Jurisprudence', as 'the fundamental laws and principles of the universe (…) provide the ultimate framework within which any human legal framework must exist', and that 'the ultimate source of rights is the universe and not human society': Cullinan, *Wild Law* (n 8), chap. 6.

Stone's approach, by contrast, is pragmatic and positivistic.[18] He does not argue that nature has inherent moral rights; instead, he focuses on procedural mechanisms that allow natural entities to be represented in court.

Stone's proposal addresses a specific issue—standing to sue—and does not aim to produce the eco-centric paradigm shift envisioned by Earth Jurisprudence. Granting legal personality to natural entities, in his view, is analogous to existing legal practices involving corporations or ships and does not entail a transformation of the legal order's underlying values.[19]

This distinction may help explain why some RoN cases align more closely with Earth Jurisprudence, while others do not. In Ecuador, Bolivia, and the UDRME, legal instruments grant nature fundamental rights, such as the 'right to live or regenerate one's life cycle', reflecting the moral framework developed by Berry and Cullinan.[20] In other contexts, particularly in cases involving legal personhood, Earth Jurisprudence appears to play a far more limited role.

The New Zealand experience is illustrative. The recognition of Te Urewera and Te Awa Tupua was primarily intended to resolve disputes over

[18] Tănăsescu, *Understanding the Rights of Nature* (n 4).

[19] 'Nor is it only matter in human form that has come to be recognized as the possessor of rights. The world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities, partnerships, and nation-states, to mention just a few. Ships, still referred to by courts in the feminine gender, have long had an independent jural life, often with striking consequences': Stone, 'Should Trees Have Standing?' (n 11), 452.

[20] Cullinan, *Wild Law* (n 8). Article 71 of Ecuador's Constitution, for example, states that 'Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution'; the same goes for Cochabamba Universal Declaration of the Rights of Mother Earth (UDRME), which article 2 recognizes the 'Intrinsic Rights of Mother Earth', including (a) 'the rights to live and exist', (b) 'the right to be respected' and (c) 'the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruption'.

ownership and governance between the Crown and Māori communities, rather than to advance environmental protection. The treaties made these entities inalienable largely to avoid assigning ownership to either party.[21]Although present, ecological considerations did not primarily drive legal recognition, and the granting of legal personhood to natural entities did not straightforwardly strengthen environmental protection.[22]

Failing to recognize these differences risks collapsing diverse legal experiences into a single narrative and obscuring the distinct objectives and effects of RoN in different contexts.[23]

III. INDIGENOUS PEOPLES AND RIGHTS OF NATURE

1. An indigenous paradigm? Some reflections and a few examples

In addition to the tendency to frame RoN as a unified paradigm under the 'umbrella theory' of Earth Jurisprudence – a tendency that, as noted above, raises significant doubts – another widely diffused assumption in RoN scholarship concerns their close connection to Indigenous cosmovision and

[21]Tănăsescu, *Understanding the Rights of Nature* (n 4); Boyd (n 3). Carwyn Jones, New Treaty, *New Tradition: Reconciling New Zealand and Māori Law* (UBC Press 2016); Vincent O' Malley, 'Tūhoe-Crown Settlement – Historical Background' (*Māori Law Review*, 2014) <https://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-historical-background/> accessed 22 January 2026; Katherine Sanders, '"Beyond Human Ownership"? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2017) 30 Journal of Environmental Law 207.

[22] Tănăsescu, *Understanding the Rights of Nature* (n 4); Elizabeth Macpherson, 'The (Human) Rights of Nature: A Comparative Study of Emerging Legal Rights for Rivers and Lakes in the United States of America and Mexico' (*Duke Environmental Law & Policy Forum*, 18 August 2021) <https://scholarship.law.duke.edu/delpf/vol31/iss2/3> accessed 8 October 2024.

[23] Tănăsescu, *Understanding the Rights of Nature* (n 4).

their purported 'decolonial' potential in relation to Western legal thought. [24]

There is no doubt that the formal recognition of RoN often intertwines with Indigenous peoples' struggles for the acknowledgment of their rights and political agency. In countries such as Ecuador, Bolivia, Colombia, and New Zealand, Indigenous groups have been at the forefront of activism, advocating not only for their own rights but also for the recognition of RoN.[25] In Ecuador and Bolivia, constitutional and legislative provisions

[24] By the term 'Indigenous peoples' we refer to 'the 400 million persons worldwide who, prior to a period of invasion, colonization or settlement, exercised collective self-determination according to their own cultural and political systems': Giada Giacomini, *Indigenous Peoples and Climate Justice: A Critical Analysis of International Human Rights Law and Governance* (Springer International Publishing 2022) 28. The expression 'Indigenous cosmovision', instead, refers, in general terms, 'to the worldview of a human group as a key concept for understanding otherness and delving into diversity between cultures', or the 'structured vision in which the members of a community coherently combine their notions about the environment in which they live and about the cosmos in which they place human life'. It must be clarified that each Indigenous people have their own cosmovision; therefore, there is not a single Indigenous cosmovision but different cosmovision belonging to each Indigenous people. When referring in general to Indigenous cosmovision, scholars normally refer to some common features: among them, the sacredness of the territories, the extreme relevance of spirituality and the conception that all elements of the world have life stand out: ibid., in reference to Núria Reguart Segarra, *La Libertad religiosa de los pueblos indígenas: estudio normativo y jurisprudencial de su relevancia en la lucha por sus tierras* (Tirant lo Blanch 2021), 70-71. It must be however highlighted that the same concepts of 'Indigenous' and 'Indigenous people' – and consequently the notion of Indigenous cosmovision - are still ambiguous and subject to debate. This aspect will be further discussed later, at chap. III, §2.

[25] República del Ecuador, *Constitución de la República del Ecuador*, 2008; Estado Plurinacional de Bolivia, *Ley de Derechos de la Madre Tierra* n. 71/2010 and *Ley marco de la Madre Tierra y desarrollo integral para vivir bien* n. 300/2012; Corte Constitucional de Colombia, *Sentencia T-622/16 'Rio Atrato'*, Corte Suprema de Justicia de Colombia, STC4360-2018; Corte Suprema de Justicia de Colombia, STC3872-2020; New Zealand Parliamentary Counsel Office, *Te Awa Tupua*

explicitly employ concepts expressed in Quechua, such as *Pachamama* or *sumak kawsay*. In Colombia, despite criticisms raised, the recognition of rights for the Atrato River is closely linked to the biocultural rights of affected communities, who defend their territories against extractive activities. Similarly, in New Zealand, the recognition of Te Awa Tupua and Te Urewera as legal entities cannot be understood outside the historical struggles of the Māori people to assert authority over their lands. For these reasons, some scholars argue that Indigenous activism in support of RoN constitutes a genuine 'political-epistemic insurgency' with decolonial potential, operating as a form of resistance to neo-imperialist policies and neoliberal development models.[26] Within neo-Andean neo-constitutionalism, the recognition of the rights of *Pachamama* in plurinational states is interpreted as a post-development alternative to neoliberalism and as a counter-hegemonic discourse that challenges Western, individualistic, and anthropocentric relationships with both community and the environment.[27]

However, contrasting perspectives have also emerged. Several scholars argue that the legalization of Indigenous concepts does not necessarily signal a paradigmatic shift but rather reflects the hegemonic capacity of the state to appropriate and reframe alternative worldviews within its own institutional

(Whanganui River Claims Settlement) Act 2017; *Tuhoe Claims Settlement Act*, Public Act No 51, 27 July 2014.

[26] Catherine Walsh, 'Development as Buen Vivir: Institutional Arrangements and (de)colonial Entanglements' (2010) 53 Development 15; Alex Latta, 'Locating Nature's Citizens: Latin American Ecologies of Political Space' (2013) 17 Citizenship Studies 566; Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54 Development 441; Arturo Escobar, 'Latin America at a Crossroads: Alternative Modernizations, Post-Liberalism, or Post-Development?' (2010) 24 Cultural Studies 1; Sarah A Radcliffe, 'Development for a Postneoliberal Era? Sumak Kawsay, Living Well and the Limits to Decolonisation in Ecuador' (2012) 43 Geoforum 240.

[27] Acosta and Martínez, *La naturaleza con derechos* (n 16); Gudynas, 'Buen Vivir: Today's Tomorrow' (n 26).

logic. Sieder and Viveiro, for example, observe that the Ecuadorian and Bolivian constitutions recognize abstract concepts that remain disconnected from the everyday lives of Indigenous peoples, potentially fostering romanticized and essentialized representations of Indigenous thought.[28]

The Bolivian case is particularly illustrative of these concerns. As Calzadilla and Kotzé demonstrate, Bolivia's Law of the Rights of Mother Earth failed to incorporate positions previously articulated by Indigenous organizations.[29] The government discarded the original draft prepared by the coalition *Pacto de Unidad*. At the same time, Indigenous participation in the legislative process was effectively marginalized, likely in light of governmental interests surrounding the construction of a highway through Indigenous territories. After its adoption in 2010, Bolivian authorities never implemented the law, as they never established the *Defensoría de la Madre Tierra*. Moreover, the subsequent Law No. 300 of 2012 subordinated the protection of Mother Earth's rights to the pursuit of 'integral development' and economic growth, ultimately facilitating rather than constraining extractive activities.[30] These patterns in Bolivia highlight the importance of examining the concrete effects of RoN, rather than focusing exclusively on their theoretical formulations.

In a similar vein, Tola critically examines the Bolivian government's discourse on RoN, showing how President Evo Morales' speeches reframed *Pachamama* as a gendered subject – 'Mother Earth' – portrayed as a nurturing

[28] Rachel Sieder and Anna Barrera Vivero, 'Legalizing Indigenous Self-Determination: Autonomy and Buen Vivir in Latin America' (2017) 22 The Journal of Latin American and Caribbean Anthropology 9; Jean Comaroff and John L Comaroff (eds), *Law and Disorder in the Postcolony* (University of Chicago Press 2006); Erin Fitz-Henry, 'Decolonizing Personhood' in Michelle M Maloney and Peter Burdon, *Wild Law - In Practice* (Routledge 2014).

[29] Paola Villavicencio Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 Transnational Environmental Law 397.

[30] ibid.

and maternal figure. According to Tola, this rhetoric serves to legitimize the appropriation and exploitation of 'nature's body' by the state, cloaked in a language of care and reverence.[31] Such dynamics are not unique to Bolivia, as RoN have in other contexts functioned as a 'political cover for mining and extraction', raising broader concerns about the potentially colonial character of the RoN model promoted at the international level.[32]

As early as 2012, Radcliffe warned that this emerging paradigm risked reproducing postcolonial patterns of development, including state centrality, unequal resource distribution, and the marginalization of vulnerable populations.[33] More recent scholarship suggests that RoN are often designed by elites within governmental and non-governmental organizations, who universalize Western models by presenting them as 'natural'.[34] Rawson and Mansfield, for instance, note that a relatively small group of actors from the Global North frequently mobilizes Western philosophical concepts to frame RoN as an Indigenous alternative to Western development.[35]

---

[31] Miriam Tola, 'Between Pachamama and Mother Earth: Gender, Political Ontology and the Rights of Nature in Contemporary Bolivia' (2018) 118 Feminist Review 25, 36.

[32] Fitz-Henry, 'Decolonizing Personhood' (n 28); Erin Fitz-Henry, 'The Natural Contract: From Lévi-Strauss to the Ecuadorian Constitutional Court' (2012) 82 Oceania 264.

[33] Radcliffe, 'Development for a Postneoliberal Era?' (n 26).

[34] Tănăsescu, *Understanding the Rights of Nature* (n 4); Ariel Rawson and Becky Mansfield, 'Producing Juridical Knowledge: "Rights of Nature" or the Naturalization of Rights?' (2018) 1 Environment and Planning E: Nature and Space 99; Jérémie Gilbert and others, 'The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's "Greening" Agenda' in Daniëlla Dam-de Jong and Fabian Amtenbrink (eds) *Netherlands Yearbook of International Law 2021* (vol 52, TMC Asser Press 2023); Cristina Espinosa, 'The Advocacy of the Previously Inconceivable: A Discourse Analysis of the Universal Declaration of the Rights of Mother Earth at Rio+20' (2014) 23 The Journal of Environment & Development 391, 404.

[35] Rawson and Mansfield, 'Producing Juridical Knowledge' (n 34).

Cristina Espinoza further explores this dynamic in her analysis of the Universal Declaration of the Rights of Mother Earth, which she shows to be grounded in the Western holism articulated by Cormac Cullinan, yet rendered politically effective through the strategic adoption of an 'Indigenous speaking position'.[36]

The literature thus reveals a clear divide between scholars who view RoN as an Indigenous paradigm and a tool for anticapitalist and anticolonial struggle, and those who regard them as an expression of Western legal frameworks that appropriate Indigenous concepts in a neocolonial manner. Navigating between these positions is not straightforward, as the RoN appear to carry both emancipatory promise and significant potential for abuse. Assessing their effects, therefore, requires attentiveness to longstanding warnings against romanticizing marginalized voices.[37]

---

[36] Margaret E Keck and Kathryn A Sikkink, 'Activists beyond Borders' (Cornell University Press, 1998) 40–41; Sidney Tarrow, *The New Transnational Activism* (1st edition, Cambridge University Press 2005) 58–64.

[37] Such warnings have been articulated, amongst others, by Haraway and Spivak nearly fifty years ago: see Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 Feminist Studies 575, and Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg, *Marxism and the Interpretation of Culture* (Macmillan 1988); Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999). On Spivak, see the explanatory work of Stephen Morton, *Gayatri Chakravorty Spivak* (Routledge, Taylor and Francis 2004). As well known, Spivak raises awareness on the fact that general claims or statements made by Western intellectuals on behalf of subaltern populations may result in silencing their authentic voices and unwarily put in practice ulterior practices of colonialism. She even states that the same 'Colonial Discourse studies […] can sometimes serve the production of current neocolonial knowledge by placing colonialism/imperialism securely in the past'. Her work therefore teaches us that it is essential testing the limits of dominant narratives on subaltern people, with a special attention on the methodological question on how to

As will be discussed further, this risk often materializes through narratives that portray Indigenous peoples as living in harmony with nature, reproducing idealized images associated with the myth of the 'noble savage'. For this reason, the Rights of Nature should not be treated as inherently valuable or effective simply because they are framed as Indigenous or anti-anthropocentric in abstract terms. Without attention to their historical trajectories and concrete consequences, such generalizations risk reinforcing forms of 'environmental colonialism'.

What remains clear is that the globally expansive RoN movement, informed mainly by Earth Jurisprudence and characterized by universalistic ambitions, brings together highly heterogeneous cases within a single ideological framework. Not all instances subsumed under the category of RoN share the same objectives, legal and cultural foundations, or practical effects. Ignoring these differences risks flattening the discourse and undermining the development of context-specific approaches that can respond to diverse Indigenous worldviews and local needs.[38] It is therefore necessary to make room for alternative conceptions and strategies for addressing environmental issues, including— as will be discussed further (§4)—the contributions that non-centred and relational theories may offer to this debate.

2. Critical approaches to Indigenous peoples and eco-centric law: RoN framework reimagined

As previously noted, a significant strand of the doctrinal debate conceives RoN as continuous with Indigenous visions and histories, arguing that Indigenous political movements challenge established practices precisely because they 'challenge the separation of nature and culture' and 'consider

not damage the interest of subaltern groups. In 'A Critique of Postcolonial Reason' she also argues for the necessity of creating platforms where these voices can articulate their own experiences rather than being interpreted by outsiders.

[38] Tănăsescu, *Understanding the Rights of Nature* (n 4).

nonhumans as actors in the political arena'.[39] This dimension of RoN, however, requires further problematization, or at least a more nuanced understanding. This section, therefore, offers critical reflections grounded in existing scholarship, conceptual analysis, and selected examples.

From a theoretical perspective, the first difficulty in conceiving RoN as an Indigenous paradigm lies in a simplified understanding of indigeneity. Despite the complexity of the issue, Earth Jurisprudence authors frequently invoke inspiration from holistic 'Indigenous cosmovision' or 'culture' without specifying which ones.[40] While defining indigeneity is undoubtedly challenging, influential works, such as that of Patrick Glenn, identify shared features of 'chthonic' legal cultures, including holistic worldviews and sustainable practices, to which Earth Jurisprudence scholars generally allude.[41]

---

[39] Marisol De La Cadena, 'Indigenous Cosmopolitics in the Andes: Conceptual Reflections beyond "Politics"' (2010) 25 Cultural Anthropology 334.

[40] Amongst the others, Berry, *Evening Thoughts* (n 8); Berry, *The Great Work* (n 8); Cullinan, *Wild Law* (n 8).

[41] Despite its widespread international use, including in the United Nations Declaration on the Rights of Indigenous Peoples, the concept of 'Indigenous peoples' remains contested. Originally linked to first occupancy, it has evolved to include criteria such as vulnerability and historical continuity, with self-identification now prevailing—though not without controversy. On the topic, see Manvir Singh, 'It's Time to Rethink the Idea of the "Indigenous"' (The New Yorker, 20 February 2023) <www.newyorker.com/magazine/2023/02/27/its-time-to-rethink-the-idea-of-the-indigenous> accessed 22 January 2026; Patrick Thornberry, Indigenous Peoples and Human Rights (Manchester University Press 2013). 'Chthonic law' is a concept notably used by H. Patrick Glenn, a comparative law scholar from the United States. In his influential work, Legal Traditions of the World: Sustainable Diversity in Law (5th edn, Oxford University Press 2014), Glenn identifies the legal traditions of Indigenous peoples as one of the seven legal traditions globally—alongside civil law, common law, Islamic law, Hindu law, Talmudic law, and Asian legal traditions. He refers to Indigenous law as 'chthonic law', describing it as the law of 'peoples who

Nevertheless, Indigenous peoples are extraordinarily diverse, encompassing thousands of cultures, languages, and traditions. Treating them as a homogeneous group connected to the emergence of RoN risks misrepresentation and the reproduction of harmful stereotypes. As scholars such as Kuper and Béteille have observed, the concept of indigeneity is often entangled with outdated notions of 'primitive' peoples, a concern echoed by Indigenous intellectuals such as Joanne Barker and Evan Poata-Smith.[42]

Against this background, some RoN narratives – albeit unintentionally – risk perpetuating a romanticized ideal of Indigenous knowledge. The image of Indigenous peoples living in 'harmony with nature', promoted by some Earth Jurisprudence scholars, may reinforce associations between Indigenous identity, authenticity, and primitiveness, thereby reproducing colonial dynamics through a contemporary version of the 'ecological noble savage' myth.[43]

A central critique of the RoN discourse thus concerns its selective engagement with Indigenous worldviews. Often, only those elements perceived as appealing or functional are emphasized, while others are

live ecological lives by being chthonic (…) which means that they live in or in close harmony with the earth': ibid 60.

[42] Adam Kuper, *The Reinvention of Primitive Society: Transformations of a Myth* (Routledge 2017); André Béteille and Dipankar Gupta, *Anti-Utopia: Essential Writings of André Béteille* (Oxford University Press 2011); Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Duke University Press 2011); Bronwyn Carlson, Michelle Harris and Evan Te Ahu Poata-Smith, 'Indigenous Identities and the Politics of Authenticity' in Bronwyn Carlson, Michelle Harris and Martin Nakata (eds), *The Politics of Identity: Emerging Indigeneity* (2013); the quotations contained in this paragraph are borrowed from the critical article written by Singh on the problematic use of the concept of 'Indigenous': Singh, 'It's Time to Rethink the Idea of the "Indigenous"' (n 41).

[43] Giulia Sajeva, *When Rights Embrace Responsibilities: Biocultural Rights and the Conservation of Environment* (Oxford University Press 2018).

marginalized.[44] This selective adoption risks transforming Indigenous worldviews into utilitarian tools, extracting isolated aspects elements to fit the conceptual framework of RoN. Such extractivist treatment of knowledge has been widely contested by Indigenous peoples, who have consistently voiced opposition to these reductive approaches. In many Indigenous nations, ancestral knowledge is not a detachable resource but is deeply interwoven with cultural identity, spiritual traditions, and normative systems of governance. Attempts to abstract and instrumentalize this knowledge sever it from the relational and juridical contexts in which it holds meaning.[45]

From this perspective, Earth Jurisprudence advocates are not necessarily forging new paradigms, but rather reinterpreting fragments of voices from peoples who colonial systems have historically marginalized. Illustrative examples include decisions such as the Colombian ruling on the Atrato River, which recognized the 'biocultural rights' of Indigenous and ethnic communities. As scholars note, biocultural rights – understood as the rights of such groups to manage and protect their territories – implicitly presuppose an obligation to live in 'harmony with nature', an assumption that becomes problematic when Indigenous interests diverge from conservation

[44] Alessandro Pellizzon, 'Earth Law, Rights of Nature and Legal Pluralism', in Michelle M Maloney, Peter Burdon (eds), *Wild Law: In Practice* (Routledge, 2014).

[45] For example, in the international biodiversity regime, Indigenous knowledge has often been instrumentalized within biodiversity conservation and sustainability frameworks through Western epistemological logics that seek to define, quantify, and assign economic value to what is inherently intangible and embedded in social relations and ecological contexts. Within these frameworks, Western knowledge systems continue to occupy a dominant position, treating Indigenous knowledge not as a living, relational practice but as a commodifiable asset—something that can be produced, stored, managed, and accessed like a form of property. See also: Saskia Widenhorn, 'Towards Epistemic Justice with Indigenous Peoples' Knowledge? Exploring the Potentials of the Convention on Biological Diversity and the Philosophy of Buen Vivir' (2014) 56(3) Development 378–386.

objectives.[46]

Gilbert highlights this tension in the Bangladeshi context, where the 2019 recognition of river rights raised concerns that fishermen and farmers could be displaced from land essential to their livelihoods.[47] Such cases illustrate the need for caution when invoking generalized 'Indigenous' characteristics.

More fundamentally, it is difficult to argue that Indigenous philosophies constitute the roots of RoN. While Earth Jurisprudence scholars often claim inspiration from Indigenous thought, the concepts of both 'rights' and 'nature' are products of Western intellectual traditions. The notion of subjective rights emerged within the same framework that underpinned doctrines of discovery and the dispossession of Indigenous peoples.[48] At the same time, as Maurizio Gnerre observes, the concept of 'nature' lacks equivalents in many non–Standard Average European languages.[49]

From this standpoint, RoN embody a significant contradiction. While aiming to overcome the Western human–nature dichotomy through a holistic vision inspired by Indigenous perspectives, they rely on subjective

[46] Sajeva, *When Rights Embrace Responsibilities* (n 43); Sanjay Kabir Bavikatte, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights* (1st edn, Oxford University Press 2014).

[47] Jérémie Gilbert, 'Human Rights and the Rights of Nature: Friends or Foes?' (2024) 47 Fordham International Law Journal 447, 471.

[48] Giada Giacomini, *Indigenous Peoples and Climate Justice: A Critical Analysis of International Human Rights Law and Governance* (Springer International Publishing 2022) 7.

[49] Maurizio Gnerre, '"La Natura è soggetto di diritti": intraducibilità e riflessività di una proposizione' in Flavia Cuturi, *La Natura come soggetto di diritti. Prospettive antropologiche e giuridiche a confronto* (Editpress 2020). Similarly, Petel argues that 'RoN serves as a mechanism for determining who, among humans, holds the authority to define 'nature', to prescribe its acceptable uses, to shape the development models, and to strike the right balance between social and environmental concerns', in Matthias Petel, 'The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature' (2024) 13 Transnational Environmental Law 12.

rights,[50] which presuppose separation between a rights-holder and those against whom rights are claimed.[51] Framing nature as a rights-bearing subject distinct from human actors thus departs from holistic understandings in which all beings form part of an integrated whole.

This contradiction is intensified by the use of the concept of 'nature' itself, which lies at the core of the Western dichotomy (human/nature) that Earth Jurisprudence seeks to dismantle.[52] Ecocentrism may enable a transition 'from the realm of things to that of subjects', yet in doing so it risks reaffirming 'the same metaphysical dichotomy that structures the anthropocentrism'.[53] In this sense, Earth Jurisprudence aspires to holism while relying on conceptual tools that presuppose ontological division between humans and nature.

Another critical element that needs to be taken into consideration is that the interpretation of RoN from an Indigenous perspective rests on ontological

[50] On this note, Sally Engle Merry defines vernacularization as the process through which transnational ideas, such as human rights, are adapted to local contexts and meanings. It involves translating universal discourses into culturally resonant forms that align with local norms, values, and institutions, while often retaining core elements of the original framework. See Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' American Anthropologist 108, no. 1 (2006): 39–51, at 40–41

[51] Emanuela Borgnino, 'Kuleana tra diritti della Natura e responsabilità: un'introduzione all'ontologia giuridica nativa hawaiana', in Flavia Cuturi (eds) *La Natura come soggetto di diritti* (Editpress 2020).

[52] Giacomini, *Indigenous Peoples and Climate Justice* (n 48) 358. See also further in this article, §4.

[53] Anna Montebugnoli, 'Recensione - Yan Thomas and Jacques Chiffoleau, L'istituzione della Natura' (2020) 9 Jounal of Interdisciplinary Histoy of Ideas 6; Federica Buongiorno and Xenia Chiaramonte, 'Istituire. Filosofia, politica, diritto' (Meltemi Editore 2024); Xenia Chiaramonte, 'Un problema di "natura" politica', in *Zapruder 58 – Ambienti ostili* (Mimesis 2022) 14.

foundations tied to 'human personhood' rather than 'legal personhood'.[54] This distinction is crucial to understanding the deeper ontological meaning of RoN. Assigning rights to 'nature' or specific natural elements, such as rivers, and recognizing their intrinsic values, does not inherently dismantle the anthropocentric framework RoN seeks to challenge. Inherent values, if defined solely by human recognition, remain tied to human-centric perspectives, as the attribution of value requires human acknowledgment. Conversely, the concept of 'human personhood' in Indigenous contexts is not confined to humans alone.[55]

This perspective is rooted in Indigenous animism and anthropomorphism. Colonization, including its religious dimensions, profoundly altered Indigenous spiritual systems, though many communities retained ancestral practices alongside externally imposed religious frameworks.[56] In some cases, Indigenous peoples formally adopted the colonizers' beliefs while maintaining their spiritual traditions in private.[57] Central to particular Indigenous worldviews is animism - the belief that all forms of existence possess a 'soul' or essence. In this view, personhood is not limited to humans; it extends to 'other-than-human' beings, such as river persons or wind persons.[58] Consequently, these systems embrace anthropomorphism,

[54] On personhood and personification, see Rafi Youatt, 'Personhood and the Rights of Nature: The New Subjects of Contemporary Earth Politics' (2017) 11 International Political Sociology 39.

[55] Eduardo Gudynas, 'Los Derechos de La Naturaleza En Serio. Respuestas y Aportes Desde La Ecología Política' in Alberto Acosta and Esperanza Martínez (eds), *La Naturaleza con Derechos: de la Filosofía a la Política* (Abya-Yala 2011) 239–286.

[56] De La Cadena, 'Indigenous Cosmopolitics in the Andes' (n 39).

[57] Reguart Segarra, *La Libertad religiosa de los pueblos indígenas* (n 24) 77.

[58] Alfred I. Hallowell, 'Ojibwa Ontology, Behaviour, and World View'. In Stanley Diamond (eds), *Culture in History: Essays in Honour of Paul Radin* (Columbia University Press, 1962).

attributing person-like qualities across the spectrum of existence.[59]

Anthropomorphism and animism should then play a central role in shaping the conceptual foundation of RoN, particularly to strengthen their connection with Indigenous worldviews and spirituality. Within this framework, the strict division between humans, animals, and natural elements dissolves. Instead, all entities are understood as part of a unified existential continuum, expressed in diverse forms of life and being. This perspective highlights an example of the fundamental difference that may occur between Western notions of 'legal personhood' and Indigenous understandings of 'human personhood'.

This relational ontology also underpins the concept of non-eco-centric theories, which will be explored later. For many Indigenous peoples, RoN may not necessarily emphasize the recognition of nature's intrinsic value - a notion deeply rooted in Western thought.[60] Instead, nature and the environment are often viewed as integral parts of humanity, spaces where ancestors dwell, and a kinship with natural entities is acknowledged. While Indigenous peoples might not explicitly articulate the intrinsic value of nature, their practices frequently embody respect for and harmony with the environment in their territories.[61] Further empirical research is required to

[59] 'The original common condition of both humans and animals is not animality but, rather, humanity.' Eduardo Viveiros De Castro, 'Exchanging Perspectives: The Transformation of Objects into Subjects in Amerindian Ontologies' (2004b) 10 Common Knowledge 463.

[60] See generally: Leena Vilkka, *The Intrinsic Value of Nature* (Rodopi 1997).

[61] For example, in biodiversity conservation, Indigenous knowledge has been incorporated into conservationist discourse largely due to its underlying philosophy of sustainability, which emphasizes the respectful use of natural resources, the preservation of biodiversity, and a holistic relationship with the environment—values often seen as absent or diminished in Western paradigms. However, biodiversity conservation within Indigenous territories cannot be separated from the recognition of territorial rights, the authority of Indigenous customary law, and the sustained

investigate this dimension more deeply, a task that may be undertaken in future scholarship building upon the insights developed in this paper.

In light of the foregoing, the incorporation of Indigenous philosophies and cosmovisions into the conceptual framework of RoN is problematic, where RoN are grounded in the universalistic and eco-centric paradigm of Earth Jurisprudence. It is quite challenging to believe that the use of Western legal categories may not reproduce distortions in trying to embrace cosmovisions that have radically opposite epistemological and ontological premises than Western philosophies. This, of course, does not imply that RoN, as recognized in various contexts, particularly where there has been strong Indigenous representation, cannot consist of hybridizations of Western ideas and institutions with Indigenous cultural and legal elements. Such hybridization might occur through meaningful participatory approaches in environmental and climate governance, ensuring the political representation and agency of Indigenous peoples at the law-making and enforcement levels. It also does not imply that RoN cannot be useful tools in addressing environmental issues or in supporting any kind of Indigenous struggles, or that they cannot be successfully rethought as a decolonial tool.

Engaging with Indigenous perspectives, which often represent counter-hegemonic approaches to environmental governance, is essential for fostering a transformative shift in environmental law. However, this transformation cannot be limited to adopting RoN by selectively incorporating fragments of Indigenous worldviews into the framework of legal personhood. Instead, it requires embracing Indigenous cosmovisions in

access of Indigenous peoples to natural resources and sacred sites. These elements form an integrated framework in which environmental stewardship is inseparable from cultural survival and legal autonomy. See also: Grazia Borrini-Feyerabend, Gonzalo Oviedo and Ashish Kothari, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (IUCN 2004); Federica Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection: Access, Benefit-Sharing and Conservation in Indigenous Lands* (Brill 2019).

their entirety, recognizing that these holistic philosophies are deeply rooted in the diverse manifestations of Indigenous legal pluralism.[62] Legal pluralism is desirable because politics of recognition, while symbolically important, do not in themselves guarantee Indigenous self-determination or the legal coexistence of Indigenous customary law alongside dominant positivist legal systems.[63] What enables such coexistence is the implementation of meaningful participatory processes and the co-creation of law and policy at both national and international levels. Therefore, legal pluralism is understood as the presence of multiple normative systems within a shared juridical space.

Legal scholars and policymakers could approach these dimensions as integral to the RoN discourse, acknowledging historical injustices, renegotiating power structures, and upholding the sovereignty and self-determination of Indigenous peoples. This includes respecting their spiritual and religious

[62] Michael Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Clarendon Press 1975); Alessandro Pelizzon, 'Earth Law, Rights of Nature and Legal Pluralism' in Michelle Maloney and Peter Burdon (eds), *Wild Law: In Practice* (Routledge 2014).

[63] Politics of recognition, while symbolically important, do not in themselves guarantee Indigenous self-determination or the legal coexistence of Indigenous customary law alongside dominant positivist legal systems. What enables such coexistence is the implementation of meaningful participatory processes and the co-creation of law and policy at both national and international levels. This approach aligns with the principles of legal pluralism, understood as the presence of multiple normative systems within a shared juridical space. International law has contributed to shaping the category of 'Indigenous peoples,' but has also at times reinforced static or stereotypical notions of Indigenous identity linked to 'authenticity'. Without attention to these dynamics, recognition risks reproducing colonial hierarchies by framing Indigenous law as inherently oppositional or inferior to Western legal systems. In contrast, decolonial approaches promote the full realization of Indigenous peoples' right to self-determination through institutional arrangements that prioritize their agency and normative traditions. Rachel Sieder, 'The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition' (2012) 18(2) The Brown Journal of World Affairs 103–114.

freedoms. The broader Earth Jurisprudence movement should aim not only to shift away from neoliberal and positivist paradigms towards a legal framework aligned with planetary harmony but also to create a platform for genuine intercultural dialogue. Such dialogue must amplify the voices of those who have been historically marginalised and work to rectify longstanding imbalances of power.

IV. Eco-Centric Vis À Vis Non-Centred Theories

As evidenced above, the RoN framework extends far beyond simply granting personhood—interpreted in the Western legal sense—to elements of the natural world.[64] It focuses on repairing the ecosystems we have harmed and reimagining our legal systems to align more closely with ecological principles and perspectives. However, essentialist-centred theories, whether anthropocentric or eco-centric, run the risk of perpetuating hierarchical structures by merely replacing one dominant paradigm with another.[65] Within this dynamic, RoN, when grounded in Indigenous legal pluralism and enriched by animistic and anthropomorphic traditions, offer a balanced alternative. This approach transcends the binary of anthropocentrism and ecocentrism, creating a synthesis that challenges the limitations of Western legal and philosophical traditions. This final section aims to clarify the problems associated with the conceptualization of RoN as an essentialist eco-centric theory and to propose a possible way forward for reconsidering RoN through a more holistic perspective.

1. Non-eco-centric theory

Ecological, non-eco-centric theories aim to reframe our understanding of the relationship between humans and the natural world, challenging both

[64] Jana Norman, 'Introducing the Cosmic Person: An Eco-centric Legal Subject' (2018) 43 Alternative Law Journal 126.

[65] Rawson and Mansfield, 'Producing juridical knowledge' (n 34).

anthropocentric and eco-centric frameworks.[66] Unlike anthropocentrism, which centres human needs and interests, and ecocentrism, which often prioritizes the non-human to the exclusion of human agency, these theories advocate for a relational perspective that views humans and nature as deeply interconnected and interdependent. Such approaches reject hierarchical dichotomies, emphasizing that all beings, human and non-human, exist within a shared ecological system that thrives on balance, reciprocity, and mutual respect.

The very conceptualization of 'nature' and 'wilderness' stems from a cultural invention that also involved colonialism and the forced removal of native Americans from the first US national parks.[67] This history underscores the need for ecological governance frameworks that go beyond articulated rights-based solutions and address systemic ecological harm. A non-centred theory, therefore, instead of focusing on the substantive rights discourse as a solution to the current ecological crises, encompasses interrelated concepts

[66] For example, Haraway reimagines the Anthropocene as the 'Chthulucene', an epoch characterized by the entangled co-existence of human and non-human beings through complex, tentacular interconnections. This perspective challenges the human-centered narrative of the anthropocentric approaches to law, encouraging a re-evaluation of humanity's role within the web of life. Reflecting on the Anthropocene/Chthulucene invites a critical shift in thinking, prompting a deeper understanding of interdependence and the need for more inclusive, relational approaches to environmental governance and ecological responsibility. See also Donna Haraway, 'Anthropocene, capitalocene, plantationocene, chthulucene: Making kin' (2015) 6 Environmental humanities 159-165 and Anna Grear, 'Anthropocene, Capitalocene, Chthulucene': Re-encountering environmental law and its 'subject' with Haraway and new materialism', in Louis Kotzé, (eds) *Re-Imagining Environmental Law and Governance for the Anthropocene* (Oxford: Hart Publishing, 2017).

[67] William Cronon, 'The Trouble with Wilderness: Or, Getting Back to the Wrong Nature' (1996) 1 Environmental History 7.

such as ecological responsibility, duty of care, and the possibility of nonuse.[68]

Ecological responsibility shifts the focus from entitlement of rights to shared responsibility and accountability, recognizing that all entities, human and non-human, participate in interconnected ecological systems. This approach calls for proactive stewardship to maintain ecosystem health, challenging exploitative and extractive practices.[69]

2. *Duty of Care*

The duty of care extends beyond human relationships to include obligations to the non-human world. Rooted in legal and ethical principles, this concept obliges individuals and institutions to prevent harm to ecosystems, even when it conflicts with immediate human interests. Legal frameworks incorporating this duty might mandate that decisions prioritize long-term ecological stability, such as through policies that require rigorous environmental impact assessments or emphasize restoration over development.[70]

---

[68] 'The wilderness dualism tends to cast any use as ab-use, and thereby denies us a middle ground in which responsible use and nonuse might attain some kind of balanced, sustainable relationship […] Learning to honor the wild - learning to remember and acknowledge the autonomy of the other-means striving for critical self-consciousness in all of our actions. It means the deep reflection and respect must accompany each act of use, and means too that we must always consider the possibility of nonuse. It means looking at the part of nature we intend to turn toward our own ends and asking whether we can use it again and again and again-sustainably-without its being diminished in the process.', ibid.

[69] Klaus Bosselman, 'Environmental Trusteeship and State Sovereignty: Can They Be Reconciled?' in Emily Webster and Laura Mai (eds), Transnational Environmental Law in the Anthropocene (Routledge 2021) 47.

[70] For example, the revised directive on the protection of the environment through criminal law that entered into force on 21 May 2024 in the European Union (EU), seeks to strengthen the prevention and enforcement of measures against environmental crime (Directive (EU) 2024/1203 of the European Parliament and of

3. The principle of nonuse

Finally, the principle of nonuse may be articulated as a central ecological and legal alternative within the RoN discourse – one that challenges dominant paradigms centred on the instrumental valuation of nature.[71] This principle emphasizes the significance of leaving certain ecosystems and natural spaces uninhibited by human intervention, unlike models that prioritize sustainable use or managed extraction. While acknowledging the global and transboundary effects of climate change and pollution (which leave no part of the biosphere completely isolated), the principle of nonuse still holds normative importance. It opposes the commodification of nature by rejecting the assumption that all natural entities must be subject to human use, regardless of their regulation or sustainability.

This approach diverges from both traditional conservation strategies and mainstream RoN formulations, which remain embedded in Western legal categories (eg, legal personality, rights-holders) and anthropocentric epistemologies. Instead, it aligns more closely with certain Indigenous and relational ontologies that prioritize the integrity of ecosystems, not just for human use, but due to their vital role in a broader web of life. In this sense, nonuse can serve as a corrective to forms of RoN that risk reinforcing extractivist logics under the guise of legal recognition.

By proposing nonuse as a legal and conceptual horizon, we contribute to RoN scholarship by offering an alternative that is not only more consistent with deep ecological ethics but also potentially more effective in curbing environmental degradation. Instead of trying to balance human use and

---

the Council of 11 April 2024 on the protection of the environment through criminal law [2024] OJ L2024/1203) Moreover, duty of care towards the environment is being emphasized in climate litigation as a way to compel more ambitious climate litigation (Christina Voigt and Joe Udell, 'Duty of Care' in Margaretha Wewerinke-Singh and Stephen Mead (eds), *The Cambridge Handbook on Climate Litigation* (Cambridge University Press 2025) 223).

[71] See generally Jan Laitos, 'The Right of Nonuse' (Oxford University Publisher, 2013).

ecological limits with uneven results, nonuse completely redefines the terms of engagement. It demands legal and political frameworks that recognize spaces of ecological autonomy, where nature's rhythms and regenerative capacities are not subordinated to human needs or economic growth. In doing so, it reorients the goal of environmental law from regulation toward restraint, from management toward humility, and from dominance toward coexistence.

Beyond RoN, the right of nonuse can also be realized through established legal mechanisms found in domestic law. One of them is *actio popularis* – a legal action that allows any member of the public to initiate a lawsuit to protect a public interest, such as environmental preservation. For example, under Italian law, *interesse collettivo* (collective interest) serves as another legal basis for asserting the right of nonuse.[72] In this context, environmental associations and civil society organizations, acting as *enti esponenziali* (representative bodies), are entitled to bring claims on behalf of the broader community to prevent environmental harm.[73]

---

[72] Giuseppe Manfredi, 'Interessi diffusi e collettivi (dir. amm.)' in *Enciclopedia del diritto*, Annali (Milano, 2014) 513. See also the decisions *Consiglio di Stato* (Sez V) 14 October 2024, no 8208 and *Consiglio di Stato* (Adunanza Plenaria) 20 February 2020, no 6.

[73] In the Italian legal system, environmental protection is linked to the concept of *interesse diffuso* (diffuse interest), which refers to the shared interest of an unorganized community in the integrity of the environment. Since this interest is not attributed to any specific individual, it cannot be directly enforced in court unless represented by an *ente esponenziale*—an association that regularly advocates for the protection of such interests. Once organized in this manner, the interest is reclassified as a 'collective interest' (*interesse collettivo*), which can be judicially enforced. Environmental associations are the main vehicle through which communities assert their rights to environmental integrity. However, not all associations have locus standi to take legal action. According to Italian law (Article 13 of Act No. 349/1986) and case law from the Council of State, eligible associations must meet specific criteria, including a consistent pursuit of environmental protection, sufficient

There are many other examples of public interest procedures in environmental protection. India provides a compelling example of how *actio popularis*-like mechanisms can be integrated into constitutional frameworks through its well-established practice of Public Interest Litigation (PIL).[74] Developed judicially in the late 1970s and 1980s, PIL enables any individual or organization to petition the Supreme court or High courts to enforce constitutional rights or public duties, even without demonstrating direct personal harm. In environmental matters, this mechanism has been especially influential, with the Indian judiciary interpreting Article 21 of the Constitution, which guarantees the right to life, to include the right to a clean and healthy environment.[75] Two landmark cases illustrate the significance of PIL in shaping environmental jurisprudence. In M.C. Mehta v. Union of India (1987), the Supreme court ordered the closure of polluting industries near the Taj Mahal to prevent further damage to the historic monument.[76] In Vellore Citizens Welfare Forum v. Union of India (1996), the court formally introduced the precautionary principle and the polluter pays principle into Indian environmental law.[77] These rulings demonstrate

representativeness and stability, and a link to the affected area (the *vicinitas* criterion). In addition to meeting standing requirements, these associations must demonstrate an interest to sue, meaning they must show that their environmental interests have been harmed. Once these conditions are met, environmental associations may intervene in civil lawsuits for environmental damage initiated by the State, thereby strengthening public interest protection and ensuring appropriate redress for environmental harm.

[74] Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India' in Diana Kapiszewski, Gordon Silverstein and Robert Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press 2013) 262.

[75] Gitanjali Nain Gill, 'Human Rights and the Environment in India: Access through Public Interest Litigation' (2012) 14(3) Environmental Law Review 200.

[76] M.C. Mehta v. Union of India, AIR 1987 SC 1086; (1987) 1 SCC 395

[77] Killi Bhaskararao, 'Balancing Development and Environmental Protection: The Vellore Tanneries Case Revisited' (22 February 2025) SSRN <https://ssrn.com/abstract=5226037> accessed 20 January 2026.

how PIL has evolved into a powerful tool for ecological protection and for expanding legal standing in the public interest, offering valuable lessons for other jurisdictions seeking to operationalize the right of nonuse through judicial means.

Another relevant example is South Africa's 1996 Constitution, which is widely regarded as progressive, particularly for its explicit recognition of environmental rights and expansive access to justice provisions. Section 24 of the Constitution guarantees everyone the right to an environment that is not harmful to their health or well-being, and that is protected for the benefit of present and future generations through reasonable legislative and other measures. This environmental rights approach is reinforced by Section 38, which allows for broad legal standing.[78] Under this provision, legal action can be initiated not only by individuals directly affected but also by anyone acting in the 'public interest', including non-governmental organizations (NGOs), civil society groups, traditional communities, and concerned individuals. Together, these clauses establish a robust legal framework that safeguards environmental rights and facilitates the use of litigation to promote ecological justice. The generous interpretation of these provisions by South African courts has allowed a diverse range of actors to hold both state and private entities accountable for actions that threaten environmental integrity. This model illustrates how constitutional design can institutionalize principles similar to *actio popularis*, offering practical means to defend the right to nonuse and foster a legal culture centred on environmental protection.

4. Posthumanism

Finally, it is worth noting a critical and philosophical proposal which, departing from a critique of the Rights of Nature framework, advocates for

[78] Neels CF Swanepoel, 'The Public-Interest Action in South Africa: The Transformative Injunction of the South African Constitution' (2016) 41(2) Journal for Juridical Science 29.

an expansion of the existing human rights system to encompass a posthuman conception of the legal subject. This expansion is realized through a shift in legal focus, with the reconceptualization of the human as ecologically embedded and cosmically interconnected. The 'cosmic person' is a concept that redefines the human as existing within three interdependent contexts – the Universe, as a single, evolving energy event that grounds all existence; the Earth, as a web of co-constituted life where 'existence is coexistence'; and the Person, as a being whose relationality, embodiment, and affect are integral to legal identity.[79] As a practical example of this approach, Norman illustrates The Waimea River mediation in Hawai'i (2017), demonstrating how legal processes can embody a 'cosmic' mode of law grounded in relationality and coexistence. Rather than pursuing adversarial litigation, the parties engaged collaboratively, recognising the river's vitality as central to the resolution. The resulting agreement prioritised the preservation of the river's life alongside sustainable human use, thereby exemplifying a model of mutual flourishing that achieves ecological justice without the formal conferral of legal personhood on nature.

5. Key takeaways

The above described approaches bridge the gap between abstract environmental values and enforceable legal action by institutionalizing mechanisms through which nature's right to remain untouched can be defended. Whether through constitutional rights, public interest litigation, or representative legal standing, the right of nonuse enables citizens and organizations to directly challenge environmental degradation and affirm ecological autonomy in legal forums. When combined with other rights-based approaches, the right of nonuse can contribute meaningfully to advancing environmental protection, as well as fostering climate adaptation

[79] Jana Norman, 'Introducing the Cosmic Person: An Ecocentric Legal Subject' (2018) 43(2) *Alternative Law Journal* 126.

and mitigation efforts in a way that bridges diverse worldviews.[80] This not only promotes a more balanced relationship between human and non-human worlds but also demonstrates the potential for ecological principles to reshape legal systems from within. The emphasis on procedural tools, such as *actio popularis* and related mechanisms, reveals how environmental protection can be pursued without relying solely on new normative frameworks like RoN. Instead, these mechanisms provide actionable pathways rooted in diverse legal traditions that prioritize the protection of ecosystems. They thus reflect a broader shift toward integrating ecological integrity into environmental governance and linking environmental protection more explicitly with the realization of fundamental rights.

The perspectives expressed in the present section echo earlier critiques of RoN's portrayal as a singular, eco-centric model by emphasizing interdependence rather than opposition. Such perspectives might also draw on Indigenous relational ontologies, where human and non-human beings are seen as part of a shared ecological continuum rather than isolated categories. In many Indigenous worldviews, the well-being of ecosystems is intimately tied to human flourishing, not as a derivative interest but as a co-constitutive reality. This stands in contrast to dominant RoN approaches, which often reframe nature in the image of Western legal personhood, thereby introducing a new kind of abstraction and potentially essentializing Indigenous knowledge, as demonstrated in this paper.

In this context, legal mechanisms such as *actio popularis* and broad public interest standing may offer effective procedural means that ultimately enable environmental protection. These tools permit communities, not just states

[80] For example, Gilbert examines the 'paradoxical' relationship between human rights and the rights of nature, suggesting that while human rights are inherently anthropocentric, there are growing alignments between the two. One example is the global recognition of the right to a healthy environment, which connects human rights and the rights of nature. Jérémie Gilbert, 'Human Rights and the Rights of Nature' (n 47) 447.

or institutionalized legal subjects, to defend the integrity of the land and ecosystems in court. Rather than reducing nature to a legal object with individual rights, they enable a collective responsibility to be enacted through law. Such mechanisms could be more in line with relational ontologies than certain universalized RoN frameworks due to their potential resonance with Indigenous understandings of reciprocal duties and shared custodianship.

The ecological continuum approach is effective in avoiding the pitfalls of essentialism while also providing a practical and pluralistic foundation for reimagining legal systems, emphasizing interdependence, procedural inclusion, and ecological responsibility. By committing to relationality, the duty of care, and the principle of nonuse, it becomes possible to bridge the conceptual gaps between anthropocentric and eco-centric frameworks and Western and Indigenous traditions. The outcome of this synthesis is the development of legal approaches that acknowledge the intrinsic value of all life forms and connect environmental protection to broader struggles for justice and self-determination.

V. Conclusions

The RoN framework has gained significant traction in recent years, celebrated as a transformative legal paradigm that addresses the ecological crisis. However, as this paper has demonstrated, the narrative of RoN as a singular, universally applicable model rooted in Indigenous worldviews and promoting an eco-centric shift is far from complete. By problematizing key aspects of RoN, this paper has revealed the complexity and plurality inherent in its conceptual foundations, legal structures, and practical applications.

The analysis has shown that the standard historical account of RoN overlooks important divergences in theoretical underpinnings and ignores the significant contributions of non-Western perspectives. Moreover, while RoN is often framed as a holistic, eco-centric paradigm, this paper has questioned the coherence of such claims, noting how ecocentrism itself may

reproduce the very dualistic logic it seeks to overcome. The relationship between Indigenous worldviews and RoN is equally contested, with critiques highlighting the risks of essentializing Indigenous perspectives and the potential for neocolonial appropriation of Indigenous knowledge for Western legal purposes.

The creation of non-centred ecological theories as a convincing alternative to both anthropocentric and eco-centric frameworks is one of the most significant contributions of this paper. In contrast to models that primarily focus on extending legal rights to nature, this approach emphasizes normative concepts, such as ecological responsibility, duty of care, the recognition of the 'cosmic person', and the possibility of nonuse as foundational principles. These concepts provide a normative and procedural basis for environmental protection that does not depend on attributing rights or personhood to nature, but instead on acknowledging interdependence and relationality within ecological systems.

This perspective enables the articulation of legal tools that are more aligned with Indigenous ontologies and alternative epistemologies. These tools prioritize coexistence and restraint over management and ownership. Without imposing paternalistic or colonial frameworks, ecosystems can be protected through public interest litigation, broad standing provisions, and the establishment of constitutional environmental rights. By mobilizing these mechanisms, harm can be prevented proactively, conservation can be supported through nonuse, and care-based obligations can be institutionalized.

This framework can provide solutions that are context-sensitive, culturally respectful, and ecologically grounded by focusing on responsibility and interrelation instead of abstract rights. By doing so, environmental governance shifts away from utilitarian logics and focuses on environmental preservation and the right of nonuse.

Ultimately, this paper calls for a more pluralistic and context-sensitive approach to RoN. Instead of treating it as a monolithic, ready-made solution, it should be understood as a dynamic, context-dependent process that interacts with local legal, cultural, and social realities. The recognition of nature's rights must be accompanied by critical reflection on its implications for Indigenous sovereignty, environmental justice, and the conceptualization of nature itself. By problematizing these assumptions, this paper contributes to a more rigorous and reflective discourse on RoN, opening space for legal pluralism, intercultural dialogue, and alternative pathways for ecological governance.

MAINSTREAMING CLIMATE AND ENERGY JUSTICE: THE EU CLIMATE AND ENERGY PACKAGE REVISITED

Kim Fyhr*

This article analyses the evolution of EU energy law. It identifies the preparation of the EU climate and energy package (CAEP, 2007-2008) as an important phase in the historical development of EU energy law. This topic and the period have already been extensively studied, but the research to date has largely focused on the CAEP negotiations as a game of political and economic interests. This article brings a novel approach by delving into the early preparatory phase of the CAEP and examining it against the backdrop of climate and energy justice. Drawing on the documents of the key, early preparatory phase of the CAEP, the fundamental argument of this article is that considerations of justice were the catalyst through which energy and climate law converged in the legislative package. Despite the evident practice-oriented energy policy goals of the EU legislators, the CAEP reveals longer-term objectives pertaining to justice that, taken together, can be

* Dr. Kim Fyhr (LL.D., University of Helsinki 2017, ORCID ID: 0000-0002-9340-5474).) is Senior Researcher at the Law School of University of Eastern Finland (UEF). Prior to joining UEF, he worked at the Ministry of Foreign Affairs of Finland, serving in the Embassy of Finland in Vienna and the Permanent Representation of Finland to the EU in Brussels. During his first posting in Brussels, he functioned as energy counsellor and participated in the negotiations on one key part of the Climate and Energy Package, the Renewable Energy Directive. E-mail: kim.fyhr@uef.fi. This work was funded by the European Research Council (INTEL 101160605). The views and opinions expressed are those of the author(s) only and do not necessarily reflect those of the European Union or the ERC Executive Agency (ERCEA). Neither the European Union nor ERCEA can be held responsible for them. This work was also supported by the Research Council of Finland (361603). The author is indebted to Associate Professor Kaisa Huhta and Dr. Lea Di Salvatore for their invaluable comments during the writing process of this article.

considered as a paradigm change vis-à-vis the earlier, more extensive EU exercises of energy policy and law.

Keywords: EU energy law; energy justice; climate justice; EU climate and energy package

TABLE OF CONTENTS

I. INTRODUCTION

This article examines the emergence of climate and energy justice as an underlying driver in the evolution of European Union's (EU) energy law. The analysis will focus on one groundbreaking legislative package of EU climate and energy law, the Climate and Energy Package (CAEP) adopted

in 2009.[1] I argue that the CAEP was a paradigm change in the evolution of EU energy law, not only because it significantly contributed to making real – in a legislative sense – the well-known 20-20-20 targets set by the European Council,[2] but also because it marked the breakthrough of climate and energy justice into mainstream EU energy law-making. This happened a long time before 'just transition' started to emerge in EU policies. The key thesis of this article is that considerations of justice were the catalyst through which energy and climate law converged in a legislative package.

---

1 The CAEP consists of Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L307/18; Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L/140/63 ; Directive 2009/30/EC of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC [2009] OJ L140/88; Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide and amending Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L140/114; Regulation (EC) No 443/2009 of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO2 emissions from light-duty vehicle [2009] OJ L140/1 and Decision No 406/2009/EC of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L140/136.

2 European Council, Presidency Conclusions of the European Council, 8–9 March 2007, 7224/1/07 REV 1 [2007]. The climate and energy package included the following targets: a) 20% reduction in greenhouse gas emissions compared to 1990 levels, b) 20% share of renewable energy in the EU's total energy consumption, and c) 20% improvement in energy efficiency by 2020.

Previous research on the CAEP has focused on the multi-level governance and political bargaining reflected in the package.[3] Accordingly, the focus has been on the negotiations as a game, a power struggle between the EU institutions involved and the national priorities of the Member States or as a very expeditious legislative process.[4] Previous research has not been fully successful in identifying the CAEP as a model for the development of EU energy law.[5] These shortcomings are understandable given that most of the research on the package was undertaken soon after its adoption, focusing on the negotiations and the outcome.[6] From a legislative point of view, the CAEP was a precedent that shaped the way in which major climate and

---

3 Comprehensive research on the climate and energy package includes, among other publications, Jon Birger Skjærseth, Per Ove Eikeland, Lars H. Gulbrandsen, Torbjørg Jevnaker, *Linking EU Climate and Energy Policies: Decision-making, Implementation and Reform.* (Edward Elgar Publishing 2016); Elisa Morgera, Kati Kulovesi and Miquel Munoz, 'The EU's Climate and Energy Package: Environmental Integration and International Dimensions' (2010) Edinburgh Europa Paper Series 2010/07, University of Edinburgh School of Law Working Paper 2010/38 <http://dx.doi.org/10.2139/ssrn.1711395> accessed 9 December 2025; Sebastian Oberthür and Marc Pallemaerts (eds), *The New Climate Policies of the European Union. Internal Legislation and Climate Diplomacy* (VUB Press 2010).

4 See Rüdiger Wurzel, James Connelly and Duncan Liefferink (eds), *The European Union in International Climate Change Politics: Still Taking a Lead?* (Routledge 2016); Jon Birger Skjærseth, *Unpacking the EU Climate and Energy Package. Causes, Content and Consequences* (Fridtjof Nansen Institut 2013); Claire Dupont, *Climate Policy Integration into EU Energy Policy. Progress and Prospects* (Routledge 2016) 23.

5 ibid.

6 In historical research, including legal history, it is often the case that only temporal distance can help the observer to deal with the topic more objectively by identifying previously hidden phenomena and developments. The preparatory documents produced in the front end of the legislative process have the merit of revealing underlying argumentation and motivation of the legislative proposals.

energy legislation was later put forward.[7] What have been largely overlooked in the legal research on the CAEP are the underlying arguments relating to climate and energy justice – lines of reasoning which paved the way for the legislative proposals included in the package and, ultimately, their adoption. The CAEP can be regarded as a major EU legislative exercise aimed at moving towards a just transition that will take due account of justice.[8] Indeed, the CAEP set the benchmark for the development of EU climate and energy law and has since functioned as a model for implementing the ever-stricter triple targets of EU climate and energy policy: reducing CO2 emissions, promoting renewable energy sources, and fostering energy efficiency.[9]

This article takes a novel approach by focusing on the CAEP as a temporal turning point in EU energy law. Temporal turning points are important for the evolution of law, as they bring to light major changes in the discipline.[10]

---

7 In EU energy law, the method of introducing package proposals for legislation has been very common (eg EU internal energy market packages).

8 On the concept of just transition and its usage in different contexts, see Darren McCauley and Raphael Heffron, 1. See also Romain Mauger, 'Cast away? How EU Energy Law provides for a Just Transition for EU Islands' (2021) 19(1) OGEL; Simone Abram and others, 'Just Transition: A Whole-Systems Approach to Decarbonisation' (2022) 22 Climate Policy 1033; Thomas Muinzer, 'Challenges in Research Approaches to the "Just Energy Transition" in Legal Studies and Other Branches of the Social Sciences', (2022) 16(1) Journal of World Energy Law & Business.

9 The EU triple targets here refer to the EU architecture of climate and energy policy resting on three pillars: 1) CO2 reduction, 2) promotion of renewable energy sources and 3) fostering energy efficiency. This format of EU climate and energy policy came into existence because of the European Council's 20-20-20-targets and has prevailed since.

10 With a temporal turning point, I am referring to a moment in history when an event – in this case CAEP – causes a major change in historical development. It is a 'before and after moment', which has consequences on the course of future events.

This applies in the case of EU energy law, which has undergone turbulent and fast-paced development during the past nearly three decades.[11] The CAEP is significant in three ways. First, it is important because of its practical legal outcomes. Second, it reveals the underlying legal principles and forces shaping the EU legal culture in the field of energy law. Third, turning points such as the CAEP also provide useful insights into how the current legal structures have been constructed and what their *raison d'être* is.

This article argues that climate and energy law converged in an unprecedented fashion in the preparation of the CAEP and provided impetus for their mainstreaming in the EU legislative process on energy. While one can identify many dimensions of climate and energy justice in the CAEP, perhaps the most striking are justice, fairness and solidarity within the EU (i.e. among the EU Member States) and internationally (i.e. towards non-EU States, most notably developing countries).[12] In the light of the

---

[11] On the various temporal turning points in the evolution of EU energy law, see Kim Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013) 74-75. On the importance of historical turning points, which can be sudden but with a long-term impact, see Eric Hobsbawm's contributions in the trilogy *The Age of Revolution 1789-1848* (Weidenfeld & Nicolson 1962); *The Age of Capital: 1848-1875* (Weidenfeld & Nicolson 1975); *The Age of Empire: 1875-1914* (Weidenfeld & Nicolson 1987); and the *Age of Extremes: 1914-1991* (Michael Joseph 1994). Hobsbawm's view differs from that of another distinguished historian, Fernand Braudel, who based his position on long-lasting developments – longue durée – which undermined the importance single specific events. See Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II. Vol. 1.* (Harper & Row 1972).

[12] From a conceptual point of view, it should be noted that 'justice' has been utilised in the article when the emphasis is on institutional or moral systems, which determine what individuals are entitled to. The focus is on their rights and duties. With fairness, I refer to equitable treatment of individuals particularly in different processes and decision-making. Furthermore, 'intergenerational' perspective has been used instead of 'intragenerational' perspective as the source material reveals

preparatory documents of the CAEP, the article also submits that justice and fairness in intergenerational perspective were another important topic.[13] In this respect as well, the CAEP can be characterised as a paradigm change.

The research question informing this article is: how did climate and energy law, from the perspective of justice, converge in the early preparatory phase of the EU climate and energy package (CAEP)? It hence sets the CAEP in the context of the evolution of EU energy law. Addressing this question requires adopting a historical perspective on law and applying a legal-historical method to extract key concepts, patterns and reflections of justice emanating from the preparatory documents of the CAEP.

Before proceeding, it is necessary to introduce some limitations on the scope of the research from a conceptual point of view. First, the article deals with the concepts of climate justice and energy justice with a focus on distributive justice. It should be noted that these are distinct concepts, each with its unique features and connotations. Climate justice concerns itself primarily with global justice transitions that enable vulnerable groups to deal with inevitable consequences of climate change. Most often these inequalities manifest in the Global South.[14] Energy justice, for its part, focuses on the prospect of a transition in production towards low-carbon sources as well as on consumption-based concerns about achieving energy efficiency without compromising individual well-being or community cohesion.[15] Climate

more forward-looking perspectives reaching across generations and not within generations.

13 The positive aspects of revisiting past legislative files can be found in the classic work of David Easton focusing on inputs and outputs of the policy and legislative process, see David Easton, *A Systems Analysis of Political Life* (John Wiley 1965) 26-29.

14 Darren McCauley and Raphael Heffron, 'Just Transition: Integrating Climate, Energy and Environmental Justice' (2018) 119 Energy Policy 1.

15 ibid 1. On energy justice in the context of the EU, see Laura Kaschny, 'Energy Justice and the Principles of Article 194 (1) TFEU Governing EU Energy Policy' (2023) 12(2) Transnational Environmental Law.

justice and energy justice also have important common features and interfaces. Given the scope of the research process which includes preparatory documents of EU instruments in both climate and energy law, climate and energy justice will be treated *en bloc*. The two are examined through the lens of distributive justice, focusing on the distribution of risks and responsibilities while not omitting vulnerabilities.[16] Concerned as they are with the fair distribution of burdens and benefits of the energy sector, climate and energy are closely interlinked with sustainable energy democracy, not least because they emphasise the moral implications of energy in the context of the energy transition.[17]

Second, as noted above, the analysis will examine the preparatory documents of the CAEP and the package as a whole. The approach is holistic, tapping the extensive array of preparatory documents produced by different EU institutions rather than individual instruments such as the Renewable Energy Directive. The objective in doing so is to identify overarching and cross-cutting trends in the source material.

Third, it is necessary to shed light on what the preparatory phase of EU legislation entails. It encompasses several stages. It can include the very early stage where institutions and other stakeholders involved in process start to outline the legal form, design, and the possible content of the legislative proposal. This stage often comprises consideration of the purposes of the draft legal measure from political, legal, technical, economic, social and other angles. Justifications are provided and often particular policy approaches are articulated. Within the domain of EU law, the preparatory phase may alternatively and equally well refer to the stage where EU co-legislators – the Council of the European Union (Council) and the European Parliament (EP) – proceed to debate and negotiate on the legislative proposal of the

16 ibid 4.

17 Ruven Fleming, Kaisa Huhta and Leonie Reins, 'What is Sustainable Energy Democracy in Law?' In Ruven Fleming, Kaisa Huhta and Leonie Reins (eds), *Sustainable Energy Democracy and the Law* (Brill Nijhoff 2021) 12.

European Commission (Commission). This phase falls outside the scope of this article.[18] Also excluded are preparatory phases centring on the actions of a single EU institution, such as the Commission, which incorporate impact assessments and public consultations.[19] The reason for these limitations is the focus on the early stage of the preparation, which is highlighted in depth by the selected sources. Alternatively, one could have discussed in a broader fashion the whole preparatory phase including the negotiations between the institutions based on the Commission's proposal. Relevant discourse has already explored broader discussions as to the whole preparatory phase including the negotiations between the institutions based on the Commission's proposal. Therefore, building on this research, this paper focuses instead on the early preparatory phase, which warrants further analysis.

The article also underlines that the CAEP manifested a breakthrough of climate and environmental considerations into EU energy law on equal footing with the internal market, competition, and security of supply.[20] In fact, the CAEP went beyond this by elevating the dimension of clean energy

---

18 The implementation, application and enforcement of the CAEP fall outside the scope of this article. Interestingly, no real attempts were made to challenge the climate and energy package in the EU courts by either EU Member States or institutions.

19 This choice is justified because the aim in this paper is to provide analysis of all the institutions involved the preparation of CAEP. Focusing on the impact assessment phase would have meant observing mainly the actions of the Commission as impact assessment arrangements of the EP and the Council are nearly non-existent.

20 It was stipulated in Article 6 of the Treaty establishing the European Community (TEC), which was in force during the time of CAEP, that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. This so-called integration principle is now enshrined *mutatis mutandis* in Article 11 of the TFEU.

to the core of EU energy policy and law.[21] This advancement bolstered the evolution of EU energy law and provided the starting point for further EU climate and energy legislation with ever-stricter targets and legal obligations.[22] Indeed, the CAEP did much to accelerate the sustainability and energy transition.[23] These are the fundamental factors of continuity and change that makes CAEP a milestone in the development of EU energy policy and law. This underscores the relevance of CAEP as a research topic even after almost two decades.

This article is structured as follows: Section II sets out the framework for the analysis. Its backbone is the legal-historical approach. Section III proceeds to examine the issue of justice, with arguments in respective subsections revealing the positions of the European Council, the Commission, the Council and Parliament in the preparatory documents of the CAEP. Section IV discusses the key substantive issues emerging from the documents in light of the framework established in Section II. Section V concludes, setting out the main findings and presenting suggestions for further research.

---

21 On the interrelationship between EU climate and energy law, see Seita Romppanen and Kaisa Huhta, 'The Interface Between EU Climate and Energy Law' (2023) 30(1) Maastricht Journal of European and Comparative Law 48-50. For a comparative approach to these two areas of law as disciplines see Kaisa Huhta and Seita Romppanen, 'Comparing Legal Disciplines as an Approach to Understanding the Role of Law in Decarbonizing Societies' (2023) 12 (3) Transnational Environmental Law 658-660.

22 EU climate and energy policy was ambitious already prior to the climate and energy package, but this body of legislation spurred a much higher level of ambition.

23 On the different roles of law in sustainable transitions, see Niko Soininen, Seita Romppanen, Kaisa Huhta, Antti Belinskij, 'A Brake or an Accelerator? The Role of Law in Sustainability Transitions' (2021) 41 Environmental Innovation and Societal Transitions 71-73.

II. A Historical Perspective On Justice in EU Energy and Climate Law

The historical perspective adopted for the analysis rests on three forms of justice – energy justice, climate justice, and distributive justice. Energy justice is a moral, ethical and philosophical concept that developed in the late 20th and early 21st centuries.[24] In the EU, energy justice has been examined especially in the post-Lisbon context.[25] Its focus is on the fair distribution of the benefits and costs of energy services and on more representative energy decision-making.[26] It is also closely linked to efforts promoting human rights.[27] The concept of energy justice comprises many elements.[28] Energy justice can be used to describe the justice-related aspects of the energy sector, but the concept can also be used normatively to guide legislative, judicial and executive decision-making in the energy sector toward more equitable and inclusive energy regulation.[29] Energy justice informs collective

24 Raphael Heffron, Anita Rønne, Joseph Tomain, Adrian Bradbrook and Kim Talus 'A Treatise for Energy Law' (2018) 11 Journal of World Energy Law & Business 42.

25 Kaschny has concluded that 'the elements of energy justice relating to the social aspects of energy regulation are under-represented, Kaschny (n 16) 294.

26 See Benjamin K. Sovacool, Raphael Heffron, Darren McCauley and Andreas Goldthau, 'Energy Decisions Reframed as Justice and Ethical Concerns' (2016) 1(5) Nature Energy 1-6.

27 See Kaisa Huhta, 'Conceptualizing Energy Justice in the Context of Human Rights Law' (2023) 41(1) Nordic Journal of Human Rights 388-390. See also Margaretha Wewerinke-Singh, 'A Human Rights Approach to Energy. Realizing the Rights of Billions within Ecological Limits' (2021) 31(1) Review of European Comparative and International Environmental Law 16-18.

28 For example, Blanche Lormeteau is reflecting energy justice in light of inequalities and energy vulnerability. Blanche Lormeteau 'Justice énergétique et inégalités: Introduction à la vulnérabilité énergétique' (2021) 46 (3) Revue Juridique de l'Environnement 551-555.

29 ibid 292.

aspirations, ideals or values that the law must strive for.[30] In literature, the principles of energy law are more concrete than those of energy justice and have been articulated in order to translate the demands of energy justice into positive law.[31] Climate justice, in comparison, began to attract more attention in the late 1990s because of active social and environmental justice movements.[32] As in the case of energy justice, there are many different understandings of the concept.[33] It has perhaps most aptly been defined as follows:

> [Climate justice] recognises humanity's responsibility for the impacts of greenhouse gas emissions on the poorest and most vulnerable people in society by critically addressing inequality and promoting transformative approaches to address the root causes of climate change.[34]

Distributive justice concerns itself with 'the distribution of material outcomes, or public goods such as resources or wealth and public bads such as pollution or poverty'.[35] This perspective is clearly visible in the CAEP in

30 Íñigo del Guayo Castiella, 'Concepto, contenidos y principios del derecho de la energía' (2020) 212 Revista de Administración Pública 339.

31 ibid.

32 Tahseen Jafry, Michael Mikulewicz and Karin Helwig, 'Introduction: Justice in the Era of Climate Change' in T. Jafry (ed), *Routledge Handbook of Climate Justice* (Routledge 2018) 2.

33 Íñigo del Guayo Castiella 'Energy Justice and Energy Law – An Approach to the Differences between both Concepts' in Raphael Heffron and Louis de Fontenelle (eds), *The Power of Energy Justice & social contract* (Palgrave MacMillan 2024) 29-33.

34 Tahseen Jafry et al. (n 33) 3.

35 Benjamin K. Sovacool and Michael Dworkin, *Global Energy Justice. Problems, Principles, and Practices* (CUP 2014) 11.

many ways, such as in the burden-sharing between EU Member States and the EU's responsibilities towards developing countries.[36]

A historical approach is needed in order to anchor energy and climate law and justice in a particular place and time.[37] This inevitably brings in an element of subjectivity, which is always present in historical research. When working within the discipline of history, a distinction is often drawn between the past event (*res gestae*) and a narrative of past events (*historia rerum gestarum*).[38] The classic work in the scholarship of history and historiography is Edward Hallett Carr's 'What is history?'. Carr makes the cross-cutting point that the interpretations of historians cannot be completely neutral.[39] Although historians should strive for objectivity, they always – at least to some extent – carry the weight of bias.[40]

With this limitation in mind, the article's point of departure is that, historically, the political energy narrative has been dominated by economic growth.[41] During the last 20 years, however, climate change mitigation has

---

36 The elements of distributive justice were clearly present especially in Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16; Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63 and Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L140/136.

37 According to John Lewis Gaddis, historians may manipulate time and place and compress, expand, compare, measure and even transcend them. John Lewis Gaddis, *The Landscape of History. How Historians Map the Past* (OUP 2002) 17.

38 Robin George Collingwood, *The idea of history* (Revised edn OUP 2005) 12.

39 Edward Hallett Carr, *What is history?* (2nd edn Penguin Books 1987) 13.

40 See in particular Carr's discussion on the interrelationship between historical facts and historical interpretation, ibid 10-20.

41 Heffron et al. (n 24) 44.

been integrated into the energy narrative and climate law has become a key source of EU energy law.[42] Indeed, there have been few dissenting voices among the EU Member States, which highlights the strong consensus that has emerged on the need to curb CO2 emissions.[43] To be sure, there is disagreement as well, for example on the priorities of EU Member States with regard to matters such as the schedule for the targets and the means to achieve the objectives.[44] To resolve these differences, the negotiations for the CAEP paved the way for a fair distribution of effort.[45]

The priorities of energy law have changed in response to swift legislative developments, rapid fluctuations in the political landscape and the emergence of crises of different natures.[46] For example, the war in Ukraine brought security of supply to the fore.[47] Nevertheless, if one were to extract the single most important factor driving the development of EU energy law and policy, one might propose sustainability, particularly climate change

---

42 In practice, this has meant that nowadays sustainability and climate change mitigation considerations are placed on the same level with economic and security of supply aspirations. Additionally, legal norms stemming from legal instruments of climate law now function as important sources of energy law. In the presentation, climate and energy justice has been discussed. Within this frame, energy law, rather than climate law, has been looked into. The reason for this is that the intrusion of climate justice into energy law is a relatively new feature, which deserves attention.

43 Jeffrey Rosamond and Claire Dupont, 'The European Council, the Council and the European Green Deal' (2021) 9(3) Politics and Governance 357.

44 ibid 351.

45 Jos Delbeke and Peter Vis, *EU Climate Policy Explained* (Taylor and Francis Group 2015) 21.

46 On EU climate and energy policy in times of crisis and turbulence, see Mary Dobbs, Viviane Gravey and Ludivine Petetin, 'Driving the European Green Deal in Turbulent Times' (2021) 9(3) Politics and Governance 316-326.

47 Anna Wójtowicz, 'EU Energy Security After Russia's Invasion of Ukraine – Substance, Strategy and Lobbying' (2024) 28(2) Studia Europejskie - Studies in European Affairs 160.

mitigation. Neither successive economic crises nor the shattering of peace in Europe has slowed down the EU's progress in this field.[48] Quite the contrary, climate change mitigation has been regarded as an objective supporting, not impeding, the other aspirations of the energy trilemma – ensuring a secure, sustainable, and fair energy transition.[49] One could even argue that over the years climate change mitigation has become a force enveloping and galvanising the trilemma.

To set the scene for analysing why the CAEP was a paradigm change, it is necessary to briefly illustrate the situation before and after this phase. Before CAEP, climate and clean energy ambition of the EU was significantly lower, and the package mostly implemented the 20-20-20 targets. The CAEP was not only important because it set the bar of ambition higher, but also because it widened the scope of the related legal instruments and introduced legally binding targets.[50] This is important also from the point of view of justice. Increasing the targets and reinforcing the binding elements of the legislative package underlined the need to act now and in a way that would oblige Member States to carry out the measures needed for the energy transition. This contributes to the intergenerational justice and the reduction of burdens of future generations – CAEP highlighted that the time to act is now and not later. Furthermore, economic situation of different EU Member States was considered when setting the national targets, which also

48 According to Falkner, the war in Ukraine has stimulated the EU leaders' commitment to the net zero goal and accelerated decarbonisation efforts. Robert Falkner, 'Weaponized Energy and Climate Change: Assessing Europe's Response to the Ukraine War' (2023) LSE Public Policy Review 3(1) 10, 6.

49 In the context of the EU Green Deal, clean energy can be seen as also supporting energy security objectives, see Odysseas Christou, 'Energy Security in Turbulent Times Towards the European Green Deal' (2021) Politics and Governance 9(3), 365-366.

50 For example, before the Renewable Energy Directive, the EU had a Renewable Electricity Directive (2001/77/EC), which was limited only to electricity sector and did not include legally binding national targets.

encapsulated the strong aspect of energy justice and solidarity.[51] The CAEP marks a paradigm change because after the adoption of the package it has functioned as a model for the subsequent clean energy legislative packages; the European Green Deal and the Fit for 55.[52] Both these major legislative exercises have been important for climate and energy justice. The next chapter demonstrates how this pattern combined with considerations of justice in the energy sector, was integrated into the preparatory documents of the CAEP.

III. JUSTICE IN THE PREPARATORY DOCUMENTS OF THE CAEP

This section discusses the issue of justice in light of the EU preparatory documents of the CAEP. Sub-section 1 introduces the EU preparatory documents as the sources of the examination. It sheds light on the different categories of preparatory documents stemming from different institutions. Sub-section 2 addresses the research question from the angle of the European Council. Following, sub-section 3 focuses on the angle of the Commission. Sub-section 4 explores the Council's angle, while the discussion on the institutions' positions is drawn to a close in sub-section 5 covering the European Parliament.

---

51 Seita Romppanen 'Targets, Timetables and Effort Sharing as Governance Tools: Emergence, Scope and Ambition' in Tim Rayner, Kacper Szulecki, Andrew J. Jordan and Sebastian Oberthür (eds), *Handbook on European Union climate change policy and politics* (Edward Elgar 2023) 216-227.

52 Commission, The European Green Deal (Communication) COM(2019) 640 final; Commission, 'Fit for 55': Delivering the EU's 2030 Climate Target on the Way to Climate Neutrality (Communication) COM(2021) 550 final.

1. *The EU preparatory documents reflecting institutional will*

Legislative initiatives do not appear in any political entity *ex nihilo*.[53] In the EU, the introduction of legislative measures is usually preceded by policy documents, which often include political, legal, social, technical and economic considerations. Often, these documents set out the state of play, or status, of a particular phenomenon or development.[54] They may also describe and outline the arguments for ways forward and different policy options.[55]

An examination of the *travaux préparatoires* may be useful in comprehending the driving forces and justifications of the legislative enterprises. In EU law, one source where these rationales may be sought is explanatory memoranda. However, these only accompany legislative proposals and are not incorporated in the final legal document adopted. Another shortcoming of the explanatory memoranda for analytical purposes is that they represent the thinking of the Commission, not the other EU institutions, that is, the Council and the EP, which are the co-legislators. Similar concerns apply in the case of other preparatory documents, such as impact assessments and Commission staff documents. All the same, none of these concerns means that the documents would be biased; very often they are balanced and comprehensive.

One strategy for gaining a wider perspective on the thinking of EU institutions other than the Commission would be to search for motivations

---

53 On the agenda-setting of the EU, see Sebastiaan Princen, 'Agenda Setting and the Formation of an EU Policy-making state' in Jeremy Richardson (ed), *Constructing a Policy-making State. Policy Dynamics in the EU* (OUP 2012) 30-33.

54 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (8th edn, OUP 2024) 157-158.

55 On justification and policy options in the case of impact assessments, see Alberto Alemanno and Anne Meuwese, 'Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in "New Comitology"' (2013) 19(1) European Law Journal 76–92.

in political documents such as Council conclusions and EP resolutions. Clearly, European Council conclusions[56] are highly authoritative documents for assessing the political will of the EU.[57] Such preparatory documents are the focus of this sub-section. The period chosen for close scrutiny is 2006-2008, which marks the most significant stage in the preparation of the legislative proposals of the CAEP. Within this timeline, 2007 and early 2008 are particularly salient.

The following documents relevant to the preparatory phase of the CAEP are the primary sources used for the analysis:

- European Council Conclusions;[58]
- European Commission documents, that is, communications and explanatory memoranda accompanying the legislative proposals;[59]

---

56 The European Council conclusions of March 2007 set the preparation of the climate and energy package in motion. See European Council, Presidency Conclusions of the Brussels European Council*, 8–9 March 200*7, 7224/1/07 REV 1.

57 European Council conclusions or (sectoral) Council conclusions are *stricto sensu* not *travaux préparatoires*. They are above all political documents. In the preparation of the climate and energy package, the European Council played a significant and an active role in monitoring the preparation of the package. Expressions of the will of the EU Heads of States and Governments can be found in the European Council conclusions.

58 The preparation of European Council conclusions is confidential. The preparation of European Council meetings, including its conclusions, takes place formally under the General Affairs Council (GAC) and hence Coreper II.

59 The preparation of communications and legislative proposals takes place in the responsible Directorate General (DG) of the Commission. As the Commission follows collegial decision-making, the college of Commissioners collectively makes the formal decision on issuing such documents.

- Council conclusions of the Transport, Telecommunications and Energy Council configuration (TTE) and Environment Council configuration (ENV);[60] and
- EP resolutions.[61]

The statements of the key institutions involved in the law-making process for the CAEP will be discussed by institution in sub-sections 2 onwards,[62] with a focus on implications for energy justice. First, concepts pertaining to justice are identified in the positions of the different institutions. The sources will be allowed to 'speak for themselves', meaning that in many parts of the text the positions of the institutions are quoted as stated in the documents. This descriptive phase is followed by an analysis from a substantive and, later,

---

60 The Council prepares its conclusions at different levels: The technical discussion based on the text of the rotating Presidency of the Council (in fact prepared by the Council Secretariat) and the preparation of at least the first few compromise drafts takes place at the Working Party level, in this case in the Working Party on Energy and the Working Party on the Environment. The text then goes to Coreper I (either for compromise brokering or formal passing to the ministerial level). The final stage is the formal adoption in the Council at the ministerial level. The decision-making procedure in the Council conclusions is unanimity.

61 The European Parliament prepares its positions in the responsible parliamentary committees, in this case either in the Committee on Industry, Research and Energy (ITRE) or the Committee on the Environment, Public Health and Food Safety (ENVI). Resolutions may also have other committees involved for the purpose of providing statements. The rapporteur (Member of European Parliament appointed for this task) of the file concerned is in a central position for forming the EP position, as are what are known as the shadow rapporteurs (MEPs nominated from other EP political groups than that of the rapporteur). The draft resolution proceeds from committee voting to the vote in the Plenary, which finally establishes the EP's position.

62 On the role of EU institutions in shaping EU energy policy and law, see Vicki L. Birchfield, 'The Role of EU Institutions in Energy Policy Formation' in Vicki L. Birchfield & John S. Duffield (eds), *Toward a Common European Union Energy Policy* (Palgrave MacMillan 2011) 235-262.

from an institutional perspective. The approach is hence qualitative, descriptive content analysis of discourse arising from EU institutional documents.

2. *The European Council as climate and energy justice pioneer? Paving the way for the preparation of climate and energy legislation*

The European Council played a significant role in formulating the general lines of EU policies even before the entry into force of the Lisbon Treaty and its 'institutionalisation'.[63] In addition to 'thinking big' on the EU's future, the European Council participates in monitoring how well the Commission and the co-legislators, the EP and the Council, adhere to the guidance of the European Council in respect to legislation. In recent years, the European Council has often taken a compelling role in steering the legislators, especially in times of crisis and when faced with urgent priorities of the EU.[64] The most important documents of the European Council are its conclusions. According to Puetter, the European Council exercises leadership through its conclusions, whereas their authoritative character is demonstrated by how the Council and the Commission follow them.[65]

The European Council had a pivotal role in guiding the CAEP exercise. This role is illuminated by examining European Council conclusions from spring 2006 until the release of draft CAEP. In its conclusions of March 2006, the

---

63 On the growing importance of the European Council, see Desmond Dinan, 'The Arc of Institutional Reform in Post-Maastricht Treaty Change.' (2012) 34(7) European Integration 852.

64 On the strengthened role of the European Council, see Jan Werts, *The European Council in the Era of Crises* (John Harper Publishing 2021); Wolfgang Wessels, Lucas Schramm and Tobias Kunstein, *The European Council as a Crisis Manager: The EU's Fiscal Response to the COVID-19 Pandemic* (Nomos 2022). The central role of the European Council has been highlighted for instance during the financial crisis of 2008 and the war of aggression of Russia against Ukraine.

65 Uwe Puetter, *The European Council and the Council. New Intergovernmentalism and Institutional Change* (OUP 2014) 140.

Council drew special attention to the energy policy of Europe.[66] Notably, it dedicated the entirety of Part II of its conclusions to energy policy for Europe. It merits mention here that the Council considered sustainability to be equally important as the security of supply and competitiveness.[67]

In its conclusions of July 2006, the European Council attached a great deal of importance to intergenerational justice; It found that 'sustainable development means meeting the needs of the present generation without compromising the ability of future generations to meet their own needs. It is a fundamental objective of the European Union.'[68] With this expression the European Council not only accepted the definition of intergenerational justice as put forward in the conclusions, but it also recognized its status as a fundamental objective of the EU. In the context of the CAEP, the European Council has mostly been regarded as a high-level *primus motor*, setting the package in motion and persuasively ensuring that it would be approved through an effective brokering of compromise.[69] Analyses of the European Council's work in this regard have taken a practical and action-oriented perspective rather than examining its substantive argumentation.[70] A look at the argumentation reveals, quite strikingly, the strong positioning of the

66 European Council, Presidency Conclusions of the Brussels European Council, *23–24 March 2006* 7757/1/06 REV 1.

67 ibid 14-16.

68 European Council, Presidency Conclusions of the Brussels European Council, 15–16 June *2006* 10633/1/06 REV 1, para 17, 7. It should be noted that these European Council conclusions were heavily focused on climate and energy. With the strong sustainability angle, the references to sustainable development can be seen as closely linked to climate and energy policy. However, references to sustainable development do not explicitly rule out the broader meaning of sustainable development, not only limited to climate and energy issues.

69 Jos Delbeke 'EU Climate Policy after 25 Years. Looking Back, Looking Ahead' in Jos Delbeke (ed), *Delivering a climate neutral Europe* (Taylor & Francis 2024) 33-34.

70 Puetter (n 66) 72.

European Council as a steady advocate of intergenerational solidarity and justice in the framework of sustainability.

In its conclusions in December 2006, the European Council stated that it

> recognizes that there is a strong link between the EU's climate change policy and its energy policy as well as its jobs and growth and sustainable development strategies, and that all of these policies can and should be mutually reinforcing.[71]

The European Council further held that

> with regard to the development of the Energy Policy for Europe, and with reference to the conclusions of the 2006 Spring European Council, significant progress has been achieved especially on strengthening the coherence between its external and internal aspects and between energy policy and other policies.[72]

These statements underscored the need for an approach that converges especially climate and environmental considerations with EU energy policy. This integrated approach was a novel feature in the positions of the European Council and it has set the trend ever since, for instance in the subsequent EU Green Deal and Fit for 55 packages.

The European Council also contemplated that

> [t]he challenge of climate change is assuming ever greater importance as its long-term consequences become clearer and new information from recent studies shows that the costs of inaction for the global economy will significantly outweigh the costs of action.[73]

This call for early action highlights the need for intergenerational solidarity. It suggests that if climate action was postponed, the future generations would have to bear the costs. These costs would be much higher than the costs of

---

71 European Council, Presidency Conclusions of the Brussels European Council, *14–15 December 2006* 16879/1/06 REV 1 paras 32, 14.

72 ibid paras 33, 14.

73 ibid para 39, 16.

acting immediately. The statement can be seen as a departure from the earlier approach in climate and energy policies, one focusing on the costs in the shorter term. In the same vein, it can be regarded as step towards alignment with for example instruments of international environmental law.

The CAEP contributed significantly to the goal of environmental integration and had an impact on the mainstreaming of climate change considerations into energy policy.[74] This can be seen in the positions of the European Council paving the way for the CAEP. In the European Council's March 2007 conclusions, energy and climate issues occupied an even more interesting position.[75] The European Council strongly called for an integrated climate and energy policy and stressed the importance of sustainability.[76]

In June 2007 the European Council held in its conclusions that

> With its decisions on an integrated climate and energy policy the European Council in Spring 2007 underlined the synergies between these two key areas and paved the way for improved climate protection and dealing responsibly with energy.[77]

The importance of integrated climate and energy policy highlighted by the European Council is one of the key findings from the CAEP exercise and it has been an important objective also in the major EU climate and energy policy endeavours following this package.

Additionally, the European Council encouraged all parties to contribute to an urgent and global response to climate change bearing in mind their

74 Morgera, Kulovesi and Munoz (n 3) 38.

75 European Council, Presidency Conclusions of the Brussels European Council*, 8–9 March 2007* 7224/1/07 REV 1.

76 ibid paras 27-39 and Annex I.

77 European Council, Presidency Conclusions of the Brussels European Council*,* 21–22 June 2007 11177/1/07 REV 1 para 4, 1.

common but differentiated responsibilities and capabilities.[78] Here again, the European Council called for urgent global action and emphasised different responsibilities and capabilities. The global response stresses the responsibility of the EU and its solidarity towards developing countries. This can be seen as linked to distributive justice, whereby different actors are accountable for differing responsibilities stemming from past emissions and the current ability to bear the costs for climate and clean energy action.

In December 2007, climate and energy issues were high on the European Council's agenda also just before the official publication of the CAEP, and the European Council clearly stated that implementing the 20-20-20 climate and energy targets is essential. The European Council found the Commission's legislative proposals to this effect instrumental and their timely adoption important.[79] The European Council also highlighted that '[s]ustainable development is a fundamental objective of the European Union'.[80] According to the European Council,

> [t]he EU's integrated climate and energy policy and an integrated approach to the sustainable management of natural resources, the protection of biodiversity and ecosystem services and sustainable production and consumption are among the drivers for achieving objectives under both the SDS (EU Sustainable Development Strategy) and the Lisbon strategy.[81]

To conclude, the European Council, in its various conclusions paving the way for the CAEP, underlined considerations of energy and climate justice as well as the responsibility of the current generations vis-à-vis future generations. Furthermore, responsibility of the EU towards developing countries figured visibly in the preparatory documents. For the European Council, the key means to address energy and climate challenges, including

---

78 ibid paras 10, 40.

79 European Council, Presidency Conclusions of the Brussels European Council*, 14 December 200*7 16616/1/07 REV 1 paras 15, 51,52.

80 ibid paras 16,56.

81 ibid.

those related to climate and energy justice, was the integration of climate and energy policy and, hence, the law. The sources illustrate the role of the European Council as a rather strong proponent of newer energy policy and legal objectives of sustainability, energy and climate justice, responsibility and solidarity, endeavouring to set these on par with more traditional goals, most notably security of supply, energy markets and competitiveness. These observations are important also because of the ever-increasing importance of the European Council in EU policy-making and steering the EU legislative agenda.[82]

3. *The Commission: seeking a balance between justice and other aspects of climate and energy law*

In the EU architecture, the Commission, with its right of initiative, has the key function in shaping the EU regulatory framework.[83] What the Commission proposes and how it justifies its proposals is, thus, of crucial importance for the purposes of this article. The justifications for the adoption of the CAEP can be found especially in the Commission's Communications preceding the package.

In March 2006, the Commission presented a Green Paper titled, 'A European Strategy for Sustainable, Competitive and Secure Energy'.[84] It starts the section on the integrated approach to tackling climate change by stating that

> [e]ffective action to address climate change is urgent and the EU must continue to lead by example and, above all, work towards the widest possible

---

82 On the issue of the European Council gaining an increasingly important role in EU policy-making, see Puetter (n 66) 69-73.

83 Pursuant to Article 17 (2) of the Treaty on European Union 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide'.

84 Commission, 'Green Paper: A European Strategy for Sustainable, Competitive and Secure Energy' (Communication) COM(2006) 105 final.

> international action. Europe needs to be ambitious and must act in an integrated manner that promotes the EU's Lisbon objectives.[85]

It then concludes the Green Paper with the following words: 'Europe needs to deal with the challenges of climate change in a manner compatible with its Lisbon objectives'.[86] Already in this document, the Commission links the high level of climate ambition with competitiveness, a connection that derives from the EU Lisbon strategy. EU climate leadership stems not only from the need to secure a competitive edge in the move towards a low-carbon economy, but also from the Union's responsibility as a source of CO2 emissions. The spearhead of the EU Lisbon strategy adopted in 2000 was to make the EU the most competitive and dynamic knowledge-based economy in the world by 2010.[87] As can be seen from the CAEP related European Council conclusions, the political masters of the EU regarded sustainability and climate action as equally important as competitiveness, which was underlined in the Lisbon strategy.

In early 2007, the Commission published its communication on the energy policy for Europe.[88] Throughout the document it attached utmost importance to the sustainability dimension and very clearly concluded that energy policies within the EU were not sustainable.[89] Furthermore, it found

---

85 ibid 10.

86 ibid 9.

87 European Council, Presidency Conclusions, Lisbon European Council*, 23–24 March 2000*. The Lisbon objectives were focused on economic growth to address the stagnation of the European economy. Promoting innovation and knowledge-based economy were the main objectives of the strategy.

88 Commission, 'An Energy Policy for Europe' (Communication) COM(2007) 1 final.

89 ibid 3. 'Energy accounts for 80% of all greenhouse gas (GHG) emissions in the EU; it is at the root of climate change and most air pollution. The EU is committed to addressing this - by reducing EU and worldwide greenhouse gas emissions at a global level to a level that would limit the global temperature

that the EU's commitment to act immediately on CO2 reduction had to be at the centre of the new European energy policy.[90] Sustainability and the urgency of climate action are the cross-cutting themes in the communication. Both concepts underline the importance of responsibility and broad solidarity across generations as well as toward the outside world. This position also underlines the significance of distributive justice, inasmuch as the EU did not, at the time, contribute to the allocation of benefits and harms of its climate and energy policy. The explicit admission that energy policies within the EU were not sustainable was an especially strong statement and self-reflection.

The Commission published its Communication on the Renewable Energy Roadmap as a part of its strategic energy review.[91] In the beginning of the Communication, it underlines the need to address climate change as well as the role of renewable energy and the related targets in reducing greenhouse gas emissions and pollution.[92] The final sentence of the Communication illustrates well the overarching justification for the Roadmap in noting,

> most importantly, this Road Map provides EU citizens with the assurance they seek from their policy makers: that the serious problems of climate change and environmental degradation and of security of supply are being given equally serious answers.[93]

---

increase to 2°C compared to pre-industrial levels. However, current energy and transport policies would mean EU CO2 emissions would increase by around 5% by 2030 and global emissions would rise by 55%. The present energy policies within the EU are not sustainable'.

90 ibid 5.

91 Commission, 'Renewable Energy Road Map: Renewable Energies in the 21st Century – Building a More Sustainable Future' (Communication) COM(2006) 848 final.

92 ibid 3.

93 ibid 18.

This highlights the moral responsibility of the EU decision-makers in shaping EU energy policy and law.[94] It is also one of the few references interlinked with procedural justice and the need to involve citizens.

In its proposal for a directive on renewable energy sources, the Commission acknowledged that

> [t]he challenges of climate change caused by anthropogenic emissions of greenhouse gases, mainly from use of fossil energy, need to be tackled effectively and urgently. Recent studies have contributed to growing awareness and knowledge of the problem and its long-term consequences and have stressed the need for decisive and immediate action. An integrated approach to climate and energy policy is needed given that energy production and use are primary sources for greenhouse gas emissions.[95]

Again, pointing to the urgency of rolling out renewable energy sources, the Commission stressed the need to act swiftly and not to leave the decisions to future generations.

More recently, the Commission put forward the argument that solidarity is needed in the face of climate change.[96] It asserted that 'public opinion has shifted decisively towards the imperative of addressing climate change, to adapting Europe to the new realities of cutting greenhouse gas emissions

---

94 Liz Fisher has discussed the epistemic responsibility of legal professionals and scholars. Diversity of knowledge and different voices is necessary for avoiding social injustice and epistemological failure. Liz Fisher, 'Environmental Law, Scholarship, and Epistemic Responsibility' (2021) 33(3) Journal of Environmental Law 523.

95 Commission, Explanatory memorandum of the proposal for a Directive on the Promotion of the use of energy from renewable energy sources COM(2008) 19 final 2-3.

96 Claire Dupont, and Radostina Primova, 'Combating Complexity: The Integration of EU Climate and Energy Policies' (2011) in Jale Tosun and Israel Solorio (eds) *Energy and Environment in Europe: Assessing a Complex Relationship*, European Integration online Papers (EIoP), Special Mini-Issue 1, 15 <http://eiop.or.at/eiop/texte/2011-008a.htm> accessed 20 June 2025.

and developing our renewable, sustainable energy resources'.[97] It also highlighted the urgency of acting in a timely manner and emphasised the EU's position as an international leader.[98] The EU's climate change policy legislation has been closely tied to its desire to take a leadership role internationally in the fight against climate change.[99] This can be regarded as an expression of climate leadership, climate justice, and global solidarity.[100] The EU, as a wealthy economic area, has been prepared to adopt a higher target for CO2 reduction given its role as a major emitter currently and in the past. This can be seen as climate responsibility on its part. The Communication concluded that '[f]airness and solidarity have been at the heart of the Commission's thinking in developing the proposals'.[101] This statement has an internal and an external facet. On the one hand, fairness and solidarity refer to these concepts as applied among the EU Member States and, on the other, as they pertain to third countries, especially developing countries.

---

97 Commission, '20 20 by 2020 Europe's Climate Change Opportunity'(Communication) COM(2008) 30 final 2.

98 The communication stated: 'A global commitment remains indispensable to tackling climate change. But the case for Europe to act now is compelling. The longer Europe waits, the higher the cost of adaptation. The earlier Europe moves, the greater the opportunity to use its skills and technology to boost innovation and growth through exploiting first mover advantage. The trend of global opinion is clear, and the EU can take the lead in pointing the way to an international climate agreement for the post 2012 period' ibid 3.

99 Morgera, Kulovesi and Munoz (n 3) 7.

100 On the paradox of not achieving EU climate and energy targets and yet striving for EU international leadership, see Jamile Bergamaschine Mata Diz and Márcio Luís de Oliveira, 'The EU in a Multidimensional Regime: The Regulation of Climate Neutrality' in Andrea Ribeiro Hoffmann, Paula Sandrin and Yannis E. Doukas (eds), *Climate Change in Regional Perspective. European Union and Latin American Initiatives, Challenges, and Solutions* (Springer 2024) 14.

101 Commission, '20 20 by 2020 Europe's Climate Change Opportunity' (n 97) 4.

In its 2008 impact assessment on the CAEP,[102] the Commission attached importance to 'fairness', but mainly with reference to fairness among the EU Member States.[103] Its impact assessment on the Renewable Energy Roadmap is significant, because it includes results from the related public consultations.[104] The Commission utilises the results of the public consultations in assessing different policy options.

The Commission stressed the importance of climate justice by stating that

> [t]he distribution of impacts of climate change is likely to be uneven. Some regions in the EU will suffer disproportionately. For instance, in Southern Europe, climate change is likely to decrease crop productivity, increase heat related mortality and have a negative impact on tourism conditions during summer.[105]

It continued,

> [l]east developed countries will suffer disproportionately from the impacts of climate change. Because of their low level of GHG emissions, they should not be subject to obligatory emissions reductions. The EU will further enhance its co-operation with Least Developed Countries to help them

---

102 In line with better law-making, EU legislative proposals are accompanied by impact assessments analysing the impacts of the proposed legislation.

103 Commission, Impact Assessment: Document Accompanying the Package of Implementation Measures for the EU's Objectives on Climate Change and Renewable Energy for 2020 (Commission staff working document) SEC(2008) 85.

104 Commission, 'Renewable Energy Road Map: Renewable Energies in the 21st Century – Building a More Sustainable Future' (n 91) COM(2006) 848 final. See also Commission, 'Renewable Energy Road Map: Renewable Energies in the 21st Century – Building a More Sustainable Future. Impact assessment' SEC(2006) 1719 final (Commission staff working document). This process included consultations with Member States, the European Council, the EP, citizens, stakeholder groups, civil society organizations, NGOs and consumer organisations.

105 Commission, 'Limiting Global Climate Change to 2 Degrees Celsius: The Way Ahead for 2020 and Beyond' (Communication) COM(2007) 2 final 4.

> tackle climate change challenges, inter alia through measures to reinforce food security, capacities to monitor climate change, disaster risk management, preparedness as well as disaster response. Whilst development assistance will be required to integrate climate change concerns, additional support will be required to allow the most vulnerable among them to adapt to climate change.[106]

It is possible to detect the concern for the most vulnerable of the least-developed countries. This is yet again a powerful statement advocating for distributive justice.

In conclusion, considerations of energy and climate justice are readily apparent in the Commission's preparatory documents. As the Commission is the main institution in the preparation of EU legislation, given its right of initiative, this is a significant observation. It should be noted that a balance was struck between other aspects of energy law and the dimension of justice. Paramount for the Commission in its discussion of justice were internal justice and fairness, that is, burden sharing and the division of responsibilities among EU Member States.[107] Thus, the integration of EU climate and energy policy and law was a central issue for the Commission across the board.

---

106 ibid 12.

107 Making CAEP politically acceptable was carried out by eg compensating for the costs in relation to the economic standing of Member States Jon Birger Skjærseth, 'The Commission's Shifting Climate Leadership. From Emissions Trading to Energy Union' in Rüdiger Wurzel, James Connelly and Duncan Liefferink (eds), *The European Union in International Climate Change Politics: Still Taking a Lead?* (Routledge 2016) 56–58.

4. The Council: pragmatism and differing emphases of two key configurations

The Council is the EU co-legislator,[108] but it also has a role in onward-looking moulding of EU legislation through, for example, Council conclusions. In these documents, the Council often conveys messages to the Commission about which initiatives it expects from the Commission and what the content of these instruments should be.[109]

As an institution, the Council is a single entity but, in practice it consists of different ministerial configurations, the most important for the present research being the Energy Council (TTE) and the Environment Council (ENV). [110] The Council Conclusions of these two configurations preceding the CAEP are analysed next. In its conclusions published in February 2007, the Environment Council took up the Energy Policy for Europe. Referring to the Stern review, it underlined the importance of strong early action on climate change. [111] It tackled not only adverse economic impacts of climate change, but also social consequences, including poverty. In a particular concern, the document underscored developing countries and a fair response to climate change and attainment of the United Nations Millennium

108 In accordance with Article 16 (1) of the Treaty on European Union 'The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties'.

109 In its conclusions, the Council may directly request the Commission to prepare a legislative proposal on a policy issue, such as a proposal for a Directive. The Council may also express its wishes regarding the substantive content of the potential proposal. As the Commission has the right of initiative, it remains at the full discretion of the Commission how to respond to such a request if at all.

110 The configuration dealing with energy issues is the Transport, Telecommunications and Energy Council (TTE), which convenes in different formations. I refer to it as the 'Energy Council' in what follows.

111 Nicholas Stern, The Economics of Climate Change: The Stern Review (CUP 2007).

Development Goals.[112] Moreover, many parts of the conclusions highlighted urgency, fairness and the need to address climate change, citing mutually supportive climate and energy strategies as useful tools.[113] Overall, the ENV's positions comprise a record highlighting the importance of justice. Climate change and its social consequences, such as poverty and the need to respond in a timely and fair manner, are intertwined with justice. It appears that the conclusions evince a concern for distributive justice.

Similarly, the Energy Council published conclusions of its own in February 2007 as input to the upcoming meeting of the European Council. Its commitment to the effort is reflected in the following:

> The Council therefore supports ambitious overall EU targets for reducing greenhouse gas emissions for 2020 as a key component of the global action required to achieve this climate change objective, taking into account national circumstances. The Council acknowledges that the impacts of dangerous climate change resulting from increased greenhouse gas emissions would have grave consequences, inter alia for global economic development, and therefore underlines the need for an integrated climate and energy policy, in a mutually supportive way.[114]

Generally, the Energy Council's conclusions were focused more on EU internal energy regulation than on international regulation or policies in the field of climate change. Security of supply and the internal market were equally prominent concerns.

---

112 Council of the European Union, Press release: 2785th Council Meeting of Environment Ministers (Brussels, 20 February 2007) Council conclusions on climate change para 2.

113 ibid paras 4, 5, 7.

114 Council of the European Union, Press release: 2782nd Council Meeting Transport, Telecommunications and Energy (Brussels, 15 February 2007) 7.

In its conclusions on the review of the Emissions Trading System Directive (ETS),[115] the ENV underlined fairness and national circumstances.[116] In a section on the prospective CAEP in conclusions published in 2008, the energy ministers primarily highlighted sustainability and solidarity.[117] Solidarity in that context can be interpreted as meaning solidarity in broader terms than intra-EU solidarity; theirs was a wider-ranging concern that came to figure as an important element in the climate and energy package.

As a general trend, the Council of the EU was mainly interested in intra-Union developments. Its concerns were closely related to justice and fair burden sharing between EU Member States. One can, however, identify a difference between how the Energy Council and ENV dealt with justice in relation to third countries. Even though the Council of the EU is formally one institution, it is not a monolithic entity. Different Council configurations look at the same issues from different angles, and their positions often vary. For example, the Environment Council devoted greater attention to the impacts of climate change on developing countries, whereas the Energy Council had to strike a balance between the different objectives of energy policy, namely security of supply, economic development and sustainability. Despite being a political organ and in institutional terms, the Council's statements tend to be technical in comparison to those of its co-legislator counterpart, the EP, whose statements feature more political rhetoric.

---

115 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32.

116 Council of the European Union, Council Conclusions on Review of the European Union Emissions Trading Scheme (2812th Environment Council meeting, Luxembourg, 28 June 2007) paras 2, 4.

117 Council of the European Union, Press release: 2854th Council meeting Transport, Telecommunications and Energy (Brussels, 28 February 2008) 11.

5. The EP: a moral voice and calls for a high level of ambition

Like its counterpart, the Council, the EP is the major player in negotiating the legislative proposals of the Commission. Similarly, it often tries to influence upcoming legislative proposals through its resolutions and other policy documents. For current purposes, the key EP resolutions introduced before the CAEP are discussed next. In their preparation, the key parliamentary committees were ITRE and ENVI, but here the focus is on the positions taken in the EP plenary, as it represents the view of the EP as a whole. Overall, the EP has been an actor of increasing relevance in internal and external EU climate policy-making, including matters pertaining to climate justice.[118]

In its report on the European strategy for sustainable, competitive and secure energy, published in late 2006, the EP observed that

> climate change is causing serious environmental problems requiring immediate EU and international action; believes that by 2050 the overwhelming proportion of EU energy needs must come from carbon free sources or be produced with technologies which withhold greenhouse gas emissions, with a focus on energy saving, efficiency and renewable energies and that there is therefore a need to set out a clear roadmap for attaining this objective.

The EP further urged 'EU leaders to agree by the end of next year on a binding 2020 CO2 target and an indicative 2050 CO2 target.'[119] Clearly, the EP considered urgent action important.

In its resolution on the Roadmap for Renewable Energy in Europe, the EP drew particular attention to sustainability concerns, most notably the lack of

---

118 Sanja Petrović, Franziska Petri, Katja Biedenkopf, 'The European Parliament's shifting Perspectives on Climate Justice with regard to China and India' (2022) 20 Asia Europe Journal 423–439.

119 European Parliament, Resolution of 14 December 2006 on a European Strategy for Sustainable, Competitive and Secure Energy – Green paper.

social and environmental safeguards in the field of biofuels.[120] Liquid biofuels were a particularly salient issue at the time, with their significance found in justice-related environmental and social concerns. A common concern was what would happen if, with a view to exporting biofuels, a developing country were to set aside an increasing amount of arable land for their production, thereby leaving less land available for local agriculture production. The risk of such indirect land use change (ILUC) with grim repercussions loomed large at the time.[121]

From a social and environmental point of view, an interesting statement can be found in the EP resolution pointing out that the EP

> regrets that the poorest developing countries will be hit earliest and hardest by climate change, even though they have contributed little to the causes of the problem; believes that the European Union can play an important role through the transfer of technology to developing countries.[122]

In many parts of the resolution, the EP voices the importance of responsibility on the part of the EU towards developing countries.[123] Notably, these reflections deal with the moral responsibility of the EU and the need for fairness towards the developing countries. The core of the argument is distributive justice, which acknowledges that the consequences of climate change are the hardest for developing countries.

---

120 European Parliament, Resolution of 25 September 2007 on the Road Map for Renewable Energy in Europe, preambular para V. This contradicts the quite positive view expressed on biofuels in its Biofuels Progress Report released earlier that year. See Commission, 'Biofuels Progress Report on the progress made in the use of biofuels and other renewable fuels in the Member States of the European Union'(Communication) COM(2006) 845 final.

121 James Palmer and Susan Owens, 'Indirect Land-use Change and Biofuels: The Contribution of Assemblage Theory to place-specific Environmental Governance' (2015) 53 Environmental Science and Policy 20.

122 European Parliament, 2007/2090 Resolution of 25 September 2007 on the Road Map for Renewable Energy in Europe [2008] OJ C219E/82 para 56.

123 ibid para 51.

Justice towards the developing countries was addressed in the EP resolution on conventional energy sources and energy technology. The EP notes that

> increased access to sustainable energy is key to the ability of developing countries to achieve their Millennium Development Goals and that an estimated two billion people currently suffer from energy constraints that limit their opportunities for economic development and a better standard of living.[124]

These statements go directly to the heart of justice in recognising that poverty and energy poverty are serious problems for billions of people. The EP highlights the importance of sustainability in addressing these grave problems. Sustainability in boosting development has remained a crucial argument for the EP also in the later the EU law-making.

The EP adopted its resolution on climate change in February 2007. In it, the EP proposed a higher level of ambition regarding CO2 reduction and renewable energy targets.[125] Also after the CAEP, the EP has consistently supported higher targets than other EU institutions. In the EU climate and energy legislative files, attention is very often paid especially to differing views of the EU institutions on the level of ambition of the targets. One should also try to avoid this pitfall by looking at the substantive argumentation of the institutions and not only the level of ambition, which each institution wants to set. This can be done by delving into policy documents by asking how to achieve the targets and what are the needs behind them.

---

124 European Parliament, 2007/2091 (INI) Resolution of 24 October 2007 on Conventional energy sources and energy technology [2007] OJ C263E/424 para 6.

125 European Parliament, Resolution of 14 February 2007 on climate change (P6_TA(2007)0038), paras 9, 27. The EP proposed a 30% CO2 reduction target instead of 20%, and a 25% renewable energy target instead of 20%.

Underlying these calls of the EP was an urgency to act, expressed in different parts of the resolution.[126] The urgent need for climate action was very topical at this time due to a greater awareness caused by devastating natural catastrophes, such as hurricane Katrina and the gloomy warnings on the impacts of climate change set forth in the Stern Review.[127] Climate change mitigation was high on the agenda of the EP in 2007, and it established a temporary Committee of Climate Change in spring 2007.[128] When the EP sets up special committees, it finds the topic concerned so important that it deserves a special committee for political and legislative work to address the issue. For example, one of the main duties of the temporary Committee of Climate change was to formulate proposals on the EU's future integrated policy on climate change and to coordinate the EP's position in the negotiations on the international framework for climate policy after 2012.[129]

To conclude, climate and energy justice often appear in the EP's contributions related to the preparatory documents of the CAEP. This is interesting because generally the outcome of the CAEP negotiations have been interpreted as indicating that the EP had to yield on its original

126 See ibid para 39, where the EP encouraged 'much greater direct involvement in mitigation efforts at European citizen level; calls on the Commission therefore to intensify its awareness-raising activities concerning the urgency of the situation with the aim of informing individuals about their role in controlling climate change'.

127 Stern (n 111) 56.

128 European Parliament, Decision of 25 April 2007 on setting up a temporary committee on climate change (P6 TA(2007)0151. The tasks of the Committee included studying social impacts of climate change, see para 1 d). The decision acknowledges the responsibility of political leaders in activating concrete measures.

129 ibid Rules 213 and 214 of Rules of Procedure of the European Parliament stipulate how special committees and temporary legislative committees are established and what their remits and competences are. It should be noted that the temporary Committee of climate change remained of temporary duration and does not exist anymore.

positions. It may well be that climate and energy justice were in fact previously undetected elements by the EU policy-makers that the EP was able to see included in the CAEP. The same applies to the moral responsibility of the EU and the need to address concerns related to distributive justice. In the context of the EP, too much attention has been given to the traditional discussion on the level of ambition of climate and energy legislation.[130] In other words, the role of the EP in energy law-making is often reflected against its goals of setting the bar higher than the Commission and the Council when it comes to EU targets and legal obligations. This tendency may, ultimately, overshadow what the EP actually has had to say about the substantive content of legislative proposals, such as climate and energy justice.

IV. Analysis Of Justice Against The Legal Historical Framework

The CAEP and its early preparatory phase are important not only because they raised the EU's level of ambition with respect to climate and energy. The CAEP also placed sustainability on a par with economic concerns and security of supply. The adoption of the package marked a highly significant EU legislative accomplishment in the field of energy, because EU policy-makers and legislators converged climate and energy law for the first time to create a major force steering the preparation of the package. To date, research has focused on the practical, problem-oriented elements of the package.[131] Also, the law-making process and institutional relations have

130 For an enlightening analysis on the EP's calls for a higher level of ambition during the negotiations and the less successful outcomes, see Charlotte Burns, 'The European Parliament and Climate Change. A Constrained Leader?' In Rüdiger Wurzel, James Connelly and Duncan Liefferink (eds), *The European Union in International Climate Change Politics: Still Taking a Lead?* (Routledge 2016) 56-58.

131 See (n 3).

been at the centre of the academic interest.[132] In short, to the observer, the CAEP is *prima facie* a legislative exercise that implements a high level of climate and energy policy ambition on the part of the EU; yet, it reveals tensions among the institutions as well.

The preparatory documents of the CAEP reveal the importance of climate and energy justice as a significant input to the preparation. Such justice is predominantly of distributive nature, and it has been overlooked in the research to date. For distributive justice, it is essential to realise how and where inequalities are distributed throughout the given energy and climate change system.[133] This is what the EU institutions basically did in the CAEP, although not extensively. One could claim that the institutions even went one step further by endorsing ambitious legislative measures to at least partially remedy the situation.

In substantive terms, the considerations of justice to be discerned in the preparatory documents relate to internal justice, that is, just burden-sharing between the EU Member States. Yet, perhaps even more important are the facets of external justice to be found, which deal with justness and fairness between the EU and third countries, most notably developing countries. The responsibility of the EU is an extremely important issue in this regard. Another overarching justice-related concern expressed in the package is sustainability and, especially, its intergenerational aspects. Contrastingly, the analysis revealed that the institutions paid relatively little attention to the concepts of procedural justice or restorative justice. This happened indirectly, without directly referring to these concepts.

In addition to substantive considerations, the source material provides interesting insights into the institutions' positions on climate and energy

---

132 See Israel Solorio and Pierre Bocquillon 'EU Renewable Energy Policy: A Brief Overview of its History and Evolution' in Israel Solorio and Helge Jörgens (eds), *A Guide to EU renewable energy policy* (Edward Elgar Publishing 2016) 23-42.

133 Darren McCauley, *Energy Justice. Re-balancing the Trilemma of Security, Poverty and Climate Change* (Palgrave MacMillan 2018) 14.

justice. Interestingly, the European Council can be identified as a leader in injecting justice-related argumentation into the drafting and adoption of the CAEP. The Commission, for its part, highlighted responsibility and sustainability as well as justice between generations. The EP shared positions quite similar to those of the European Council and the Commission. The Council had less arguments relating to climate and energy justice, its primary concern being fairness among EU Member States. Today, it has been argued that consideration of energy decisions should start with considerations of justice.[134] In this respect, the EU institutions were ahead of their time in addressing justice in the CAEP. Of course, the EU was able to take into account the earlier developments in the field international environmental law, which also contain elements pertaining to justice.

The CAEP has often been considered an example of pragmatic instrumentation in the development of the EU's climate and energy law in the shadow of a turbulent surface level shaped by policies. However, the CAEP also reveals a more fundamental dimension and a more permanent change in the EU's energy agenda. The CAEP paved the way for a breakthrough of climate and energy justice into the EU legal culture in the domain of energy.[135] Since then, climate and energy justice considerations have underpinned subsequent EU legislative packages on climate and energy together with energy policy considerations, such as the internal market, security of supply, and competitiveness. This can be seen for example in the

134 Raphael Heffron, 'Energy Justice – The First Step in an Energy Decision Today' in Raphael Heffron and Louis de Fontenelle (eds), *The Power of Energy Justice and the Social Contract* (Palgrave MacMillan 2024) 4.

135 This concern seems genuine also in the light of the outcome of the CAEP. The EU has sometimes used its talk, decisions and actions to build organisational facades that address conflicting demands in the climate policy. See Feyyaz Baris Celik, 'The EU's Different Faces in Climate Diplomacy: Leadership, Interests, and Responsibilities' (2022) 40(8) Journal of European Integration 1020.

'EU Green Deal' package launched in 2019 and 'Fit for 55' package introduced in 2021.

V. Conclusion

This article has suggested and demonstrated that the CAEP represents a paradigm change springing from not only practical pressures but also considerations of energy justice. Indeed, the CAEP marked the emergence of the term 'just transition' in the EU energy law vocabulary long before the concept entered the core of EU law-making with the EU Green Deal.[136] The CAEP represents a significant law-making endeavour, one paving the way for further legislative packages aimed at implementing the EU climate and energy targets.

The source material used in this article revealed interesting insights into the preparation of the CAEP both from a substantive and an institutional perspective. The analysis has established that for the first time climate and energy law converged through considerations of justice in the preparation of a major EU legislative package. In one finding of institutional interest, the research has identified a very strong position on the part of the European Council, not only in steering the policy-goal oriented process of the CAEP, but also in providing justice-related arguments for its positions.

The CAEP can be considered a temporal turning point in EU energy law. Such turning points in the evolution of an area of law should also be looked at from different perspectives when there is enough distance in time to the target of research. It is here that a historical method can prove its worth, for it serves to identify previously overlooked factors that have driven the evolution of the law.

136 See Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund [2021] OJL 23/1. The recitals include justice-related considerations.

TEMPORAL RUPTURES IN INTERNATIONAL HUMAN RIGHTS: AUTHORITARIAN POPULISM AND A VIEW OF CRITICAL RE-ENGAGEMENT FROM THE PHILIPPINES

Ruby Rosselle Tugade*

Notable literature in international human rights law that emerged from the last two decades calls back themes of historicity and time. One end of the spectrum comes to the defence of the international human rights project, citing its utopian post-historical quality—that human rights are timeless and unbounded. On the other hand, there is a view that espouses apocalyptic or 'end-times' visions for human rights. This paper grounds the temporal dimensions of such discussions in the populist era of the 21st century. As a case study, this article examines Rodrigo Duterte's authoritarian populism in the Philippines as a consequential example for understanding the temporalities of international law and international human rights. Duterte's hostility to international norms, a hallmark of contemporary authoritarian populism, is also a challenge to temporal assumptions of linearity and progression in international law and international human rights. Drawing on empirical observations from Duterte's case, the article outlines theoretical implications that link populists' rival temporal rhetoric to their challenge of the international legal system. Finally, instead of arguing for a mere restoration of the linear, progressive temporality of international law and international human rights, the paper explores reparative forms of re-engagement. Repair, in this paper, is a turn to a hopeful possibility that may be located in temporal uncertainty and emphasises the redistributive consequences of certain temporal assumptions.

* PhD in Law (ongoing), School of Global & Public Law, Faculty of Law & Justice, University of New South Wales, Sydney, Australia. Senior Lecturer, University of the Philippines - College of Law. The author is supported by the Australian Government Research and Training Program (RTP) scholarship. I wish to thank the editors and anonymous reviewers for their constructive feedback on the piece. ORCID ID: 0009-0001-6457-2126.

Keywords: populism; international legal temporality; human rights backlash

TABLE OF CONTENTS

I. INTRODUCTION

International human rights, the 'last utopia'[1] or 'universal church'[2] of the modern world, stands at a crucial point. In the 21st century, it confronts an array of perceived threats to its continued relevance as a legal and normative framework.[3] Some of the theoretical and practical questions that challenge the classical, self-evident formulation of human rights, which have been

1 Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012).

2 Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2018).

3 See for example, Gerald L Neuman, *Human Rights in a Time of Populism* (Cambridge University Press 2020). The collection gathers case studies from different contexts, including the Philippines, to illustrate how the rise of populist leaders posed credible threats to human rights.

taken up by Moyn and Hopgood, as well as Mutua[4] and Kennedy,[5] are the following: Are human rights truly for all, and at all times? Can societies continue to look to human rights as universal goods to guide our politics?

I acknowledge the critical appraisals of international human rights in academic literature, including the strand which maps its colonising origins and its continued imperial impulses.[6] My present examination, however, focuses on one identified external threat to the universal human rights project: the 'rise' of global populism. In 2017, the then executive director of Human Rights Watch, Kenneth Roth, made a categorical warning about the dangers posed by populism and strongman rule to the human rights enterprise.[7] According to his view, global populism poses great peril to international human rights insofar as it ushers in a new 'dark era' reminiscent of the 'demagogues of yesteryears', thus challenging international human rights' fundamental conception of time and progress.[8] Roth primarily addresses the West in this exhortation. Nevertheless, he cites examples outside of it, including the then-President of the Philippines Rodrigo Duterte, as cautionary tales. Warning against the plunge into a 'dark era,' Roth saw the rise of populists as having an 'emboldening' and amplifying effect on one another, thus normalising the disregard for rights.[9]

---

4 Makua Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

5 David Kennedy, 'The International Human Rights Movement: Part of the Problem?' in Robert McCorquodale (ed), *Human Rights* (Routledge 2017).

6 Mutua (n 4); Colin Samson, *The Colonialism of Human Rights: Ongoing Hypocrisies of Western Liberalism* (Polity Books 2020).

7 Kenneth Roth, 'The Dangerous Rise of Populism: Global Attacks on Human Rights Values' (*Human Rights Watch*, 12 January 2017) <www.hrw.org/world-report/2017/country-chapters/global-4> accessed 01 November 2024.

8 ibid.

9 ibid.

Duterte, former mayor of Davao City for many years, was locally known for his brutal approach to criminality. His infamous 'death squads' have been flagged by human rights watchdogs prior to his presidency, characterised by targeted extrajudicial killings of petty criminals and dissidents alike.[10] His ascent to the highest political office in the 2016 elections—where he was dubbed 'The Punisher'—was largely due to his promise of ending criminality nationwide, in the same fashion as he had in Davao City.[11] In 2025, he was brought to The Hague to face crimes against humanity charges in the ICC. His persistent rhetoric against human rights asserted the message of doing things in his own terms, often criticising human rights defenders in the same breath as criticising the West and its colonial history.[12] In comparative studies, Duterte's rise is associated with global democratic backsliding, thus placing his regime within a broader empirical investigation of a critical political phenomenon.[13]

The impact of Duterte on human rights and the rule of law domestically is well-documented in literature, yet its mechanics are still undertheorized in international legal scholarship.[14] This is where I situate my contribution.

---

10 Human Rights Watch, '"You Can Die Any Time": Death Squad Killings in Mindanao' (06 April 2009) <https://www.hrw.org/report/2009/04/07/you-can-die-any-time/death-squad-killings-mindanao> accessed 23 January 2026.

11 Charlie Campbell, 'Why the Philippines Elected "The Punisher" as President' (*Time Magazine*, 13 May 2016) <https://time.com/4328007/why-the-philippines-elected-the-punisher-as-president/> accessed 24 January 2026.

12 Tom Smith, 'Duterte's Latest Target: The Commission on Human Rights' (*The Diplomat,* 08 August 2017) <https://thediplomat.com/2017/08/dutertes-latest-target-the-commission-on-human-rights/> accessed 23 January 2026.

13 Björn Dressel and Cristina Regina Bonoan, 'Southeast Asia's Troubling Elections: Duterte Versus the Rule of Law' (2019) 30 Journal of Democracy 134, 135.

14 For example, Mark R Thompson, 'The Early Duterte Presidency in the Philippines' (2016) 35 Journal of Current Southeast Asian Affairs 3; Nicole Curato, *A Duterte Reader* (Cornell University Press 2017); Dante Gatmaytan, 'Lost in Transmission: Rule of Law Challenges in the Philippines' (2017) 8 Impunity

While I take an analytical approach focusing on Duterte, I treat his regime not as a one-off warning with self-contained repercussions for Philippine law and politics. Instead, I examine whether his regime, marked by a rebuff of international human rights and international legal accountability, could be consequential for international law. In Bagulaya's appraisal, the crimes against humanity investigation on Duterte might be precedent-setting for international criminal law jurisprudence.[15] Like Bagulaya, I use Duterte's case as a basis for broad theorisation. I do so by framing Duterte's challenge of human rights as an emblematic example of how critiques of progress narratives implicate ideas of linearity . Specifically, I argue that the temporality embedded in this challenge vitally contributes to the re-examination of international law's and human rights' notions of time, triggered by 21st-century populism. If the modern regime of international human rights is marked by the 'advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear' that rejects a past marked by 'barbarous acts which have outraged the conscience of mankind',[16] then a seeming resurgence of the latter through populist leaders like Duterte becomes an urgent concern.

Watch Law Journal 6; Lisandro Claudio, The Erosion of Liberalism and the Rise of Duterte in the Philippines (European Policy Brief 2019) <https://shs.hal.science/halshs-03151036v1>; Sharmila Parmanand, 'Duterte as the Macho Messiah: Chauvinist Populism and the Feminisation of Human Rights in the Philippines' (2020) 29 Review of Women's Studies 1; Ruby Rosselle L Tugade, 'In Duterte's Perfect Storm: A Rule of Law Dispatch in the Dire Days of Philippine Liberal Democracy A Representative Government under the Rule of Law' (2021) 66 Ateneo Law Journal 604.

15 Jose Duke Bagulaya, 'From Cinema to The Hague: Contextualizing Murder as a Crime against Humanity in Duterte's War on Drugs' (2025) 25 International Criminal Law Review 1, 7.

16 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III).

Early explanations of Duterte's rise point to his direct challenge of the 'liberal reformist political order',[17] though later, postmortem discussions offer nuance, arguing that he enjoyed a form of support from ordinary Filipinos that was always 'qualified, contingent, and negotiated'.[18] While Duterte's rhetoric of opposing liberal politics was contingent, he still belonged to a global moment that drew on a 'collective fascination of the road not taken', hawked by political strongmen.[19] A common thread in their rise is their promise of an alternative, ambitious vision of the future that does away with business-as-usual. For Duterte in the Philippines, this meant embracing the edgy, even vulgar, articulation of politics different from the 'decency' promoted by liberal elites.[20] Despite the analytical differences in the literature, there is little room to dispute that Duterte made his stance towards human rights clear. In a State of the Nation Address in 2018, Duterte pointedly addressed human rights defenders: '[y]our concern is human rights; mine is human lives'.[21] Duterte went beyond mere rhetoric, taking steps to challenge international human rights and to thwart efforts at

17 Thompson (n 14) 42.

18 Athena Charanne Presto and Nicole Curato, 'Authoritarian Fantasies and Democratic Aspirations: The Philippines After Duterte' in Gabriel Facal, Elsa Lafaye De Micheaux and Astrid Norén-Nilsson (eds), *The Palgrave Handbook of Political Norms in Southeast Asia* (Springer Nature Singapore 2024) 227.

19 Fleur Johns, 'On Dead Circuits and Non-Events' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in international law: on the possibility of different legal histories* (Oxford University Press 2021) 25.

20 Kathleen Rose Gatchalian Kho, 'Behavioural Biases and Identity in Social Media: The Case of Philippine Populism, President Duterte's Rise, and Ways Forward' (*National University of Singapore,* 2019) <https://lkyspp.nus.edu.sg/docs/default-source/case-studies/behavioural-biases-and-identity-in-social-media_1204.pdf> accessed 26 January 2026.

21 Felipe Villamor, "Your Concern Is Human Rights, Mine Is Human Lives,' Duterte Says in Fiery Speech' *The New York Times* (New York City, 23 July 2018) <www.nytimes.com/2018/07/23/world/asia/philippines-duterte-speech-muslims.html> accessed 05 November 2024.

international legal accountability. It was under Duterte's regime that the Philippines withdrew from the International Criminal Court (ICC), signifying disagreement with the international rule of law.[22] More practically, the withdrawal may be seen as an early effort to evade accountability for crimes against humanity, given that it came shortly after the Office of the Prosecutor's announcement of a preliminary examination.[23]

Methodologically, a case study on Duterte is justified as it could generate 'exploration, explanation, and evaluation' of theoretical claims about the temporality of international human rights, going beyond mere description. I take on an exploratory move here, providing an opening to link the case to wider debates on temporality.[24] A case study approach, while starting out granularly, responds to broad inquiries on international law.[25] Such a theorisation may be crucial, especially in the field of international human rights, where newer interventions can help address anxieties about the continued relevance of human rights. Recent empirical work has already taken Duterte as an important case study to examine populist state behaviour in relation to international law and institutions, showing the Philippines'

22 International Criminal Court, 'ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law' (20 March 2018) < www.icc-cpi.int/Pages/item.aspx?name=pr1371>.

23 Dhun Vinod Santosh, 'A Look at the ICC's Philippines Decision: Is a Preliminary Examination Enough for the Court to Retain Jurisdiction?' (*LSE Law Review Blog*, 12 May 2025) <https://blog.lselawreview.com/2025/05/12/a-look-at-the-iccs-philippines-decision-is-a-preliminary-examination-enough-for-the-court-to-retain-jurisdiction/> accessed 26 January 2026.

24 Roda Mushkat, 'The Case for the Case Study Method in International Legal Research' (2017) 42 Journal for Juridical Science 143, 148.

25 Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 American Journal of International Law 1, 2.

uneven engagement across domains.[26] My analysis builds on this empirical grounding but shifts the focus to international legal theory. I am interested in exploring the following questions, bearing in mind this methodological consideration: What does Duterte's populist presidency reveal about the relationship, if any, between populism and the temporal assumptions of international human rights law? Crucially, how might these insights inform debates on future engagement with human rights norms? The Philippines provide a distinct example here. It is one of the few populist contexts subject to ongoing international proceedings on criminal accountability. Notably, its own historic domestic jurisprudence foreshadowed the development of modern international mechanisms for accountability for international crimes.[27] As early as 1922, the Supreme Court already recognised universal jurisdiction for crimes 'against all mankind.'[28] And prior to the US Supreme Court's establishment of the doctrine of command responsibility in the case of General Tomoyuki Yamashita, the validity of his military trial was first upheld by the Philippine Supreme Court.[29] In other words, the case for looking at the Philippines becomes stronger considering its present entanglement with international criminal law and its role in the past in shaping international legal norms.

Temporality is a useful lens in my inquiry, as the time of international human rights is an echo of general international law's own foundational assumption that history moves in a forward, linear fashion, and is thus structured as such.[30] Consequently, calls for re-engagement with international norms

---

26 Nina Araneta-Alana and others, 'Populism and Institutional Fortitude: Philippine Engagement With International Law And Institutions During The Duterte Administration' (2025) 15 Asian Journal of International Law 1.

27 Raul Pangalangan, *Philippine Materials in International Law* (Brill Nijhoff 2021) 375.

28 Ibid.

29 Ibid 377.

30 Valentina Vadi, 'Hope and History: The Spirit of Time in International Law' (2024) 32 Tulane Journal of International & Comparative Law 1, 35.

contesting populist backlash, and, more specifically, for a 'broad reaffirmation of human rights',[31] are grounded in the scrutiny of international law's ideas of progress and history. An attentive inquiry into these issues is especially crucial for places like the Philippines – places outside the West – to pre-empt any recursive and reductive accounts of what re-engagement may look like. Duterte's later arrest by the ICC, for example, highlights the imperative of examining forms of re-engagement by the Philippines, a country historically ambivalent towards international justice mechanisms.[32] Thus, my intervention projects the implications of the Philippine case to the ways of thinking about international law broadly.

My discussion unfolds in four parts. In Part II, I look at relevant scholarship on legal temporality and relevant descriptions of populism to clarify how each frames the current anxieties on human rights. Part III applies the previous section's theoretical exploration to Duterte's temporally disruptive populism. In Part IV, I consider what 're-engagement' with human rights might entail if we recognise that linear temporality has fractured, and I sketch a reparative path that moves beyond simply restoring progressive time. Part V concludes with a brief epilogue, noting how future developments may open a further research agenda on temporal ruptures introduced by the populist challenge to international human rights and legal norms, broadly.

---

31 Roth (n 7).

32 Ruby Rosselle Tugade, 'Duterte in the Hague Tests Philippine Engagement with International Criminal Law' (*CIL Dialogues*, 11 April 2025) https://cil.nus.edu.sg/blogs/duterte-in-the-hague-tests-philippine-engagement-with-international-criminal-law/ accessed 21 April 2025. I previously incubated the idea of the ambivalent relationship of the Philippines towards international criminal law by showing displays of formal commitment to international rules and processes while remaining doubtful of international criminal law's purpose and effectiveness.

II. The Temporality of International Law and International Human Rights

1. International Law and Time

International lawyers consider the role of time in international law to be essential, as it determines the outcomes of a legal dispute. The inter-temporal rule in international law unambiguously captures this concern.[33] One may see the rule invoked in international decision-making of international courts and tribunals, first articulated by Judge Huber in the Island of Palmas arbitration: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'.[34] Students of international law are expected to have a familiarity with this rule and international lawyers are similarly trusted to know it by heart.[35] The doctrine itself considers time as a plane of change, setting the allocation of rights and applicability of relevant law.[36] Beyond treaty interpretation, the 'intertemporal problem' also covers customary law, as seen in the *Chagos Archipelago* proceedings in the ICJ.[37] This relates to Orford's observation that lawyers are 'trained in the art of making meaning move across time', for example, in arguing for the binding nature of a case as precedent.[38]

The temporality of international law, as described by Johns, is 'often linear and oriented around a point in time: the definite duration or the time-

---

33 Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 International and Comparative Law Quarterly 501.

34 *Island of Palmas case (Netherlands, US)* (1928) 2 RIAA 829.

35 Higgins (n 31) 515.

36 Steven Wheatley, 'Revisiting the Doctrine of Intertemporal Law' (2021) 41 Oxford Journal of Legal Studies 484, 485.

37 Ibid.

38 Anne Orford, 'On International Legal Method' (2013) 1 London Review of International Law 166, 172.

limited procedure; that is, the time of calendar and clock'.[39] Time is not merely a conceptual dimension in international law. Temporality within international law has far-reaching consequences; analytical assessments of *time* in law are necessarily involved in legal interpretation.[40] Some examples may help illustrate this point. In the realm of migration law, for instance, legal time determines how public authorities appraise the legality of a person's immigration status based on length of stay.[41] Time also impacts the status of political revolutions. Depending on its outcome, the passage of time determines whether to apply the laws of armed conflict or the fundamental right to self-determination.[42] In these illustrations, time functions to mark the availability of legal rights or obligations. For Gordon, the 'politics of time and international law'[43] is seen in imperial practices such as the British Empire's imposition of standardised time facilitated chains of market transactions of extracted goods.[44] Speaking broadly, Greenhouse argues that the 'social nature of time' converges with the ordering logic of law to produce 'regulation of social processes' material to the decision-making of judges and courts and governance at large.[45]

---

39 Fleur Johns, 'The Temporal Rivalries of Human Rights' (2016) 23 Indiana Journal of Global Legal Studies 39, 43.

40 Siniša Rodin , 'Time, History and Legal Interpretation' (2021) 28 Maastricht Journal of European and Comparative Law 433.

41 See Martijn Stronks, *Grasping Legal Time: Temporality and European Migration Law* (Cambridge University Press 2022).

42 Raul Pangalangan and Elizabeth Aguiling, 'The Privileged Status of National Liberation Movements under International Law' (1983) 58 Philippine Law Journal 44.

43 Geoff Gordon, 'Imperial Standard Time' (2018) 29 European Journal of International Law 1197, 1200.

44 Ibid 1208.

45 Carol Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1988) 98 Yale Law Journal 1631, 1632.

When considered historically, temporality in international law operates as a mode of ordering that produces hierarchies through difference in status or identity. This temporal ordering is grounded in civilizational difference central to imperial projects.[46] Before a society is incorporated into the international legal order, it is still part of the 'backward, aberrant, violent, oppressed, undeveloped people of the non-European world' that must integrate into international society for it to evolve.[47] Examining international law's temporal dimension thus entails taking stock of its very history. Perspectives that examine progress, whether descriptive or critical, often accept a linear structure of historical and even legal time,[48] always in terms of past and future, or what is 'backward' and what is 'advanced'.[49]

Alternative understandings of temporality challenge the assumption that international legal time is singular and progressive. Interrogating the propped-up linearity of time in international law encompasses a critique of law's 'disciplinary' impulse that always orients itself towards constant improvement.[50] This accepted disciplinary instinct disregards what Vadi describes as the 'rich cultural and epistemological diversity of the world', where views of legal temporality could be cyclical or even unpredictable.[51] She points to how 'various African, American, Asian, European, and

46 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004).

47 Ibid 3.

48 Conklin argues that legal time is structured around recognised starting points, such that legal events are understood by reference to labelled beginnings that ultimately trace back to the founding moment of the legal order itself. See William Conklin, 'Legal Time' (2018) 31 Canadian Journal of Law & Jurisprudence 1.

49 Anghie (n 43) 100.

50 Fleur Johns, Richard John Joyce and Sundhya Pahuja, 'Introduction' in Fleur Johns, Richard John Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 2.

51 Vadi (n 28) 14.

Oceanian' communities adopt multiple temporalities and contingencies.[52] In pre-colonial Philippines, timekeeping was deeply related to the patterns of nature and repeating intervals.[53] Moreover, assertion of land cultivation since 'time immemorial' bore legal weight for indigenous ancestral domains in the Philippines when it came to resisting settler incursion.[54] Indeed, a progressive view of international legal history and its assumption of linear temporality is often baked into the violence of legal norms like *terra nullius*, now rejected for its role in inflicting historical wrongs upon Indigenous communities.[55]

2. The Temporality of International Human Rights

The story of international human rights law does not escape this talk of time and history, of past and future. Yet because of its 'temporal unruliness', that is the assertion of the 'timelessness' of its demands,[56] international human rights law is able to make claims of both urgency (of the now!) and a utopian ideal. To characterise human rights as 'timeless' is to lean into the highly individualist, progressive narrative of international law.[57] As Castellanos-Jankiewicz argues, triumphalist attitudes towards international human rights are now justified as a cumulative victory of 'natural rights, classical philosophy, and scholastic theory', producing a flattened view of history.[58] Within this frame, individuals are positioned as bearers of an ever-advancing

---

52 Ibid 4.

53 Victor L Badillo, 'Time Keeping: Philippine Style' (1980) 28 Philippine Studies 354.

54 Lourdes Aranal-Sereno and Roan Libarios, 'The Interface between National Land Law and Kalinga Land Law' (1983) 58 Philadelphia Law Journal 420, 455.

55 Vadi (n 28) 18.

56 Johns (n 19) 44.

57 Ibid. 54.

58 León Castellanos-Jankiewicz, 'Overlooking Continuity: National Minorities and "Timeless" Human Rights' in Klara Polackova Van der Ploeg, Luca Pasquet and León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer International Publishing 2022) 427.

project, erasing where and when they are situated. This account of modern international human rights makes it co-constitutive with a polished view of linear time, treating the rights as a gradual accumulation of progress.

In orthodox accounts, international human rights law is largely viewed as a product of the political consensus after World War II, its attendant legal infrastructure becomes part of the institutional innovation to respond to the immediate past events.[59] The adoption of the Universal Declaration of Human Rights (UDHR, 1948) under the auspices of the United Nations was within this immediate post-war context.[60] The subsequent drafting and entry into force of the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Convention for Economic, Social, and Cultural Rights (ICESCR, 1966) entrenched human rights in the international legal order.[61] In these documents, human dignity becomes the basis for the universality, indivisibility, and inalienability of human rights.[62] Having human dignity serve as an anchor is significant in many ways, including projecting human rights as guaranteed and never contingent on earthly whims.[63] From this view, human rights' *raison d'être* does not require any lengthy justification. By the sheer survival of humanity, human rights have to endure and transcend any nationality, race, faith, gender, place, and even time. Such an orthodox framing, as opposed to a critical one, thus treats human rights as self-justifying.

---

59 Stephen Sencer, 'The Age of Rights' (1992) 90 Michigan Law Review 1309, citing Louis Henkin's account of international human rights law as emerging from the post–World War II political settlement and its associated institutional responses.

60 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III).

61 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

62 ICCPR, Preamble; ICESCR, Preamble.

63 Stephanie DeGooyer and others, *The Right to Have Rights* (Verso Books 2018) 6.

International law is in lockstep with this story of human rights. Moyn notes that 'among the major purposes—and perhaps the essential point—of international law is to protect individual human rights'.[64] This passage takes the position that international law and international human rights are mutually reinforcing. In other words, it refers to the way in which international law supplies the institutional authority and continuity for human rights claims, while human rights provide international law with a moral purpose and future orientation.[65] This framing generates a specific political demand that future conditions must secure the continuation of these legal frameworks for the sake of humanity.[66] Protecting human lives thus aligns with the vision of repudiating past acts of brutality that violated human rights. Such a view aligns with Moyn's description of the rise of international law as the victory of historical forces to thwart anarchy and disorder.[67] International law and international human rights thus compel societies to always improve themselves, never returning to a worse state.

As critical international legal scholars began calling out international law's founding myths and imperial history, modern international law had to adapt to these claims.[68] Modern international law now grounds its legitimacy and

---

64 Moyn (n 1) 176.

65 Anthony Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy' (2003) 31 Political Theory 171, 194.

66 Bardo Fassbender and Anne Peters, 'Introduction: Towards A Global History Of International Law', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Publishing 2012) 1.

67 Matt Craven, 'Introduction: International Law and Its Histories' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Brill Nijhoff 2007) 1, 1.

68 Koskenniemi's work is instructive of how international law's entanglements with shifts in history and power have prompted reformulations of the field's own self-justification. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 1989).

authority 'on its claim to have transcended its European heritage and to operate today as a universal law capable of representing humanity'.[69] Under this belief, international law is often presented as having overcome its former purpose as a tool of subjugation, reimagined as a set of rules upon which humanity may flourish. International human rights is cast as a normative anchor, though this characterisation increasingly became open to challenge. Recognising the view of international law by mainstream thought as an encompassing framework governing modern life is crucial in understanding why temporal disruptions to progress are perceived as anomalous.[70] Following this, challenges to international human rights, including those posed by populists like Duterte, may have triggered an instinct to defend the project of international human rights as an idea of progress.

Beyond enriching scholarship, there are urgent practical matters that a reconsideration of time may address. When we begin to think of international law and international human rights beyond a linear temporal structure, we may also start to better understand the interactions between different actors from a wider perspective.[71] The present idea of progress may have resulted in exclusions and inequity. Such a critical response is owed in part to a palpable observation that, despite the promised inevitability of progress built into international law and international human rights, clear gaps exist in on-the-ground practice.[72]

---

69 Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (2011) Institute for International Law and Justice Working Paper 2012/2, 1 <https://papers.ssrn.com/abstract=2090434> accessed 2 November 2024.

70 Greenhouse (n 42) 1633.

71 Randall Lesaffer, 'International Law and Its History: An Unrequited Love' in Matthew CR Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International law* (Brill Nijhoff 2007) 40.

72 Elsewhere, I observe how despite commitments to international human rights law, the Philippines has failed to address past violations upon women victims of

The unfulfilled emancipatory promise of international human rights suggests problems beyond legal enforcement, with some scholars presenting the possibility of thinking beyond human rights itself.[73] It also points to the tensions in how time is structured within international law. This is so because the 'temporal dimensions of the progress discourse' in international human rights include 'certain distributive outcomes' facilitated by international law.[74] This point strikes at the heart of my analysis. Populist leaders, as threats to democratic rule, interact with matters of 'economic inequality and distributive injustice'.[75] While Duterte became globally known for unleashing a violent anti-drug criminality crusade, his campaign also included promises of alleviating economic precarity and fixing a broken economy borne out of colonial, neocolonial, and elite dominance.[76] The dichotomy he established between lofty human rights ideals and a pragmatic

---

wartime sexual slavery, the consequences of which have flowed into the present, Ruby Rosselle Tugade, 'Assessing the CEDAW Committee's Determination of Continuing Gender-Based Discrimination against Wartime Sexual Slavery Survivors in the Philippines' (15 September 2025) International Journal of Discrimination and the Law <https://journals.sagepub.com/doi/10.1177/13582291251381117> accessed 30 January 2026.

73 Christos Marneros, '"Human Rights Do Not Exist": Thinking about and beyond the Existence of Human Rights' (2023) 29 Australian Journal of Human Rights 299.

74 Eliana Cusato, 'Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity' (2025) 84 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law 865, 867.

75 Jean L Cohen, 'Populism and the Politics of Resentment' (2019) 1 Jus Cogens 5, 9.

76 Cristina Cielo, 'Social Inequalities and Political Organization in the Philippines' in Hans-Jürgen Burchardt and Johanna Leinius (eds), *Colonial archipelagos: Comparing the legacies of Spanish colonialism in Cuba, Puerto Rico, and the Philippines* (University of Michigan Press 2022) 259, 274.

concern for 'human lives' in a public speech reflects this intent.[77] Duterte's pledges reflected a deep sense of dissatisfaction with the global and national order, along with the absence of palpable progress. In the following section, I take 21st-century populism as a phenomenon that disrupts the international human rights project's assumption of progress. Duterte's populism can be seen as an act that ruptures the assumed timeline of international law.

III. Populism as a Rift in International Human Rights' Linear Time

1. Temporal dimension of populist rhetoric

Strongmen who personify the 21st-century wave of global populism challenge the characterisation of international human rights as a progressive set of norms.[78] Pappas describes four mutually reinforcing characteristics of populism:

> 1) a reliance on extraordinary charismatic leadership; 2) the ceaseless, strategic pursuit of political polarization; 3) a drive to seize control of the state, emasculate liberal institutions, and impose an illiberal constitution; and 4) the systematic use of patronage to reward supporters and crowd out the opposition.[79]

---

77 'Philippines: Duterte's Human Rights Smears a "Classic Diversionary Tactic"' (*Amnesty International*, 23 July 2018) <https://www.amnesty.org/en/latest/news/2018/07/philippines-dutertes-human-rights-smears-a-classic-diversionary-tactic/> accessed 1 February 2026.

78 Strongmen are political leaders who pose a fundamental challenge to democratic institutions, cultivating mass support among those who feel resentful, disenfranchised, and left behind by cultural, economic, and political change, see Yiannis Gabriel, 'The Allure of Strongman Leaders' in David Knight and others (eds), *The Routledge Critical Companion to Leadership Studies* (Routledge 2024).

79 Takis S Pappas, 'Populists in Power' (2019) 30 Journal of Democracy 70, 71.

Populism is conceptually contested, partly due to the 'semantic drift' of widespread use and politically-charged utilisation of the term.[80] In the Philippine context, Duterte's overall wild, vulgar manner was seen as 'central to his populist image' yet at the same time, his populism meant being a relatable leader.[81] Nevertheless, examining populism through its effects on human rights clarifies how populist rhetoric erodes the very institutional protections for vulnerable groups and the institutions meant to safeguard them.[82]

Populists thrive by promoting discourse that rejects 'establishment' values, such as multiculturalism and tolerance, in favour of a purported people's will.[83] In politically anxious times, popular consensus is replaced with a 'monocultural vision of society' that elevates a dominant group or identity, suppressing all others.[84] The rise of populist leaders was accompanied by, among others, an adversarial stance towards human rights and its defenders. Duterte squarely fits into this rubric with his active dehumanising rhetoric against 'Drug War' victims.[85]

Charismatic populist strongmen appear to puncture the fabric of international law's linear time and international human rights' sense of linear progress. One way populists do so is by leaning on political promises to return to a glorious past, as amorphous as this bygone time actually is. Beyond Duterte, other 21st-century populists assume a 'temporal template'

---

80 Cohen (n 71) 13.

81 Adrian Chen, 'When a Populist Demagogue Takes Power' (*The New Yorker*, 13 November 2016) <https://www.newyorker.com/magazine/2016/11/21/when-a-populist-demagogue-takes-power> accessed 1 February 2026.

82 Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 84.

83 Cohen (n 71) 13.

84 Ziya Öniş, 'The Age of Anxiety: The Crisis of Liberal Democracy in a Post-Hegemonic Global Order' (2017) 52 The International Spectator 18, 12.

85 Tugade (n 14).

rooted in the nation rather than an international order. [86] For instance, Turkey's Erdogan mobilises nostalgia for a glorious Ottoman past to order the present and future.[87] United States' Trump and Hungary's Orbán also utilise the idea of a past age that needs revival to secure the future of the nation.[88] Sounding the alarm over the atrophy of international human rights at the hands of populists has been framed temporally as well: the 'endtimes of human rights' is at our doorstep, writes Hopgood, conscious of the increasingly contested character of human rights as global norms.[89]

Analysing populism's temporal dimension against the assumed temporality of international human rights, rather than a contingent approach, responds to empirically observable uses of time-related concepts. Taken together, populist rhetoric combines attacks on human rights institutions with temporal narratives. These patterns show how populism may operate as a temporal rupture, challenging the assumption of a singular line oriented towards progress.

2. The temporality of Duterte's populism

The Philippines under Duterte provides a case study of how questioning international human rights norms is integral to the modern populist playbook. Populist governments, after all, 'have learned from each other, to the point that copycat attacks against human rights have spread to countries in different regions'.[90] Apart from the human rights/human lives dichotomy

---

86 Jan-Willem Van Prooijen and others, 'Make It Great Again: The Relationship Between Populist Attitudes and Nostalgia' (2022) 43 Political Psychology 951, 964.

87 Hakkı Taş, 'The Chronopolitics of National Populism' (2022) 29 Identities 127.

88 ibid 138.

89 Hopgood (n 2).

90 César Rodríguez-Garavito and Krizna Gomez, 'Responding to the Populist Challenge: A New Playbook for the Human Rights Field' in César Rodríguez-Garavito and Krizna Gomez (eds), *Rising to the Populist Challenge: A New Playbook for Human Rights Actors* (1st edn, Dejusticia 2018) 13.

in the early days of his presidency, Duterte made clear that he rejected criticisms of his 'Drug War' rooted in international human rights.[91] He once launched a tirade against the UN as an institution 'easily swayed into interfering in the affairs of this republic' and hypocritical for its silence in other human rights issues.[92] During the COVID-19 pandemic, Duterte issued a statement in the High-Level General Debate of the UN General Assembly, calling the UN a 'product of an era long past,' and the only way out for the world is an institutional reset of the UN-framed international order.[93] Duterte points to specific institutions like the UN and ICC and international legal frameworks to sharpen his polemic that criticisms from outside are attacks on the national interest. This pattern of rhetoric is what Roth, through Human Rights Watch, warned about: that at the hands of populist strongmen, the international order is on the brink of collapse, lest anything be done.[94]

Yet locally, Rafael asserts that Duterte's representation of a 'dream of benevolent dictatorship' is not at all new.[95] This dream reaches far back into the deep wells of colonial history, where the patriarchal dictator is hoped to

---

91 Sky News, 'Philippine President Rodrigo Duterte Threatens to Slap UN Critic of Drugs War' (*Sky News,* 10 November 2017) <https://news.sky.com/story/philippine-president-rodrigo-duterte-threatens-to-slap-un-critic-of-drugs-war-11120645> accessed 1 February 2026.

92 Al Jazeera, 'Duterte Slams "Stupid" UN Criticism of His War on Drugs' (*Al Jazeera*, 18 August 2016) <www.aljazeera.com/news/2016/8/18/duterte-slams-stupid-un-criticism-of-his-war-on-drugs> accessed 21 April 2025.

93 Rodrigo Roa Duterte, 'Statement of President Rodrigo Roa Duterte at the High-Level General Debate 76th Session of United Nations General Assembly' (21 September 2021) <https://estatements.unmeetings.org/estatements/10.0010/20210921/TSfFq675wDmn/wPQJVrqgHdRW_en.pdf> accessed 21 April 2025.

94 Roth (n 7).

95 Vicente L Rafael, *The Sovereign Trickster: Death and Laughter in the Age of Duterte* (Duke University Press 2021).

deliver a certain form of justice. Despite fitting national history and the onward march of the years into the mould of progress, 'such dreams always turn into nightmares."[96] From the larger conceptualisation of political cycles in the Philippines, the swing to populist Duterte may also be seen as part of an inescapable pattern of moving between reformist and populist presidencies.[97] Bagulaya additionally demonstrates how an examination of the law's time may be done by dissecting the temporal restraints to Presidential power within the structure of the 1987 Constitution.[98] Duterte's campaign promise of eradicating drugs within a three to six-month timeframe is also a play on time: what decades of liberal governance have failed to do, he vowed to implement swiftly.[99]

Whether as a disruptive novelty or a manifestation of a national political cycle, any analysis of the emergence of Duterte cannot be separated from questions of legal temporality. Specifically analysing Duterte's regime, I argue that any 'restorationist' approach after Duterte may not be productive, as the law's historical contingency must be acknowledged.[100] That is, it may be difficult, or already impossible, to erase the effects of Duterte's rule so as to revert to a 'pre-Duterte' condition. For scholars such as Iglesias, Duterte's campaign of mass violence facilitated democratic backsliding, or the state

96 Ibid 19.

97 Mark R Thompson, 'Reformism vs. Populism in the Philippines' (2010) 21 Journal of Democracy 154.

98 José Duke Bagulaya, 'Time as Constitutional Constraint: Temporal Limits and Emergency Powers in the 1987 Philippine Constitution' (2024) 97 Unitas <https://unitasust.net/wp-content/uploads/2024/06/UNITAS-97-1-Full-Issue-Color-Adjusted_compressed.pdf> accessed 05 November 2024.

99 Ariel Paolo Tejada, 'Duterte Vows to End Criminality in 3 Months' (*PhilStar Global,* 20 February 2016) <https://www.philstar.com/headlines/2016/02/20/1555349/duterte-vows-end-criminality-3-months> accessed 1 February 2026.

100 Tugade (n 14).

itself leading the charge towards the erosion of its democratic institutions.[101] The 'unprecedented' nature of Duterte's campaign has led to something 'unusual', in that while democratic features remained, the implications for rights are profound.[102]

Seen as a rupture, Duterte disrupts the linearity assumed in international human rights law at the local level by rejecting internationalist norms in his populist rhetoric. He also does so globally by exemplifying how populist leaders challenge the progressive promise of human rights. Treating Duterte as a temporally irruptive force on international human rights is not an incidental concern for theorising next steps in analysis. This is so because populists pit international human rights against the 'avowedly nationalistic, xenophobic, and explicitly antagonistic' spirit of their agenda, hurling novel challenges at international human rights scholars and practitioners alike, such as the increasing unavailability of civic spaces and doubts cast on democratic institutions.[103] The call to defend international human rights against populists, when framed as such, appears to be an attempt to rescue the system from demise.[104] Moyn, however, presciently detects what is disconcerting in treating human rights as the consummate reflection of international law's linear progress. For him, the 'most troubling shortcoming of the contemporary attempt to give human rights a history is that it distorts the past to suit the present'.[105] A backward projection becomes shaky, especially once human rights become the subject of contestation.

---

101 Sol Iglesias, 'Human Rights Violations and Democratic Backsliding in the Philippines under Duterte' (2024) 3 Human Rights in the Global South (HRGS) 169.

102 Ibid 172.

103 Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

104 Roth (n 7).

105 Moyn (n 1) 1.

One way to subvert expectations of international law's linear temporality—and by extension, international human rights' inevitability of progress—is to temporally theorise the rise of populists like Duterte. Viewing the emergence of global populism as an anomalous event may be productive if it is seen as a 'rupture', 'dislocation', or 'the shock of the new', demanding reflections on international law's orientation.[106] This way, we may move beyond the cynical diagnoses from various strands, such as treating linearity and progress with pure suspicion, or another view that surrenders to the inevitability of an apocalyptic vision. I follow this discussion with prospects for repair that avoid overestimating optimism. Bearing in mind the exclusions that international law's linearity has produced, favouring narratives of progress while obscuring events that repeat past violations, I pay attention to emerging ideas of re-engagement as a guide rather than a panacea.

IV. Reparative Prospects for International Legal Time

Departing from linearity may be theoretically and practically beneficial for international human rights and international law. Doing so may better capture instances of regression or repetition, or generate new ways of thinking about the future. To disagree with the characterisation of international human rights' progressive temporality does not mean to abandon wholesale its emancipatory and redistributive claims. Openness to alternative visions and even contingency may realistically frame these emancipatory political projects. McNeilly suggests that framing international human rights as 'out of time' may help in reorienting us in the present towards the openness of the future for a more grounded form of hope.[107] The populist moment is thus not simply to be swept under the rug

[106] Johns, Joyce and Pahuja (n 47) 4.

[107] Kathryn McNeilly, 'Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change' (2019) 28 Social & Legal Studies 817, 826.

as a temporary aberration of history, with the expectation that international legal time will self-correct. Even such self-correction is to be assumed part of the progressive trajectory, folding the populist moment within this frame risks treating its dangers as a bug of the system. At this juncture, taking the rival temporalities of international human rights and those of populists may help redefine pathways for engaging with international legal norms.

Articulated differently, the rise of the populist moment and the accompanying 'acts of resistance against the international global legal order' is, arguably, a 'backlash against the international legal order itself'.[108] The outlines of this backlash may be explored further: is it 'a particular moment in time' or a more 'long-term phenomenon'?[109] One emergent response to this backlash is reform and renewal, or to 'strengthen, reinforce, and renew the existing global and legal political order'.[110] One may theorise the call directed at populist regimes to 're-engage' with international law as an attempt to smooth out the ruptures created in international law's temporality. From this view, ruptures are merely disruptive. The 'common ethos' of international law, after all, is largely temporally structured around a foundational claim that exacts unity and obedience.[111] In the modern formulation, such would translate to the commitment to institutions of global peace and pacific settlement of disputes, which rests on a shared path to progress.

Reform and renewal emphasise, among others, 'the re-articulation of shared global values' to ensure a return to the international system's authentic spirit

---

[108] Peter G Danchin and others, 'Navigating the Backlash against Global Law and Institutions Special Issue: The Backlash against International Law: Australian Perspectives' (2020) 38 Australian Yearbook of International Law 33, 38.

[109] Ibid 48.

[110] Ibid 47.

[111] Jennifer Beard, 'The International Law in Force' in Fleur Johns, Richard John Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2010) 27.

and rules as articulated in Post-WWII institutions.[112] In this rubric, reasserting humanity's faith in international law and in the international human rights system is necessary to whip them back into shape.[113] In so doing, their role in history as vessels of the post-war universal, progressive vision continues. Multilateralism and constant engagement, especially with the 'UN political and human rights machinery', are features of the post-war international legal order, with practitioners not yet ready to retreat despite multiple events challenging this system.[114] The optimist commitment to reform and renewal acknowledges the punctuating effects of challenging events, but nevertheless looks to the 'abiding elements in the world' that remain sources of hope.[115]

A more sombre treatment of 're-engagement' would be seeing it as a retrieval operation of international law's values amid the difficulty of securing broad reaffirmation. Such an attitude of international legal scepticism tempers the initial optimism that came with the materialisation of

---

112 Danchin and others (n 104) 48.

113 In late 2025, UN Secretary-General António Guterres emphasised to the General Assembly that 'we must never give up' in the face of the multiple international crises. United Nations, '"We Must Never Give Up", Secretary-General Tells World Leaders, Urging Bold Global Action on Peace, Human Rights, Climate Justice, in High-Level Debate Remarks' (*UN Meetings Coverage and Press Releases*, 23 September 2025) <https://press.un.org/en/2025/sgsm22823.doc.htm> accessed 31 January 2026. In the backdrop, talks on the 'death' of international law has found their way to the mainstream. Linda Kinstler, 'Are We Witnessing the Death of International Law?' (*The Guardian*, 26 June 2025) <https://www.theguardian.com/law/2025/jun/26/are-we-witnessing-the-death-of-international-law> accessed 31 January 2026. The state of international law as a discipline in crisis has been articulated in scholarship, see Ntina Tzouvala, 'International Law as a Discipline in Crisis' (2025) 79 Australian Journal of International Affairs 71.

114 For example, Michael Kirby, 'Multilateralism, Pushback, and Prospects for Global Engagement?' (2020) 27 Indiana Journal of Global Legal Studies 1.

115 Ibid 28.

fields like international human rights law.[116] This observation, expressed by Lefkowitz, stems from the contemporary reality of international legal practice, where 'a fair number of international officials either have no commitment to the rule of law, or if they do, that they do not (implicitly) understand the value of that ideal'.[117] However, caution must still be exercised in assessing what lies beyond the wave of backlash against international law. This includes how we make sense of the global populist moment that disavows international human rights. It may be so that any purported alternative to the backlash will not necessarily guarantee greener pastures.[118]

One possible approach to navigating the spectrum between rejection and re-engagement with international law and international human rights is to acknowledge the existence of 'conflicting temporalities' in the international legal system.[119] The time of international law will not always align with the time of the nation-state, as the latter may still be recovering from periods of repression and violence, or oscillating between periods of national reform or discontent. The Philippine nation-state is itself riddled with contradictions, in that modern legal values often encounter tradition or custom older than constitutionalism.[120] This is not, however, a justification of pitting the value

---

116 David Lefkowitz, 'A New Philosophy for International Legal Scepticism?' (2024) 16 International Theory 237.

117 Ibid 265.

118 David D Caron and Esme Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' (2016) SSRN Electronic Journal < www.ssrn.com/abstract=2834000> accessed 5 November 2024.

119 Wayne Hope, 'Conflicting Temporalities: State, Nation, Economy and Democracy under Global Capitalism' (2009) 18 Time & Society 62.

120 See for example, Dante Gatmaytan, 'Legal Transfers as Colonization: Initial Thoughts on Decoloniality and the Constitution' (2020) 93 Philadelphia Law Journal 276; Leia Castañeda Anastacio, *The Foundations of the Modern Philippine State: Imperial Rule and the American Constitutional Tradition in the Philippine Islands, 1898–1935* (Cambridge University Press 2016).

of international human rights as political goods against feverish dreams of hyper-nationalism. In a way, there is an affinity here with political philosophy's view of time as 'out of joint' or at odds with itself.[121]

International human rights, as the ethical anchor of international law, can never be confined to a specific vision of historical progress. A longer view of chronological time of international law—and indeed conflicting temporalities—has emerged in the aftermath of Duterte's brutal regime. In a sense, the expectation that international justice would come slow for Duterte has been subverted by the relatively quick movement of the ICC investigation.[122] For the victims of Duterte's 'Drug War', however, his arrest by the ICC came to represent a 'cosmic reckoning' of how the 'long overdue day of judgment' bends towards the oft-referred arc of the moral universe.[123] For others persecuted under the regime, the ICC proceedings are rather 'swift' and therefore indicative of a strong case.[124] Meanwhile, the notion of slowness of justice was felt in other mass atrocity events prosecuted domestically, such as the Ampatuan Massacre, where advocates lamented the 'grindingly slow judicial proceedings' for a trial stage that took a decade to

---

121 Jacques Derrida, *Specters of Marx* (Routledge 1994); Wendy Brown, *Politics out of History* (Princeton University Press 2001).

122 Rebecca Ratcliffe, 'Rodrigo Duterte's Arrest Could Be Telling Blow in the Philippines' Dynastic Feud' (*The Guardian*, 12 March 2025) < www.theguardian.com/world/2025/mar/12/rodrigo-dutertes-arrest-could-be-telling-blow-in-the-philippines-dynastic-feud> accessed 21 April 2025.

123 Philippine Daily Inquirer, 'Editorial: Victimized Twice Over' (*Inquirer.net,* 10 April 2025) <https://opinion.inquirer.net/182324/victimized-twice-over> accessed 21 April 2025.

124 Krixia Subingsubing, 'De Lima: ICC "Swift Denial" of Duterte Release Bid Proof of Strong Case' (*INQUIRER.net*, 10 October 2025) <https://newsinfo.inquirer.net/2123162/de-lima-icc-swift-denial-of-duterte-release-bid-proof-of-strong-case> accessed 31 January 2026

conclude.[125] Though a discussion of the temporalities of international criminal law, this variance in experiences of legal time exhibits the terrain of conflicting temporalities in the international legal system. These are lived and legal realities that should signpost ways of engaging with international legal norms in the time of disruptive populists.

In thinking about international law's promise of progress, it may be valuable to detect how international law's temporality clashes with the 'contingent and short-term preoccupations of domestic public life'.[126] Duterte's three-to-six-month promise is an instructive example: Despite the Philippines' avowed 'long-standing and rich human rights tradition' founded in the moment of its adoption of the UDHR,[127] international human rights commitments apparently become negotiable in the face of the immediate problem of public order posed by drugs and criminality. This is where analyses such as McNeilly's become useful in thinking about futurity.[128] Futurity here can mean a time 'not quite here' that is filled with potentiality.[129] International human rights law, under attack for its failed

---

125 Delayed Convictions for "Ampatuan Massacre" in the Philippines Are Critical Step for Justice' (*Amnesty International*, 19 December 2019) <https://www.amnesty.org/en/latest/press-release/2019/12/philippines-convictions-for-ampatuan-massacre-delayed-critical-step-justice/> accessed 31 January 2026.

126 Tommaso Soave, 'The Politics of Time in Domestic and International Lawmaking' in Klara Polackova Van der Ploeg, Luca Pasquet and León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer International Publishing 2022) 169.

127 Enrique Manalo, 'Keynote Address of Secretary for Foreign Affairs Enrique Manalo "The Philippine Human Rights Tradition: Past, Present and Future"' (Philippines Department of Foreign Affairs, 12 December 2023) <https://dfa.gov.ph/speeches-and-statements/33893-keynote-address-of-secretary-for-foreign-affairs-enrique-manalo-the-philippine-human-rights-tradition-past-present-and-future> accessed 21 April 2025.

128 McNeilly (n 103).

129 José Esteban Muñoz, *Cruising Utopia, 10th Anniversary Edition: The Then and There of Queer Futurity* (New York University Press 2019) 22.

promise of progress, could be the subject of new ways of thinking about just outcomes without necessarily falling back to a disciplined linear ordering. One could start with revisiting international legal norms built around human dignity in human rights, and what it could practically entail in terms of redistributing goods in any society.

V. Epilogue: A Reparative Spirit Outside Acts of Repair

Can international human rights retain its reparative promise for a fractured world, without necessarily engaging in mere mechanical acts of repair? This question is one of many I set out to ask, implicating the notion of time amid the search for an appropriate response to looming existential threats.

I recall the world of Alan Moore's 'Watchmen', where characters are confronted with the anxiety of a nuclear apocalypse under the gaze of an indifferent ticking doomsday clock. The war was over, yet global powers made possible the enduring threat of a new one. In Moore's world, where the end of history meant the possibility of apocalypse, the concept of time remains critical: 'If time is not true, what purpose have watchmakers, hein?'[130]

In our world outside the pages of literary flights of fancy, finding relief away from populists who threaten the stability of the world arguably created by international law and international human rights may mean employing viable doses of critique and tactics.[131] Coming into terms with the unruly temporalities of international human rights may even elucidate its orientation 'towards representation and rallying'.[132] Re-engagement with

---

130 Alan Moore and Dave Gibbons, *Watchmen* (DC Comics 1987).

131 Christine Schwöbel-Patel, 'Populism, International Law and the End of Keep Calm and Carry on Lawyering' in Janne E Nijman and Wouter G Werner (eds), *Netherlands Yearbook of International Law 2018*, vol 49 (TMC Asser Press 2019) 114.

132 Johns (n 19) 55.

international human rights and international law, then, must be informed by a kind of discernment over the inequities they have helped produce.

The irruptive emergence of strongmen like Duterte is also an event relevant to political economy. Thus, any response fails if the prescription is a mere return to history and law's prefigured temporality. Having a redistributive goal accompany a measured approach to re-engagement may be an important starting point. The centrality of human dignity in international human rights presents a space for thinking about the past, present, and future in a way that informs political and legal struggles.[133] Taking inspiration from the analysis of 'uneven distribution of futurity' in international environmental law, re-engaging international human rights after Duterte will entail reparative work.[134] Such reparative work must acknowledge mechanisms of exclusions produced by internationalism while taking stock of domestic demands that are immediate and urgent. This sharpened insight is especially crucial when some global populists have hammered the point of liberal democracy's perceived selectivity in spreading its prosperity. Trump's second term, a more unsparing challenge to international legal norms, immediately comes to mind. The work of international lawyers, in the face of irruptions, requires a reconstructive spirit both in scholarship and practice. In the 'time of monsters', we face our old gods while birthing a world more truly of our own.[135]

---

[133] Cusato (n 70) 892.

[134] Cusato (n 70). One may see, for example, how climate change, as a result of economic and technological processes, produces negative impacts disproportionately on 'particularly vulnerable' communities in the International Court of Justice's *Obligations of States in respect of Climate Change* (Advisory Opinion) 2025 <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf> accessed 15 February 2026.

[135] From a quote attributed to the Italian Marxist Antonio Gramsci: 'The old world is dying, and the new world struggles to be born: now is the time of monsters.' Žižek S, 'Living in the Time of Monsters' (2012) 422 Counterpoints 32, 42.

THE AFRICAN STATES' PRACTICE OF WITHDRAWAL IN THE LIGHT OF THE INTERNATIONAL LAW OF TREATIES

Luigi Zuccari*

The article examines the recent practice of African States withdrawing from international treaties, intending to highlight its most notable aspects, particularly those that diverge from relevant international law and practice.

The analysis demonstrates, first and foremost, that several distinctive practices in Africa concerning withdrawal are frequently directed at preserving the continuity and stability of the international obligations undertaken by the States of the continent. This approach is evident in continental trends that explicitly recognize the right to revoke a withdrawal or that vest the power to withdraw in parliamentary bodies.

Other African practices have also been identified, such as those promoting the termination of treaties concluded with former colonial powers. In this regard, the African practice of 'collective withdrawal' becomes relevant. Notably, the study has shown that 'collective withdrawal' can be considered as a reaction to the enduring forms of legal imperialism, through which African States are also challenging the limits provided for by the international law of treaties.

Keywords: withdrawal; denunciation; African practice; law of the treaties

* Luigi Zuccari is a Research Fellow at Sapienza University of Rome and an Adjunct Professor of International Law at the Niccolò Cusano University, ORCID ID: 0000-0003-1636-6413.

This article is an updated English version of a contribution previously published in Italian in the journal Federalismi.it (No. 6, 2025, pp. 56-81), titled: *Il recesso dai trattati nella prassi degli Stati africani. Una reazione a persistenti forme di "imperialismo giuridico"?*

TABLE OF CONTENTS

I. INTRODUCTION

This article on the recent African States' practice regarding withdrawal from international treaties arises from the need to explore further an area of international law and practice that remains largely unexplored by authors.

It is noted that scholarly analyses of treaty withdrawal, even the most recent ones[1], often do not devote sufficient attention to the legal trends emerging in the African continent, where withdrawal is exercised not infrequently, in contrast with the prevailing international practice. Moreover, over the past decade, there has been a growing trend among African States to resort to treaty withdrawal, a development that has accelerated markedly in the past four years. Specifically, several West African States have, in a coordinated manner, denounced multiple treaties establishing international organizations, as well as bilateral agreements pertaining to military, fiscal, and economic matters.

The paper aims to systematically examine this continental practice, highlighting its most significant aspects, particularly those that diverge from relevant international law and practice.

To achieve this specific goal, the analysis begins with a concise overview of the international law governing withdrawal (Section II). In this context, international law primarily, though not exclusively, serves as the benchmark against which the conformity of African States' practices is assessed. Subsequently, the investigation focuses on the legal regime and practical application of treaty withdrawal in Africa.

The legal regime is studied in Section III. Here, both the 'withdrawal clauses' contained in the 'African agreements' and the constitutional provisions of the African States are analyzed to identify the *idem sentire* of the continent

[1] See, Averell Schmidt, 'Treaty Withdrawal and the Development of International Law' (2024) Review of International Organizations 785; Inken von Borzyskowski and Felicity Vabulas, 'When Do Withdrawal Threats Achieve Reform in International Organizations?' (2023) 4(1) Global Perspectives; Antonio Morelli, *Withdrawal from Multilateral Treaties* (Brill 2021); Connie de la Vega & Andrew Campbell Lee, 'Provisions for Withdrawing from International Human Rights Treaties' (2022) 28 Journal of International and Comparative Law 315.

regarding withdrawal.[2] This section examines the international treaties adopted by the five leading African international organizations, as well as the constitutions of all 54 African countries.[3]

Section IV focuses on the practical application of treaty withdrawal. The main cases of denunciation of international treaties by African States are examined, to highlight how the procedures applied by these countries are not always consistent with international law and practice. The research primarily focuses on cases of withdrawal involving African countries over the past decade, paying particular attention to those concerning agreements with the former colonial powers.[4]

Finally, the findings are systematically organized in the conclusions, in order to assess whether distinctive African patterns of withdrawal have given rise to new practices that may challenge the international law of treaties as codified in the 1969 Vienna Convention on the Law of the Treaties (VCLT).[5]

---

2 In this article, the term 'African agreements' will refer to treaties concluded exclusively between African States.

3 In particular, the research has covered all 179 treaties adopted within the framework of the African Union, the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the Economic Community of Central African States (ECCAS) and the East African Community (EAC). Only treaties amending other treaties have been excluded from the analysis.

4 As will be more fully illustrated in the subsequent sections, these specific instances of withdrawal can be interpreted as a reaction to persistent forms of legal imperialism. In this paper, 'legal imperialism' refers to the use of law by a State as an instrument to extend its authority, power and sovereignty into another State. This is typical of some colonial and post-colonial treaties.

5 Vienna Convention on the Law of the Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

II. THE PRACTICE OF TREATY WITHDRAWAL IN INTERNATIONAL LAW

1. Definition of Treaty Withdrawal and Terminological Issues

In international law, withdrawal is a unilateral act of a State party to a treaty that results in the termination of that treaty for the withdrawing Party.[6] Like 'withdrawal', 'denunciation' refers to the termination of a State's participation in a treaty.[7] However, some authors prefer to distinguish between the two concepts, considering them as distinct legal mechanisms.[8] They suggest that the term 'withdrawal' should be used for multilateral agreements, where the State's will to terminate its treaty obligations does not necessarily determine the termination of the agreement for the other

---

6 Anthony Aust, 'Treaties, Termination' (2006) *Max Planck Encyclopedias of Public International Law* <https://opil.ouplaw.com/home/mpil> accessed 14 January 2026; Ugo Villani, 'Recesso (Diritto internazionale)' (1988*) Enciclopedia del Diritto* 45; Herbert W Briggs, 'Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice' (1974) 68 American Journal of International Law 51.

7 See, VCLT, articles 42, 43 and 56.

8 The VCLT, as well as its commentaries, also distinguish between denunciation and withdrawal without providing a definition of these concepts. See, International Law Commission (ILC), Draft Articles on the Law of Treaties with commentaries, Report 1966. This distinction, however, is not confirmed by international practice, where the terms 'withdrawal' and 'denunciation' are often used interchangeably. See, the long list of international treaties that explicitly refer to the term 'denunciation' while being multilateral in nature. See, for example, the United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) UNTS 2349; the Optional Protocol to the Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS 999; Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) UNTS 119; UN Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) UNTS 2225.

contracting parties.[9] The term 'denunciation', instead, would seem more appropriate for bilateral treaties, where the will of the withdrawing State always results in the complete termination of the agreement.[10]

Since this paper focuses on the terminating effects of these unilateral acts, the terms 'withdrawal' and 'denunciation' will be used interchangeably.

2. The Evolution of Withdrawal in International Relations: A Legal-Historical Analysis

Like other aspects of international law, the practice of withdrawal has been shaped by the transformations that have affected the international community since the end of World War II. Over this period, withdrawal has evolved from a marginal legal mechanism to a significant instrument of both domestic and international state policy.

At the end of World War II, the need arose to ensure a lasting, homogeneous, and universal application of international law, promoting the establishment of a 'new world order' based on the maintenance of international peace and security. At this time, 'international treaties were meant to be perpetual tools, without withdrawal clauses, with which to secure world order around core values'.[11] Withdrawal, therefore, was essentially perceived as a legal instrument that could undermine the

[9] However, where a multilateral treaty provides for a minimum number of States parties to be in force, a withdrawal which determines the loss of that minimum number shall result in the termination of the agreement for all contracting parties. See, Convention on the Political Rights of Women (adopted 31 March 1953, entered into force 7 July 1954) 193 UNTS 135, art 8(2).

[10] In order to clarify the differences between 'withdrawal' and 'denunciation', see Francesco Capotorti, 'L'extinction et la suspension des traités' (1971) 134 Recueil des Cours de l'Académie de droit international de La Haye 417. Recently, see Laurence R Helfer, 'Terminating Treaties' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, Oxford University Press 2020).

[11] Morelli (n 1) 82.

achievement of the objectives provided for by emerging international law, of which the UN Charter was the main expression.

During this period, and until the early 1970s, withdrawal was primarily exercised when it served the interests of the 'new international order'. Specifically, it was employed to terminate obsolete treaties that had become irrelevant due to historical or political developments.[12] Cases of withdrawal as an 'oppositional reaction' to treaty obligations have been almost nonexistent.[13] In these rare instances, withdrawal was not even formally recognized as such. This is exemplified by Indonesia's withdrawal from the United Nations in 1965 and the departures of several socialist countries from UNESCO and the WHO in the 1950s, which the organizations did not regard as withdrawals but rather as 'inactive members'.[14]

Limiting the right of withdrawal appeared justified by the social need to promote a legal system based on the values of security and peaceful

---

12 See, for instance, withdrawals from the Agreement on Most-Favoured-Nation Treatment for Areas of Western Germany under Military Occupation, which became obsolete with the end of the occupation of Western German territory. For more examples of this trend, see *Depositary Notifications (CNs) by the Secretary-General* at <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en> accessed 14 January 2026. See also, Frederick Cowell, *The Law, Politics and Theory of Treaty Withdrawal* (Bloomsbury 2023) 4.

13 For instance, out of the 25 declarations of withdrawal submitted to the UN Secretary-General between 1950 and 1970, 19 referred to obsolete treaties (relating, for example, to West Germany or to the jurisdiction of the Permanent Court of International Justice). Very similar results are obtained if the study takes into account the declarations under the name 'denunciation' received by the Secretary-General throughout the same period. Further details, at *Depositary Notifications (CNs) by the Secretary-General* (n 9).

14 On the Indonesia's withdrawal and the notion of "inactive members", see footnote (38) and also Nathan Feinberg, 'Unilateral Withdrawal from an International Organization' (1963) 39 *British Yearbook of International Law* 189.

cooperation among States.[15] However, this approach contrasts with the voluntary nature of international treaties, of which withdrawal is a significant aspect.

Around the mid-1970s — and thanks to the process of decolonization and the adoption of the VCLT, — withdrawal began to be used more frequently. For instance, the were numerous instances of African countries withdrawing from colonial-era treaties are significant, as are the withdrawals of the United States (1983), Israel, and the United Kingdom (1984) from UNESCO, along with the departures of the United States (1975), Vietnam (1983), and Poland (1984) from the ILO. Withdrawal emerged as a valuable instrument to assert national interests, if necessary, even in opposition to international governance.

From the 1970s onwards, therefore, treaty withdrawal practice underwent a shift: it was no longer primarily a tool for consolidating the political and legal order established after World War II but instead reacquired its traditional function of 'disengagement'. From that moment, States began to withdraw for a wide range of reasons.[16] Today, States denounce international treaties when they are perceived as obstacles to the pursuit of national interests or as a means to challenge specific policies adopted by the international organization established by each respective agreement.[17]

---

15 In this perspective, it is also relevant to mention the legal position according to which denunciation could only be exercised in the presence of specific withdrawal clauses. See Villani (6) 49, according to which 'in assenza di una siffatta disposizione, è da ritenere che la possibilità di recedere sia esclusa'.

16 For instance, see Stefan Gänzle, Jens U Wunderlich and Tobias C Hofelich, 'Differentiated Disintegration in the Economic Community of West African States, the Eurasian Economic Community and the European Union: A Comparative Regionalism Approach' (2024) 46 Journal of European Integration 881. See, also, footnotes (17), (18), (19) and (20).

17 See the withdrawal procedures initiated by the President of the United States, Donald Trump, between 2016 and 2020, which led the American administration

Furthermore, States withdraw from treaties to criticize the work of some international tribunals,[18] to claim specific spaces of sovereignty[19], or for purely economic reasons.[20]

---

to withdraw from the Paris Climate Agreement and the Optional Protocol to the Vienna Convention on Diplomatic Relations.

18 See for example, the arguments used by Venezuela to denounce the American Convention on Human Rights in 2012, available at <www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf> last accessed 28 March 2025. See also Benin's withdrawal of the declaration accepting the jurisdiction of the African Court on Human and Peoples' Rights. *République du Bénin, Ministères des Affaires étrangères et de la Coopération du Bénin*, n. 216/MAEC/AM/SP-C, Cotonou, 24 March 2020, available at: <https://www.african-court.org/wpafc/declarations/>, accessed 21 January 2026. For a deeper analysis, see Girma Gadisa, 'State Parties' Withdrawal of Direct Access to African Court on Human and Peoples' Rights: The Need to Reinvigorate Complementarity' (2023) 12 Oromia Law Journal 141.

19 See the well-known case of Brexit (*Letter from the Prime Minister to Donald Tusk Triggering Article 50*, Prime Minister's Office, 29 March 2017 <www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> accessed 16 January 2026) and the Nicaragua's denunciation of the Charter of the Organization of American States (*Letter to the Secretary General of the Organization of American States Denouncing Nicaragua's Acceptance of the OAS Charter*, Nicaraguan Minister of Foreign Affairs, 19 November 2021 <www.oas.org/en/sla/dil/docs/A-41_letter_denounce_Nicaragua_11-19-2021.pdf> accessed 16 January 2026).

20 See the *Executive Order 'Withdrawing the United States from the World Health Organization'*, President of the United States, 20 January 2025 <www.whitehouse.gov/presidential-actions/2025/01/withdrawing-the-united-states-from-the-worldhealth-organization/> accessed 16 January 2026. See also the recent Trump's Presidential Memoranda, *Withdrawing the United States from International Organizations, Conventions, and Treaties that Are Contrary to the Interests of the United States*, 7 January 2026.

Moreover, withdrawal can have significance even when merely threatened.[21] In contemporary practice, States frequently use the threat of denunciation as a strategic lever to strengthen their position within the cooperative framework established by a treaty or to prompt its modification.[22] A pertinent example is found in the 'threatened withdrawal' of South Africa and Gambia from the Statute of the International Criminal Court (ICC), to make the Court's work more 'impartial'.[23]

Since the 1970s, through this frequent recourse to withdrawal, States have asserted their sovereignty. They have also reaffirmed the voluntary nature of international treaties as implying the transience of the agreement. By its very nature, the treaty is not concluded as a perpetual instrument. Instead, it is a consensual act and, for this reason, it is subject to the changing will of the Parties, which can be expressed through withdrawal.[24]

3. The Legal Regime Governing Withdrawal from International Treaties

A. Withdrawal from Treaties Containing Ad Hoc Clauses

From a legal perspective, withdrawal is governed by the exit clauses enshrined in a treaty, which may establish a simple and generic 'right of

---

21 In this contribution, the term 'threatened withdrawal' refers to a strategic invocation of denunciation in which the formal legal process is never completed.

22 Wabwile claims that 'exit, proposed withdrawal, or expressions of dissent by a significant number of important states parties may be the catalyst required to trigger reform of contentious aspects of a treaty system'. Michael Nyongesa Wabwile, 'South Africa's Proposed Exit from Rome Statute: Alternative Perspectives' (2018) 11 *African Journal of Legal Studies* 117, 140.

23 See *Depositary Notification by Gambia: Withdrawal*, C.N.862.2016.TREATIES-XVIII.10 10 November 2016 and *Depositary Notification by South Africa: Withdrawal*', C.N.121.2017.TREATIES-XVIII.10 7 March 2017.

24 See, Morelli (n 1) 10. Here, the author defines 'withdrawal as an expression of the States' voluntarism'.

withdrawal' or set specific procedural limits on the States' ability to terminate the treaty unilaterally.[25]

For instance, certain international human rights agreements negotiated under the auspices of the United Nations (UN) provide for a generic and straightforward right of withdrawal. Some of these treaties establish that

> [a] State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.[26]

This specific type of withdrawal provision, also enshrined in the founding treaties of certain international organizations, requires only a written notification and defers its effectiveness for one year.

In other cases, withdrawal clauses provide for strict limits. In this regard, reference is made to the conventional rules that prevent withdrawal for a specific number of years, calculated from the date the agreement entered into force. This is the case of the Treaty establishing the Atlantic Alliance, various ILO Conventions, and the Convention for the Suppression of Genocide.[27]

Some withdrawal clauses provide for 'circumstantial' restrictions, which prevent or allow denunciation to produce legal effects only upon the occurrence of specific events. An example of this can be found in the clauses

---

25 VCLT, art 42(2). For a detailed analysis of different withdrawal clauses, see Cowell (n 12) 56.

26 See, Convention on the Rights of Persons with Disabilities (adopted 13 December 2006) 2515 UNTS 3; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966) 660 UNTS 195; Convention on the Rights of the Child (adopted 20 November 1989) 1577 UNTS 3.

27 The North Atlantic Treaty (adopted 4 April 1949) 34 UNTS 243; Promotional Framework for Occupational Safety and Health Convention (No. 187) (adopted 15 June 2006); Worst Forms of Child Labour Convention (No. 182) (adopted 17 June 1999) 2133 UNTS 161; Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948) 78 UNTS 277 art XIV.

contained in the four Geneva Conventions of 1949 that preclude denunciation from producing legal effects if the denouncing State is involved in an armed conflict.[28]

In the case of disarmament agreements, the exit clauses frequently provide for an obligation to give reasons for withdrawal, in accordance with Article 65 of the VCLT.[29] The obligation to provide reasons is also established by some non-proliferation treaties, the UN Arms Trade Treaty, as well as the UN Convention on the Law of the Sea.[30]

Frequently, the withdrawal clauses combine two or more of the above limitations, restricting the State's ability to terminate the agreement. Nevertheless, an analysis of international practice shows that in most cases, States diligently comply with the withdrawal provisions, respecting both terms of notice and procedural obligations.[31] The same applies to the obligation to provide reasons for withdrawal. Despite the general obligation stipulated in Article 65 of the VCLT, States appear to comply with the motivation requirement only if expressly provided for in the withdrawal

[28] See, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949) art 63.

[29] See, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997) 2056 UNTS 211 art 20; Convention on Cluster Munitions (adopted 30 May 2008) 2688 UNTS 39 art 20. Article 65 of the VCLT stipulates that 'the notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor'.

[30] UN Convention on the Law of Sea (adopted 10 December 1982) 1833 UNTS 3 art 317. Nevertheless, the Convention establishes that 'failure to indicate reasons shall not affect the validity of the denunciation'.

[31] For an extensive analysis in this regard, see Martina Buscemi and Loris Marotti, 'Obblighi procedurali e conseguenze del recesso dai trattati: Quale rilevanza della Convenzione di Vienna nella prassi recente? (2019) 4 Rivista di diritto internazionale 939.

rules of the agreement.[32] The obligation to give reasons of denunciation, for example, was recently applied in the withdrawal of Lithuania from the Convention against Cluster Bombs and in the denunciation of Russia of the 1990 Treaty on Conventional Armed Forces in Europe, motivated by the placement of conventional weapons by the North Atlantic Treaty Organization (NATO) in the territory of new Member States (Finland).[33]

B. Withdrawal from treaties without exit clauses

In the absence of specific withdrawal clauses in the treaty, the international legal regime to be applied is that of the VCLT, which is widely recognized to largely codify customary international law.[34]

In this regard, Article 56 (1) of the VCLT states that withdrawal from an international agreement which does not provide for exit clauses is generally not permitted, except when '(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty'.

---

[32] See, for example, the latest declarations of withdrawal notified to the UN Secretary-General, none of which have been motivated: *Depositary Notification by the United States of America: Withdrawal,* C.N.71.2025.TREATIES-XXVII.7.d), 27 January 2025; *Depositary Notification by the Republic of Moldova: Withdrawal,* C.N.167.2024.TREATIES-XIX.37, 21 May 2024; *Depositary Notification by Costa Rica: Withdrawal,* C.N.531.2023.TREATIES-XIX.47 22 December 2023. More examples, available at *Depositary Notifications (CNs) by the Secretary-General* (n 9) <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en>.

[33] Further details, *Depositary Notification by Lithuania: Withdrawal,* C.N.347.2024.TREATIES-XXVI.6, 6 September 2024 and *Treaty on Conventional Armed Forces in Europe, Parties with reservations, declarations and objections,* Overheid.nl Treaty Database <https://treatydatabase.overheid.nl/en/Treaty/Details/004285_p.html#Russian%20Federation> accessed 16 January 2026.

[34] See, for instance, Anthony Aust and Oliver Dörr, 'Vienna Convention on the Law of Treaties' (2023) *Max Planck Enyclopedias of Public International Law,* paras 14-18 <https://opil.ouplaw.com/home/mpil> accessed 29 January 2026.

The first exception applies where the contracting States, while generally agreeing on the possibility of denouncing the treaty, have not provided for an ad hoc clause because they disagree on the specific terms and modalities regulating withdrawal.

The second exception establishes that, in the absence of specific exit rules, withdrawal may be exercised only with reference to certain types of treaties that, by their nature, are susceptible to denunciation. The VCLT does not specify which categories of treaties these are. However, in his second report, the Special Rapporteur on the Law of Treaties, Humphrey Waldock, argued that agreements on commercial, cultural, scientific matters, as well as those concerning military alliances or instituting mechanisms of arbitration, conciliation, or international organizations, may be denounced.[35]

Where the exceptions of Article 56 of the VCLT apply, the withdrawing State must notify its intention to the other contracting parties at least twelve months in advance, in accordance with Article 56 (2) of the VCLT.

This legal regime, which applies to treaties without withdrawal clauses, is only partially implemented in international practice. States often give immediate effect to withdrawal notices, in contravention of the 12-month notice period introduced in Article 56 of the VCLT.[36] Equally evident is the failure to comply with the obligation to motivate the withdrawal set out in Article 65. Despite some important exceptions, in most declarations of

[35] Humphrey Waldock, *Second Report on the Law of Treaties*, Special Rapporteur, UN Doc A/CN.4/156 and Add1-3, *Yearbook of the International Law Commission* (1963) vol II 64.

[36] As explicitly stated by the International Law Commission, this specific term does not codify a customary norm, but was incorporated to promote the progressive development of international law (see, ILC, *Draft Articles on the Law of Treaties with Commentaries* (1966) II *Yearbook of the International Law Commission* 251, para 6). For instances of withdrawals inconsistent with this term, see, *Depositary Notification by United States: Withdrawal* C.N.487.2018.TREATIES-III.5, 12 October 2018 and *Depositary Notification by Republic of Korea: Withdrawal*, C.N.467.1997.TREATIES, 12 November 1997.

withdrawal from treaties without a specific regime, States notify their intention to withdraw without giving reasons.[37]

Consequently, States enjoy a broad right to withdraw in the absence of specific denunciation clauses. However, this is not the case for treaties establishing international organizations or those protecting human rights, where the lack of an exit clause often resulted in the impossibility of withdrawal.[38]

This analysis of the international legal framework governing withdrawal is essential to the case study proposed in this piece, as it serves as the benchmark against which African practice will be examined in the following sections.

---

[37] For examples of 'exceptions', see Letter dated 20 January 1965 from the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia addressed to the Secretary-General, UN Doc S/6157 (20 January 1965) and *Depositary Notification by Republic of Korea: Withdrawal*, C.N.467.1997.TREATIES, 12 November 1997, both widely motivated. For instances of withdrawals without reasons, see Buscemi and Marotti (31) 939. See also *Depositary Notification by United States: Withdrawal* C.N.487.2018.TREATIES-III.5, 12 October 2018 and *Depositary Notification by Colombia: Withdrawal* C.N.521.2017.TREATIES-XXI.5, 15 September 2017.

[38] See Indonesia's denunciation of the United Nations Charter, which was never considered as a withdrawal by the Organization. Its readmission took place by mere declaration and not through the legal procedure provided for in Article 4 of the Charter. The withdrawals of Hungary and Czechoslovakia from UNESCO in the 1950s, *Communications received from Hungary and Czechoslovakia* (1953) UN Doc 2 XC/6, and the withdrawals of other Socialist States from the WHO in 1949 (*Official Records of the World Health Organization*, No 17, *Report of the Executive Board*, Third Session held in Geneva, 21 February–9 March 1949), were considered to turn them into 'inactive members'. See also Feinberg (14) 189.

III. Distinctive Trends in the Regulation of Withdrawal, in Treaties and Domestic Law of African States

Building on the foregoing considerations, this section will analyze the legal regime of withdrawal, as it emerges from the regional and domestic legal instruments of African States.

In this regard, the analysis first examines the denunciation clauses embedded in the approximately 180 agreements concluded within the African organizations, before evaluating the constitutional provisions of African States that specifically regulate withdrawal.[39] The examination of this body of law will allow to identify the recurring legal elements which are indicative, to some extent, of the *idem sentire* of African States in the matter of withdrawal.

1. The Regulation of Withdrawal in the African Continent and Confirmations of International Practice

An analysis of the withdrawal clauses contained in the 'African treaties' reveals that the limitations on the right of withdrawal generally do not differ from those established in other international agreements.[40]

African treaties contain obligations such as written notification or compliance with notice periods, which may vary significantly.[41] For

[39] The research has shown that only 91 (51%) out of 179 treaties adopted in the framework of the main African organizations provide specific withdrawal clauses. It has also demonstrated that out of the 54 Constitutions examined, only 8 expressly regulate withdrawal. At the international level, according to the website 'Constitute Project', curated by the University of Texas and the University of Chicago, only 43 out of 190 Constitutions address the issue of withdrawal. More details at, <https://www.constituteproject.org/> accessed 16 January 2026.

[40] For the notion of 'African treaties', see supra (n 2).

[41] See the Agreement on Customs Cooperation (South Africa – Malawi) (May 27, 2021), as well as Constitutive Act of the African Union (signed 11 July 2000)

example, the Memorandum of Understanding between the SADC and the Association of Chambers of Commerce of Southern African Countries provides for a 3-month notice period, whereas the Agreement Establishing the African Continental Free Trade Area provides for a longer notice period of 24 months.[42] In some cases, denunciation clauses are more complex. They can impose temporal limitations that prohibit States Parties from withdrawing before a minimum period has elapsed since the treaty's entry into force. This is the case for many bilateral investment protection treaties or some agreements adopted within the frameworks of continental and regional organizations.[43]

Other African treaties, including the ECOWAS Convention on Small Arms and Light Weapons and other instruments adopted under the auspices of the

UNTS 2158; Revised Treaty of the Economic Community of West African States (ECOWAS) (signed 24 July 1993) UNTS 2373; Declaration and Treaty of Southern African Development Community (SADC) (signed 17 August 1992).

42 Memorandum of Understanding between the Southern African States Development Community and the Association of Chambers of Commerce of Southern African Countries (adopted 7 August 2000); Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018) 58 ILM 1028.

43 See Agreement on the Reciprocal Promotion and Protection of Investments (Republic of the Congo - Republic of Angola) (signed 9 September 2010) art 11; Agreement for the Promotion and Protection of Investments (Arab Republic of Egypt - the Federal Democratic Republic of Ethiopia) (signed 27 July 2006). Ratified in Ethiopia as Proclamation No. 517/2007, art 13; Agreement on the Reciprocal Promotion and Protection of Investments (People's Democratic Republic of Algeria - Government of the Republic of Mali) (signed 11 July 1996), JORADP N° 097 del 27-12-1998, art 11. See, also African Convention on the Conservation of Nature and Natural Resources, (signed 11 July 2003) art XL; ECOWAS Energy Protocol (signed 31 January 2003); SADC Agreement on the Establishment of the Zambezi Watercourse Commission (signed 13 July 2004).

African Union, include denunciation clauses that require States to give reasons for withdrawal, in accordance with Article 65 VCLT. [44]

In addition to these clauses reflecting prevailing international practice, African treaties are also characterized by distinctive withdrawal provisions, which are examined in detail in the following subsection.

2. Peculiar Aspects of the Continental Regime of Withdrawal

Treaties concluded within the main African continental and regional organizations exhibit atypical rules of withdrawal, specifically aimed at ensuring the continuity and stability of international obligations undertaken by African States.[45]

This is exemplified by certain withdrawal rules that provide the withdrawing State with the right to unconditionally revoke its notice before it becomes effective, with the aim of restoring international commitments. These clauses are frequently found in bilateral and multilateral treaties concluded between African countries, as well as in agreements adopted within the

[44] ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials (signed 14 June 2006) art 32(C). See also The African Nuclear Weapon Free Zone Treaty (signed 11 April 1996) art 20; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (signed 23 October 2009) art XIX, para 1. The duty to state reasons is also stipulated in the revised African Charter on Maritime Transport (signed 26 July 2010) art 52.

[45] For the purposes of this article, the term 'continental organization' exclusively denotes the African Union (AU). Conversely, 'regional organizations' refers to those organizations composed solely of African States within a defined geographical proximity, including but not limited to the ECOWAS, SADC, and the EAC.

regional organizations.[46] The 'right to revoke withdrawal' is also established in all founding treaties of the African organizations: in Article 31 of the Constitutive Act of the African Union, in Article 91 of the Founding Treaty of ECOWAS, in Article 34(2) of the SADC, in Article 91 of the Constitutive Act of the Economic Community of Central African States and in Article 145 of the East African Community Treaty (TEAC).[47]

The 'right to revoke withdrawal', while a distinctive feature of certain African treaties, may seem legally insignificant, as it merely codifies what is generally considered an inherent aspect of the consensual nature of international treaties. Indeed, the 'right to revoke' is also provided for in Article 68 of the VCLT, according to which a declaration of withdrawal 'may be revoked at any time before it takes effect'. However, Article 68 of the Convention does not codify a rule of customary international law. This view is shared not only by legal doctrine but also by the International Law

---

[46] For bilateral and multilateral treaties, see the Agreement Concerning the Equitable Sharing in the Development, Conservation and Use of Their Common Water Resources (Federal Republic of Nigeria - Republic of Niger) (signed 18 July 1990); Agreement Concerning the River Niger Commission and the Navigation and Transport on the River Niger (signed 25 November 1964). For treaties adopted within African organizations, see the OAU Convention Governing Specific Aspects on Refugee Problems in Africa, (adopted 10 September 1969) 1001 UNTS 45; AU Convention of the African Energy Commission, (adopted 11 July 2001); ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, (adopted 10 December 1999); the ECOWAS Protocol on Education and Training, (adopted 1 January 2003).

[47] As an example, see Treaty of the Economic Community of West African States (adopted 24 July 1993), art 91, according to which 'Any Member State wishing to withdraw from the Community shall give to the Executive Secretary one year's notice in writing who shall inform Member States thereof. At the expiration of this period, *if such notice is not withdrawn*, such a State shall cease to be a member of the Community'.

Commission (ILC).[48] In its commentary on the Convention, the ILC noted that the procedural rules set out in Articles 65 to 68 were introduced as part of the progressive development of international law.[49] With reference to Article 68, moreover, the Commission specified that 'certain Governments had questioned the desirability of stating the rule in a form which admitted a complete liberty to revoke a notice of denunciation, termination, withdrawal or suspension prior to the moment of its taking effect'.[50]

Such perplexities, which suggested limiting the unilateral 'right to revoke withdrawal,' still exist today, at least with reference to agreements establishing international organizations. In the Brexit case, for example, not only scholars, but also British courts have denied the possibility of the United Kingdom to unilaterally revoke withdrawal from the Union.[51] The Council

48 See, Christina Binder, 'The VCLT Over the Last 50 Years: Developments in the Law of Treaties with a Special Focus on the VCLT's Rules on Treaty Termination' (2019) 24 Austrian Review of International and European Law (2019) 89; Christian J Tams, 'Treaty Breaches and Responses' in Tams and others (eds), *Research Handbook* (n 2) 479.

49 ILC, *Draft Articles on the Law of Treaties with Commentaries* (1966) II *Yearbook of the International Law Commission* 263, para 6.

50 Ibid.

51 See, Paul Eden, 'The Revocability of Instruments of Withdrawal from Multilateral Treaties with Particular Emphasis on the United Kingdom's Article 50 TEU Notification' (2018) <https://ssrn.com/abstract=3238431> accessed 27 March 2025; Gino Naldi and Konstantinos Magliveras, 'The Right to Revoke Withdrawal Notices from International Organizations: The Case of Brexit and the European Union' (2021) 28 Maastricht Journal of European and Comparative Law 30; Mariana Alvim, 'The Right to Withdraw the Notification to Leave the European Union under Article 50 TEU: Can We Still Save the Marriage?' (2017) 3 EU Law Journal 139; Patrick Ostendorf, 'The Withdrawal Cannot be Withdrawn: The Irrevocability of a Withdrawal Notification under Article 50 (2) TEU (2017) European Law Review 767; European Parliament, The (ir-)revocability of the withdrawal notification under Article 50 TEU, Directorate General for Internal Policies, PE 569.820, March 2018. For jurisprudence, see *Miller v Secretary of State*

of the European Union has also opposed the absolute right to revoke withdrawal, as demonstrated in the *Wightman case*. Here, the Council argued that in the lack of a specific provision in the Treaty on European Union, Article 50 had to be interpreted 'in the sense that it permits revocation, but only if the European Council unanimously agrees to it'.[52]

While these considerations raise doubts on the consolidation of the 'right to revoke' in international relations, they also highlight the legal value of the withdrawal clauses provided for in the African treaties. These clauses demonstrate that the right to revoke withdrawal—specifically intended to restore and ensure the continuity of international obligations—is widely recognized in the African treaty practice, while remaining contested at the international level.[53]

However, the inclusion of these 'revocation clauses' in African agreements is not the only defining feature of the continental legal regime on withdrawal.[54] In this regard, Article 145 of the TEAC is of relevance, which allows withdrawal only if authorized by a resolution of the parliamentary body of the withdrawing State adopted by a majority of at least two-thirds.[55]

---

for Exiting the European Union [2016] EWHC 2768 (Admin) [10], [11]; *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] EWHC 2768 (Admin) [26]; *McCord's (Raymond) Application* [2016] NIQB 85 (Maguire J). For an opposite position: C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999.

52 *Andy Wightman and Others v Secretary of State for Exiting the European Union* (C-621/18) ECLI:EU:C:2018:999 [42].

53 Recently, the withdrawing States from ECOWAS have been granted the right to revoke withdrawal even beyond the time limits provided by the exit clause of the Organization's founding treaty. *Final communique, Sixty-Sixth Ordinary Session of the Authority of Heads of State and Government*, Abuja, 15 December 2024 [43].

54 In this section, the phrases 'African law on withdrawal' and the 'Law of African States on withdrawal' refer to the legal regime on withdrawal emerging from the analysis of the African treaties and from the domestic law of the States of the continent.

55 TEAC (63) art 145.

By expressly recognizing the 'right to denounce treaties' for national parliaments, this provision is the starting point for broader considerations on the attribution of the competence to withdraw. Article 145 of the EAC founding treaty, if examined in the light of African States' practice, becomes an expression of a continental trend moving in the opposite direction to international practice.

Outside the African continent, identifying a uniform practice for the attribution of the power of withdrawal proves complex. Several scholars have noted that the power of withdrawal, which is rarely regulated by the domestic legal systems, varies in form and characteristics from one State to another. In some cases, the 'right to withdraw' is assigned exclusively to the executive power,[56] in others to the Head of State,[57] and in others entirely to the legislative body.[58] Sometimes, national law distinguishes certain types of treaties that can be denounced by the government from others that require parliamentary approval.

More frequently, the lack of a specific regime for withdrawal has fostered political and jurisprudential practices that confer the power to withdraw to the Head of State or the executive body. This is the case in the United States, where the domestic law's silence on the competence to withdraw has favored a political practice, partially confirmed by case law, that recognizes the President's right to denounce international treaties.[59] An analogous approach

---

[56] Constitution of the People's Republic of China (adopted 1982, revised 2004) art 81; Constitution of Guatemala (adopted 1985, revised 1993) art 183.

[57] Constitution of Norway, (adopted 1814, revised 2016) art 26.

[58] Constitution of Argentina, (adopted 1853, revised 1994) art 75, para. 24.

[59] For a judicial decision on the power of withdrawal, see *Goldwater v Carter* 617 F.2d 697 (DC Cir 1979). President Trump's Executive Order 14199, issued on February 4, 2025, and entitled 'Withdrawing the United States from and Ending Funding to Certain United Nations Organizations and Reviewing United States Support to All International Organizations' constitutes a salient demonstration of this presidential withdrawal power. See, also, Curtis A Bradley and Jack L

was adopted in the United Kingdom, where the Supreme Court, in the Brexit case, established that the right to denounce an international agreement belongs to the government.[60] This attribution of competence does not apply to cases involving individual rights and the constitutional order of the State.[61] In this international trend, in which the authority to withdraw is typically vested in the Head of State or the executive, the decision of the Supreme Court of the Philippines on the country's withdrawal from the Rome Statute is particularly relevant. In its judgment, the Court of Manila dismissed petitions submitted by some Senators aimed at annulling the Philippines' withdrawal insofar as it lacked parliamentary authorization.[62]

African practice appears to follow an opposite trend; where the power of withdrawal is regulated by domestic law, it is consistently vested in the legislative body.[63] This is the case of Angola, where 'the National Assembly shall be responsible for: […] Approving withdrawal from treaties, conventions, agreements and other international instruments'.[64] The Constitution of the Central African Republic is similar and affirms that '[t]he ratification or the revocation may only intervene after the authorization of the Parliament'.[65] Provisions of the same character can be found in the Constitutions of Cape Verde, Mozambique, Malawi, and Namibia.[66] The

---

Goldsmith, 'Presidential Control over International Law' (2018) 131 Harvard Law Review 1207.

60 *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] EWHC 2768 (Admin) [55].

61 Ibid, [86] – [87].

62 *Pangilinan and Others v Cayetano and Others* (Supreme Court of the Philippines, G.R. Nos 238875, 239483 and 240954, 16 March 2021).

63 See, supra footnote (39).

64 Constitution of Angola (adopted 2010) art 161(L).

65 Central African Republic Constitution (adopted 2016) art 91, para. 2.

66 Constitution of Cape Verde (adopted 1980, revised 1992) art 12 in conjunction with Article 190; Constitution of Mozambique (adopted 2004, revised 2007) art 179, para 2, lett. T; Constitution of Malawi (adopted 1994, revised 2017) art 211; Constitution of Namibia (adopted 1990, revised 2014) art 63(2)(d) and art 143.

Constitutions of Malawi and Namibia regulate only the withdrawal from treaties that came into force before the Constitution. Nevertheless, in such cases, the power of withdrawal is vested in the parliamentary body.

In certain cases, despite the absence of an explicit constitutional provision, the power of withdrawal has nonetheless been attributed to the legislative body. Burundi's denunciation of the ICC Statute, for example, was notified after the adoption of a decree by the Parliament, although the Constitution is silent on the matter.[67] The African jurisprudential practice also appears to be moving in this direction, leaning towards the attribution of withdrawal power to the legislative authority. In this regard, it is important to recall South Africa's withdrawal from the Rome Statute, which was annulled by the Constitutional Court due to the absence of prior parliamentary authorization.[68] The Pretoria Court, applying the theory of the '*acte contraire*', stated that if participation in an international treaty requires parliamentary authorization, a resolution of the same body is also necessary for withdrawal.[69] The same theory was applied by the Supreme Court of Ghana in the case *John Akparibo Ndebugre v. Attorney General, Minister of Justice*.[70] Although the latter case concerned an agreement concluded between the State and an oil extraction company, the Court ruled that an agreement 'ratified' by Parliament could only be terminated by a resolution of the same body.[71]

Considering the above, it is evident that, in African jurisdictions, when the competence to withdraw is expressly regulated, it is preferably conferred on

---

67 See Assembly of the African Union, *Withdrawal Strategy*, Twenty-Eighth Ordinary Session, Addis Ababa, 30 - 31 January 2017, Decision on the International Criminal Court, DOC. EX.CL/1006(XXX).

68 *Democratic Alliance v Minister of International Relations and Cooperation* (High Court of South Africa, Case No 83145/2016, 22 February 2017).

69 Ibid [46].

70 *John Akparibo Ndebugre v Attorney General, Minister of Justice* (Supreme Court of Ghana, Accra A.D. 2016 No J1/5/2013, 20 April 2016).

71 Ibid [conclusion].

the legislative body. This trend contrasts with international practice, where the power to denounce is generally assigned to the Head of State or executive bodies. However, in the absence of a specific domestic legal framework, the power to withdraw in African States generally lies with the executive, in line with international practice. This is illustrated by the recent withdrawals of Mali, Niger, and Burkina Faso from ECOWAS, which will be discussed in more detail in the following section.

On the basis of this extensive analysis of the 'African Law' on withdrawal, it seems useful to propose a systematic reading of the two main continental trends examined in this subsection: 'the right to revoke withdrawal' and the attribution of the 'competence to denounce' to the parliamentary bodies.

As indicated at the beginning of this analysis, both practices under consideration share the same objective, namely, to foster the 'continuity' of international commitments undertaken by African States. The right to revoke withdrawal, for instance, could be understood as a legal mechanism to unilaterally restore treaty obligations and ensure the preservation of conventional engagements previously accepted by the States of the continent. Similarly, attributing the power of withdrawal to parliamentary bodies is an attempt to make the withdrawal procedure more difficult. It also serves to protect the 'power to denounce' from the political instability that often characterizes African Governments. Accordingly, emerging African practices regarding withdrawal seem to be a necessary legal response to the continent's political instability, intended specifically to ensure the continuity of international commitments accepted by African States.

IV. The Exercise of Withdrawal in the Recent Practice of African States

Building upon the analysis of 'African law' on withdrawal, this section examines the specific methods and procedures through which States across the continent have denounced international treaties in practice.

1. Withdrawal in the African Continent: An Overview

Over the past decade, African States have denounced international agreements of different natures and forms. Withdrawal declarations have involved treaties establishing international tribunals, as evidenced by the notifications of South Africa, Burundi and Gambia to the UN Secretary-General of their withdrawal from the Statute of the ICC in 2016.[72] Although not withdrawals in the strict sense, the decisions of Côte d'Ivoire, Benin, Rwanda, Tanzania and Tunisia to withdraw from the jurisdiction of the African Court on Human and Peoples' Rights may also be mentioned, as they have significantly restricted the Court's capacity to play a role in the protection of human rights on the continent.[73] Kenya withdrew from the International Court of Justice's (ICJ) jurisdiction in 2021, adding to the list of African States attempting to evade international jurisdiction, which is not

[72] While South Africa and Gambia revoked their withdrawal declarations, Burundi's denunciation became effective on 27 October 2017. The notifications of South Africa and Gambia stem from the arrest warrant of President Al Bashir of Sudan, issued by the ICC in 2009, and from the proceedings initiated by the Court against the President and Deputy President of Kenya, William Samoei Ruto and Uhuru Muigai Kenyatta. Indeed, from 7 to 15 June 2015, South Africa hosted several institutional events of the African Union and faced 'the conflicting obligation to arrest President Al Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965' (see *Declaratory statement by the Republic of South Africa*, C.N.862.2016.TREATIES-XVIII.10, 2).

[73] The official declarations of Côte d'Ivoire, Benin, Rwanda, Tanzania and Tunisia to withdraw from the jurisdiction of the African Court on Human and Peoples' Rights are available at: <www.african-court.org/wpafc/declarations/>, accessed 21 January 2026.

infrequently perceived by these States as a limitation of national sovereignty.[74]

In other instances, withdrawal has involved treaties establishing international organizations. This occurred, for example, in 2021, when Uganda withdrew from the International Coffee Organization, due to unfavorable commercial conditions for coffee produced on the African continent.[75] More recently, on 28 January 2024, after having ended cooperation within the G5Sahel in 2023,[76] three West African States – Mali, Niger, and Burkina Faso – denounced the founding treaty of ECOWAS in response to the sanctions imposed on them by the Organization.[77]

Recent African States' practice also includes withdrawal declarations aimed at terminating bilateral treaties, such as those safeguarding investments. South Africa, Niger, Tanzania, Burkina Faso, Kenya, and Mali recently ended investment protection agreements with Spain, the Netherlands, Germany, Belgium, Switzerland, and France.[78] In other cases, withdrawal has affected bilateral military cooperation agreements. Since 2023, several

---

74 See, *Depositary Notification by Kenya: Withdrawal*, C.N.281.2021.TREATIES-I.4, 24 September 2021. See also, Assembly of the African Union, *Withdrawal Strategy*, Twenty-Eighth Ordinary Session, Addis Ababa, 30 - 31 January 2017, Decision on the International Criminal Court, DOC. EX.CL/1006(XXX).

75 Among the main reasons for its withdrawal, Uganda highlighted 'The lopsided classification of coffee by the International Coffee Organization (ICO) which only lists Brazilian and Colombian types of coffee and refers to the rest under the category 'Others". For more details, see International Coffee Organization, Withdrawal of Uganda from the International Coffee Agreement 2007, Press Release PR 325/22, 22 February 2022.

76 Frederick Cowell, 'ECOWAS Withdrawal and the law of treaty withdrawal' (EJIL:Talk! 2024) <www.ejiltalk.org/ecowas-withdrawal-and-the-law-of-treaty-withdrawal/> accessed 4 January 2025.

77 *Joint communique by Burkina Faso, the Republic of Mali and the Republic of Niger*, 28 January 2024.

78 For more details, see Jonathan Lang and Bowman Gilfillan 'Bilateral Investment Treaties - a shield or a sword?' (*Bowman Gilfillan Africa Group,* 2016).

West African States have terminated defense treaties with France, the USA, and other Western States.[79] The same countries have also terminated some double taxation treaties, which were considered unfair to national interests.[80]

This recent African practice of withdrawal exhibits several distinct features and legal implications regarding two specific aspects: 1) the reasons for continental States to terminate conventional obligations; 2) the modalities and procedures through which African countries exercise withdrawal. The following subsection, therefore, examines these aspects, with the aim of highlighting the most interesting features of treaty withdrawal by African countries.

2. Withdrawal as a Reaction to Continuing Forms of 'Legal Imperialism'?[81]

An analysis of African countries' withdrawals shows that they demonstrate considerable diligence in articulating detailed reasons for their withdrawal. When withdrawing from an international treaty, African States often cite unequal legal relations, double standards, or even persecution, thereby fulfilling the obligation to state reasons pursuant to art. 65 VCLT.

A clear illustration of this is South Africa's declaration of withdrawal from the ICC, where the African country, while providing extensive reasons for its denunciation, pointed out the 'inequality and unfairness in the practice of the ICC that do not only emanate from the Court's relationship with the Security Council, but also by the perceived focus of the ICC on African

79 For instance, see the Institutional website France Diplomacy at the following link: <www.diplomatie.gouv.fr/en/country-files/burkina-faso/france-and-burkina-faso-65116/>, accessed 21 January 2026.

80 *Communique conjoint n° 001 de la République du Mali et de la République du Niger: Les deux pays dénoncent deux conventions désavantageuses en matière fiscale avec la France* (Bamako and Niamey, 5 December 2023).

81 For a definition of 'legal imperialism', see supra footnote 4.

states.'[82] This unequal and unfair treatment of African States has also been highlighted by the Gambian Minister of Information, according to whom withdrawal from the Rome Statute is inevitable because the Court is used 'for the persecution of Africans and especially their leaders.'[83] The same criticisms were made by the Kenyan President Uhuru Kenyatta against the ICJ in 2021. Withdrawing the declaration of acceptance of the Court's jurisdiction, the President recalled that 'a trend has emerged of some supposedly international organizations being deployed as political tools against African countries. Sadly, this misfeasance has infected the ICJ.'[84]

In other instances, it is not the proceedings initiated by an international court that are perceived as unfair, but rather the legal relationships arising from certain bilateral agreements. This is the case of Mali and Niger's denunciations of the double taxation agreements with France, where the two African countries denounced the '*caractère déséquilibré de ces Conventions*.'[85] Similarly, the spokesman of the Niger junta called the military cooperation

---

82 *Depositary Notification by South Africa: Withdrawal*, C.N.786.2016.TREATIES-XVIII.10, 19 October 2016.

83 Statement by the Gambian Minister of Information, reproduced in Assembly of the African Union, *Withdrawal Strategy*, DOC. EX.CL/1006(XXX) [25]. According to Ssenyonjo, one of the main reasons behind the Gambia's withdrawal was also 'to ensure that state officials, including sitting heads of state […] escape possible criminal investigations'. Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia' (2018) 29 Criminal Law Forum 63, 68.

84 *Statement By H.E. Hon. Uhuru Kenyatta on the International Court Of Justice Judgement In Maritime Delimitation Case* (Embassy of the Republic of Kenya, 18 October 2021) <www.kenyaembassyaddis.org/2021/10/statement-by-h-e-hon-uhuru-kenyatta-on-the-international-court-of-justice-judgement-in-maritime-delimitation-case/> accessed 25 January 2026.

85 *Communique conjoint n° 001 de la République du Mali et de la République du Niger* (80).

agreement with the United States 'profoundly unfair'.[86] The joint declaration of withdrawal from the G5Sahel by Burkina Faso and Niger follows a similar pattern. Here, the two States declared themselves no longer willing to accept '*un partenariat dévoyé et infantilisant qui nie le droit à la souveraineté de nos peuples*.'[87]

From this practice of the right of withdrawal and patterns of argumentation accompanying it, it is evinced that this right has been exercised by African States, first and foremost, as a tool to reshape those legal relations perceived as unfair and relegating the continent's States to a position of relative disadvantage to the other parties of the treaty.[88] For African States, withdrawal from international treaties is thus conceived as an instrument of 'social emancipation' that allows them to assert their sovereignty within the international community. By exercising withdrawal, African countries reorganize relations with other States in a perspective of greater equality and justice. Indeed, this objective has been partially achieved with regard to the work of the ICC. Following the collective withdrawals of 2016, the Court has sought to reorganize its approach towards a perspective that is no longer

[86] Video message by Colonel Amadou Abdramane on national television on 16 March 2024, partially reproduced at TV5MONDE Info, 'Le Niger dénonce l'accord de cooperation militaire avec les États-Unis' (17 March 2024) <www.youtube.com/watch?v=fYm4r_Zum_w> accessed 21 January 2026.

[87] *Communique conjoint n° 001 de la République du Burkina Faso et de la République du Niger* (adopted 02 December 2023) Text available at : <www.lesahel.org/communique-conjoint-n001-du-burkina-faso-et-de-la-republique-du-niger/> accessed 21 January 2026.

[88] On the specific topic of 'unequal treaties', see Craven Matthew, What Happened to Unequal Treaties? The Continuities of Informal Empire (2005) *Nordic Journal of International Law*, 335; Gerry Simpson, *Great Power and Oulaw States, Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004).

'Afrocentric'. Since 2017, investigations have also been launched in Georgia, Afghanistan, Myanmar, Palestine, the Philippines, Venezuela, and Ukraine.[89]

Redefining conventional relations in a balanced manner has become particularly necessary in relation to the former colonial powers, which are viewed as symbols of an ever-present legal imperialism that African States no longer tolerate. In the withdrawals from the ICC, for example, African countries have pointed out that the Court has been particularly diligent in proceeding against leaders of the continent 'while ignoring crimes committed by the West (…)'.[90] Similar reasons can be found in the joint withdrawals from ECOWAS by Niger, Mali and Burkina Faso, where it is contended that the organization, acting 'under the influence of foreign powers, violating its fundamental principles has become a threat to its member states and its people who were rather expecting joyfulness thereof.'[91] In the same sense, it is worth recalling the reference '*partenariat dévoyé et infantilisant*' mentioned in the withdrawal of Burkina Faso and Niger from the G5Sahel,[92] '*l'attitude unilatérale du partenaire français*' in Mali's denunciation of the Cooperation Agreement with France,[93] and '*l'attitude*

89 While this practice may appear attributable to an escalation in conflicts, it should be noted that since 2016, the Court has authorized the Prosecutor to initiate investigations into alleged crimes dating back to 2003 (Afghanistan), 2008 (Georgia), and 2011 (Philippines). This suggests a potential shift in the Court's strategic approach.

90 Statements by the Gambian Minister of Information, reproduced in Assembly of the African Union, *Withdrawal Strategy*, DOC. EX.CL/1006(XXX)[25].

91 The phrase "foreign powers" probably refers to France, which on several occasions called for ECOWAS military intervention in Niger after the coup d'état of 2023. *Joint communique by Burkina Faso, the Republic of Mali and the Republic of Niger*, 28 January 2024, 1.

92 *Communique conjoint n°001 de la République du Burkina Faso et de la République du Niger* (87).

93 *Communiqué n. 029 du Gouvernement de la transition: Annexe à la lettre datée du 2 mai 2022 adressée à la Présidente du Conseil de sécurité par le Représentant permanent du Mali auprès de l'Organisation des Nations Unies* (Bamako, 2 May 2022).

hostile persistante de la France contre nos Etats' in the communiqué of Niger and Mali's withdrawal from the double taxation agreements.[94] Using the sovereigntist argument, the Chadian authorities also denounced the military assistance agreement with France on 28 November 2024, stating that '[a]fter 66 years since the proclamation of the Republic of Chad, the time has come for Chad to assert its full and complete sovereignty.'[95]

This extensive regional practice on withdrawal indicates that African States tend to be careful in providing detailed reasons for their denunciations. As a result of their colonial past, African countries perceive—more than other States—the need to formally denounce unfair legal relations and to publicly explain reasons for their withdrawals.

From a legal standpoint, the above-mentioned practice clearly demonstrates that African States, by complaining about discriminatory treatments, fully implement the obligation to give reasons, set out in Article 65(1) of the VCLT—an obligation frequently ignored at the international level.[96]

In conclusion, it seems that the implementation of the obligation to give reasons constitutes not only a peculiar feature of African practice but also a

---

94 *Communique conjoint n°001 de la République du Mali et de la République du Niger* (80).

95 The news was reported by several international media. See, for instances: Oman Al Yahyai, 'Chad ends defence pact with France nixing its military presence' *Euronews* (29 November 2024) <www.euronews.com/2024/11/29/chad-ends-defence-pact-with-france-in- effort-to-assert-sovereignty> accessed 21 January 2026; Chad ends military cooperation with France Aljazeera (30 November 2024) <www.aljazeera.com/news/2024/11/29/chad-ends- military-cooperation-with-france> accessed 21 January 2026.

96 For several instances, see footnotes (32) and (37) but also *Depositary Notification by Russian Federation: Withdrawal*, (C.N.297.2024.TREATIES-XXVII.1.a) 23 July 2024). For a systematic analysis of the international practice on the implementation of the obligation to give reasons, see also Buscemi and Marotti (31) 939.

legal means to denounce colonial relations and to reject the remaining forms of legal imperialism.

3. 'Collective Withdrawal' as a Distinctive Element of Recent African Practice on Withdrawal

Often driven by the same needs and political interests, African countries not infrequently exercise withdrawal in a collective form, i.e. by denouncing simultaneously and on the same grounds one or more international treaties.[97]

Regarding this pattern of legal practice, it is useful to recall again the case of South Africa, Burundi, and Gambia, which collectively notified the UN Secretary-General of their intention to withdraw from the Rome Statute.[98] On that occasion, the African Union also played a significant role by adopting the so-called 'Withdrawal Strategy' (WS)—a document aimed at promoting institutional reforms of the ICC and providing Member States with helpful information on collective withdrawal and its implications.[99]

---

[97] Although there is no commonly accepted definition of 'collective withdrawal', see Laurence R. Helfer, 'Exiting treaties' (2005) Virginia Law Review 1636; Laurence R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) Yale Journal of International Law 55-59; Assembly of the African Union, *Withdrawal Strategy*, Twenty-Eighth Ordinary Session 30 - 31 January 2017 Addis Ababa, *Decision on the International Criminal Court*, DOC. EX.CL/1006 (XXX).

[98] For more details, see supra n (72).

[99] The *Withdrawal Strategy* (67) and the previous Assembly of the African Union, *Decision on Africa's Relationship with the International Criminal Court (ICC),* Ext/Assembly/AU/Dec.1(Oct. 2013) (12 October 2013) are the most important AU reactions to the proceedings launched by the ICC against African Leaders. Nevertheless, the legal and political value of the Withdrawal Strategy is more nuanced than it may appear. For example, Makaza states that 'the [Withdrawal Strategy Document (WSD)] neglects to give either an explicit instruction for more African States to withdraw from the Court, or a timeframe for the execution of the strategy. As a result, the WSD is non-binding'. Dorothy Makaza, 'Towards

The recent withdrawal of Mali, Niger, and Burkina Faso from the Treaty establishing the Economic Community of West African States also has a 'collective character'. After being suspended from ECOWAS due to the military coups,[100] the Sahel States issued a joint *communiqué* to terminate their conventional obligations, denouncing the imposition of what they called 'illegitimate, inhuman and irresponsible sanctions.'[101] The three military juntas have also collectively withdrawn from the G5Sahel, after having established the Alliance of Sahel (AES), a new organization aimed at setting up 'an architecture of collective defense and mutual assistance for the Contracting Parties'.[102]

Afrotopia: The AU Withdrawal Strategy Document, the ICC, and the Possibility of Pluralistic Utopias' (2017) 60 *German Yearbook of International Law* 481. See also, Manisuli Ssenyonjo, 'African States Failed Withdrawal from the Rome Statute of the International Criminal Court: From Withdrawal Notifications to Constructive Engagement' (2017) 17 International Criminal Law Review 749; Patryk I Labuda, 'The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?' (EJIL:Talk! 2017) <www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/> accessed 28 March 2025.

100 Mali, Burkina Faso and Niger have been suspended from the ECOWAS Institutions by ECOWAS in 2021, 2022 and 2024, respectively, for unconstitutional changes of government. In this regard, see the ECOWAS Committee, *Communique Extraordinary Summit on the Political Situation in Mali* (Accra, 30 May 2021), where the Heads of State and Government of the Community 'reaffirm the importance and necessity of respecting the democratic process for ascending to power' and decide 'to suspend Mali from ECOWAS Institutions in line with ECOWAS provisions.'

101 *Joint communique by Burkina Faso, the Republic of Mali and the Republic of Niger*, 28 January 2024.

102 For details on the withdrawals from G5Sahel, see the *Communique Conjoint n. 001 du Burkina Faso et de la République du Niger* (114). When Mali, Niger and Burkina Faso left the G5Sahel, the two remaining Members, Chad and Mauritania, announced the dissolution of the Organization. See the *Joint Communiqué by*

In Africa, 'collective withdrawal' —or, at least, 'coordinated withdrawal'— has also been exercised in respect of bilateral treaties considered unfair by African countries. For example, the Member States of the AES, acting together, have adopted a common strategy, collectively denouncing the military and fiscal cooperation treaties concluded with France and the United States. Specifically, between 2022 and 2024, Burkina Faso, Niger, and Mali denounced the defense cooperation treaties concluded with Paris in 1961, 1977, and 2014, respectively.[103] Although affecting separate bilateral treaties, in some cases the withdrawal was notified by means of a joint *communiqué*, as was the case for the tax cooperation treaties concluded by Niger and Mali with France in 1965 and in 1972.[104]

From a legal perspective, it is worth noting that, when collectively leaving treaties without withdrawal clauses, African States provide a very short or no notice period for their denunciations. This practice indicates that the 12-

Islamic Republic of Mauritania, Republic of Chad on G5-Sahel (Agence Mauritanienne de l'Information, 5 December 2023) <https://ami.mr/en/archives/12844> accessed January 25, 2026. Among authors, see, David Doukhan, 'The G5 Sahel: The End of the Road' (International Institute for Counter-Terrorism, 2024) <https://ict.org.il/the-g5-sahel-the-end-of-the-road/> accessed January 25, 2026. On the Alliance of Sahel, see Charter of Liptako-Gourma Establishing the Alliance of Sahel States (adopted 16 September 2023).

103 Accord d'assistance militaire technique entre la République française et la République de Haute-Volta (adopted 24 April 1961); Agreement on Technical Military Co-Operation (France – Niger) (adopted 19 February 1977); Traité de coopération en matière de défense (France - Mali) (adopted 16 Juillet 2014).

104 *Communique conjoint n° 001 de la République du Mali et de la République du Niger* (107); Convention tendant à éliminer les doubles impositions et à établir des règles d'assistance mutuelle administrative en matière fiscale (France - Niger) (signed 1 June 1965) JO 13 July 1966 ; Convention tendant à éviter les doubles impositions et à établir des règles d'assistance réciproque en matière d'impôts sur le revenu, d'impôts sur les successions, de droits d'enregistrement et de droits de timbres (France - Mali) (signed 22 September 1972) JO 17 May 1975.

month notice established by Article 56 of the VCLT has not yet been consolidated in the African continent.[105]

More interesting is the attempt by African countries to exercise 'collective withdrawal' in violation of the notice period, despite the treaty's withdrawal clauses stipulating it. This is what occurred in the case of 'collective withdrawal' from ECOWAS. In the joint *communiqué,* the withdrawing States declared 'to withdraw their countries—Burkina Faso, Mali, and Niger—from the Economic Community of West African States, with immediate effect' even though the Community's founding treaty provides for a one-year notice period.[106] Also, Mali and Niger jointly denounced their double taxation agreements with France, providing three months' notice, thereby ignoring the deadlines set by the relevant provisions of the denounced agreements.[107]

The foregoing considerations suggest that collective withdrawal, as practiced by African States, serves two distinct functions. Firstly, it emerges

---

[105] As demonstrated in Section II, the twelve-month notice requirement provided for in Article 56 of the VCLT does not appear to have become established in international practice either. For examples, see footnote (36); for a specific focus on African practice, see: *Communique conjoint n° 001 de la République du Burkina Faso et de la République du Niger* (87); Ministry of Foreign Affairs and Cooperation of the Republic of Niger, 'Note Verbale No 000305/MAE/C/NE' (16 March 2024) partially reproduced at <https://edition.cnn.com/2024/03/16/africa/niger-ends-us-military-agreement-intl-hnk> accessed 21 January 2026; Ministères des affairse étrangères, de la cooperation régional et des Burkinabè de l'Extérieur du Burkina Faso, n. 2023 – 090 MAECRBE/CAB, 28 February 2023) partially reproduced at <www.lemonde.fr/afrique/article/2023/03/02/le-burkina-denonce-un-accord-militaire-de-1961-avec-la-france_6163866_3212.html> accessed 21 January 2026 ; *Communiqué no 029 du Gouvernement de la transition* (93).

[106] *Joint communique by Burkina Faso, the Republic of Mali and the Republic of Niger,* 28 January 2024.

[107] For details, see, *Convention tendant a eviter les doubles impositions* (France – Mali) (104) art 44 ; *Convention tendant à éliminer les doubles impositions* (France – Niger) (104) art 44.

in the African practice as an instrument for pursuing the aforementioned 'social emancipation'; by acting collectively, African States cut ties with former colonial powers, leave international organizations, and, more generally, reshape international relations.[108] Secondly, this collective approach fulfils a function with a more strictly legal dimension. By leveraging the collectiveness of their action, African States not only strengthen their political positions but also bypass the notice periods provided for in Article 56 of the VCLT or in the withdrawal clauses of the treaty.

Based on the foregoing discussion, it may be argued that, in recent practice of African States, 'collective withdrawal' has become a tool of reducing the notice periods imposed by the international law of treaties, while simultaneously promoting a more rapid reconfiguration of international relations.

V. CONCLUSION

The research identified the emergence of distinctive African trends regarding treaty withdrawal, in particular regarding the regional-wide application of the procedural obligations outlined in Articles 65 and 68 of the VCLT. Specifically, the article demonstrated that the duty to state reasons for withdrawal, as prescribed in Article 65, and the right to revoke the withdrawal, as enshrined in Article 68, are widely recognized in African

[108] This is particularly evident in West Africa. Indeed, by collectively withdrawing from regional treaties and organizations, the Member States of AES are attempting to redefine their international position cutting ties with Western States and establishing new relationships with Russia and China. See, Lassana Toure, Mickaël Clevenot, Abdoul Karim Diamoutene, Mahamadou Bassirou Tangara, 'The impact of the withdrawal of ESA countries (Burkina Faso,Mali,Niger) from ECOWAS on their foreign direct investment' (2024) HAL – Open Science, available at <https://hal.science/hal-04686072/document> accessed 14 April 2025.

law and practice, whilst they remain frequently contested at the international level.

An examination of the constitutions of African States revealed additional distinctive features of regional practice. Notably, the research indicates that in Africa, the power of withdrawal, when expressly regulated, is vested in the legislative bodies. This stands in contrast to the prevailing international trend, where such power typically lies with the Head of State or executive authorities. Subsequently, it has been argued that this divergence between international and African practice may reflect a specific policy choice. Indeed, entrusting withdrawal authority to national parliaments serves as a safeguard against governmental instability, thereby fostering greater continuity in African States' international legal commitments.

The motivations behind African States' practice of withdrawals have also been examined, with a specific focus on the effects of the continent's colonial past on this practice. The analysis has highlighted that African States, in their withdrawal declarations, tend to denounce violations of sovereignty or the political orientations of the institution created by the agreement. Often, the countries of the continent also complain about unequal legal relations, especially with respect to the former colonial powers, and consider such an imbalance as an expression of the remains of a legal imperialism no longer justified under current international law. Referring to this, the analysis has shown how African countries, in an effort to reinforce these arguments and eradicate the residual forms of legal imperialism, have developed additional specific practices.

This is evident not only in the above-mentioned implementation of the obligation to provide reasons—which African States use to formally and publicly denounce the remaining colonial ties—but also in the practice of 'collective withdrawal'. By acting together, African States not only give greater voice to their political positions but also seek to collectively redefine international relations in a more favorable way to their interests. Moreover, the research has also pointed out that 'collective withdrawal' is often

exercised by the African countries in violation of the notice periods outlined in Article 56 of the VCLT or in the specific withdrawal clauses of the agreement. Against this background, collective withdrawals have been interpreted as a means to reduce the notice periods prescribed by the international law of treaties and to promote the rapid social emancipation of African States.

In conclusion, the analysis has demonstrated that the practice of African States in the domain of withdrawal is characterized by a series of distinctive features that significantly diverge from the international practice. In some cases, these practices reflect a broad application of provisions of the VCLT that are otherwise frequently overlooked in global practice; in other instances, they represent innovative developments, such as the phenomenon of 'collective withdrawal'. Taken together, these findings clearly reveal that the aforementioned African practices on withdrawal consistently converge toward two primary objectives: on the one hand, they are explicitly oriented toward upholding the continuity of international obligations undertaken by African States despite their political instability; on the other, and more frequently, they serve to complete the decolonization process, asserting the full sovereignty of African States, and promoting the self-determination of the peoples and States of the continent.

REVISITING THE DELIBERATIVE POTENTIAL OF JUDICIAL DIALOGUE: THE SUBTLE INFLUENCES OF NATIONAL COURTS IN THE ARTICLE 267 TFEU PRELIMINARY REFERENCE MECHANISM*

Filip Vlček† and Marek Pivoda‡

This article interrogates the deliberative potential of judicial dialogue: it argues that the Article 267 TFEU preliminary reference procedure enables Member State courts to subtly influence the EU decision-making in ways that can enhance the democratic legitimacy of the EU's functional constitution. While the principal-agent and team models represent partially useful theoretical frameworks for conceptualising the Article 267 TFEU mechanism, both ultimately reinforce the prevailing 'monologue' criticism that reduces the procedure to a one-dimensional, bilateral interaction confined to an individual case. In our view, it is overly reductive to presume that national judges can significantly influence the content of EU law only if the ECJ explicitly engages with their input in its rulings. In response, our communicative discourse model offers an attractive imaginary to understand national courts' ability to shape EU law. When asking questions, domestic judges can subtly — yet meaningfully — affect many stakeholders of the European integration in a rather indirect manner. In particular, the article identifies three main

* This article was written as part of the project 'Judicial Dialogue in EU Matters: Czech and Slovak Case Study' supported by the Czech Science Foundation (project code GA22-21872S). The authors are grateful to the two anonymous referees as well as the EJLS editors for their thoughtful feedback and insightful suggestions, which have substantially improved this manuscript.

† Researcher, Department of Constitutional Law and Political Science, and PhD Candidate, Department of International and European Law, Masaryk University; Judicial Clerk, Supreme Administrative Court of the Czech Republic / email: filip.vlcek@law.muni.cz, ORCID ID: 0000-0001-8875-7339.

‡ Researcher and PhD Candidate, Department of Constitutional Law and Political Science, Masaryk University; Judicial Clerk, Constitutional Court of the Czech Republic / email: marek.pivoda@mail.muni.cz, ORCID ID: 0000-0001-8334-7920.

types of latent impact: agenda-setting, systemic signalling, and jurisprudential contestation. In doing so, the article revives the ideal of the EU's democratic legitimacy by foregrounding the deliberative capacities of its judicial architecture.

Keywords: judicial dialogue, Article 267 TFEU mechanism; preliminary reference procedure; European Court of Justice; ECJ; Member State courts; deliberative potential

TABLE OF CONTENTS

I. INTRODUCTION

The European Union's (EU) preliminary reference mechanism is a real spectacle. Enshrined in Article 267 of the Treaty on the Functioning of the European Union (TFEU), the procedure has been labelled in numerous ways — as the 'keystone' of the EU's judicial system,[1] the 'jewel in the crown' of

[1] Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, para 176.

the jurisdiction of the European Court of Justice (ECJ; Court),[2] the 'machinery for judicial cooperation' within the EU,[3] or as a procedure that has been 'pivotal' to EU legal integration.[4]

It was this procedure that has in the past considerably contributed to the establishment of the fundamental principles of EU law, such as primacy,[5] direct effect,[6] or Member State liability.[7] Allowing the ECJ to give preliminary rulings concerning the interpretation of the Treaty on the Functioning of the European Union and the Treaty on European Union (Treaties) or the validity and interpretation of acts of the EU institutions, this procedure remains the most prominent category within the Court's docket.[8]

It is the Member States' judges who have historically been said to play a vital role in the EU's integration through law.[9] Overall, Article 267 TFEU enables

---

[2] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020) 496.

[3] Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 159.

[4] Tom de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Continuity' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021) 228.

[5] See Case 6/64 *Costa v ENEL* EU:C:1964:66; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; Case 106/77 *Simmenthal* EU:C:1978:49.

[6] Case 26/62 *van Gend en Loos* EU:C:1963:1; and Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* EU:C:1990:456.

[7] Case C-6/90 *Francovich* EU:C:1991:428; and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* and *R (Factortame) v SS for Transport* EU:C:1996:79.

[8] Between 2012 and 2021, the proportion of preliminary references within the ECJ's docket ranged between 61 to 75 per cent. For instance, in 2020, 556 preliminary questions were lodged. In: Court of Justice of the European Union, *Annual Report 2020: Judicial Activity* (Court of Justice of the European Union 2021) 56.

[9] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Clifford J Carrubba and Lacey Murrah, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' (2005) 59(2) International

the ECJ to interpret and invalidate EU law only once a Member State's court initiates proceedings by submitting a preliminary reference. Accordingly, national judges were routinely characterised as 'the motors of European integration' and 'most consequential interlocutors' of the ECJ.[10]

The cooperation between national courts and the ECJ has been theorised through multiple frameworks.[11] For neorealists, the inter-judicial interaction takes the form of bargains between Member States who retain control over judicial appointments at both national as well as the EU level.[12] In this setting, the ECJ acts in the interest of the Member States, which possess the highest bargaining power.[13] Contrarily, neofunctionalists argue that the main actors of the interaction are not Member States, but rather litigants, national courts and supranational institutions, that — through the possibility to directly invoke EU law — collectively create a self-sustaining system of adjudication, independent of the interests of the Member States.[14] Correspondingly, many scholars have examined how and why various

Organization 399; Lars Hornuf and Stefan Voigt, 'Analyzing Preliminary References as the Powerbase of the European Court of Justice' (2015) 39(2) European Journal of Law and Economics 287.

[10] Joseph Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) 26(4) Comparative Political Studies 510, 518; Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998) 227.

[11] For a general overview of the existing theories, see Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice' (1998) 52 International Organization 177.

[12] Karen Alter, 'The European Court's Political Power' (1996) 19 West European Politics 458.

[13] Geoffrey Garrett, 'The Politics of Legal Integration in the European Union' (1995) 49 International Organization 171.

[14] Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.

Member States' courts refer questions to the ECJ, providing explanations by a quite complex mix of factors — legal, institutional, personal, and strategic.[15]

Despite multiple challenges to these classical, judge-centric narratives,[16] it remains the fact that the ECJ's ability to 'govern through law' largely hinges on domestic judiciaries' willingness to supply meaningful cases to Luxembourg. In short, national courts act as the 'gatekeepers' who ultimately decide whether to make a reference and what questions to ask.[17]

Although it is indisputable that national judges are vital at the initial phase of the preliminary reference procedure, this does not necessarily mean that they exercise significant influence over the ECJ's decision-making. Lately, some scholars have argued that the Article 267 TFEU mechanism does not provide national courts with an opportunity to effectively participate in the process of judicial law-making within the EU.[18] Indeed, the Luxembourg

[15] Apart from the above-cited classical works, see also Morten Bromberg and Neils Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn, Oxford University Press 2021); Arthur Dyevre, Monika Glavina and Angelina Atanasova, 'Who refers most? Institutional incentives and judicial participation in the preliminary ruling system' (2020) 27 Journal of European Public Policy 912; Michal Ovádek, Wessel Wijtvliet, and Monika Glavina, 'Which Courts Matter Most? Measuring Importance in the EU Preliminary Reference System' (2020) 12 European Journal of Legal Studies 121; Karin Leijon, 'National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?' (2021) 44 West European Politics 510.

[16] Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press 2022).

[17] Nils Wahl and Luca Prete, 'The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings' (2018) 55 Common Market Law Review 511; George Tridimas and Takis Tridimas, 'National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure' (2004) 24 International Review of Law and Economics 125.

[18] Anna Wallerman Ghavanini, 'Mostly Harmless: The Referring Court in the Preliminary Reference Procedure' (2022) 47 European Law Review 310.

Court has been criticised for rarely engaging with the referring courts' arguments.[19] As a result, domestic courts are claimed to be in no position to have a real impact on the development of EU law.[20]

What is it then? Do national judges act as influential actors in the process of European integration, or should they rather be perceived as 'useful puppets' whose only task is to supply Luxembourg judges with questions so the latter can later use them in whichever way they prefer? More importantly, which version of the role of Member State courts is normatively attractive vis-à-vis the democratic legitimacy of the EU's constitution?

This article advances a normative theoretical claim about the deliberative potential of judicial dialogue. It explores both the theoretical premises and methodological foundations which have so far framed the discourse on the impact of national judges on the development of EU law. We argue that the existing criticism of the preliminary reference mechanism stems from a misguided conception of the role of both the ECJ and referring courts in handling preliminary references.

Indeed, the prevailing view that domestic courts meaningfully impact the content of EU law only if the ECJ acknowledges their input in the final text of its rulings is too reductive. While the traditional models of judicial hierarchies — the principal-agent and team models — serve as useful tools for conceptualising the preliminary reference procedure, both ultimately reinforce the simplistic 'monologue' narrative that reduces the Article 267

[19] Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar Publishing 2021) 110–118; Jasper Hoevenaars and Jasper Krommendijk, 'Black Box in Luxembourg: The Bewildering Experience of National Court Judges and Lawyers with the ECJ' (2021) 46 European Law Review 61.

[20] Rob van Gestel and Jurgen de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts* (Cambridge University Press 2019) 124–134.

TFEU mechanism to a one-dimensional, bilateral interaction confined to an individual case.

Our central claim is that the Member State courts have the power to impact the decision-making at the EU level in more subtle ways than conventional wisdom holds. By submitting requests for preliminary ruling, domestic judges can meaningfully affect many stakeholders of the European integration in a rather indirect manner beyond the boundaries of an individual preliminary reference case. Accordingly, we propose a novel communicative discourse model that captures the broader, multi-actor nature of judicial dialogue and conceptualises national courts as active participants in the EU's discursive process. From this perspective, the preliminary reference procedure, properly theorised, embodies a deliberative dimension that can enhance the democratic legitimacy of the EU's functional constitution.

Our article proceeds as follows: first, we revisit the long-lasting debate about the influence of national courts within the Article 267 TFEU preliminary reference mechanism. Here, we contend that both the imaginary of 'judicial dialogue' and its 'monologue' criticism were developed without a proper theoretical conceptualisation of the influence of national courts over the EU's decision-making (Part 2). In the following part, we remedy such a theoretical gap. We first reimagine the relationships in the EU's judicial system by means of the two traditional models of national judiciaries — principal-agent and team model; we explain how they relate to the 'dialogue' concept (Part 3). While such models can be useful in highlighting different aspects of the relationship between the ECJ and national courts, we claim that there is a more attractive way to conceptualise how domestic courts' referrals contribute to shaping the content of EU law: a communicative discourse model. Such model better incorporates the complexities of the Article 267 TFEU preliminary reference procedure and highlights subtle ways by which national courts impact the development of EU law (Part 4). Additionally, we argue that this novel conception of 'dialogue' accurately

reflects the deliberative potential of the preliminary reference mechanism vis-à-vis the democratic legitimacy of the EU's functional constitution (Part 5). We then put our theoretical claims in context and demonstrate that such a subtle impact may take three different forms: 1) changing legislation through agenda setting; 2) flagging systemic issues; and 3) challenging and refining precedents (Part 6). Finally, we outline suggestions for future empirical research, which can make use of our understanding of the domestic courts' salience in the context of the preliminary reference mechanism (Part 7).

II. A Dialogue or a Monologue?

Under Article 267 TFEU, courts or tribunals of Member States may – and in certain circumstances shall – request the ECJ to give a preliminary ruling concerning either the interpretation of the Treaties and secondary EU law or the validity of the latter.[21] On the one hand, the role of the national courts is initiatory – once the request for preliminary ruling reaches Luxembourg, national courts are no longer expected to play any further role in the proceedings as they are not considered parties to the proceedings. They are not authorised to submit written observations, nor are they entitled to participate in the oral hearing.[22] The sole possibility for the national court to further express its views during the preliminary reference proceedings is in response to a request for clarification pursuant to Article 101 of the ECJ's Rules of Procedure. Such requests are, however, rare.[23] On the other hand, national courts are required to respect the preliminary rulings of the ECJ in

[21] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU), art 267(3).

[22] Rules of Procedure of the Court of Justice of the European Union [2012] OJ L265/1 (RoP), art 96.

[23] Broberg and Fenger (n 15) 287; van Gestel and de Poorter (n 20) 125, 157–158.

full, they are binding as regards the interpretation of EU law for the purposes of resolving the dispute before it.[24]

The Article 267 TFEU preliminary reference mechanism is often imagined in terms of a 'judicial dialogue'.[25] However, a strong contradiction appears to lie at the very centre of such a concept. Normatively, the promise of 'dialogue' implies bringing about an inclusive, deliberative forum by means of which domestic courts meaningfully influence the ECJ's power to interpret and create legal rules for all Member States.[26] From a practical perspective, that potential appears to remain largely unfulfilled. This is partly due to the inability of national courts to intervene in the ongoing preliminary reference proceedings during their course. Besides, the ECJ is often accused of failing to engage adequately with the voices of Member States' judges, potentially reducing the 'judicial dialogue' to a situation in which national courts ask questions and the CJEU answers them.[27]

Here, we aim to show that both the imaginary of 'judicial dialogue' and its corresponding criticisms were developed without a proper theoretical understanding of what the impact of national courts over the EU's decision-making could be, notwithstanding the 'initiate-and-obey' role seemingly assigned to them by the Treaties and the ECJ's Rules of Procedure.

The mainstream European scholarship has gradually begun to firmly depict the Article 267 TFEU mechanism in terms of a 'judicial dialogue' between

[24] The binding character of ECJ's judgments stems both from the text of the Treaties (namely art 19(1) TEU, as well as art 267 TFEU) as well as from the constant case law of the ECJ itself (see, for instance, Case 52/76 *Benedetti* EU:C:1977:16, para 26; or Case C-62/14 *Gauweiler and Others* EU:C:2015:400, para 16).

[25] van Gestel and de Poorter (n 20).

[26] For a recent comprehensive study on the influence of national courts on the decision-making of the ECJ, see Tommaso Pavone and Daniel Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' (2019) 25 European Law Journal 352.

[27] van Gestel and de Poorter (n 20) 147.

the ECJ and national courts since the 90s.[28] This is understandable as others had used the parallel of 'dialogues' in the context of institutional relationships between various branches of government, mostly between parliaments and supreme courts.[29]

Indeed, comparing the preliminary reference procedure to a 'dialogue' seems apt at a first glance. When drafting an order for preliminary reference, it is the responsibility of the referring court to include a summary of the dispute at hand, relevant findings of facts, applicable national provisions and case-law, a statement of reasons for the reference, and the precise question(s) referred.[30] Additionally, referring judges may also — this time entirely voluntarily — openly suggest the appropriate answer(s) to the question(s)

[28] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99, 112; Alec Stone Sweet, 'Constitutional Dialogues in the European Community' in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart Publishing 1998) 305; Francis Jacobs, 'Judicial Dialogue and the Cross-fertilization of Legal Systems: The European Court of Justice' (2003) 38 Texas International Law Journal 547, 548; Alan Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 European Journal of Legal Studies 121, 124; Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009) 106–109; Anthony Arnull, 'Judicial Dialogue in the European Union' in Julie Dickinson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 117.

[29] Henry M. Hart, 'The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic' (1953) 66(8) Harvard Law Review 1363; Barry Friedman, 'A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction' (1990) 85 New York University Law Review 1; Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press 1988); Kent Roach, 'Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States' (2006) 4(2) International Journal of Constitutional Law 347.

[30] RoP (n 22), art 94.

referred for a preliminary ruling.[31] In other words, national judges can choose to express pre-emptive opinions and tell the ECJ what they think the outcome of the dispute should be.

As a result, orders for preliminary references seem to serve as efficient, 'rhetorical weapons' that provide national courts with an opportunity to influence the ECJ's decisions and achieve desired EU law interpretation.[32] Preliminary references allow national judges a 'first strike' to stress specific elements of the broader controversy and shape EU law issues accordingly.[33] By means of pre-emptive opinions, national judges usually signal which interpretations of EU law are acceptable in their Member State's political context.[34] Alternatively, they may also decide to use the pre-emptive opinion as a powerful strategic tool in their rebellion against the views of higher national courts with which they do not fully align, with a view to effectively achieve what has been described in the literature as 'judicial empowerment'.[35]

Indeed, the idealistic approach toward the Article 267 TFEU mechanism functions as the normative beacon for the legitimacy of the EU's judicial system and fits well within the broader idea of constitutional pluralism: the system of heterarchical relationships among a multiplicity of units, each of

[31] Court of Justice of the European Union (ECJ) Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2019] OJ C380/1.

[32] Stacy Nyikos, 'Strategic Interaction Among Courts Within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions' (2006) 45(4) European Journal of Political Research 527, 531.

[33] ibid 531; Wallerman Ghavanini (n 18).

[34] Karin Leijon, 'Active or Passive: The National Judges' Expression of Opinions in the Preliminary Reference Procedure' (2020) 5(2) European Papers: A Journal on Law and Integration 871.

[35] Joseph Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403, 2426.

which exercises authority in a certain sphere of influence.[36] As is well known, the 'dialogue' mantra was later embraced by the ECJ itself.[37] In its Opinion 2/13, the Court added that by setting up 'a dialogue between one court and another', the preliminary ruling procedure is apt to secure 'uniform interpretation of EU law', while ensuring 'its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.[38]

The *Taricco* saga is traditionally said to represent a rare example of such understanding of a 'judicial dialogue'.[39] In *Taricco I*, the ECJ responded to a preliminary reference first submitted by an Italian criminal tribunal and held that Italian criminal courts were obliged to disapply some provisions of the Italian Criminal Code that reduced a statutory limitation period in criminal proceedings. Based on these provisions, many Value Added Tax (VAT) fraud criminal proceedings were closed because they had been brought late. The ECJ was convinced that reducing the limitation period in that way contradicted the Member States' legal duty to take all necessary measures to combat fraud against the financial interests of the EU.[40] The

[36] See generally Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 337; Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016) 132; Turkuler Isiksel, 'Global Legal Pluralism as Fact and Norm' (2013) 2 Global Constitutionalism 160.

[37] Case C-2/06 *Kempter* EU:C:2008:78, para 42; Case C-210/06 *Cartesio* EU:C:2008:723, para 91; Case C-137/08 *VB Pénzügyi Lízing Zrt.* EU:C:2010:65, para 29; Case C-416/10 *Križan* EU:C:2013:8, para 66; and Case C-104/10 *Kelly* EU:C:2011:506, para 63.

[38] Opinion 2/13 (n 1) para 176.

[39] Giovanni Piccirilli, 'The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey' (2018) 14(4) European Constitutional Law Review 814; Matteo Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union' (2018) 25(3) Maastricht Journal of European and Comparative Law 357.

[40] Case C-105/14 *Taricco and Others* EU:C:2015:555.

ECJ's initial interpretation, however, forced the Italian *Corte Costituzionale* – until then very reluctant in entering into a judicial dialogue with the ECJ – to submit a new preliminary reference. This time, the Italian Constitutional Court openly expressed its opinion and suggested that the ECJ's interpretation was incompatible with the fundamental constitutional principle, which requires that rules of criminal law are precisely determined and cannot be retroactive.[41] Indeed, such pre-emptive opinion later resonated with Luxembourg judges who effectively overruled *Taricco I* while being praised for being responsive towards the Italian Constitutional Court's arguments.[42]

On a larger scale, however, the optimistic conception of the EU's judicial dialogue has been subject to growing criticism. Many scholars have pointed out that the naïve 'dialogue' metaphor does not reflect the real power dynamics behind the relationship between the ECJ and its national counterparts and that it is the 'last standing myth of EU law'.[43] Rather, it has been argued that the inequality between the involved stakeholders, inevitably stemming from the supremacy of EU law over national law, leads to the conclusion about the monological nature of such a relationship.[44]

In line with such a sceptical view, domestic courts are said to be estranged within the procedure as they are not capable of materially influencing the

[41] Case C-42/17 *M.A.S. and M.B.* EU:C:2017:936.

[42] Daniel Sarmiento, 'The "Overruling Technique" at the Court of Justice of the European Union' (2023) 3 European Journal of Legal Studies 107, 125.

[43] Graham Butler and Urška Šadl, 'The Preliminaries of a Reference' (2018) 43 European Law Review 120, 128.

[44] Dimitry Kochenov and Matthijs van Wolferen, 'Dialogical Rule of Law and the Breakdown of Dialogue in the EU' (2018) 1 EUI Law Working Papers 15; Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308, 323; Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100, 104–106.

ECJ's opinions in the realistic sense.[45] Indeed, a number of empirical studies employ the 'monologue' narrative while contending that the ECJ is hardly responsive to the argumentation of referring courts as it gives very little or no consideration neither to the domestic judges' pre-emptive opinions, nor to their legal reasoning provided in the orders for preliminary rulings.[46]

The rather sceptical view is often illustrated on the notorious *Melloni* preliminary reference where the Spanish Constitutional Court presented its arguments about the validity of some provisions of the European Arrest Warrant (EAW) Framework Decision.[47] In its judgment, the ECJ rejected the Spanish court's suggested interpretation according to which the execution of an EAW may be conditioned upon the conviction rendered *in absentia* being open to review in the issuing Member State. Subsequently, the ECJ was heavily criticised for having replied 'in terms of the absolute principle of primacy and left many questions unanswered'.[48] In short, instead of engaging actively with the Spanish constitutional judges' fundamental rights concerns, the ECJ was claimed to turn the procedure from a dialogue into a monologue.[49]

Indeed, it appears that from a practical perspective, the normative ideal of the dialogue — a form of mutual influencing through value-based discourse, capable of balancing legal coherence with respect for pluralism — remains largely unfulfilled. In this article, we propose to take a step back. We claim that there is very little common understanding of what we empirically observe, or rather, should observe.

---

[45] Claes and de Visser (n 44) 104.

[46] van Gestel and de Poorter (n 20); Hoevenaars and Krommendijk (n 19); Wallerman Ghavanini (n 18).

[47] Case C-399/11 *Melloni* EU:C:2013:107.

[48] Jan Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420, 433.

[49] Aida Torres Pérez, *Conflicts of Rights in the European Union* (Oxford Academic 2009) 315.

The lack of theoretical grounds on what the 'dialogue' in the context of the Article 267 TFEU mechanism entails can be illustrated by Anna Wallerman Ghavanini's study, in which she argues that the influence of referring courts is marginal.[50] Specifically, her content analysis of 159 preliminary reference cases ought to demonstrate that national courts have very little influence over the ECJ's decision-making as Luxembourg judges show 'little or no consideration to the legal reasoning provided by referring courts'.[51] While the central message 'mostly harmless' seems quite straightforward at first, one cannot overlook that such a study conceptualises and measures the national courts' influence in a quite limited and undertheorised way.

Anna Wallerman Ghavanini assesses the national courts' influence on the ECJ by examining the following criteria: 1) whether the ECJ explicitly interacts with an argument expressed by the referring court in the order for reference; 2) whether the case outcome openly suggested by the referring court in the order for reference corresponds with the final decision of the ECJ; 3) whether the ECJ respects the formulation of legal questions by the referring court or if it reformulates them; 4) whether the ECJ interacts with the referring court's order for reference (eg citing the same legal sources, case-law, or considering the same facts of the case).[52]

While these criteria provide valuable insights into how the ECJ interacts with referring courts' orders for references, one should notice that because of the chosen criteria, the ideal of the EU's dialogue is inherently conceptualised in a quite limited sense. For instance, if the ECJ cited different case-law than a referring court, does it really demonstrate that the referring court had not influenced substantive legal and policy arguments of the ECJ? By contrast, if the referring court explicitly suggests a desired outcome of the case and that outcome then corresponds with the final ECJ's judgment, does that automatically mean that the referring court caused the

[50] Wallerman Ghavanini (n 18).

[51] ibid.

[52] ibid.

Luxembourg judges to decide in a certain way and that the 'dialogue' really took place?

In short, we argue that assessing national courts' influence over the EU's decision-making merely according to the correspondence between an order for reference and a final ECJ's judgement assumes that the text of a final ECJ's decision is the definitive marker of the national courts' influence over the development of EU law. Such an approach, however, is overly restrictive as it disregards the rather subtle mechanisms, not fully visible in the explicit reasoning of the ECJ's judgments, through which national courts shape the content of EU legal rules.

Before other scholars continue trying to empirically assess the degree of influence that domestic courts enjoy in the process of creating EU law, it is essential to define what that 'influence' can theoretically entail. We contend that to fully understand the dynamics of influence within the preliminary reference mechanism, it is more productive to adopt a broader understanding of judicial dialogue in the EU.

III. Re-Imagining the Dialogue: Principals, Agents and Teammates

In order to fully comprehend the significance of national courts' influence in the Article 267 TFEU mechanism, it is first useful to posit their role in the preliminary reference procedure within the existing imaginations of the judicial systems.[53] We do so because how one assesses the influence of individual actors of a judicial system necessarily depends on the assumptions about the relations within that system. In short, theoretical framings of the preliminary reference mechanism matter.

[53] See Francisco Ramos Romeu, 'Law and Politics in the Application of EC Law: Spanish Courts and the ECJ 1986–2000' (2006) 43 Common Market Law Review 395.

In what follows, we will reimagine the relationships in the EU's judicial system by means of the two traditional models of national judiciaries — principal-agent and/or team models.[54] We will use those models to view the concept of a 'dialogue' from different perspectives in order to highlight specific, so far undervalued, aspects of the relationship between the Member States' courts and the Luxembourg Court.

1. *Active Agents — Unresponsive Principal?*

The principal-agent model has become a widely accepted analytical tool for studying hierarchical relationships.[55] The model operates as follows: one party — the principal — enters into a contractual agreement with another — the agent — expecting that the agent will subsequently choose actions that produce outcomes desired by the principal.[56] The agency is based on a representative relationship where the agent has a key duty to act primarily for the benefit of the principal.[57] In other words, the agent has a fiduciary obligation to act not only on behalf of the principal, but also in the interest of the principal. In that way, the agent is expected not merely to follow the principal's instructions, but also to act loyally, subordinating their own interests to those of the principal.[58] Examples of such agency relationships are those between a client and their lawyer, or employer and their employee.

[54] Monika Glavina, 'Judicial Hierarchy in the Preliminary Ruling Procedure: Exploring the Relationship Between the First and Second Instance Courts' (2020) 5 European Papers: A Journal on Law and Integration 799, 808.

[55] Here, we mostly draw on an excellent analysis of this theory by Pauline Kim, 'Beyond Principal–Agent Theories: Law and the Judicial Hierarchy' (2011) 105 Northwestern University Law Review 535.

[56] Terry Moe, 'The New Economics of Organization' (1984) 28 American Journal of Political Science 739, 756.

[57] Donald R Songer, Jeffrey A Segal, and Charles M Cameron, 'The Hierarchy of Justice: Testing a Principal–Agent Model of Supreme Court–Circuit Court Interactions' (1994) 38 American Journal of Political Science 673, 674.

[58] Kim (n 55) 542.

In theory, principals retain control (or authority) over agents. However, due to the limited time, informational, or expertise resources, principals are not able to give agents instructions which would completely specify their obligations under all possible circumstances in advance — as anyone else, principals are not able to foresee all the future combinations of events. In this way, principals necessarily delegate to their agents the authority to make the rules themselves (or at least interpret the given instructions).[59]

Yet, as a result of such delegation, the possibility arises that agents will not comply with principals' instructions and rather pursue their own goals, which are in contradiction with those of principals.[60] Since principals lack resources to monitor and punish all the deviations on the side of agents, the core objective of the model is then to explain how principals can control their agents' actions.[61] Importantly, the principal is significantly constrained in her decision-making by incentive compatibility.[62] In other words, the principal must be aware of the fact that should she ignore the views expressed by her agent, the latter will not have any incentive to continue working for her. Correspondingly, the principal's success — and the success of the whole relationship — is assessed according to the principal's ability to pursue its aims by means of its agents.

Following other scholars who have used the model to analyse judicial systems, we can now apply the relationships described above to the Article 267 TFEU preliminary reference mechanism. Indeed, others have already made the analogy (perhaps unknowingly) when claiming that 'the ECJ

[59] Clifford J Carrubba and Tom S Clark, 'Rule Creation in a Political Hierarchy' (2012) 106 American Political Science Review 622.

[60] See Tracey George and Albert Yoon, 'The Federal Court System: A Principal–Agent Perspective' (2003) 47 St Louis University Law Journal 819.

[61] John Kastellec, 'The Judicial Hierarchy', *Oxford Research Encyclopaedia of Politics* (Oxford University Press 2017).

[62] Sean Gailmard, 'Accountability and Principal–Agent Theory', in Mark Bovens, Robert Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford Academic 2014) 92.

appoints national courts as its agents and asks them to fulfil their part of the bargain.'[63] Thus, one can envision the ECJ as the principal and national courts as its agents.

It is undisputable that the ECJ cannot and — in line with the Treaties — should not resolve thousands of disputes concerning EU law in all Member States on its own. Therefore, it necessarily delegates this task onto national judges while still claiming to remain in the superior position regarding the interpretation of EU law norms in the name of the unity and effectiveness of EU law. Indeed, the principal-agent perspective fits well into the narrative of the ECJ through which it asks the domestic courts to give full effect to EU law and ensure its uniform and effective application in the national context. In accordance with the principle of sincere cooperation stipulated in Article 4(3) TEU, the ECJ expects national judges to act loyally in pursuit of that goal.

The Luxembourg court gives authoritative instructions regarding the content of EU law to domestic judges in the form of its judgements, which it also asks them to follow strictly. Most importantly, it asks national courts to submit preliminary references in cases where the goal of uniform interpretation of EU law requires it. Thus, in line with *Da Costa* and *CILFIT* doctrines, the ECJ commands domestic judges first to identify the appropriate cases and then supply them to Luxembourg so it could provide all the Member States with the 'correct' answers regarding the substance of EU norms. Secondly, after illuminating the content of EU law, the ECJ expects domestic judges to follow its instructions and apply them in subsequent cases. [64]

[63] Takis Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 International Journal of Constitutional Law 740.

[64] Case C-28/62 *Da Costa en Schaake NV and Others* EU:C:1963:6; Case 283/81 *Cilfit and Others* EU:C:1982:335.

However, the ECJ's formal instructions inevitably cannot be clear enough to provide domestic judges with specific guidelines on how to resolve every question of EU law put before them. Therefore, national judges enjoy various degrees of discretion in both submitting preliminary references and implementing the final decisions of the Luxembourg judges.[65] In other words, acting as European courts affords national courts a certain degree of flexibility because of the choices the ECJ makes in framing its decisions (instructions).[66] Consequently, since national judges have their own preferences — be it policy or personal — which might not reflect the policy preferences held by the ECJ, there is a real possibility that when interpreting the ECJ's decisions, they will not advance the ECJ's preferences as faithful agents would do.

As in the case of principals and agents, at this place the question of control mechanisms comes into play. The Court lacks the usual levers of control to ensure compliance of lower court judges with its preferences — it cannot review and, if necessary, overturn decisions by Member State courts that do not comply with its views, nor can it report instances of repeated and serious non-compliance to competent authorities with a view of initiating disciplinary action against the 'disobedient' judges. Nevertheless, the Court can induce national courts' compliance indirectly. Specifically, it does so by means of threats of liability claims under the *Köbler* doctrine and under the Article 258 TFEU infringement procedure.[67]

As a result, the principal-agent model can serve as a useful tool for highlighting several aspects of the EU's 'judicial dialogue.' First, the

[65] See Pauline Kim, 'Lower Court Discretion' (2007) 82 New York University Law Review 383.

[66] Tridimas famously categorises ECJ's decisions according to the degree of specificity of the judgment and the room for manoeuvre left to national courts into outcome cases, guidance cases and deference cases. See Tridimas (n 63) 739.

[67] Jan Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 Common Market Law Review 9, 15-17.

'dialogue' between the principal and its agents presupposes a relationship that is sincere, loyal, but also hierarchical. While national courts must faithfully apply EU law and cooperate under the principle of sincere cooperation, the ECJ has the authority to define and clarify the interpretation of EU law. This hierarchical structure does not negate the existence of dialogue but frames it within a system where both parties have defined roles. Second, a meaningful dialogue depends on the ECJ (the principal) acknowledging and considering the unique contributions of national courts (its agents) who necessarily enjoy a certain degree of discretion in applying and interpreting EU law. To be effective in its position, the ECJ, as the principal, needs to be receptive to the concerns of national courts — its agents. Third, a functional dialogue is not precluded by the existence of a conflict of interests between the principal and its agents. Although such conflicts may exist, the fiduciary relationship can be beneficial if appropriate control mechanisms are applied.

Following up on these assumptions, the principal-agent model can be used to critically analyse the Article 267 TFEU mechanism. Those who criticise Luxembourg judges for not being responsive enough to the arguments advanced by domestic courts essentially criticise the ECJ for acting as a bad principal who does not sufficiently consider their agent's views. If domestic judges provide the ECJ with the necessary national legal context, including their proposed answer to the question they are submitting, the ECJ has a duty to reflect upon the insights of the national court. To put it differently, the ideal of the EU's 'judicial dialogue' is only realised if the ECJ listens and responds to the concerns of the Member States' courts, which act as its agents. Contrarily, where the ECJ, acting as the principal, does not explicitly reflect the opinions of domestic judges, acting as its agents, it is said to undermine the value of their 'judicial dialogue', turning it into a mere 'monologue' where the voices of the 'agents' remain unheard.

In that way, the principal-agent model can also be used to critically assess the degree of influence Member State courts enjoy within the preliminary reference mechanism. If domestic judges can, acting as agents, impact the

decision-making of their principal — the ECJ — they are claimed to play a meaningful role in the overall procedure. On the contrary, where the ECJ is not responsive enough to the Member State courts' inputs, the influence is said to be rather insignificant.

2. Part of the Same Team, but Playing Different Positions

In the previous section, we argued that the principal-agent model can be useful for highlighting some important aspects of the EU's 'judicial dialogue'. The team model — developed mainly by Lewis Kornhauser in the context of the US federal judiciary — presents a different useful perspective, which we are going to explore here. The key assumption of that model is that members of the team share the same goal and that, in order to achieve that goal, those team members cooperate.[68] In line with this view, judges in the judicial hierarchy are viewed as teammates whose goal is to reach a many correct answers as possible. Certainly, this 'correctness' may be understood in different ways. Yet, what matters for the purposes of this model is not the substantive content of correctness, but the assumption that all judges orient their decision-making toward the same underlying criterion. [69]

Now, the team model recognises that individual judges will necessarily disagree on what particular outcome best promotes the shared team's goal, or, in other words, the correct answer (whatever one thinks that is) in a specific case.[70] Notably, this is not caused by the fact that individual judges want to pursue their personal interests. In contrast, potential conflicts of views regarding correct outcomes in an individual case are a result of informational constraints that judges at various levels of hierarchy face.[71] In

[68] Lewis Kornhauser, 'Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System' (1995) 68 Southern California Law Review 1605, 1612–1613.

[69] ibid 1606.

[70] ibid 1612-1613.

[71] Kastellec (n 61) 3-4.

particular, different judges, despite sharing the same values, may arrive at different conclusions because they lack a full understanding of relevant facts due to limited resources or differing informational advantages. This is because judges' ability to achieve the correct outcome ultimately depends on the time they can afford to spend collecting relevant information about the case.[72] Thus, even though judges as members of the team would agree on the 'correct answer' in theory, their understanding of correct outcomes in specific cases directly depends on their understanding of the relevant facts, which varies due to different resource constraints.

In comparison with the principal-agent model, the inclusion of the possibility of error and of resource constraints then brings up new concerns regarding the design of judiciaries. Whereas agency models focus on creating oversight to prevent strategic non-compliance by lower-court judges, the team perspective focuses on organisational efficiency, seeking to determine how to best divide labour between fact-finding and law-finding to maximise the quality of legal decisions given a fixed set of resources. [73] Ultimately, the question remains: what is the best way to organise the judicial hierarchy to minimise the overall number of incorrect answers?

For Kornhauser, the hierarchy within the judiciary is justified as it allows specialisation of labour and allocation of resources — lower courts are primarily devoted to fact-finding, whereas higher courts invest more resources into legal deliberation.[74] Such specialisation, in turn, affects how judges on different levels treat precedents. The existence of hierarchy implies strict vertical stare decisis because judges sitting at higher courts will make higher quality decisions and thus be more likely to reach the 'correct legal judgment' than lower court judges. Moreover, lower court judges should consult only cases decided by courts above them because otherwise the

[72] ibid.

[73] See Kornhauser (n 68).

[74] ibid 1624.

resources would be wasted.[75] In short, in the team model where judges seek to maximise the number of correct decisions, the higher quality of the higher courts' judgements implies that the lower courts should defer to them.[76]

At this place, it is possible to try to evaluate the fit of the team model with the EU judicial system.[77] Dyevre and others used the model to describe the non-hierarchical system of preliminary references. According to them, at least in the initial phase, referring national courts and the ECJ share the same goal — finding the right answer to the question of EU law.[78] Accordingly, based on the principle of division of labour, national courts that primarily apply the EU law look at the ECJ for guidance because it is a specialised court, the key task of which is to interpret and solve general EU law questions in abstract.[79] When referring questions to the ECJ, national judges outsource the production of knowledge that is needed to resolve difficult EU

[75] Kastellec (n 61) 4.

[76] Kornhauser (n 68) 1624.

[77] While it is true that the transferability of the model might seem prima facie problematic due to differences in hierarchy (or absence thereof) in US and EU respective judicial architectures, we argue that both systems are, for the purposes of the team-model, functionally equivalent. Both the US Supreme Court and the ECJ serve as apex courts that ensure uniform interpretation and application of a higher legal order – US federal law in the former, and EU law in the latter, both relying on lower courts to implement their rulings, thereby making compliance enforcement a shared challenge and a key feature of their hierarchical relationship. Furthermore, both systems involve courts adjudicating on the division of powers within a federal or quasi-federal system: while the US Supreme Court resolves conflicts between federal and state authority, the ECJ addresses the balance between the EU (or its institutions) and Member States. For a general discussion on the functional equivalence between both jurisdictions, see Michel Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court' (2006) 4 International Journal of Constitutional Law 618.

[78] Arthur Dyevre, Nicolas Lampach, and Monika Glavina, 'Chilling or Learning? The Effect of Negative Feedback on Interjudicial Cooperation in Nonhierarchical Referral Regimes' (2022) 10 Journal of Law and Courts 87, 91.

[79] Ramos Romeu (n 53) 397.

law issues, which ultimately leads to efficient saving of their resources. In this view, submitting preliminary references is desirable to maximise the number of correct decisions within the team.[80]

How can one use the team model to explain the role of national judges within the preliminary reference procedure? To put it plainly, according to the team model, the primary task of national courts is merely one of initiation. Accordingly, the national court can limit itself to the identification of a problem and signalling it to the ECJ, which is primarily competent to resolve it. In this model, any activity on the part of the national court which goes beyond the mere initiation of the preliminary ruling procedure — in particular, the expression of a pre-emptive opinion on its outcome — is rather tolerated than encouraged.[81] This is mainly because national courts necessarily suffer greater information and time constraints than the ECJ when it comes to EU law.

In other words, national judges are not meant to spend precious time on deliberation regarding the structural EU law issues with the aim of influencing the ECJ's final decision. Instead, they are expected to delegate this task to Luxembourg judges whose primary task is to interpret EU law, thereby guiding national courts toward the resolution of a dispute before them. Because, together with the ECJ, they share the goal of reaching 'correct' EU law answers, domestic judges can supply their teammate in Luxembourg with their views, merely to help them come up with the right conclusions. Thus, even if domestic courts decide to engage in a complex analysis of EU law, perhaps even expressing their pre-emptive opinion on the issue, they do so with a quite specific aim to maximise the chances of their teammate to reach the 'correct outcome' well suited for the uniform interpretation of EU law.[82]

[80] Glavina (n 54) 810–811.

[81] ECJ (n 31).

[82] cf Dyevre, Lampach and Glavina (n 78) 91; Ovádek, Wijtvliet and Glavina (n 15).

As a result, we consider the team model to provide a helpful framework for bringing into focus three key aspects of the EU's judicial dialogue. First, the team model emphasises the shared goal between the ECJ and national courts: achieving the correct interpretation and application of EU law. This shared objective forms the foundation of the dialogue, as it necessitates complementarity and cooperation between the ECJ and national courts. Second, the team model highlights the division of labour within the judicial hierarchy, where each actor has specialised responsibilities. National courts are primarily tasked with identifying problematic legal questions and signalling them to the ECJ, while the ECJ specialises in crafting authoritative, uniform interpretations of EU law. Third, the team model underscores the potential for tension in the preliminary reference procedure due to differing constraints. While the ECJ operates with better resources and a stronger mandate to develop overarching EU legal principles, national courts — especially the lower ones — face time and information constraints, which may limit their ability to understand the EU law issues from the same perspective as their Luxembourg teammates.

Now, one may use the team model to critically analyse the functionality of the Article 267 TFEU mechanism. Those who criticise the ECJ for not being responsive enough essentially argue that the ECJ does not behave like a good 'teammate' who relies on their colleagues' expertise.[83] Since the responsibilities of domestic courts and the ECJ are strictly divided within the team, one might argue that the ECJ must be responsive to the attempts of domestic judges who try to offer their understanding on the issue in question. Accordingly, the division of labour ought to mirror a real dialogue where each party brings unique expertise to the conversation, ensuring that the resulting output is contextually informed. If the 'correct' answers only stem from the ECJ's specialisation for abstract decisions, even though domestic judges add some valuable insights into the game (ie facts of the

[83] For the critical account of the dialogic nature of the preliminary reference procedure, see Section 2 above.

case, wider context of national regulation, etc), the ideal of EU judicial dialogue is not realised, turning the procedure to mere monologue. Seen through this lens, the judicial discourse may be considered as failing if the task of the national court is limited merely to the initiation of the proceedings before the ECJ while, once the reference is made, the ECJ begins to rely solely on its own input, without making use of the work already done by its national counterpart.

Similarly, the team model can be used to critically assess the degree of influence Member State judges assert over the ECJ's decision-making power. If domestic courts can impact the ECJ, their teammate, by bringing their specific lower-level expertise to the ECJ (in the form of the factual background and national context), they may be perceived as valuable and influential actors within the procedure. Such influence would reflect the institutional design of the system, which presupposes a division of epistemic labour rather than strategic alignment. On the other hand, if the role of Member State judges is limited merely to 'outsourcing' the difficult EU legal issues to Luxembourg, their role might be considered as marginal.

IV. Beyond Monologic Imaginaries: The Communicative Discourse Model

Although both principal-agent and team models represent partially useful theoretical frameworks for the conceptualisation and critical assessment of the Article 267 TFEU mechanism, they both share a fundamental limitation: they conceptualise the national courts' influence and the EU's dialogue in a reductive way that overlooks the multifaceted and dynamic nature of the preliminary reference procedure.[84]

[84] Here, we differ from other scholars who have used the models to describe the preliminary reference procedure in the past. See, in particular, Dyevre, Lampach, and Glavina (n 78).

Both models implicitly frame the judicial dialogue as a one-dimensional, bilateral interaction between the ECJ and the referring national court, confined to an individual case. They assume that the preliminary reference procedure operates in a vacuum, where influence flows directly from Member States to Luxembourg and back. In other words, they strongly focus on the interaction between either the principal and its agents, or within the collective of the team, consisting only of two players.

Moreover, neither of the models seems to clearly address in which form Member State courts may influence the decision-making of the ECJ. Both models seem to tacitly presume that a meaningful impact requires explicit recognition (validation) from the top of the hierarchy (ie the principal or the teammate). In the context of the EU judicial system, the success of the dialogue seems to be measured by the extent to which the ECJ engages with or adopts the reasoning of the referring court in its final ruling. Accordingly, it is assumed that national courts only impact the development of EU law when the ECJ explicitly incorporates their input into its rulings.

Here, we take issue with approaches based on such a limited understanding of what the EU's judicial dialogue and national courts' influence mean. In our view, both frameworks ultimately reinforce the prevailing monologue criticism. We consider traditional judicial hierarchy models normatively too reductive, for they are unable to capture effectively the much more complex dynamics of the preliminary reference procedure.

What we argue instead is that it is normatively more attractive to conceptualise EU dialogue and the Member State courts' influence within the Article 267 TFEU mechanism from the perspective of our communicative discourse model. This model is built on the idea of the intersubjective and interpretative processes of generating the meaning of legal norms.[85] In short, it assumes that all actors within the system generate

[85] David Kosař et al, *Domestic Judicial Treatment of European Court of Human Rights Case Law: Beyond Compliance* (Routledge 2020) 59.

law with various and sometimes conflicting interests. What is crucial is that each actor is necessarily confined to a particular phase in which they can only carry out a limited portion of the overall labour. Yet, it is emphasised that all parts of the process are equally important.

What connects the ECJ with domestic courts is their participation in this interactive communicative process in which the opinions on EU law questions are generated. In this way, the preliminary reference procedure can be viewed as the reflective process of making EU law, where all actors play their respective roles even though their interests might differ. Central to this conception is the ongoing interaction between multiple actors involved within the process.

Unlike the principal-agent and team models, the communicative discourse model acknowledges that Member States' courts and the ECJ do not merely engage in a bilateral exchange confined to an individual case but participate in a broader web of interactions involving multiple actors. These include EU institutions like the Commission and Parliament, other Member State courts, Member States' governments, and even non-state actors such as NGOs and the public.

Let us first consider the initial phase of the procedure. Here, the domestic judges' motivations for submitting the reference play a crucial part.[86] The referring court might choose to bring the matter before Luxembourg judges in a manner where it does not merely aim to obtain a direct answer from the

[86] Karin Leijon, 'A Matter of Prescriptive Clarity? Analysing How Swedish Judges' Motives for Action Vary in the Preliminary Ruling Procedure' (2024) 62(2) Journal of Common Market Studies 469-471; Monika Glavina, 'To Refer or Not to Refer, That Is the (Preliminary) Question: Exploring Factors Which Influence the Participation of National Judges in the Preliminary Ruling Procedure' (2020) 16 Croatian Yearbook of European Law and Policy 31-34; Urszula Jaremba, 'At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-Level Legal Order' (2014) 6(3-4) Erasmus Law Review, 197-202.

ECJ, but because that court wants to interact with other actors involved in the preliminary reference procedure.

For instance, the domestic court might try to 'emancipate' itself from the authority of the highest national courts by bringing their non-compliant practices into the attention of other national political actors, eg the national government (which naturally cannot directly influence the decision-making of higher courts, but may – in its written or oral submission – argue against it in the proceedings before the ECJ), the European Commission or the ECJ itself.[87] By framing the preliminary reference in a certain fashion, the referring court's opinion might also aim at actors outside the national context. In short, a judge might try to use the opinion to highlight the significance of the referenced questions and try to gain support from the side of the Commission, the EU Parliament, the Advocate General, and other Member States' governments, which can all take part in the preliminary reference procedure.[88]

Furthermore, referring judges may want to submit preliminary references in a manner which enhances their prestige among their colleagues within the referring court.[89] A referring judge may signal what they believe is the correct solution on the difficult question, such as one involving genuine uncertainty as to the interpretation or validity of EU law or a sensitive interaction between EU norms and national law. If the ECJ concurs with the suggested solution, its author may legitimately regard the outcome of the preliminary reference procedure as their individual victory. This reflects an understanding of judicial decision-making as an institutionalised contest

[87] Indeed, this would correspond with the assumptions of the infamous emancipation theory which describes the reasons why domestic courts submit references in the first place. See Weiler (n 35) 2426.

[88] See notably RoP (n 22) art 96.

[89] On the influence of collegial considerations in general see Forrest Maltzman, James F Spriggs, and Paul J Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge University Press 2000).

over the authoritative meaning of law. In this sense, the referring judge would successfully prevail in this interpretative competition by anticipating and shaping the authoritative articulation of EU law.

As a result, already in the initial phase, referring judges — intentionally or unintentionally — communicate with a high number of political actors, not merely the ECJ. Accordingly, their references might influence those actors even if their insights are not explicitly reflected in the final ECJ's decision. In this sense, the communicative discourse within the preliminary reference procedure already reaches beyond the one-dimensional framework.

The communicative discourse model recognises the strategic role of national courts in framing their references and the multipurpose nature of their communication. To put it plainly, national courts do not merely seek answers from the ECJ. Within this model, they also use preliminary references to communicate with other stakeholders.

Similarly, those who depict the ECJ as a more or less responsive principal and teammate do not sufficiently consider the multiplicity of actors in the second phase of the procedure — the ECJ's decision-making itself. Here, it is crucial to highlight that the ECJ's primary job is not only to respond to the formal inquirers — the referring courts — but to provide a uniform interpretation of EU law to essentially all actors in the EU.[90] In this sense, our model acknowledges that the preliminary reference becomes a strategic communicative act aimed at influencing the content and scope of EU legal norms.

According to the Treaties, the ECJ was not established to adjudicate real-life disputes, but to fulfil the role of a superior authority on the interpretation of EU law.[91] The adjudication of the ECJ thereby comprises two basic elements

[90] Broberg and Fenger (n 15) 406-409.

[91] Although, in practice, the boundaries between interpretation and application might not always be clearly delimited. See Case C-923/19 *Van Ameyde España* EU:C:2021:125, Opinion of AG Bobek, paras 56–58.

— deciding a particular case at hand and exercising judicial authority which reaches beyond that particular case — which, in ideal scenarios, complement each other, but in reality may often operate against each other or, at the very last, may be mutually in tension.[92] Indeed, detaching interpretation from application makes the ECJ more of a legislator rather than a court.[93] This distinguishes the ECJ from national apex courts, which, notwithstanding their law-shaping functions, typically remain embedded in the adjudication of specific cases and retain the power to apply the law to the facts before them. At the same time, this detachment helps explain why preliminary rulings operate as authoritative interventions in the EU legal order rather than as mere dispute-settlement decisions, thereby reinforcing the communicative dimension of judicial interaction.

What is crucial is that when ECJ's judges exercise their power, they not only give legal reasons for deciding a particular case one way or another, but also articulate principles which have broad policy and distributive ramifications.[94] The rules communicated in their decisions influence a wide range of future social, economic, and political choices that other political actors make with regard to the ECJ's stances.[95] As a result, the ECJ's doctrine provides

[92] Jan Komárek, 'Judicial Legitimacy in the European Union' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice* (Oxford University Press 2020) 134.

[93] Tamara Ćapeta, 'Ideology and Legal Reasoning at the European Court of Justice' in Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018) 84.

[94] Paul Wahlbeck, 'The Life of the Law: Judicial Politics and Legal Change' (1997) 59 The Journal of Politics 778; Michael Blauberger and Susanne K. Schmidt, 'The European Court of Justice and Its Political Impact' (2017) 40 West European Politics 907.

[95] Jack Knight, *Institutions and Social Conflict* (Cambridge University Press 1992) 252. On the policy implications of the ECJ's case law, see generally Susanne K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018).

guidance not only to the Commission and EU Parliament, but also to Member States' governments, domestic courts, corporations, NGOs as well as individuals.[96] From this perspective, the ECJ's rulings can be viewed as a signal by which it communicates its guidance to other decision-makers who are in turn expected to implement them.[97] In other words, domestic courts are not meant to be the sole audience of that guidance.

Consequently, what the ECJ writes into its decisions — what arguments it specifically mentions in its reasoning — is necessarily affected by the high diversity of political actors it addresses.[98] Following that argument, when one is assessing whether the ECJ is responsive towards the insights of domestic courts, they should also take into account that the referring courts are not the only actors the ECJ talks to. Indeed, previous research shows that the Court pays close attention to Member State preferences, the Commission's and the Advocate General's views when crafting its decision.[99] Once again, the 'backward' communication from the ECJ, taking the form of a response to the inputs received during the preliminary reference procedure, is not one-dimensional, in the sense of being directed

[96] Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007) 27-30.

[97] See Jan Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 The American Journal of Comparative Law 149; Mattias Derlén, 'Multilingual Interpretation of CJEU Case Law: Rule and Reality' (2014) 39 European Law Review 295; Peter Tiersma, 'The Textualization of Precedent' (2007) 82 Notre Dame Law Review 1187.

[98] Anna Wallerman Ghavanini, 'The EU Court of Justice as a Relational Actor: An Introduction' (2023) 2 European Law Open, 237.

[99] Philipp Schroeder, 'Seizing Opportunities: The Determinants of the CJEU's Deference to National Courts' [2023] Journal of European Public Policy 1; Michal Ovádek, 'Supranationalism, Constrained? Locating the Court of Justice on the EU Integration Dimension' (2021) 22 European Union Politics 46; Olof Larsson, Daniel Naurin, Mattias Derlén, and Johan Lindholm, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2017) 50 Comparative Political Studies 879.

exclusively at the referring court. Rather, it is multi-dimensional insofar as the ECJ's reasoning simultaneously addresses multiple audiences and normative expectations, within a single authoritative decision.

Finally, the communicative discourse model captures the iterative and reflexive nature of EU law generation. It emphasises that preliminary references are not isolated events but part of a continuous process where questions raised by national courts, judgments issued by the ECJ, and subsequent reactions from other actors feed into one another. Over time, this iterative process adapts EU law. This dynamic perspective underscores that national courts' contributions may influence EU law not only in an immediate case at hand, but also as part of a cumulative process that spans multiple cases and decisions. This aspect highlights that national courts can be integral contributors to the ongoing dialogue in a wider sense, even if their opinions are not reflected in the final ECJ's decision in one particular case. In this way, national courts indeed fulfil the role that the constitutional architecture of the European Union confers on them – that of 'apostles of EU law'.[100]

As a result, we argue that our communicative discourse model incorporates the complexities of the Article 267 TFEU preliminary reference procedure and highlights multiple subtle ways by which national courts impact the development of EU law. By submitting requests for preliminary ruling, domestic judges can meaningfully affect many stakeholders of the European integration in a rather indirect manner beyond the boundaries of an individual preliminary reference case.

[100] Takis Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability', in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 407.

V. THE DELIBERATIVE POTENTIAL OF JUDICIAL DIALOGUE

So far, we have argued that our communicative discourse model captures the complexity, multidimensionality, and iterative nature of the preliminary reference mechanism, as well as the various forms of Member States' courts' influence over the EU's decision-making. Here, we claim that the proposed theoretical model represents a useful imaginary to understand national courts' ability to shape EU law. The core normative attractivity of the broader understanding of the EU dialogue and different forms of Member State courts' influence lies in its deliberative potential.

Even though the Treaty on European Union ('TEU') formally commits the EU to an ideal of representative democracy,[101] many have claimed that the EU's system of democratic legitimation is ultimately insufficient to approximate such a principle, traditionally tailored to nation-states.[102] Indeed, the limitations of the European Parliament's legislative and oversight powers, the marginal role of national parliaments, fragmented electoral processes, and other institutional shortcomings all contribute to what is frequently described as the EU's representative democratic deficit.[103]

To highlight the underlying argument: the EU's decisions with far-reaching consequences for the Member States' constituencies are primarily made through executive, administrative, judicial, and technocratic avenues (most importantly, the Council, the Commission, the ECJ, and the ECB).[104] But

[101] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU), art 10(1).

[102] Eleni Nanopoulos and Fotis Vergis, 'The Inherently Undemocratic EU Democracy' in Eleni Nanopoulos and Fotis Vergis (eds), *The Crisis Behind the Eurocrisis* (Cambridge University Press 2019) 122.

[103] For a general discussion on the roots of EU's democratic deficit, see Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4(1) European Law Journal 5.

[104] Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) 196.

these are inherently anti-majoritarian in the sense that they do not base their legitimacy on the direct representation of EU citizens.[105] In that way, the EU's formal commitment to the ideal of representative government is weakened in practice and remains unfulfilled. Correspondingly, it is said that the EU's constitution is rather functional than democratic.[106]

With the aim to rectify this so-called democratic deficit, it has been suggested that what the EU lacks on the side of representation might be substituted by the normative ideal of deliberative supranational democracy under which mutual reflection about various preferences could be facilitated rather by means of productive institutional discourse than by traditional tools of democratic representation (parliamentary democracy).[107]

In line with such expectations, we claim that our broader understanding of EU's judicial dialogue, which is reflected in the communicative discourse model aligns with this suggested participative and deliberative democratic reading of the Article 267 TFEU mechanism. When theorised this way, the Member State courts' capacity to influence EU decision-making in rather subtle, indirect ways can represent an important aspect in recognising the full deliberative and democratising potential of the preliminary reference procedure.

---

[105] Nicole Scicluna and Stefan Auer, 'From the Rule of Law to the Rule of Rules: Technocracy and the Crisis of EU Governance (2019) 42 West European Politics, 1422.

[106] Isiksel (n 36) 12; Agustín José Menéndez, 'The "Terrible" Functional Constitution of the European Union: "Sound" Money, Economic Freedom(s) and "Free" Competition' in Marco Goldoni and Michael Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) 351.

[107] See Christian Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Bloomsbury 2022) 190; Christian Joerges and Jürgen Neyer, 'Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector' (1997) 4(4) Journal of European Public Policy 609.

In other words, we claim that our communicative discourse model is an attractive theoretical tool, as it highlights that the Article 267 TFEU preliminary reference procedure enables Member State courts to subtly influence the EU decision-making in ways that can complement the inherently anti-majoritarian and largely technocratic decision-making processes. Recognising that Member State courts have the actual capacity to take part in the EU's dialogue enhances the legitimacy of the EU's functional constitution.

VI. Subtle Influences as a Method of Shaping EU Law

In the previous section, we have outlined that the preliminary reference serves as a communicative discourse that shapes EU law significantly, rather than being a one-dimensional platform for direct answers to the questions posed by national courts. Within this process, national courts have the capacity to influence the trajectory of EU law in rather subtle ways that extend beyond direct interactions with the ECJ. This broader understanding of the EU's judicial dialogue and the national courts' influence is normatively attractive as it underlines the full deliberative potential of Article's 267 TFEU mechanism vis-à-vis the EU's functional constitution.

To clarify, we do not claim that the deliberative potential of the EU judicial dialogue is fully realised in practice. It is not the aim of the article (nor within its scope) to explore our theoretical expectations empirically. However, let us now put our theoretical claims in context and demonstrate three subtle ways of national courts' influence: 1) changing legislation through agenda setting; 2) flagging systemic issues; and 3) challenging and refining precedents. We describe the subtle influences by means of appropriate case-law examples. To be precise, we do not claim that the three provided influences are the only imaginable subtle influences that fit into the communicative discourse model. Yet we believe that they serve as good examples of our main claim that national courts have the capacity to impact the ECJ's decision-making in indirect manner.

First and foremost, by submitting a preliminary reference, the national court may achieve a significant legislative change through agenda setting. Its influence becomes direct when judicial reasoning, developed in the resolution of concrete disputes, is incorporated into the policy-making process and ultimately reflected in legislative amendments or new regulatory frameworks.[108] In such scenarios, the referring court may or may not be successful in persuading the ECJ of its view on the correct outcome of the case before it. For that matter, it may not even have the ambition to persuade it in the immediate case. What is important, though, is that by submitting the request for preliminary ruling, the referring court attracts the attention of the EU legislator to such an extent that the latter subsequently decides to amend or revise the applicable legislation.

In *Google v Costeja*, the Spanish High Court (*Audiencia Nacional*) asked the Court of Justice whether a right to be forgotten (*derecho al olvido*) vis-à-vis search engines could be inferred from the provisions of the Personal Data Protection Directive.[109] At the time of the referral, the right to be forgotten was indeed recognised by courts in certain Member States,[110] but was not codified in EU law. The reference has attracted the interest of many Member States' governments, which have sought to side with one side or the other as far as the recognition of this right by the ECJ was concerned. For instance, the Spanish government sided with the applicant in the national proceedings, Mr Costeja González, in claiming that data subjects may oppose the indexing by a search engine of personal data relating to them in case of dissemination of prejudicial information relating to these data

[108] Fabio Wasserfallen, 'The judiciary as legislator? How the European Court of Justice Shapes Policy-Making in the European Union' (2010) 17 Journal of European Public Policy 1129.

[109] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* EU:C:2014:317.

[110] Ioannis Iglezakis, 'The Right to Be Forgotten in the Google Spain Case (Case C-131/12) - A Clear Victory for Data Protection or an Obstacle for the Internet?' [2014] 6th International Conference on Information Law & Ethics.

subjects.[111] The Advocate General, on the other hand, opposed such a wide reading of the Directive.[112] Eventually, the ECJ accepted the applicant's case, going even further in holding that invoking the right to be forgotten does not presuppose a prejudice caused to the data subject.[113] Through a preliminary reference from the Spanish High Court, a 'new' right was thus recognised in the EU law framework, permanently altering the legal and regulatory standards for search engines. The adoption of Article 17 of the General Data Protection Regulation[114], which codifies a right to erasure against any controller of personal data, represents a culmination of this process, in which the referring court acted as one of the policy-makers, participating — along with the Advocate General, Member State governments, the Court of Justice, and eventually the EU legislator — in the multi-level discourse regarding the existence and scope of a right to be forgotten.

Another example of a normative issue, initially identified throughout a preliminary reference procedure and eventually turning into positive law, might be found in *ČPP Vienna Insurance Group v Bilas*.[115] In this case, one of the Czech district courts was not sure whether it could accept jurisdiction over an insurance-related dispute involving Mr Bilas, a consumer domiciled in Slovakia, who, under the Brussels I Regulation, could only be sued before Slovak courts. Despite such an explicit special jurisdictional rule, Mr Bilas appeared before the Czech court, opposing the claim on the merits, without objecting to the jurisdiction of the Czech court. In the view of the referring

[111] *Google Spain* (C-131/12) EU:C:2014:317, para 91.

[112] *Google Spain* (C-131/12) EU:C:2013:424, Opinion AG Jääskinen, para 108.

[113] *Google Spain* (C-131/12) EU:C:2014:317, para 99.

[114] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

[115] Case C-111/09 *Česká podnikatelská pojišťovna v Michal Bilas* EU:C:2010:290.

court, such a situation amounted either to a lack of jurisdiction or could alternatively be considered as an agreement on jurisdiction.

In its judgment, the ECJ — rather unsurprisingly — held that a court which would otherwise have no jurisdiction becomes competent pursuant to a tacit prorogation of jurisdiction if the defendant appears before that court and contests a claim on the merits, even in a situation where the case concerns an insurance claim against a consumer.[116] Much more interestingly, however, the ECJ obiter dictum (ie by way of a remark not strictly necessary for the resolution of the dispute) added that, in such a scenario, the otherwise incompetent court might ensure that the defendant being sued before it in those circumstances is 'fully aware of the consequences of his agreement to enter an appearance'.[117]

This obiter was not coincidental: the ECJ was addressing an objection raised by the Czech and Slovak governments, according to which the court seized should ascertain whether the appearance of the weaker party before that court is in fact deliberate and designed to give that court jurisdiction.[118] It was this consideration that apparently led the EU legislator to eventually insert the rule proposed by the Czech and Slovak governments into the recast version of the Brussels I Regulation.[119] Under its current Article 26(2), in cases in which the defendant is a weaker party subject to protective rules of special jurisdiction, the court seized is obliged to ensure that the defendant is informed of his or her right to contest the jurisdiction of such a court and of the consequences his or her appearance before that very court. Here again, we observe that what starts as an interpretative problem on the part of the referring court transforms into a broader policy question, which, amplified

[116] ibid para 33.

[117] ibid para 32.

[118] ibid para 31.

[119] Alfonso-Luis Calvo Caravaca and Javier Carrascosa González, 'Article 26 [Jurisdiction Because of Unconditional Appearance]' in Ulrich Magnus and Peter Mankowski (eds), *Brussels Ibis Regulation – Commentary* (Otto Schmidt 2022) 676.

by Member States' governments, might have considerable repercussions for EU law.

Second, the initiation of a preliminary reference may serve as a platform for the referring court to 'flag' systemic issues to other actors engaged in the preliminary reference procedure: notably, the Commission, and the ECJ itself. A prime example of such 'flagging' may be the saga of preliminary references relating to the judicial impartiality and independence of the judiciary.

In *Miasto Łowicz*, two single judges turned to the Court of Justice, expressing concern about possible disciplinary proceedings being brought against them. These judges doubted the objectivity and impartiality of the proceedings, given that the Disciplinary Chamber of the Supreme Court operated under political pressure from the legislature and the executive, seeking to influence the decisions adopted by the judiciary.[120] Later, whilst the case was still pending before the ECJ, both judges were indeed summoned to appear before the Disciplinary Chamber, partly in order to account for potential 'ultra vires conduct' consisting in submitting the preliminary references to Luxembourg.[121] The ECJ declared their request for a preliminary ruling inadmissible due to the lack of a connecting factor between the provision of EU law to which the questions related and the disputes in the main proceedings.[122] However, in a powerful obiter dictum, the Court went on to emphasise the importance of the preliminary reference mechanism for judicial independence. The ECJ noted that the mere prospect of being the subject of disciplinary proceedings as a result of making such a reference is likely to undermine the effective exercise of the judicial function.[123]

---

[120] Case C-558/18 *Miasto Łowicz and Prokurator Generalny v Skarb Państwa — Wojewoda Łódzki and Others* EU:C:2020:234, paras 6–7.

[121] ibid para 21.

[122] ibid paras 52, 60.

[123] ibid paras 55–59.

What appears to be an inconclusive dialogue between two Polish judges and the ECJ could be read as a form of impetus for the Commission to start enforcing fundamental principles of EU law in Poland. Indeed, what followed was a formal notice, which later evolved into a reasoned opinion, and eventually infringement action against Poland.[124] In its action, the Commission used the summoning of the judges responsible for *Miasto Łowicz* references as a testimony of the recent practice of the Disciplinary Chamber.[125] Following the lodging of this action, the ECJ found that Poland was in breach of Article 19(1) TEU as well as Article 267(2) and (3) TFEU.[126] The referring courts in *Miasto Łowicz* thus took an extremely important role in this case as a kind of 'rule of law whistleblowers'. Ultimately, one cannot frame *Miasto Łowicz* as an instance of denied dialogue.

Indeed, decisions on 'rule of law backsliding' fit well within our communicative discourse model. In *Associação Sindical dos Juízes Portugueses*, the Portuguese Supreme Administrative Court asked the ECJ whether austerity measures introduced by the Portuguese legislature, which, among other things, temporarily reduced the remuneration of certain judges, infringed the principle of judicial independence.[127] Whilst the Court replied in the negative, it — rather surprisingly — turned the case into a landmark decision regarding the principle of the effective judicial protection of individual rights stemming from EU law.[128] Later, the Court used this principle as a powerful tool in a combat against rule of law backsliding in

[124] Case C-791/19 *Commission v Poland* EU:C:2021:596.

[125] ibid para 117.

[126] ibid para 235.

[127] Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas EU:C:2018:117.

[128] ibid paras 30-51.

Poland and Hungary.[129] It also relied on conclusions voiced in *Juízes Portugueses* while explicitly overruling its previous case law under which Spanish Tax Tribunals (*Tribunales Económico-Administrativos*) were regarded as 'courts or tribunals' for the purposes of Article 267 TFEU and could, therefore, submit preliminary references to the ECJ.[130] The ECJ, once again, used this precedent to declare the process for appointing judges in Malta, over which the Maltese Prime Minister exercises decisive power, compatible with Article 19(1) TEU.[131]

What we argue is that this 'precedential spill over' is not accidental. Rather, it emanates from the specific nature of the dialogue within the preliminary reference procedure, which is not limited to the relationship between an individual domestic judge on the one hand and a particular chamber of the ECJ on the other. Instead, it involves a cross-fertilisation of knowledge of various stakeholders, which begins with sophisticated agenda-setting on the part of domestic judges. In this sense, it differs from the traditional adjudication based on the rule of precedent, which, on the one hand, originates from the principle of institutional hierarchy rather than from the dialogue-based procedural pluralism. On the other hand, the spill over does

[129] See, for instance, Case C-218/18 PPU LM EU:C:2018:586; Case C-619/18 *Commission v Poland* [Independence of the Supreme Court] EU:C:2019:531; Case C-192/18 *Commission v Poland* [Independence of Ordinary Courts] EU:C:2019:924; Joined Cases C-585/18, C-624/18, and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy, and DO v Sąd Najwyższy* EU:C:2019:982; Case C-824/18 *A. B. and Others v Krajowa Rada Sądownictwa and Others* EU:C:2021:153; Case C-487/19 *W. Ż.* EU:C:2021:798; Joined Cases C-748/19, C-749/19, C-750/19, C-751/19, C-752/19, C-753/19, and C-754/19 *WB and Others* EU:C:2021:931; Case C-508/19 *M. F. v J. M.* EU:C:2022:201; Case C-55/20 *Minister Sprawiedliwości v Prokurator Krajowy* EU:C:2022:6; and Case C-564/19 *IS* EU:C:2021:949.

[130] Case C-274/14 *Banco de Santander* EU:C:2020:17.

[131] Case C-896/19 *Repubblika v Il-Prim Ministru* EU:C:2021:311.

not involve the careful balancing between doctrinal stability and pragmatic responsiveness to national courts.

Third, by referring requests for preliminary ruling, national courts may seek to challenge and refine existing case-law of the ECJ with which they disagree. In this respect, they may act as de-facto appellants. It is only later that the ECJ, which has reached a decision on a particular point of law, may realise the problematic nature of its earlier opinion and only in the context of this second dialogue may it — often influenced by the arguments of the referring court — correct its previous view.

For instance, in *Metock*, the ECJ was ready to reconsider its previous opinion under which it was necessary for third country nationals to be lawfully resident in a Member State in order to be able to exercise the rights to enter and reside as a family member of EU nationals.[132] Following a preliminary reference from the Irish High Court, the Grand Chamber held that the Citizens' Rights Directive indeed precluded such legislation, expressly overruling its earlier judgment in *Akrich*[133], in which it reached the opposite conclusion.[134] Interestingly, the referring court decided to proceed with its request right after the ECJ had already considered several preliminary references, in which it either narrowed[135] or softened[136] its original position, and after it was subjected to criticism from scholarship.[137] Here, the indirect form of influence is evident.

---

[132] Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* EU:C:2008:449.

[133] Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* EU:C:2003:491.

[134] ibid paras 58,80.

[135] Case C-1/05 *Yunying Jia v Migrationsverket* EU:C:2007:1.

[136] Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind* EU:C:2007:771.

[137] Richard Plender, 'Quo vadis? Nouvelle orientation des règles sur la libre circulation des personnes suivant l'affaire Akrich' [2004] Cahiers de Droit Européen 261.

Similarly, in *Collins*, a case which involved an Irish national who unsuccessfully applied for a job-seeking allowance in the United Kingdom, the ECJ departed from its previous case law under which equal treatment as regards social and tax advantages applied solely to workers, while job-seekers only qualified for equal treatment as regards access to employment.[138] The ECJ found that it was no longer possible to a priori exclude the job-seeking allowance from the scope of the principle of equal treatment, although concluding that making such allowance conditional on a residence requirement is nevertheless possible, provided that such a requirement is proportionate.[139] The request for the preliminary ruling was submitted by the United Kingdom's Social Security Commissioner right after the Grand Chamber of the ECJ held in *Grzelczyk* that an EU citizen cannot be refused recourse to the social assistance system of the Member State in which they reside on the basis of their nationality alone.[140]

These examples illustrate that whilst a particular national court may be unsuccessful in convincing the ECJ of the soundness of its opinion, the very opening of the dialogue with ECJ itself uncovers a broader — communicative — dimension of the preliminary reference mechanism. In that dimension, any other EU domestic courts, Member State governments, academics or other actors can join in and together achieve that a particular legal opinion ceases to be followed. All these actors then must be collectively regarded as having contributed to such an outcome, as they would likely not be able to achieve it by themselves alone.

---

[138] Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* EU:C:2004:172, para 64. For previous case law, see Case 316/25 *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* EU:C:1987:302, para 26; Case C-278/94 *Commission v Belgium* EU:C:1996:321, paras 39-40.

[139] ibid paras 63-73.

[140] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458.

Importantly, these examples further serve as proof that the communicative discourse model is a more attractive way to analyse the dialogue within the EU. It assigns to the various stakeholders in the Article 267 TFEU mechanisms roles that go beyond the traditional imaginary of a domestic inquirer and a supranational respondent. Moreover, it is worth noting that while in many of these examples, the referring courts were either unable or even unwilling to convince the ECJ to rule in a particular manner, their orders for reference were, eventually, highly impactful in terms of the development of EU law. Taken from this perspective, the preliminary reference mechanism is – through the discursive interplay of various stakeholders involved – capable of enhancing the democratic legitimacy of the EU's functional constitution.

VII. Conclusions

In this article, we have challenged the prevailing assumptions about the role of domestic courts within the preliminary reference procedure under Article 267 TFEU. The article explored the deliberative potential of judicial dialogue: we argued that the Article 267 mechanism enables Member State courts to subtly influence the EU decision-making in ways that can enhance the democratic legitimacy of the EU's functional constitution.

The principal-agent and team models provide useful but limited insights into the dynamics of the preliminary reference mechanism. Both models rely on a one-dimensional conception of interaction, focusing on the immediate influence national courts exert over the ECJ's rulings. In contrast, our communicative discourse model captures the complexity, multidimensionality, and iterative nature of the process, recognising that preliminary references create a broader legal and political discourse involving numerous stakeholders.

The communicative discourse model restores the normative attractiveness of the judicial dialogue perspective by emphasising the importance of a multi-layered interaction between the ECJ, national courts and a significant

number of other players. Accordingly, the model provides a justificatory framework in which the ECJ's interpretative power appears embedded in a deliberative structure that confers legitimacy through mutual engagement. We have argued that the preliminary reference procedure serves as a complex process, where all actors pursue various goals, and the role of domestic judges' inputs should not be reduced to mere formalities. In our view and contrary to the assumptions of existing scholarship, this model acknowledges – and provides empirical observations of – the potential influence preliminary references can have both on the EU's decision-making process as well as on the behaviour of other relevant players.

Accordingly, we were able to demonstrate that domestic judges may affect the development of EU law in numerous, more subtle ways. We provided examples of requests for preliminary rulings leading to legislative changes, to the establishment of fundamental value principles transferable to other, seemingly unrelated disputes, as well as to the overturning of long-standing jurisprudential considerations. In these circumstances, it is no longer possible to insist on a linear concept of dialogue, based on the relationship between the referring court on the one hand and the ECJ on the other.

At a normative level, our communicative discourse model suggests several implications for the practice of EU adjudication. First, it invites the various stakeholders participating in the preliminary reference procedure (and the ECJ in particular) to treat preliminary references not merely as case-specific questions but as occasions for articulated dialogue with audiences extending beyond the parties to a particular procedure. Second, it supports viewing national courts' use of Article 267 TFEU procedure as part of a democratic channel, thereby reinforcing expectations that they participate actively in shaping the EU functional constitution. Third, the model indicates that EU institutional actors should recognise preliminary references as a locus where judicial interaction might feed into policy-making, which may warrant closer forms of monitoring and follow-up.

This novel perspective not only provides a richer theoretical framework for understanding the mechanism but also offers practical implications for empirical scholarship. Our approach highlights the need for methodological innovation in the empirical study of the influence of domestic courts on the EU's decision-making. Future research should consider alternative approaches that account for the context-dependent and subtle ways in which these opinions can shape the outcomes of EU judicial proceedings. This could involve in-depth case studies, interviews with judges, or other qualitative methods that can better capture the complexities of judicial interaction within the EU. Overall, the ECJ itself publishes orders for references (although, in some instances, in a shortened form), written statements of case, and written observations submitted by an interested person on the official website.[141]

It is not our claim that each and every preliminary reference carries inherent deliberative value. Indeed, the deliberative impact remains contextually variable: it peaks in high-stakes constitutional disputes or politically sensitive cases, while remaining lower in other instances. Yet, we hope to have shown that even non-landmark references can contribute to the development of EU law.

In conclusion, the Article 267 TFEU mechanism is not merely a platform for hierarchical interaction between domestic courts and the ECJ. It is a sophisticated ecosystem that reflects the pluralistic and cooperative nature of the EU legal order. National courts are far from passive participants; they have the capacity to shape EU law in subtle ways, influencing legislative, political, and jurisprudential developments in ways that extend well beyond the immediate cases they bring to Luxembourg. Indeed, the dialogue is still alive.

[141] Protocol (No 3) to the TEU on the Statute of the Court of Justice of the European Union [2016] OJ C202/210, art 23.