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Foreword: Access

Brian Leung[1]

> *"A capacity and taste for reading gives access to whatever has already been discovered by others. It is the key, or one of the keys, to the already solved problems. And not only so. It gives a relish, and facility, for successfully pursuing the [yet] unsolved ones."*
>
> *-Abraham Lincoln*

The Queen Mary Law Journal (QMLJ) has become an important forum for doctoral research associates at Queen Mary University of London Law School to peer-review, collate and publish quality scholarship in the legal arena on an annual basis. In this issue, QMLJ consolidated initiatives from previous years and extended our collaboration with *Arts Law* to include non-literary work in our publication. We also expanded QMLJ to include a case note and book review, alongside journal articles across a range of specialisms. To reflect our theme, we have decided to broaden the reach of QMLJ as an open access journal and will host our issue on the Open Journal System alongside our existing channels.[2]

In this issue, QMLJ published an open call for submissions on an all-encompassing theme – 'access'. Our decision to incorporate creative submissions under a broad theme is to reflect the observation that law itself is interdisciplinary and fluid in character. It is thereby insightful to examine the legal discourse through liberal interpretations that venture beyond the constraints of black-and-white legal discussions.

We received strong interests from legal scholars specialising in a diverse range of topics: from accessing sexual education via parenting to accessing Covid-19 vaccines, from accessing the European art market through the lens of post-colonialism to accessing the legal system itself from the perspective of gender inequality. Alongside, our case note discusses access to international trade through the lens of the 'most favoured nation' clause, and our book review

[1] Dr. Brian Leung from Queen Mary University of London is currently working on two books: 'Copinger and Skone James on Copyright' and 'Copyright and the Public Interest' with Professor Uma Suthersanen and Professor Gillian Davies. As tutor for the EUIPO Pan-European Seal Programme, his team won best research paper (*cf.* IP and dance) in 2023. Brian completed his PhD at Queen Mary University of London (QMUL), LLM (IP law) at University College London (UCL) with distinction, and LLB (hons) at University of Birmingham with Excellence Scholarship. In addition, he completed the final vocational stage of training to become a qualified solicitor in England & Wales. As part of the qualification, he received an MSc in Law, Business and Management from the University of Law. He was elected an associate fellow of the Higher Education Academy in 2023.

[2] Queen Mary Law Journal's website can be accessed via https://www.qmul.ac.uk/law/research/journals/qmlj/.

systematically examines the notion of adopting open access as one of the tools to break research publication barriers.

I would like to thank our dedicated editorial board, peer reviewers and article editors. A special token of thanks to our executive editor, Uchechukwu Oluwatosin Ani – working with you is enjoyable and inspirational. My same gratitude extends to Luisa Herrera and Zoe Asser (deputy peer review editors), Jude Mbonu and Barasha Borthakur (deputy articles editors), and Marcela Martinez (communications manager). They are enthusiastic PhD research associates at Queen Mary University of London, whose unwavering hard work has made this issue possible.

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Overparenting Sexual Education: The Need for A Control Mechanism

Bruno Andreoli Vargas de Almeida Braga*

Abstract. *The article contributes to educational literature by proposing a model aimed at identifying in which specific occasions parental interference on children's Sexual Education becomes overparenting. Comprised of four sections, the article first dissects the main duties of each stakeholder on the topic of child protection in the educational field. After demonstrating how international covenants are built upon open-ended language that does not address the clashes between parental powers and schoolchildren's education, the article proceeds to argue that legal gaps found in the international sphere stimulate the pervasiveness of overparenting at the detriment of schoolchildren's development. In the closing sections, after concluding in favour of protecting children's sexual education from prohibitive hyper-parenting, the article proposes a mechanism aimed at identifying manifestations of overparenting on schoolchildren's activities.*

1. Setting the definitions: general remarks on the clashing trend of overparenting and the right to formal education

The article's main objective is to raise awareness of the importance of protecting children's right to have access to Sexual Education, on a day-to-day basis, to the benefit of many different aspects of their lives. As this study unravels, overparenting gradually reveals itself as a much invasive – and prohibitive practice. This article will argue that it has gained prominence as a meaningful guise through which parents (supported by other stakeholders, such as schools and educators) can curtail schoolchildren's rights to be socialised under the value of respect for diversity and form their own views on matters of social importance without prejudice and intolerance. Before delving into the matter of how overparenting has become a dangerous tool to children's social rights and what can be proposed as an efficient mechanism to protect them from such pervasive interference, the article must first engage with the main concepts on this issue. To do so, the following sections set the context in which the concepts of overparenting and formal education are usually found in close proximity. As this interaction develops in an incredible and accelerated pace, the study demonstrates how the "risk-aversion" discourse (in which Sexual Education is currently being inserted) has become a key factor influencing Overparenting in many different societies.

i. Defining Overparenting

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Overparenting constitutes a social tendency of perceiving children as vulnerable individuals whose helplessness in the face of adversity demands hyper-constant supervision and guidance.[1] In other words, overparenting can be summarised as a set of different manifestations of parental well-intended behaviours taken to an excessive degree, seeking to fulfil children's well-being while keeping them out of harm's way.

After conducting a deeper examination on overparenting, Gagnon and Garst argue that this phenomenon cannot be reduced to a unique set of behaviours, as it encompasses different forms of parental manifestation. With reference to various emerging bodies of research, the scholars move on to conclude that albeit each manifestation of overparenting may be driven by dissimilar causes and contexts, they all converge to one clear-cut consequence: high rates of adult involvement in children's lives.

For instance, the different constructions on the phenomenon suggest that the parental behaviours coined as overparenting can emerge, on specific occasions. They may manifest either in the form of psychological control, demarcated by parental behaviours that are intrusive and manipulative of children's thoughts, feelings and attachment to parents[2] or more closely related to other parenting manifestations of authoritarian behaviours. These would include behaviours such as physical control, monitoring, and direction over child behaviours.[3] And yet in another example combining different studies, Gagnon and Garst illustrate how many situations and behaviours can be traced back to the concept of overparenting:

> "*for example, parents who engage in overparenting tend to monitor and/or involve themselves at higher levels in their child's physical and digital lives (*[as pointed by] *Hong et al. 2015; Kelly et al. 2017; Willoughby et al. 2015). These excessive monitoring and controlling parental behaviors* [can either be] *related to parent anxiety (*[according to *Segrin et al. 2013)* [or] *associated with risk aversion (Segrin et al. 2015),* [which is well demarcated by parents' main objective] *to protect their child from* [hazardous or frustrating

[1]Gaia Bernstein, Zvi Triger, 'Over-parenting' (2011) 44 University of California Law Review 1221, 1275.
[2]Laura Padilla-Walker, Larry Nelson, 'Black hawk down? Establishing helicopter parenting as a distinct construct from other forms of parental control during emerging adulthood' (2012) 35(5) Journal of Adolescence, School of Family Life, Brigham Young University, 1177, 1178.
[3]Holly Schiffrin, Hester Godfrey, Miriam Liss, Mindy Erchull, 'Intensive parenting: does it have the desired impact on child outcomes?' (2015) 24 Journal of Child and Family Studies, 2322, 2324.

> events, such as] *academic failure, physical danger, social harm and contact with nature (*[as provided by the study of] *Gagnon and Garst 2019; Hong et al. 2015)*".[4]

Such examples of parental involvement, despite having its positives, can also create dire consequences to the child's own development. Such side effects of overparenting seem to have become a consensus among many scholars. As Gagnon and Garst stress, this tendency to perceive children as a target of adult control comes with a high cost. According to the authors, as parental monitoring becomes excessive, thus defining the practice as exaggerated (such feature explains the use of the prefix -*hyper*[5] by many scholars[6] instead of the prefix -*over* to define those parents hyperinvolved,[7] overly attentive and protective of their children), "*the combination of overparenting behaviors and related constructs such as parental anxiety often results in a reduction of a child's well-being*".[8] Taking for example the matter of sexual initiation in early adolescence, Browning et *al* argue that the amplification of parenting tools used in the discovery of dangers can hinder children's wellness. After putting the matter of adolescent sexual behaviour under scrutiny, the scholars' conclusion is twofold:

> "*parenting practices may modulate the impact of neighborhoods on children's well-being. Youth whose parents insulate them from external environments are less likely to suffer the negative consequences of exposure to disadvantaged neighborhoods (*[according to] *Furstenberg et al. 1998; Kupersmidt et al. 1995).* [In fact,] *research on parenting more generally has shown that parent-child relationship characterised as warm and supportive are associated with a lower risk of adolescent problem behavior (*[as pointed by] *Miller*

[4]Ryan Gagnon, Barry Garst, 'Examining Overparenting and Child Gender in Adolescence' (2019) 28 J Child Fam Stud, 2876, 2877 (Gagnon I). *See also,* Chris Segrin, Alesia Woszidlo, Michelle Givertz, Neil Montgomery, 'Parent and child traits associated with overparenting' (2013) 32(6) Journal of Social and Clinical Psychology, 569–595; Chris Segrin, Michelle Givertz, Paulina Swaitkowski, Neil Montgomery, 'Overparenting is associated with child problems and a critical family environment' (2015) 24(2) Journal of Child and Family Studies, 470–479; Jon-Chao Hong, Ming-Yueh Hwang, Yen-Chun Kuo, Wei-Yeh Hsu, 'Parental monitoring and helicopter parenting relevant to vocational student's procrastination and self-regulated learning' (2015) 42 Learning and Individual Differences, 139–146; Brian Willoughby, Joshua Hersh, Laura Padilla-Walker, Larry Nelson, 'Back off! Helicopter parenting and a retreat from marriage among emerging adults' (2015) 36(5) Journal of Family Issues, 669–692; Lynne Kelly, Robert Duran, Aimee Miller-Ott, 'Helicopter parenting and cell-phone contact between parents and children in college' (2017) 82(2) Southern Communication Journal, 102–114; Ryan Gagnon, Barry Garst, 'Exploring overparenting in summer camp: adapting, developing, and implementing a measure' (2019) 22(2) Annals of Leisure Research, 161–182 (Gagnon II).

[5]*Greek root* meaning "*over, above, beyond*," and often implying "*exceedingly, to excess*", "*hyper*" can be described as a key morpheme used in English vocabulary as a word-forming element used to characterise verbs and nouns as being "*overmuch, above measure*", hence emphasising the act or effect of being "*overly*" active, making things in an "*excessive*" way. For instance, the idea of being hyper, for instance a hyperactive parent, is often associated to a person who is overexcited, overstimulated, seriously or obsessively concerned, fanatical, rabid (explanation based on the definition found at https://www.dictionary.com/browse/hyper and https://www.etymonline.com/word/hyper-; last viewed 10 July 2023).

[6]David Pimentel, 'Protecting the Free-Range Kid: Recalibrating Parents' Rights and the Best Interest of the Child' (2016) 38(1) Cardozo Law Review 1, 05.

[7]Alesia Woszidlo, Neil Montgomery, Michelle Givertz, 'Parent and Child Traits Associated with Overparenting' (2013) 32(6) Journal of Social and Clinical Psychology 569, 590.

[8]Gagnon I (n 4) 2877.

> *1998; Steinberg and Silk 2002).* […] *At the same time, highly supervised youth will not experience the benefits offered by neighborhoods with rich social and institutional resources*".[9]

In the same line of reasoning is Pimentel, to whom "*today's coddled kids not only lose a sense of discovery and exploration when they are kept home and under nonstop adult supervision, they are deprived of an opportunity to develop self-sufficiency and or to learn to take responsibility for themselves*".[10]

Bernstein and Triger highlight two phenomena that helped spread overparenting.[11] Firstly, the popularisation of digital gadgets, which have facilitated parental engagement in the digital era. Secondly, as such integration increased in the last couple of decades, the ever-expanding technological world has been helping parents engage in the task of monitoring and intervening in their children's lives, as they offer efficient mechanisms to help flag potential new safety risks to their healthy development. As Pimentel[12] and Triger[13] illustrate, rising media coverage of potential risks faced by children encourage parents to err in favour of hyper-protective styles. Consequently, alarmist reports encouraging intrusive child-rearing practices feed a cyclical process normalising "*safety constraints imposed by hovering parents*" at the detriment of children's capacities, such as "*creativity* [and] *enjoyment*".[14] Therefore, it is safe to conclude that despite its underlying benefits, Overparenting also presents a major drawback, that of perpetuating a form of intrusiveness that harms children's development and autonomy.[15]

Despite correctly depicting the negative outcomes of overparenting, such as the difficulty faced by children dependent on "*parental hand-holding*" in dealing with unanticipated challenges in life,[16]

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[9]Christopher Browning, Tama Leventhal, Jeanne Brooks-Gunn, 'Sexual Initiation in Early Adolescence: The Nexus of Parental and Community Control' (2005) 70(5) American Sociological Association Review 758, 760-1. *See also,* Janis Kupersmidt, Pamela Griesler, Melissa De Rosier, Charlotte Patterson, Paul Davis, 'Childhood Aggression and Peer Relations in the Context of Family and Neighborhood Factors' (1995) 66(2) 360-375; Brent Miller, "*Families Matter: A Research Synthesis of Family Influences on Adolescent Pregnancy*" (1st edn., National Campaign to Prevent Teen Pregnancy, Washington, DC, 1998)*;* Frank Furstenberg, Thomas Cook Junior, Jacquelynne Eccles, Elder Glen, Arnold Sameroff, "*Managing to Make it: Urban Families in High-Risk Neighborhoods*" (1st edn., University of Chicago Press, 1999); Laurance Steinberg, Jennifer Silk, 'Parenting adolescents' in M. H. Bornstein (ed.), *Handbook of parenting: Children and parenting* (1st edn., Lawrence Erlbaum Associates Publishers, 2002) 103-133.
[10]Pimentel (n 6).
[11]Bernstein (n 1) 1228-30, 1275.
[12]Pimentel (n 6), at 20.
[13]Zvi Triger, 'The Darker Side of Overparenting' (2013) Utah Law Review 284, 285.
[14]Pimentel (n 6) 3.
[15]Bernstein (n 1) 1275.
[16]Pimentel (n 6) 10.

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Pimentel draws his assertions mainly from the adult's perspective. According to him, validating overparenting as the prescribed child-rearing format undermines parents' right to raise their children according to their convictions:

> "[…] *the enforcement of overprotective parenting norms in society is, at worst, a gross violation of the constitutional rights of parents, and at best, a severe chilling of those rights. The legal system, therefore, is taking sides in the debate over what constitutes ideal parenting and, through individuals purporting to act in the best interests of children, is bullying parents into adhering to hyper- protective parenting norms"*.[17]

This approach, however, does not fully serve this study's intended purpose, as it impedes a thorough examination of how hyper-parenting negatively affects children's own social dynamics, which represents the main objective of the present study. Therefore, in order to depart from the purely adult approach of overparenting and reach a critical analysis of the issue that relocates children back to the centre of the debate, this study waives Pimentel's approach and analyses the issue of intrusive parenting from a child's legal standpoint. By adopting this methodological framework, the present article aims to investigate, among other issues, if this noxious trend conveyed as hyper-parenting (also known as *overparenting*, *helicopter parenting* and *parenting out of control*)[18] has the capacity to pervade the educational sphere and curtail children's rights within.

In these preliminary lines, this study has shown that overparenting is used to qualify parents who are overexcited with the task of exercising their parental powers in favour of their children, but whose overstimulation tacitly forces them to exceed such duties in an overly active and often negative way. In other words, by becoming obsessively concerned with their children's mental and physical integrity, the so-called hyper-parents end up intervening in their lives at the detriment of their own developing interests.

Overparenting is not unique to specific child-rearing scenarios as it can manifest through many different forms. In fact, hyper-parenting pervades multiple aspects of children's lives during different childhood stages, including their education. For instance, overparenting is often associated with parents seeking to protect their children's integrity from potential risks. This

[17]ibid 5-6.
[18]Woszidlo (n 7) 570.

happens when parents forbid children from walking unaccompanied to school.[19] The phenomenon of hyper-parenting can also affect children's individuality, when overzealous parents offer high levels of assistance on daily activities, such as school homework.

> "*in particular, four dimensions of parenting behavior have been described as characterizing overparenting parents (Segrin et al. 2012)* [one of which is] *high levels of tangible assistance (i.e., helping out with the practical issues of paying bills and providing transport, and doing day-to-day chores such as cooking and laundry)*".[20]

Such examples allow me to draw the existence of two constitutive elements of overparenting: (a) pernicious consequences to children's development[21] caused by (b) overly-intrusive parental behaviours.[22] Developing the analysis of the wide-ranging contexts in which overparenting can manifest, Part 1*(ii)* explores the definition of education with a view to setting the grounds for the debates established in the subsequent parts of this study; that of how overparenting overlaps with Sexual Education and how this association impacts children and society. After claiming that hyper-parenting children's education can also qualify as a form of overparenting, the article concludes by proposing a model that helps decision makers identify abusive parenting actions towards children's sexual education.

However, before reaching such conclusions, this study is preceded by the following steps, methodologically engaged as follows. After reflecting on overparenting and education (Parts 1, *(i)*, (*ii)*), the study moves on to Part 2*(i)*, which briefly dissects the role of stakeholders with a stance on education, followed by an examination of the importance of restraining State's education prerogatives (Part 2*(ii)*). Moving on to address the question of how parental control can hamper children's right to Sexual Education, Part 3*(i)* dissects the benefits of Sexual Education, while Part 3*(ii)* investigates how parental opposition to Sexual Education can constitute overparenting. Finally, after examining the importance of also restraining academic freedom (Part 3*(iii)),* the study calls for the protection of Sexual Education against overparenting by drawing a mechanism

[19]Pimentel (n 6) 21.
[20]Miri Scharf, Sofie Rousseau, Sujood Bsoul, 'Overparenting and Young Adults' Interpersonal Sensitivity: Cultural and Parental Gender-Related Diversity' (2017) 26 J Child Fam Stud 1356, 1356. *See also,* Chris Segrin, Alesia Woszidlo, Michelle Givertz, Amy Bauer, Melissa Taylor Murphy, 'The association between overparenting, parent-child communication, and entitlement and adaptive traits in adult children' (2012) 61(2) Family Relations 237–252.
[21]Scharf (n 20) 1357.
[22]Woszidlo (n 7) 571.

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that helps identify manifestations of intrusive parenting on schoolchildren's day-to-day activities (Parts 4(i) and (ii)).

ii. The legal framework of education

Formal education is provided by the State in the form of institutionalised educational systems. Also known as *narrow sense education*,[23] it involves teaching pedagogical-oriented academic knowledge (i.e. literacy) as well as pragmatic lessons on how to reach informed decision-making in life. Although learning is also sought within the broader concept of "*non-formal education*", focus is hereby given to formal education.

A number of provisions have a bearing on the right to formal education. Within International Child Law, Articles 28 and 29 of the United Nations Convention on the Rights of the Child ("UNCRC") stand out. Underlying Article 28(1) subparagraphs (a) to (e) is States' obligation to promote education by investing in the creation and maintenance of educational infrastructures. This provision is read with Article 29(1), according to which the task of fomenting formal education through public infrastructure must be directed to fulfilling five educational goals including:

> (a) *The development of the child's personality, talents and mental and physical abilities to their fullest potential*;
> (b) *The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations*;
> (c) *The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own*;
> (d) *The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin*;
> (e) *The development of respect for the natural environment*".

Whilst its subparagraph (b) demands that schools promote children's human rights, subparagraph (d) mandates that they raise children to participate in society in the spirit of understanding and tolerance.[24]

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[23]Klaus Beiter, *"The Protection of the Right to Education by International Law: including a systematic analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights"* (1st edn., Martinus Nijhoff Publishers, 2006) 19.
[24]United Nations Committee on the Rights of the Child, '*General Comment 01: The Aims of Education'* CRC/GC/2001/1, para 01.

By its turn, under the broader frame of International Human Rights Law, the educational goals are enshrined in Article 13(1) of the International Convention on Economic, Social and Cultural Rights ("ICESCR"), as follows:

> "*the States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace*".

The Committee on Economic, Social and Cultural Rights, in the capacity of institution overseeing the implementation of the ICESCR through its consideration of reports, general comments and substantive statements, interprets such provision as prescribing education as a tool through which stakeholders within the formal educational sphere, such as educators, can inculcate respect for diversity and provide wide-ranging education that enables children's full participation in society.[25] This study addresses Articles 29(1) and 13(1) conjointly because, as will be shown in Part 3, it is the child's right to be socialised under the value of respect for diversity that is the breeding ground for conflict between parenting and Sexual Education.

Education also dialogues with other UNCRC provisions. That is so because, as an empowering right, education is the tool through which children exercise fundamental freedoms.[26] Thus, while indispensable for the *fullest development* of children's potencies (Article 6(2)), education enables them to *impart information* on multiple issues (Article 17), and *develop their opinions* accordingly (Articles 13(1)). Finally, education associates with *freedom of expression* (Article 12(1)) by offering the means through which children can consistently express their views according to their emerging *conscience* (Article 14(1)).[27]

[25]Committee on Economic, Social and Cultural Rights, '*General Comment 13: The Right to Education'*, E/C.12/1999/10, para 04.
[26]Beiter (n 23) 28.
[27]Betsy Levin, 'Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School' (1986) 95(8) The Yale Law Journal 1647, 1648, 1678.

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2. Setting the grounds for the debate – how State manipulation and parental control interact

i. Stakeholders

Before engaging with the way in which parental control and State manipulation interact with each other in the educational field and how a mutual surveillance between them could be put in place on behalf of children's interests, this study firstly establishes the basis and limitations of each of the stakeholders' prerogatives, rights, and responsibilities in the matter of children education.

Apart from providing the public funds and infrastructure through which formal education is allowed to thrive, States must monitor if schools fulfil the objectives established in UNCRC Article 29(1). According to the UNCRC Committee, States parties must develop a comprehensive national plan of action to promote and monitor realisation of the objectives of Article 29(1).[28] Such duty of enhancing the effectiveness of the implementation of children's education originally derives from an authority belonging to parents, upon whom lies the responsibility of directing children's upbringing in a way that enables the enjoyment of their rights (UNCRC Article 5).[29] However, since not all parents have the resources needed to provide formal education,[30] the authority over it is delegated to the State, who must manage education's correct functioning as part of its broader obligation of assisting parents' child-rearing duties (UNCRC Article 18(2)). As Lundy correctly argues:

> "*there are few areas where the private and public dimensions of family life converge to such an extent as when a parent sends his or her child to be educated in a state school. In doing so, parents are passing a crucial degree of influence over their child's development to an outside agency*".[31]

Such dynamic is founded on UNCRC Article 14(2), according to which "*States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*". Such legal norm could have undoubtedly benefitted from a more assertive wording. That is so because when it comes to children's education, public and private spheres are

[28]United Nations Committee on the Rights of the Child, note 24, paras 22-3.
[29]Beiter (n 23) 21.
[30]Erik Zimmerman, 'Defending the Parental Right to Direct Education' (2005) 17 Regent University Law Review, 311, 316.
[31]Laura Lundy, 'Family Values in the Classroom? Reconciling Parental Wishes and Children's Rights in State Schools' (2005) 19(3) International Journal of Law, Policy and the Family 346, 346.

often found entangled in major conflicts. It is well-established that schools continue at the service of parental child-rearing duties,[32] as parents remain primarily responsible for directing children in the exercise of their rights. However, it must also be acknowledged that such delegation is not free of debates at the political level, as parental values are not always aligned with the ones continuously incentivised within the public educational system. Amongst such multiple issues, the one involving religious education in schools is often raised as an example of how "*education on offer in the state school system may not be fully in accordance with* [parents'] *wishes for their child*", often resulting in "*conviction-based objections as to which school they would like their children to attend*".[33]

Although a detailed investigation on the ways in which divergences between family beliefs and public values emerge nowadays departs from an adult-centric perspective which is out of this study's scope,[34] one must acknowledge, at least at the doctrinal level, that the wording of Article 14(2) is not sensitive to such practicalities. As Lundy argues, this issue gives rise to the need for a model aimed at balancing with greater precision not only parents' wishes against the broader public values, but also children's own interests and rights at stake at schools. Only then it will be possible to build a constructive and practical method of anticipating possible clashes and preparing authorities (and society as a whole) to deal with them in a way that "*supports and protects the family unit and the diversity of beliefs which families embrace within the state education system*".[35]

As practice reveals in numerous occasions of conflicting interests, this study is more concerned with the legal tools put at the disposal of stakeholders (that is, parents, public institutions, and educators) to protect children's interests in the educational field while allowing them to foster a spirit of compassion and understanding in a healthy and respectful environment. As stated previously, States must adopt whatever educational techniques that is available to create "*a positive impact in achieving the rights recognised in the Convention*" while at the same time

[32]Philippe Gaudin, 'Neutrality and impartiality in public education: the French investment in philosophy, teaching about religions, and moral and civic education' (2017) 39(1) British Journal of Religious Education,93, 97.
[33]Lundy (n 31) 347.
[34]The topic of clashing interests between the family unit and public values often gives rise to complex debates, as it can expand infinitely, ranging from religious beliefs to cultural values and political ideology. *See* Gaudin (n 32).
[35]Lundy (n 31) 367.

fighting sensitive incidents often present in the classroom, such as "*racism, racial discrimination, xenophobia and related intolerance*".[36]

On the other end, parents also have an important role to play in child protection in the educational system, which brings into question the definition and limitations of parental guidance. In the educational field, parental guidance means, among other prerogatives, influencing the form and substance of what is taught in school in a way that protects children's upbringing but also respects the family's "*cultural identity and values*" (UNCRC Article 29(1)(c)).[37] Parents' right to direct formal education thus means, on the one side, certifying that no malfunctioning learning arrangements hamper children's education and the rights derived therein,[38] and on the other, supervising schools' functioning, so to confirm that lessons do not distort family's beliefs.[39]

Finally, as regards educators, they must apply their pedagogical expertise to enhance children's learning capacities in the theoretical and practical field of academic instruction. This claim, however, brings into question a normative debate as to teachers' academic freedom at school. The lack of legal reference to the subject in the UNCRC is supplemented by Articles 18(1) and 19(2) of the International Covenant on Civil and Political Rights.

According to Beiter, academic freedom is defined as educators' entitlement to hold particular thoughts on how to exercise their profession with autonomy.[40] Within the classroom, this translates into freedom to choose the best pedagogical materials to transmit knowledge and the best learning processes to encourage children to develop their own consciences.[41] Such duties dialogue with children's educational rights, enshrined in Articles 18(1) and 19(2) of the International Covenant on Civil and Political Rights ("ICCPR"), as follows:

> Article 18(1): "*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching*".

[36]United Nations Committee on the Rights of the Child, note 24, para 24.
[37]ibid para 6.
[38]Committee on Economic, Social and Cultural Rights, note 25, para 37.
[39]ibid para 28.
[40]Beiter (n 23) 484.
[41]ibid 485.

> Article 19(2): "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*".

The question as to how children's rights should restrain academic freedom is explored in more detail in Part 3*(iii)*. For now, this study concentrates on evincing how parenting intersects with stakeholders' prerogatives. This section revealed a concerted set of rights and duties distributed among different stakeholders and organised in a scheme of check and balances that, although not free of conflicting intersections, are aimed at optimising children's education. States plan educational programmes and execute them in light of school's socialising function. Complementarily, educators direct their pedagogical expertise towards children's academic and practical education, in a way that empower their rights. Lastly, parents supervise the educational system, holding School and educators accountable for potential deviations hindering children's education and family values.

In the junction between non-formal education and Overparenting, Pimentel[42] and Zimmerman[43] defend parental autonomy in directing children's upbringing. According to them, parents must raise their children as they see fit, because they are better positioned to instil the learning necessary to meet children's developmental needs. In fact, the limits and prerogatives of parental powers within formal education is paramount to protect children from absorbing intolerant values in the classroom. The next section proves the importance of parental supervision of State actions in the educational field by giving practical examples of how the lack of proper parental surveillance negatively impacts children's upbringing.

ii. State manipulation

During World War II, the interference of the Japanese Imperial regime in formal education was notorious, with poor educational programmes pervading the school environment.[44] Dictated by the needs of wartime, educators were instructed to "*bring children into the service of the state*" by appealing to their potential military force.[45] As a result, children were specifically encouraged to

[42]Pimentel (n 6) 5.
[43]Zimmerman (n 30) 343.
[44]Sharalyn Orbaugh, 'Play, Education or Indoctrination? Kamishibai in 1930s Japan' (2018) 11(1) University of Minnesota Press, 65, 87.
[45]ibid 74.

become superior students in preparation for military service.[46] In such context, all collective values, such as compassion and respect, were fostered within the classroom only to the extent that it favoured wartimes efforts. As a result, such *modus operandi* reduced to an infinitesimal figure the potential range reached by such values in democratic societies where dialogue and compassion prevails at the detriment of violence and intolerance:

> "*the play promotes virtues that might be seen in educational material for children of any time and place: fraternal love and loyalty, generosity, kindness toward others who are in difficult situations, bravery, and cleverness. But here those virtues are framed within the larger wartime rhetoric of patriotism and concern for the important role that the home front performs in supporting the spirits of soldiers. Plays like the ones discussed so far performed the dual purpose of teaching young children how to behave properly under the circumstances of war (even if the war was not mentioned) and— through the affective impact of their sweet innocence— heightening the motivation of any adult who happened to see them to continue working hard to bring the war to a successful conclusion for the sake of children like the young protagonists*".[47]

A similar indoctrinating trend can be identified during the Spanish Francoist regime (1936-1975). In order to perpetuate the values favourable to the ruling power, schools promoted intolerance against religious and political plurality.[48] According to Capelato, the incitement of violence through hate speeches found in childhood fertile ground, as children's inclination to absorb instructions[49] facilitated the inception of indoctrinating lessons:

> "*the Francoist rule, mainly in its first decades, exerted a strong control upon education* […] *based on the premises that supported the regimen: authority, hierarchy, order, abeyance, fear and devotion* […]. [Such tools] *contributed to construct an excluding national identity based on* […] *hatred for the enemies of the religion and of "mother Spain*"".[50]

In this context, schools encouraged children to "*give their lives to Spain if needed*", teaching that violating "*basic norms of civility*" was acceptable and even recommended if it meant destroying national enemies.[51] Lastly, children learned to glorify Christian morals as the only paths to a

[46]ibid 76-8.
[47]ibid 85.
[48]Maria Capelato, 'Ensino Primário Franquista: os Livros Escloares como Instrumento de Doutrinação Infantil' (2009) 29(57) Revista Brasileira de História, 117, 121.
[49]ibid 136.
[50]ibid 117.
[51]ibid 122-5, 140.

thriving nation. This meant teaching boys the values of patriarchal power and girls the roles associated to women, such as housekeeping and motherhood.[52] This indoctrination is not unique to Spain. During the Brazilian Dictatorship (1937-1945), similar patterns of education-coerced expressions of orthodox beliefs were also identified. As part of children's civic formation, schools taught the importance of physically and ideologically repelling opposing political views. These state-sponsored forms of socialisation at schools included lessons such as the promotion of death penalty as an acceptable instrument to protect public security and military drills as part of children's educational habits.[53]

> "[…] *the use of school materials as ideological devices of totalitarian governments* […] *under the Vargas government in Brazil* […] *showed the power of indoctrination of schools* [specially through sources such as] *school exercise books, books, school newspapers, photographs, flyers, legislation and objects from material culture*".[54]

The Brazilian and Spanish scenarios share similarities with Egypt's education. During the Mubarak regime (1981-2011), intense references to nationalist values helped transform education into a "*powerful political propaganda tool*" serving the ruling power.[55] Rather than addressing social problems, the government financed textbooks that endorsed traditional-based educational *syllabi* at the expenses of plural education.[56] For instance, gender equality remained unaddressed in school books for being allegedly harmful to the public. Rather than promoting it, schoolchildren were taught to adjust into society according to preconceived "*gender-biased social values*" through children's literature specially designed to undermine female readers.[57] Put simply, by tailoring a:

> "*manipulated cultural consciousness through the virtual world of the book, the* [Egyptian] *government hoped to control and indoctrinate its readers with its view of reality. The premise is that children will internalize the submission to certain values because they have been conditioned to accept them through their reading. These results are achieved without depicting hostility or violence toward children; rather, books use powerful yet subtle*

[52]ibid 132.
[53]Ademir Valdir dos Santos, 'Escritos sob os Regimes Políticos de Vargas e Mussolini: Para uma Fascistização da Infância?' (2013) 14(34) Revista Brasileira de História e Educação, 165, 183-5.
[54]ibid 165.
[55]Muhammad Masud, 'Relocating the Roots of the Arab Spring in Children's Literature: Indoctrination and Political Socialization in Mubarak's Egypt' (2013) 12 Sarkofa 6, 8.
[56]ibid 13.
[57]ibid 16.

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> *psychological or emotional forces to reach or influence children, such as the shame of disappointing an authority figure*".[58]

These examples share a pattern of state-sponsored *curricula* favouring intolerant forms of education instead of providing for children's healthy socialisation. As Masud argues, and this study subscribes, in an authoritarian State where government controls the means of formal education, oppressed citizens often view themselves as unworthy of many rights considered unnegotiable in democratic societies, such as the right to speak freely on matters concerning their interests and impart information of different sources.[59] The above examples are key to help understand how governments, when left free of constraints by society, become oppressive regimes able to influence educational agenda in a way that normalises fear for authority over free education.

The cases also help project how parental control could have helped avert such pernicious risks to public schooling. In Japan, in the occasions where parents challenged their children's conscription, their contention was engulfed by the "*rhetoric of patriotism*".[60] In Spain, parental supervision could have counteracted State's violence-based indoctrination. However, parental guidance was also unrealistic, as schools were strictly controlled by the authoritarian regime.[61] Absence of parental control also allowed political manipulation over education to thrive in Brazil at the detriment of children's balanced development. Raising children to repel plurality with the use of force helped normalise violence as a form of settling disputes and social conflicts. The same conclusion can be drawn from the Egyptian case. By depriving the possibility of contacting different sources and opinions, schools not only indirectly valued intolerance, but also hindered children's right to form their own views on matters of social relevance. Therefore, in the long-run, children growing up in authoritarian regimes learn to respect and fear authority as immaculate values. However, at the time when this agenda thrived, little space was left for parental control, which was constantly undermined by the oppressive regime in place.

This section has benefitted from key examples to illustrate the importance of parental control in children's upbringing. The parental right to direct education is most needed, because children's evolving critical judgement is not yet able to provide enough lucidity to filter positive from

[58]ibid 17.
[59]ibid 14.
[60]Orbaugh (n 44) 85.
[61]Capelato (n 48) 123.

negative choices and project their outcomes in every situation.[62] This proneness to assimilate external factors uncritically stems from children's *plasticity*, characterised by their cognitive sensitiveness enhanced by their neurological system still being on the peak of evolvement.[63]

Juxtaposing the examples with the above normative claim that children lack enough lucidity to entirely support autonomous decision-making without involuntarily absorbing negative factors in the learning process, this section argues that parental guidance is most needed to avoid children's exposure to pernicious educational programmes. As illustrated above, without parental surveillance, educational deviations often find a fertile ground to thrive at the detriment of schoolchildren's developmental needs. Therefore, considering that parental guidance is crucial to supplement children's insufficient capacity and counteract their exposure to noxious influences, parental supervision over the setting and execution of educational programmes is paramount to protect their healthy upbringing. In other words, using the example of the influence of authoritarian regimes over education helps prove how important it is to reinforce the responsibilities of parents in the "*check and balances*" task of controlling State's prerogatives within the educational sphere. Unfortunately, however, the theory behind parental control over State's responsibilities in the educational field might prove innocuous in practice depending on the circumstances of the factual political scenario under scrutiny.

However, parental control is not only susceptible to fractures on a public level, such as the ones created by the oppression imposed by authoritarian regime over the private sphere. On the contrary, as the next section argues, parents, like governments, can also end up hampering children's education instead of helping protect them from the malfunctioning of other stakeholders' roles. With support on the example of Sexual Education, the following topics reveal how intrusive parenting impedes children from contacting different ideas and forming their views according to their lawful right to seek their own interests and conscience.

[62]Zimmerman (n 30) 315-6.
[63]Anne Park, Allyson Mackey, 'Do Younger Children Benefit More From Cognitive and Academic Interventions? How Training Studies Can Provide Insights Into Developmental Changes in Plasticity?' (2021) 16(1) International Mind, Brain and Educational Society and Wiley Periodicals 24, 25.

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3. Establishing the issue – the trend of Overparenting children's education

This section starts by contending that the collision of interests between children and parents exist mainly because international covenants do not offer clear-cut answers as to how parental responsibilities are limited *vis-à-vis* children's education. Only briefly does the law refer to this subject. According to ICESCR Article 13(3), parents are free to "*choose* [their children] *schools*", as long as they conform to "*minimum educational standards*" which, it was argued above, encompass the goals of tolerance and understanding. A second contention advocates that the *best-interest* principle (UNCRC Article 3(1)) constitutes, albeit implicitly, a limiting provision to parental control.[64]

However, both provisions are couched in vague terms which fail to expressly indicate when an act of parenting hinders children's education. Due to the lack of clarity with regards to parental abusiveness in schools, decisionmakers are left to question when children's education merits protection from their parents. The foregoing sections support the normative claim that the limits of parental powers demand legal scrutiny. By demonstrating how overparenting sexual education unravels in practice, this study defends the need to raise awareness over the importance of safeguarding sexual education. In the last subsection (iii), Part 3 addresses how educators can harm children's wellness under the guise of teaching Sexual Education.

i. Sexual Education

Part 1*(i)* illustrated the tensions emerging from Overparenting. To Pimentel, this "*child-safety-obsessed* [parenting] *orthodoxy*" is product of an alienated society which envisions the community as a risk to family's stability that can only be counteracted with parents closing "*ranks around their kids*".[65] Schools are often depicted by the public as environments where children are exposed to dangers.[66] Sexual education, for example, became targeted by strict parenting surveillance after sensational tabloid headlines alarmed the British public about the moral risks of teaching sexual plurality in schools.[67]

[64]Beiter (n 23) 121.
[65]Pimentel (n 6) 15.
[66]Damien Page, 'Conceptualizing the Surveillance of Teachers' (2017) 38(07) British Journal of Sociology of Education, 991, 994.
[67]Daniel Monk, 'New Guidance/Old Problems: Recent Developments in Sex Education' (2001) 23(03) The Journal of Social Welfare & Family Law 271, 282.

By Sexual education, this study means a public policy intersecting three main topics: *health education* – lessons on disease-prevention related to sexual activities; *gender* - cultural meanings associated with maleness-femaleness and their positions in society; and *sexuality* –social responses towards sex activities and expressions. Sexual education is meant to help children build "*aspirations and intimate choices about sexual activity and family relationships*".[68] However, it ends up including different goals and learning processes,[69] according to what majoritarian sociocultural conventions deem convenient to transmit,[70] which politicians accept to incorporate as the "*government-sponsored* [educative] *system*".[71]

For example, among the various sexual education programmes, two opposing *syllabi* are worth highlighting. The first one combines health care, gender identity and sexual equality, promoting openness towards sexual knowledge. The lessons found therein encompass contraception,[72] sexual plurality,[73] and sex equality.[74] The second approach promotes traditional gender conventions as normatively adequate, while limiting sexual information entirely.[75] Implicit in this framework is a body of knowledge corollary of broader conservative conventions that undermine gender equality and overstate the dangers of sexual activity.[76] The former programme is thoroughly problematised here, for it is the approach most commonly associated with risky behaviours demanding close parenting.

As regards *health education*, teaching safe sexual practices and disease-prevention not only serves the public interest of preserving future generations' health.[77] It also fulfils children's entitlement

[68]Jennifer Hendricks, Dawn Howerton, 'Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools' (2011) 13 University of Colorado Law School 587, 611.
[69]William Yarber, 'While We Stood by . . . The Limiting of Sexual Information to Our Youth' (1992) 23(06) American Journal of Health Education 326, 392.
[70]Daniel Mayerhoffer, 'Raising Children to Be (In-)Tolerant. Influence of Church, Education and Society on Adolescent's Stance Towards Queer People in Germany' (2018) 43(1) Historical Social Research 144, 159.
[71]Hendricks (n 68) 602.
[72]Forrest Alton, Robert Valois, Robert Oldendick, J. Drane, 'Public Opinion on School-Based Sex Education in South Carolina' (2009) 04 American Journal of Sexuality Education 116, 117.
[73]Yarber (n 69) 331.
[74]Cornelia Pillard, 'Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy' (2007) 56(4) Emory Law Journal 941, 942.
[75]Alton (n 72) 134-5.
[76]Hendricks (n 68) 592-3.
[77]Keith Brough, 'Sex Education Left at the Threshold of the School Door: Stricter Requirements for Parental Opt-out Provisions' (2008) 46(2) Family Court Review 409, 412.

to "*relationship education*",[78] for it teaches about the importance of transparency between sexual partners on matters such as contraception, family-planning and reproductive rights.

As regards *gender*, Pillard highlights how education favours sex equality. According to her, lessons on reproductive rights (i.e.: contraception) allow girls to free themselves from disempowering roles, such as housekeeping.[79] This liberating aspect of the right to education dialogues with Beiter's reference to empowerment, as it offers children the tools to control the course of their future.[80] Thus, by liberating girls from roles associated with the female gender, lessons on reproductive rights allow them to take charge of their lives and participate in society.

As regards *sexuality*, Yarber argues that sexual education is crucial to social empowerment, as it instructs children to think critically about sex-based social constraints and orientate their decisions on sexual activity according to their own developing convictions. As defines by Abramson et *al*, sexuality represents a "*heterogeneous form of individual expression*".[81] As such, allowing children to engage with sexual-related topics speaks to their self-determination, as it provides them "*a clarification of values*" that helps them make informed decisions.[82] It also give practical effect to the view that every "*person has dignity and worth no matter their sexual orientation*" and that intolerance is unacceptable.[83]

After dissecting key benefits of sexual education, the study moves on to examine how abusive parenting akin to overparenting neutralises such educative topics as an instrument of social change.

ii. Overparenting Sexual Education

In Germany, a legislative proposal charged educators with the task of encouraging children to reflect on sexual plurality in class. After facing groups condemning the initiative as promoting "*LGBTQ lifestyle*", the government yielded to moralistic conventions and reduced the importance given to the subject in school.

[78]Monk (n 67) 288.
[79]Pillard (n 74) 945-6.
[80]Beiter (n 23) 28.
[81]Paul Abramson, Derek Moriuchi, Martha Waite, Lisa Perry, 'Parental Attitudes about Sexual Education: Cross-Cultural Differences and Covariate Controls' (1983) 12(5) Archives of Sexual Behaviour 381, 382.
[82]Yarber (n 69) 332.
[83]ibid 332.

> "*the opponents of the new education agenda feared an indoctrination of adolescents to become excessively open towards sexual plurality (*[as argues] *Burchard et al. 2014). Their resistance was successful: the government froze its plans for the new education agenda and later altered it to grant sexual plurality less room and importance*". [84]

Conviction-based objections to sexual education are also identified in the U.S. After enacting the Parental Rights in Education Bill, Florida prohibited educators from teaching gender identity, because "[it] *encourages children to become gay*".[85] This example demonstrates how parents are incentivised to monitor and control schoolchildren, in a process akin to hyper-parenting. Feeding on a movement to protect conservative values, the Bill authorises parents to seek damages from schools that encourage critical thinking on sexual and gender-related topics.

In Brazil, overparenting also overlaps with sexual education, with parents acting as censors to sexual and gender-related lessons. From images of pornographic feeding bottles[86] to guidebooks encouraging homosexual activities,[87] parents shared among themselves fake footages of improper materials supposedly distributed in schools as part of defamatory campaigns against sexual education.

These examples are symptomatic of a trend encouraging parental prohibition towards alleged sexual-related risky behaviours at school. This pattern is not new. In 2010, Portugal saw parents prohibiting schoolchildren from contacting sexuality-related issues. An interview by a partisan of hyper-parenting epitomised this conflict: "*One thing is to explain reproductive system. The other is to talk about sexuality, affection and family models involving same-sex partners* […]. *These contents are not suitable* [for children]".[88]

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[84]Mayerhoffer (n 70) 144-5; Amory Burchard, Warnecke Tilmann, Sylvia Vogt, Anja Kühne, Andreas Böhme, '*Wieso ist der Lehrplan so umstritten? 2014* <www.tagesspiegel.de/politik/ sexuelle-vielfalt-im-unterricht-wieso-ist-derlehrplan-so-umstritten/9326766.html>.

[85]The Economist, '*Why Florida is banning lessons on sexual orientation and gender identity'*, 30/03/2022, last viewed 10 July 2023 <https://www.economist.com/the-economist-explains/2022/03/30/why-florida-is-banning-lessons-on-sexual-orientation-and-gender-identity>.

[86]Newspaper Estado de São Paulo, '*Erotic feeding bottles were not distributed in kindergarten by the Labor Party'*, 28/09/2018, last viewed 10 July 2023 <https://politica.estadao.com.br/blogs/estadao-verifica/mamadeiras-eroticas-nao-foram-distribuidas-em-creches-pelo-pt/>.

[87]Journal Piauí, '*Video of 'guidebook on sexual education for children is old; the material was never distributed in public schools*', 07/07/2021, last viewed 10 July 2023 <https://piaui.folha.uol.com.br/lupa/2021/07/07/verificamos-cartilha-educacao-sexual-criancas/>.

[88]Newspaper Diário de Notícias, '*Parents prohibit students from taking Sexual Education lessons'*, 10/09/2010, last viewed 10 July 2023 <https://www.dn.pt/portugal/pais-proibem-estudantes-de-terem-educacao-sexual-1659282.html>.

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With support on these examples, this section contends that Overparenting is also a trend negatively interfering in socio-educative lessons. Apart from the two defining characteristics remarked in Part 1*(i)*, scientific literature conveys the existence of four complementary dimensions of overparenting: (a) high levels of anticipatory problem-solving, (b) advice/affect management,[89] (c) overzealous assistance, and (d) low levels of child self-direction.[90]

Although these non-constitutive traits of overparenting may arise depending on the circumstances and the type of parental intervention, they are not determinant to the characterisation of overparenting. For example, *high levels of anticipatory problem-solving* are typical when parents solve problems for children facing banal challenges, such as home chores,[91] but are less frequent (or non-existent) when parents deflect "*stranger dangers*" to children's integrity, in which case *overzealous assistance* prevails.[92] Both cases, however, are considered overparenting. In this sense, this study contends that the trend of hyper-parenting sexual education does not entirely fit into the dimensions afore-mentioned but can still be categorised as overparenting. Instead, it gives rise to a different dimension, that of *high levels of intrusive control* over schoolchildren's activities with a view to averting risky behaviours. The trait of *intensely controlling* schoolchildren is described as an overparenting trait by Schiffrin et *al*[93], and Gagnon and Garst.[94]

According to Zhang, hyper-control can assume two forms, both of which, this study conveys, identifiable in schools: *psychological control*, when parents "*manipulate children's thoughts and feelings*"; and *behavioural control*, when parents "*influence children's behaviors through supervision*".[95] As illustrated above, parents contrary to sexual education firstly scrutinise schoolchildren's activities. When risk-related lessons are identified, the European Court of Human Rights acknowledges one more element to the practice of *behavioural control*, that of parents prohibiting schoolchildren's activities while campaigning against sexual education.[96] At this point, *behavioural controls* produce mental impairments conducive to children's *psychological control*.

[89]Scharf (n 20) 1356.
[90]Woszidlo (n 7) 574.
[91]Scharf (n 20) 1356.
[92]Pimentel (n 6) 7.
[93]Holly Schiffrin, Miriam Liss, Haley Miles-McLean, Katherine Geary, Mindy Erchull, 'Helping or Hovering? The Effects of Helicopter Parenting on College Students' Well-being' (2014) 23(3) Journal of Child and Family Studies 548, 560-561.
[94]Gagnon (n 4) 2877.
[95]Yue Zhang, Woosang Hwang, Eunjoo Jung, Seong Hee Kim, Hye Lim Sin, 'Helicopter Parenting, Parental Psychological and Behavioral Control Revisited' (2020) 51(1) Journal of Comparative Family Studies 59, 61-62.
[96]*Dojan and Others v. Germany*, No. 319/08, ECHR 2011-I, 03.

That is so because prohibiting certain behaviours signals to children that deviations from parentally approved ways are unacceptable and are rightly subject to surveillance. As a result of this manipulation, children struggle to access reliable sexuality and gender-related information with which to understand social and ethical dilemmas. It follows that censoring sexual knowledge leads to emotional suffering, for it disrupts children's process of developing according to their own emerging social convictions and biological predispositions.

The afore-mentioned examples probe how overparenting trends emerge when parents unjustifiably oppose to sexual education: (a) the perception of children as needy of protection (Germany, Portugal); (b) children's defencelessness demanding hyper-invasive control (U.S., Portugal); (c) the use of technology to enhance control (Brazil); and (d) parental prohibition curtailing children's complete education (Portugal, U.S.). More specifically, the German example probes how children's vulnerability are alarmedly enhanced when it comes to developing openness on sexual knowledge. The U.S. example exposes how parents are encouraged to control schoolchildren's activities, whereas Brazil revealed how digital gadgets favour vigilance and control. Finally, Portugal exposed how parental control is deemed crucial to protect children from so-called inappropriate contents. Benefitting from scientific literature on sexual education and concrete examples, this section has argued that hyper-vigilance over children's sexual knowledge constitutes Overparenting. Part 3*(iii)* describes how educators can also contribute to disrupting children's right to Sexual Education.

iii. Educators' risky behaviours

The limits of academic freedom are not codified. This led the ICESCR Committee to establish that educators must ensure that learning processes abide by the principles of *non-discrimination* and *fair discussion* of contrary views.[97] Apart from its inconclusive wording, the report is also insufficient to prevent distortions to sexual education for two reasons. Not only examples of academic abuse often associate with other subjects (such as religion), thus ignoring the specificities of sexual education, but their negative outcomes are often framed from the adult's perspective. Illustrative of this is the ESCR Committee's focus on the theme of "*history of religions*" and the

[97]Committee on Economic, Social and Cultural Rights, note 25, para 39.

educators' obligation to teach it "*in* [a] *way* [that] *respect*[s] *the liberty of parents* […] *to ensure the religious and moral education of their children in conformity with their own convictions*".[98] The fact that sexual education is not frequently associated with educators' manipulation does not detract from the possibility of it eventually arising. Disruption happens when teachers simulate sexual activities by using sexually-explicit content on lectures about reproduction.[99] Abuse also arises when teachers favour their sexual and gender-related opinions as absolutely correct, while depicting opposing views as dangerously wrong. In this respect, Pillard argues that neutrality is necessary, yet only possible when legal norms prohibit teachers from "*propagating sex-role stereotypes*".[100]

> "*sex education must contend with a legacy of official rationalizations for inequality in terms of "natural" sex differences. Against that decidedly nonneutral historical backdrop, government's obligation to maintain neutrality with respect to gender roles might include an affirmative obligation on the part of public school curricula and teachers not only to refrain from propagating, but also to contradict persistent sex-role stereotypes and double standards*".[101]

The British Guidelines delineate complementary practices expected from educators when addressing sexual education. The *Guidelines on Political Impartiality in Schools* mention *gender orientation* as an important field where children can "*form their independent opinions without being influenced by the personal views of those teaching them*".[102] Complementarily, the *Sex and Health Guidelines* stress that sexual education helps children "*understand their physical and emotional development and* […] *make positive decisions in their lives*".[103] For this to happen, teachers must impart "*a full range of issues, ideas and materials* [in class]", delivering them in a "*non-judgmental way"* that avoids reinforcing "*harmful stereotypes"* or encouraging sexist practices.[104]

[98]ibid para 28.
[99]Monk (n 67) 278-80.
[100]Pillard (n 74) 961.
[101]ibid 960-961.
[102]UK Government, '*Political Impartiality in Schools'*, United Kingdom Secretary of State, 04, 13, last viewed 10 July 2023 <https://www.gov.uk/government/publications/political-impartiality-in-schools/political-impartiality-in-schools>.
[103]UK Government, '*Plan your relationships, sex and health curriculum - Information to help school leaders plan, develop and implement the new statutory curriculum'*, United Kingdom Department for Education, 09, last viewed 10 July 2023 <https://www.gov.uk/guidance/plan-your-relationships-sex-and-health-curriculum>.
[104]ibid 11-12.

4. Suggesting a control model on Overparenting Sexual Education

i. The object of control

For the sake of clarity, the model hereby proposed does not aspire to *universality* in the sense that it offers tools to control all parents' interferences on every educational controversy. For it to succeed, this objective would require filtering all trending issues arising from the educational sphere and moulding specific models to each intervention raised. Rather, this study's model aims to detect when hyper-parenting tampers with schoolchildren's activities at the detriment of their sexual education. After advocating the importance of protecting sexual education, this section draws the model's legal foundations.

According to Beiter, international covenants are silent on what must integrate school's *curricula*.[105] Complementarily, Levin argues that education serves the purpose of imparting each country's common values.[106] Therefore, following from the assertion that each society pursues its own principles and States enjoy a margin of discretion when setting educational programmes, educational goals are naturally susceptible to variations. For example, American schools value liberal individualist principles,[107] whereas Cuban schools inculcates principles more aligned with the socialist ideology.[108]

This study conveys that, among various different *curricula*, there is a set of cardinal values that, falling outside States' margin of discretion, must integrate each and every schooling programme. These educational values are enshrined in the cogent provisions of UNCRC Article 29(1)(b), (d) and ICESCR Article 13(1). As shown in Part 3*(a)*, these provisions are promoted by sexual education in the form of *respect for diversity*, *inclusiveness*, *non-discrimination*, and *promotion of human rights.* In this sense, this study claims that these values cannot be hindered by State discretion or professorial autonomy, because they represent the very principles with which societies can seize a harmonious life for future generations.

[105]Beiter (n 23) 20.
[106]Levin (n 27) 1642.
[107]ibid 1648.
[108]Inter-American Commission on Human Rights, '*Situation of Human Rights in Cuba'*, OEA/Ser.L/V/II, 03/02/2020, para 280-1.

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Children can play "*a unique role in bridging many of the differences that have historically separated groups of people from one another*".[109] With reference to *plasticity*, this study agrees that children can become social conciliators, for they are prone to absorb lessons throughout childhood and transmit them during life. By affecting "*young people's understandings and behavior*",[110] sexual education transcends the goal of teaching how to navigate emotional and ethical issues. It also fosters dialogue between groups of different convictions in a way that promotes peace and friendship.

In short, the values of *respect for diversity*, *inclusiveness*, *non-discrimination*, and *promotion of human rights* must be promoted under the banner of sexual education because they raise children to promote social resilience and conciliation. Moving forward, the legal basis for its protection against overparenting is grounded on the following arguments.

According to the ECtHR, parental guidance is not a *carte blanche* parents can invoke indiscriminately to hinder children's wide-ranging education.[111] Therefore, considering that parental powers are not absolute and that contacting different ideas, including those distasteful to parents, benefits children's development, this study subscribes to Lundy's argument that children's right to information on sexual education overrides parents' right to direct education according to their personal beliefs.[112] That is so because the freedoms incapsulated by sexual education serve children's sexual freedom[113] and reproductive health.[114] Likewise, the public interest in promoting sexual education also outweighs parental control, due to the social diversity it stimulates, the balanced relationships it fosters and the health protection it provides to future generations.

ii. The control test

Part 4*(i)* established that in case of clash between children's Sexual Education and parents' convictions, the former takes priority. Circumscribing the proposed model to the cogent principles of *respect for diversity*, *inclusiveness*, *non-discrimination*, and *promotion of human rights*

[109]United Nations Committee on the Rights of the Child Committee, note 24, para 04.
[110]Pillard (n 74) 947.
[111]*Dojan and Others v Germany* (n 96) 16.
[112]Lundy (n 31) 363.
[113]Fernando Méndez Powell, 'Prohibition of Indoctrination in Education – A Look at the Case-Law of the European Court of Human Rights' (2015) 20(2) Brigham Young University Education and Law Journal 597, 603.
[114]United Nations Committee on the Rights of the Child (n 24), para 06.

incapsulated by sexual education, this section moves on to delimit when parental control should be restrained.

A first step to the model is defining the extent to which parents are allowed to intervene in sexual education to ensure children's healthy upbringing. As regards the State, the first parental duty is to demand and ensure that sexual education is not *omitted* from schools. This is important because States often repel sexual education on religious or moral grounds.[115] For instance, in Brazil, a conservative-sponsored Municipal Bill similar to that enacted in Florida prohibited lectures on gender identity and sexual orientation, on the grounds that lessons on sexuality manipulated children's views in such a way that they were being taught to dismiss the existence of the male and female gender.[116] Alongside three similar municipal laws,[117] the Bill was declared unconstitutional by the Brazilian Supreme Federal Court, because it violated children's freedom to contact plural sources according to their level of maturity and learn the importance of respecting diversity while at the same time repelling any form of gender or sexual-oriented discrimination. However, the recurrence of such legislative proposals is by itself symptomatic of the threat State can impose to Sexual Education.

States can also sponsor non-neutral programmes that endorse partial lines of thought. This criterion, hereby named *neutrality,* demands that States refrain from endorsing biased belief systems (i.e. gender-biased values) in school programmes.[118] Lastly, States cannot design *inaccurate* textbooks that uphold untrue facts about gender or sexuality with a view to labelling undesired opinions as life-threatening dangers.

As for educators, their freedom of expression is also outweighed by children's right to a neutral wide-ranging education. This means limiting their activities to a uniform presentation of contrasting views, in a way that avoids *proselytising*[119] particular opinions or actions that favours their own interests and beliefs. In other words, despite *neutrality* being usually related to State's

[115]Lundy (n 31) 366.
[116]Law Journal Brazilian Institute of Family Law, '*Municipal Law that prohibits "gender identity at schools is unconstitutional, says the Court of Appeals of Rio de Janeiro, Brazil*', (09/10/2020), (last viewed 28/03/2023), available at, <https://ibdfam.org.br/noticias/7825/Lei+municipal+que+pro%C3%ADbe+%22ideologia+de+g%C3%AAnero%22+nas+escolas+%C3%A9+inconstitucional%2C+decide+TJRJ>.
[117]Cases No. *457*, *460*, *465* and *467*, available at, <portal.stf.jus.br/peticaoInicial/pesquisarPetinaoInicial.asp>.
[118]*Lautsi and Others v. Italy*, No. 30814/06, ECHR 2011-I, para 60; *Dahlab and Others v. Switzerland*, No. 42393/98, ECHR 2001-I, 12-3.
[119]*Folgerø and Others v. Norway*, No. 15472/02, ECHR 2007-I, para 84(i).

activities, this study refines the term as *critical neutrality* to mean that educators cannot stigmatise differing opinions in order to advance particular beliefs, such as, for example, the promotion of stereotypes associating femaleness with social inferiority and non-traditional heterosexual orientation with immorality.

Likewise, lectures must follow the *objectivity* criterion, whereby "*correct"* and "*precise*" information on sexual education[120] are conveyed without intentionally omitting facts or opinions that hinder plural debates. While *critical neutrality* counteracts biased approaches towards certain behaviours by imposing critical-raising value-judgements, *objectivity* demands that tutors refrain from resorting to misconceptions or incomplete facts seeking to favour particular values. Despite the blurred lines separating both, *neutrality* and *objectivity* are crucial as they offer children's formative development solid protection against tutors' noxious influence on their evolving convictions.

Lastly, educators cannot adopt pedagogical performances that encourage promiscuous sex-related behaviours under the guise of teaching health education or reproduction.[121] Hereby referred as *appropriateness* criterion, educators cannot resort to materials of pornographic connotation, for instance, as they do not serve pedagogical purposes. In fact, resorting to sexually explicit content exceeds the educational sphere to constitute a pedagogical-misappropriation leeway, induced "*by the one in authority*" (that is, the tutor *vis-à-vis* the student), to indecent sexual provocation of criminal order.[122]

The final elements factored into the test are the scenarios in which parents' intervention violates children's sexual education. So far, it has been argued that parents must ensure that sexual and gender-related topics integrate school's programmes (*non-omission*) and address veracious facts (*accuracy*) through unbiased approaches (*neutrality*). As for educators, parents must supervise the style and content of lessons, checking if they contain incomplete or false information that might induce thoughts or behaviours (*objectivity*) or are based on education-inappropriate contents constituting transgressive pedagogy (*appropriateness*). Likewise, as stresses the British *Sex and*

[120]*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, No. 5095/71, ECHR 1976, para 54.
[121]Monk, note 67, 276.
[122]Richard Burt, Jeffrey Wallen, 'Knowing Better: Sex, Cultural Criticism, and the Pedagogical Imperative in the 1990s' (1999) 29(1) Johns Hopkins University Press 72, 77-9.

Health Guidelines, parents must hold teachers accountable for suggesting, for example, that non-compliance with gender stereotypes is wrong and demands adjustments (*critical neutrality*).[123] Following these assertions, this study argues that parents are not legally allowed to intervene in children's sexual education unless such interventions are aimed at strictly tackling the adverse scenarios above-mentioned involving educators and public institutions. In other words, the parental right to direct children's sexual education shall be limited to holding, on the one hand, the State accountable for violating the criteria of *non-omission* and *neutrality* and, on the other, educators for violating the criteria of *accuracy, objectivity, appropriateness* or *critical neutrality*. Any deviation from such objectives must be interpreted as unjustifiable, and thus an illegal attempt to enforce particular sexual and gender-related conventions to the detriment of children's right to be raised according to the values of *diversity*, *inclusiveness*, *non-discrimination*, and *promotion of human rights*.

This proposition pivots around an *exclusionary premise:* parental interventions become abusive when stakeholders' actions are not themselves transgressive. This *residual rationale* is justified by a practical reason, that of being impossible to anticipate every autonomous act of hyper-parenting towards sexual education. Conversely, using the foreseeable hypotheses of stakeholders' transgressions as leading references constitutes a solid factual ground upon which decisionmakers can launch investigations on potential cases of overparenting sexual education.

Finally, as the test works based on the examination of consummated episodes of overparenting, the control proposed is *a posteriori*. That is, the test offered by the model is not meant to impede parental abuse from happening. Rather, it helps identify when to hold parents accountable for forcing individual-based convictions at the detriment of children's sexual education.

Conclusion

The present study has contributed to educational literature by proposing a model aimed at identifying when parental interference on sexual education becomes overparenting. In its first stage of research, the article demonstrated how international covenants are built upon open-ended language that do not address the clashes between parental powers and schoolchildren's education.

[123]UK Government (n 102) 12.

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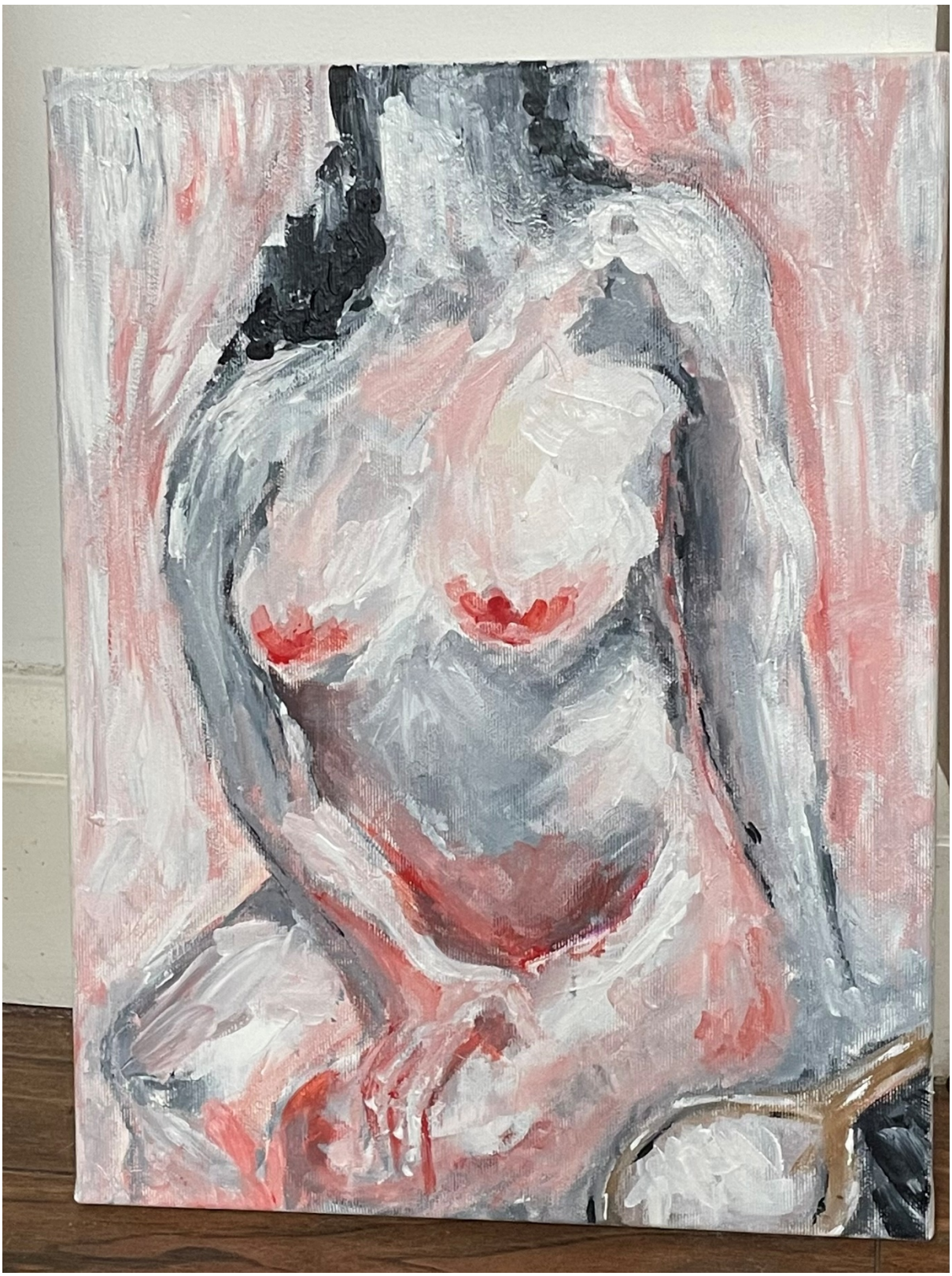
This legal gap stimulates the pervasiveness of overparenting to the detriment of children's right to development and autonomy. Moving on to analysing the junction between overparenting and education, the final part of the article conveyed the need to protect children's sexual education from prohibitive hyper-parenting. According to the model hereby proposed, overparenting arises when parents unlawfully interfere with children's sexual education outside the hypotheses where stakeholders (schools and educators) deviate from their educational duties.

Georgia Rowe, Vanity



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"You painted a naked woman because you liked looking at her, you put a mirror in her hand and you called the painting 'Vanity', thus morally condemning the woman whose nakedness you had depicted for your own pleasure."

– John Berger[1]

The inspiration behind my submission largely stems from the words of John Berger: Berger critiqued the female nude, drawing on Hans Memling's *'Vanity'* to highlight society's hypocrisy towards women. Berger's critique alludes to the *'male gaze'*[2], a term my submission heavily draws upon. My aim was to visually represent the clash between the eroticisation of a woman and her consent towards this. While she may have consented to her nudity, did she also consent to the sexist ramifications imposed by the spectator upon her? I believe the depiction of naked women attributes to a form of rape culture; a female who poses nude is branded promiscuous and vain, allowing the viewer to indulge in her nakedness. In return, she is to be blamed for her sexual exploitation.

I delved into these ideas by purposely anonymising my subject. Her individuality is erased, symbolising the blanketed misogyny placed upon all women. Despite lacking an identity, her anonymity does not protect her from the implications of her nudity. The male gaze distorts my subject's innocence, degrading her to only her nakedness. Her head is lifted out of defiance, she tries to avoid the spotlight. Yet, her anonymity does not shield her from the shame and guilt of her nudity. As Berger states, the nude woman is *'condemned for the nakedness depicted for [her spectator's] own pleasure'*[3]. The patriarchy encourages women to be sexual yet simultaneously shames them for it. I hope spectators consider the compromise my female subject made: in return

[1] As noted by John Berger in 'Ways of Seeing' (episode 2: Women and Art)'. The episode was first aired on the British Broadcasting Corporation (BBC) on 15 January 1972.
[2] Laura Mulvey, 'Visual Pleasure and Narrative Cinema', 16(3) Screen (Autumn 1975) 6–18.
[3] Berger (n1).

for her nudity, she has signed away her agency and identity. She is vulnerable to the male gaze and sexual objectification.

The purpose of my submission is for viewers to question their own role – are they attributing to the objectification of women in art through their silent judgement? And am I, the artist, equally as guilty by bringing another innocent woman into this condemnation? I painted a mirror to allude to my own blameworthiness in depicting the stereotypical vain nude woman. While it is a symbol of vanity, it concurrently suggests to the spectator that they too should transparently reflect upon their own accountability in attributing to the male gaze.

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Shaping the European Art Market:

Post-Colonial Restitution Demands and Twenty-First Century Legal Instruments

Pauline Moorkens*

Abstract: *Almost no part of the world was unaffected by European colonisation. The largest European colonial empire, that of the British, was as large as 35.5 million km² in 1920, covering more than 25% of the planetary landmass.[1] The other notable European colonial empires included the French, the Portuguese, the Spanish, and the Dutch, as well as Russia, a transcontinental country. The Belgian colonial empire appeared at a slightly later stage. This paper concerns developments in the European colonial empires after the Berlin Conference of 1884, on the contemporary art trade. These empires witnessed the rise and fall of cultures, communities, and languages, among others. The economic, religious, and political consequences of colonialism included looting, destruction, and the unlawful retention of property, including cultural artefacts, heritage, and art. The legal ramifications of the genocide and plunder of that era remain in dispute to this day. Several European institutions, both cultural and commercial, hold art from formerly colonised states. The international and domestic regulation of that matter is of considerable import in the present day.*

To what extent does post-colonial demand for restitution and 21st-century legal instruments affect the art market? This paper begins by investigating and analysing the evolution of the African art market in Europe by accounting for colonisation as well as for the origin and the evolution of the European trade in African art. It then delves into current restitution controversies and their influence on the art market. It critically analyses of the restitution of colonial art as interpreted by the courts of different European countries and analyses the plundering of art in the context of colonisation. The exposition also touches on issues such as independence, ownership, restitution, gifts, co-operation, the role of domestic legal instruments, and Belgian jurisprudence.

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[1] Rein Taagepera, 'Expansion and Contraction Patterns of Large Polities: Context for Russia' (1997) 41(3) International Studies Quarterly 480.

Introduction

> *"The auction world has changed, leaving the art market saying, 'don't touch it' when it comes to African art".*[2]
>
> - *Hubert d'Ursel*

In the past decade, the art market, which is populated by actors as varied as auction houses, galleries, museums, consignors, and collectors, has undergone a social, cultural, and legal transformation. That transformation has had to do with the European trade in African artefacts. According to Hubert d'Ursel, a former Sotheby's Board Director and currently the Director of the Fine Art Group, auctions have changed due to the intensification of African demands for post-colonial restitution.[3] Those demands have undoubtedly grown stronger during the 21st century, a development to which various recent socio-political and legal developments have contributed considerably.[4] Before analysing the influence of those developments on the art market or regulation, however, it is important to overview the history of colonial looting and its implications for the European art market and for European art institutions.[5] The practice of colonisation is ancient; this paper focuses on the colonisation of Africa between late modernity and the recent past, that is, between the start of the 19th and the end of the 20th century.[6]

Many war crimes and crimes against humanity were committed in Africa during the colonial period. These included plunder, destruction, and crimes against cultural heritage. The affected countries are still experiencing the long-term economic, social, political, and cultural repercussions. According to a 2021 Interpol report, "*Crimes against cultural heritage include the looting, theft, traffic and sale of cultural items that constitute an important pillar of a country's history*".[7] The large-scale economic exploitation of the African continent through looting and other forms of resource extraction arguably resulted in underdevelopment.[8] European power in Africa

[2] Interview with Hubert D'Ursel, Director of The Fine Art Group (Brussels, 8 June 2022).
[3] *Ibid.*
[4] Ana Temudo, 'Current Challenges for African Cultural Heritage: A Case Study of Guinea-Bissau' (2021) 13(1) Museus e Estudos Interdisciplinares.
[5] This question is analysed further in Section I, Part A.
[6] Brian Brivati, Julia Buxton and Anthony Seldon, *The Contemporary History Handbook* (Manchester University Press 1996) 121.
[7] INTERPOL, 'Survey Of Interpol Member Countries: Assessing Crimes Against Cultural Property 2020' (2021) <https://file:///Users/paulinemoorkens/Downloads/2020%20Assessing%20Crimes%20Against%20Cultural%20Property%20(3).pdf> last accessed 28 June 2023.
[8] Walter Rodney, *How Europe Underdeveloped Africa* (Bogle-L'Ouverture Publications 1972).

manifested in the employment of diverse control tactics, which included but were not limited to punitive expeditions.[9] Those expeditions entailed pillaging African cultural heritage and art. For example, a British expedition looted the Benin Bronzes in 1897.[10] The taking, pillaging, and destruction of objects of art or cultural heritage was orchestrated and executed not only by military forces but also by professionals who had been retained by European art institutions and by missionary priests who were acting on behalf of the Church,[11] such as the members of the Order of Friars Minor Capuchin.[12]

The objects taken were often displayed in art institutions and missionary museums, such as the 1925 Vatican Mission Exposition (*Esposizione missionaria vaticana*), which featured more than 100,000 artefacts, including statues and drawings.[13] The European plundering of Africa raises legal, socio-political, cultural, and diplomatic issues today, particularly in view of the fact that approximately 90% of African art is estimated to remain in Europe to this day.[14] For example, 70,000 African objects are held in the *Musée du quai Branly – Jacques Chirac* in France. Post-colonial demands for restitution and their impact on the European art market are thus live issues.[15]

This paper is a study of the interplay between these demands and contemporary legal instruments. As noted previously, it investigates the history of colonial plunder. It also covers the evolution of the European market for African art. The current restitution controversies that affect auction houses and museums are taken into account, as are the extant instruments of hard and soft international law. The role of domestic legislation and case law in Belgium, a country that lies at the heart of the post-colonial restitution controversy, in the art market is also examined. Finally, the exposition explores issues such as independence, ownership, restitution, gifts, and cultural co-operation between states.

[9] Jimena Escoto, 'Colonial Looting of African Art: A Century In Exile' DailyArt Magazine <https://www.dailyartmagazine.com/colonial-looting-african-art/> last accessed 30 July 2023.
[10] *Ibid.*
[11] *Ibid.*
[12] Pierre Guidi, 'For good, God, and the Empire': French Franciscan Sisters in Ethiopia 1896–1937' 47(3) History of Education 1-15.
[13] *Ibid*. These issues are discussed in more detail in the following sections.
[14] Tife Owolabi, 'Nigeria's Looted Benin Bronzes Returned, More Than A Century Later' Reuters (20 February 2022).
[15] *Ibid.*

1. Colonial History and the Plunder of African Cultural Heritage

Colonialism in Africa changed after the Berlin Conference, which is also known as the Congo Conference (*Kongokonferenz*) and the West Africa Conference (*Westafrika-Konferenz*), and after the New Imperialist Conquests.[16] The term "New Imperialist Conquests" refers to the period between 1873 and 1914, which was marked by "*intensified imperialistic expansion*".[17] The main colonisers included the United Kingdom, France, Belgium, Portugal, Spain, Italy, and Germany.[18] It is important to define colonialism before examining its development in and consequences for Africa. Colonialism involves conquest as well as the exercise of political, economic, social, and military control by one state over another polity, a region, or an area.[19] In essence, colonialism is control "*over a dependent territory*".[20] Colonisation, conversely, is the seizure of political and economic control over a foreign population.[21] Imperialism involves dominion over a territory through geographical acquisition or political and economic control.[22] The Scramble for Africa[23] saw colonialism, colonisation, and imperialism intertwine. The modern history of colonisation of Africa began in 1884, during the New Imperialist period. The Berlin Conference had as its purport the regulation of trade and European colonisation in Africa.[24] The role of the Conference in the colonial partitioning of Africa is debated, but its General Act is widely considered to have formalised the Scramble for Africa.[25] The Conference effectively ended the autonomy of Africans by abolishing several systems of self-governance.[26]

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[16] Kwame Anthony Appiah & Henry Louis Gates, *Encyclopaedia of Africa* (Oxford University Press 2010).
[17] Harry Magdoff, 'New Imperialism' (Encyclopaedia Britannica, 2020) <https://www.britannica.com/topic/New-Imperialism> last accessed 16 August 2022.
[18] Appiah and Gates (n 16).
[19] Stanford Encyclopaedia of Philosophy, 'Colonialism', Stanford Encyclopaedia of Philosophy (9 May 2006) <https://plato.stanford.edu/entries/colonialism/> last accessed 13 June 2023.
[20] *Ibid.*
[21] University of Saskatchewan, 'Terminology' (University of Saskatchewan 2022) <https://teaching.usask.ca/curriculum/indigenous_voices/power-and-privilege/chapter-1.php#:~:text=Colonization%20vs%20Colonialism&text=Colonization%3A%20is%20the%20action%20or,settlers%2C%20and%20exploiting%20it%20economically> last accessed 13 June 2023.
[22] Peter Duignan, 'Imperialism' (Encyclopaedia Britannica 2022) <https://www.britannica.com/topic/imperialism> last accessed 13 June 2023.
[23] Also known as the Conquest of Africa or the Partition of Africa, the Scramble for Africa refers to the "*invasion, annexation, division, and colonisation*" of large parts of Africa by the European powers during the New Imperialist period.
[24] Adekunle Ajala, 'The Nature of African Boundaries' (1983) 18(2) Institute of African Affairs at German Institute of Global and Area Studies 177–189.
[25] Simon Katzenellenbogen, 'It Didn't Happen at Berlin: Politics, Economics and Ignorance in the Setting of Africa's Colonial Boundaries' in Nugent, Peter and Asiwaju, AI(eds) *African Boundaries: Barriers, Conduits and Opportunities* (Pinter 1996).
[26] Adekunle Ajala, 'The Nature of African Boundaries' (1983) 18(2) Institute of African Affairs at German Institute of Global and Area Studies 177–189.

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2. The Looting of Art and Cultural Heritage During Colonisation

There have been various attempts to define cultural heritage throughout history. Vesselin and Tolina Loulanski defined it as "*culture and landscape that are cared for by the community and passed on to the future to serve people's need for a sense of identity and belonging*".[27] According to Christian Koboldt, conversely, cultural heritage is an expression of the identity of a community or a society at a particular point in time.[28] This paper adopts the definition of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), according to which cultural heritage comprises "*artefacts, monuments, a group of buildings and sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific and social significance*".[29] This definition captures tangible and intangible heritage, insofar as it is embedded into sites, monuments, and cultural or natural artefacts.[30] Tangible cultural heritage includes movable objects of cultural significance, such as utensils and artworks. Immovable cultural heritage includes buildings, monuments, and ritual and archaeological sites.[31] Intangible heritage includes beliefs, music, and such like.[32]

Prior to the Berlin Conference, European missionaries, hunters, explorers, and traders had already engaged in large-scale looting in Africa. The Afro-Portuguese ivories supply a salient example.[33] During the 1870s, a large number of sculptures, artworks, and curios from African exploratory expeditions arrived in Europe.[34] The monetary value of these objects was low at that time, and many were sold in markets or pawned.[35] The early 20th century saw the most intensive looting. However, between the 1960s and the 1980s, African independence resulted in demands for restitution, which were directed at the former colonial empires as well as at particular individuals.[36] The cultural and national identities of the newly independent nations were both at stake. By 1969, the Organisation of African Unity had released a manifesto that cast culture as the "*cement of every*

[27] Vesselin Loulanski and Tolina Loulanski, *Cultural Heritage and Sustainable Development* (LAP Lambert Academic Publishing 2015).
[28] Christian Koboldt, 'Optimising the Use of Cultural Heritage' (Centre for the Study of Law and Economics, Department of Economics, Universitat des Saarlandes 1995).
[29] UNESCO 2009 Framework for Cultural Statistics (FCS).
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] Enid Schildkrout & Curtis Keim, *The Scramble for Art in Central Africa* (Cambridge University Press 1998).
[34] Denise Murrell, *African Influences in Modern Art: Heilbrunn Timeline of Art History* (The Metropolitan Museum of Art 2008).
[35] *Ibid.*
[36] Interview with Hubert D'Ursel, Director at The Fine Art Group (Brussels, 8 June 2022) <https://www.INSERT URL> last accessed 20 August 2023.

social group… it is its soul, its materialisation and its capacity for change".[37] It also argued that "*the people must be the first to benefit from their economic and cultural riches*".[38]

According to the French art historian Bénédicte Savoy, nearly all African "*ancient artistic heritage is now preserved in European countries*".[39] The website of the British Museum indicates that it holds more than 105,635 African works of art and cultural artefacts.[40] In practice, the estimates of the number of objects that comprise its African collection vary. It has been claimed that the museum holds more than 73,000 items.[41] Similar observations can be made about the Royal Museum for Central Africa (*Koninklijk Museum voor Midden-Afrika* or *Musée royal de l'Afrique centrale*) in Belgium. Its departments of zoology, cultural anthropology, geology and mineralogy, and history hold more than 10 million objects and items from vegetal, mineral, and animal nature from Central Africa. Previously, it also functioned as a scientific centre. Many of the items originate from the Congo, and only 5% of the collection is on display.[42] As with the British Museum, estimates vary – according to some, the Royal Museum for Central Africa holds 180,000 African objects. The *Weltmuseum* in Austria holds 37,000 pieces, the *Ethnologisches Museum* in Germany holds 75,000, and the *Nationaal Museum van Wereldculturen* in the Netherlands holds 66,000.[43]

Large numbers of looted African artworks can also be found at military, missionary, regional, natural-history, and university museums as well as in art collections, galleries, private institutions, and libraries.[44] Conversely, the cumulative size of the U.S. collection of African art does not exceed 50,000 pieces.[45] This geographical distribution reflects the history of European

[37] Organization of African Unity, 'Pan-African Cultural Manifesto' (Organization of African Unity 1969) <https://ocpa.irmo.hr/resources/docs/Pan_African_Cultural_Manifesto-en.pdf> last accessed 29 June 2023.
[38] *Ibid*.
[39] Bénédicte Savoy, *Africa's Struggle for Its Art: History of a Postcolonial Defeat* (Princeton University Press 2022).
[40] British Museum, 'Collections Search*'* <https://www.britishmuseum.org/collection/search?keyword=africa&place=Africa&sort=object_name__asc&view=grid&page=5> last accessed 28 June 2023.
[41] Farah Nayeri, 'Return of African Artifacts Sets a Tricky Precedent for Europe's Museums' (New York Times 27 November 2018) <https://www.nytimes.com/2018/11/27/arts/design/macron-report-restitution-precedent.html> last accessed 16 August 2023.
[42] Africa Museum, <https://www.africamuseum.be/fr> last accessed 28 June 2023.
[43] Bénédicte Savoy, *Africa's Struggle for Its Art: History of a Postcolonial Defeat* (Princeton University Press 2022).
[44] *Ibid.*
[45] *Ibid.*

colonisation.[46] As mentioned previously, as much as 90% of all African art may be in Europe.[47] This significant accumulation poses important ethical and legal questions about the future of the European art market.

3. Growth of African Art in the European Art Market

In Europe, trade in traditional African art started to intensify towards the end of the 19th century. This development was driven by demand. Judith Perani and Fred T. Smith described the notion of traditional African art to which most Europeans and modern academics subscribe as "*indigenous art traditions [that were] viable and active before European colonisation of Africa*".[48] The value that is ascribed to traditional objects is linked to their association with the pre-colonial period.[49] This tendency can be explained in several ways. After the dissemination of Christianity and, later, of Islam, traditional African artistic practices came to be associated with indigenous religions and traditions.[50] The pagan artefacts that were not destroyed were taken to European museums and private collections. The uses of these objects in Europe differed considerably from their treatment at their places of origins. For example, many of the artefacts that stand behind glass boxes at the *Musée du quai Branly - Jacques Chirac* were originally used in Malian rituals. In fact, the *Musée National du Mali* regularly lends cultural objects from its collections to communities for the performance of traditional rites.[51]

Although the objects were initially displayed in ethnological contexts, large private collections of African art emerged in Europe as a consequence of the work of art collectors and dealers.[52] The art dealers Louis Carré and Charles Ratton played an important role in that process.[53] In the second part of the 20th century, several museums in Europe were dedicated solely to African art. The

[46] *Ibid.*
[47] Tife Owolabi, 'Nigeria's Looted Benin Bronzes Returned, More Than A Century Later' (Reuters, 20 February 2022) <https://www.reuters.com/world/africa/nigerias-looted-benin-bronzes-returned-more-than-century-later-2022-02-19/> last accessed 28 June 2023.
[48] Judith Perani and Fred Smith, *The Visual Arts of Africa: Gender, Power, and Life Cycle Rituals* (Prentice Hall 1998).
[49] Peri Klemm, 'African Art and The Effects Of European Contact And Colonization' (Khan Academy 2022) <https://www.khanacademy.org/humanities/art-africa/african-art-introduction/african-art-europe/a/african-art-effects-of-european-colonization> last accessed 14 July 2023.
[50] *Ibid.*
[51] Jimena Escoto, 'Colonial Looting of African Art: A Century In Exile*'* (DailyArt Magazine, 18 July 2022) <https://www.dailyartmagazine.com/colonial-looting-african-art/> last accessed 30 July 2023.
[52] Kathleen Bickford Berzock and Christa Clark, *Representing Africa in American Art Museums* (University of Washington Press 2011),.
[53] *Ibid.*

Musée Dapper in Paris, for example, was opened in 1986.[54] Other museums set space aside for African artefacts.[55] Traditional African art shaped the development of avantgarde and abstract art, as well as of the primitivist art form.[5657] The typical African representation of the human body was incorporated into impressionist art, which is noticeable in the artworks of Picasso and Matisse, among others.[58] Traditional African art also contributed heavily to the development of early modernism through the use of "*fragmented Cubist shapes and a vivid colour palette*".[59] The European art-market boom of the late 20th century can be attributed to economic prosperity and to the start of the digital era in the Western world after the 1980s.[60] It was this expansion that highlighted the problem of looted and stolen art.

4. 21st-century Post-Colonial European Art Market

In 1978, UNESCO Director General Amadou-Mahtar M'Bow made a plea for restitution by saying that some communities and peoples had "*been deprived of their cultural heritage, therefore, [we] ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish. This is a legitimate claim*".[61] The cultural objects derive their value from the materials that were used to make them, from their tribal significance, from their history, and importantly, from their typology.[62] Post-colonial demands for restitution have been accompanied by the rise of the post-colonial art form, that is, of "*art produced in response to the aftermath of colonial rule*".[63]

Europeans are familiar with both the origin and the cultural significance of the items that auction houses and art dealers hold. Recent legislation and guidelines have made it more difficult to buy, sell, and donate traditional African art. The most hotly debated question is whether these objects

[54] *Ibid.*
[55] *Ibid.*
[56] Primitivism is an artform which revolves around aesthetic idealisation and the emulation of primitive experiences.
[57] Denise Murrell, 'African Influences in Modern Art: Heilbrunn Timeline of Art History' (The Metropolitan Museum of Art 2008).
[58] *Ibid.*
[59] *Ibid.*
[60] Kelly Diane Walton, 'Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen' (1999) 549 Fordham IP Media & Ent LJ.
[61] Jimena Escoto, 'Colonial Looting of African Art: A Century In Exile' (DailyArt Magazine, 18 July 2022). <https://www.dailyartmagazine.com/colonial-looting-african-art/> last accessed 30 July 2023.
[62] *Ibid.*
[63] Tate Modern, 'Post-colonial Art' (Tate Modern 2022) <https://www.tate.org.uk/art/art-terms/p/postcolonial-art> last accessed 26 July 2022.

should be returned to the various African states and communities of whose cultural heritage they form part. According to an UBS market study, global art generated $65 billion in sales in 2022.[64]$15 billion dollars to that market.[65]In the 21st century, traditional artworks have been sold for as much as $1.7 million, as in the 2017 Sotheby's sale of a Luba-Shankadi neckrest from the Congo.[66]Towards the end of the 20th century, renowned auction houses, such as Sotheby's and Christie's, created specialised African art departments.[67]auction houses enabled many European collectors to access African art for the first time.[68]

5. Restitution Controversies

Auction houses and museums have been embroiled in various restitution controversies in the last decades. A number of European states, such as the United Kingdom, France, Germany, Belgium, and the Netherlands, have also been involved in such disputes. The art market remains largely unregulated. The colonial and the post-colonial trade in African art has often proceeded without much attention being paid to questions of provenance. As the former Principal Deputy Solicitor General of the United States Paul M. Bator wrote, auction houses do not usually "*reveal the provenance of an object that is to be sold to buyers or the public*".[69] The same is true of museums, who tend to be silent on the provenance of their African artefacts as well as on the mode of their acquisition. Due to negligence or complicity, African artefacts remain difficult to track, which renders the prospect of restitution remote.[70] The role of auction houses in authentication has also excited controversy. Due to scarce documentation and the widespread neglect of research on authentication and provenance, sequences of multi-layered transactions ultimately "*insulate the original guilty knowledge until, in many cases, it just disappears*", as argued by Jessic Darraby.[71]

[64] UBS, 'Art Basel And UBS Global Art Market Report 2022' (UBS 2022) <https://www.ubs.com/global/en/our-firm/art/collecting/art-market-survey.html> last accessed 26 July 2023.
[65] 'Global Art Market: Revenue Of Africa 2018-2023' (Statista 2022) <https://www.statista.com/statistics/1063130/africa-art-market-contribution/> last accessed 26 July 2023.
[66] Scott Reyburn, 'Restitution Fears Unsettle The Trade In African Art' (New York Times, 29 January 2019).
[67] Jacqueline Martinez, 'Top 10 Oceanic and African Art Auction Results from The Past Decade' (The Collector, 15 November 2019).
[68] *Ibid.*
[69] Kelly Diane Walton, 'Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen' (1999) 549 Fordham IP Media & Ent LJ.
[70] *Ibid.*
[71] Lisa Borodkin, 'The Economics of Antiquities Looting and a Proposed Legal Alternative' (1995) 95(2) Columbia Law Review.

Historically, the appearance of flagged African art in catalogues would lead to withdrawal, which was often fatal to tracing efforts.[72] There were some successes, especially in the context of art that was looted by the Nazis during World War II. The restitution of African art from auction houses and museums has been more contentious. There have been some recent repatriations. These include the return of 26 Benin Bronzes by France in 2021; the agreement between Germany and Nigeria for the return of 1,000 such sculptures;[73] and the agreement between the Horniman Museum and Gardens of the UK and Nigeria, which resulted in the return of a further 72 Bronzes.[74]

Restitution undeniably disrupts the trade in African art as well as the operation of museums and auction houses across the globe. The sentiments of auctioneers, curators, and gallery owners range from apathy to antipathy.[75] Widespread criticism followed the release of a French report on African art repatriation. Art-fair and auction-house representatives and workers were highly critical of its content. Notably, tribal specialist Serge Schoffel wrote that it was the work of "*Western scientists, collectors and dealers that preserved these pieces… Now we are looking like crooks*".[76] Since African museums are increasingly demonstrating that they can house repatriated objects, the argument for preservation in Europe is being progressively rebutted. The Western art market and art institutions are under more pressure than ever to consider requests for restitution, and the recent institutional responses to such demands have caused tensions to escalate.

6. International Restitution Instruments

After the end of World War II, numerous legal instruments were promulgated in order to prevent the plundering of cultural heritage and art. Both hard and soft laws were introduced to prevent future looting and to redress past wrongs. Soft law is non-binding, and includes principles, agreements, and declarations. It serves as a means of preventing international crimes, such as cultural heritage spoliation.[77]

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[72] Kelly Walton, 'Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen' (1999) 549 Fordham IP Media & Ent LJ.
[73] Philip Oltermann, 'Germany Hands Over Two Benin Bronzes To Nigeria' (Guardian, 1 July 2022).
[74] Danica Kirka, 'UK Museum Agrees To Return Looted Benin Bronzes To Nigeria' (Washington Post, 8 August 2022).
[75] Scott Reyburn, 'Restitution Fears Unsettle The Trade In African Art' (New York Times, 29 January 2019).
[76] *Ibid.*
[77] Marc-André Renold, Alessandro Chechi, Justine Ferland and Ece Velioglu-Yildizci, 'Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations' (2016). Directorate-General for Internal Policies of the European Parliament

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The soft-law instruments that are germane to the present ends include the 1954 Hague Convention, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Prior to World War II, colonial looting was not treated as a problem that would require international-law solutions. Article 1(3) of the First Protocol of the Hague Convention stipulates that cultural and individual property that is looted during a conflict has to be returned.[78] Each of the contracting parties "*undertakes to return... to the competent authorities of the territory previously occupied, the cultural property which is in its territory*".[79] In the contexts of plundered or looted art, cultural property, and heritage, the right to restitution is unalienable, and states must act to enforce it. Since looted artworks are not taken for preservation or with a view to being returned (as per Article 5 of the 1954 Convention), such works ought to be restored to their countries of origin.[80]

That the applicable international legal instruments do not operate retroactively is highly contentious. Neither the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects nor the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property operate retroactively.[81] According to Article 28 of the Vienna Convention on the Law of Treaties of 1969, retroactive effect depends on the will of the contracting parties and on "*any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*".[82]

The lack of retroactivity obstructs African restitution efforts because the plunder that they aver mainly occurred at the end of the 19th century and in the first part of the 20th century, well before the enactment of the treaties.[83] Special agreements can be struck for cases which do not fall under

<https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf> last accessed 27 July 2023.

[78] UNESCO Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict 1954

[79] *Ibid.*

[80] "Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall, as far as possible, support the competent national authorities of the occupied country in safeguarding and preserving its cultural property".

[81] Andreas Giorgallis, 'Restitution of Colonial Cultural Objects: A Glimpse From An International Law Approach' (2021) Cambridge International Law Journal.

[82] Vienna Convention on the Law of Treaties 1969.

[83] Giorgallis (n 81).

Article 15 of the 1970 Convention.[84] Furthermore, Article 10 of the 1995 Convention provides that illegal transactions cannot be legitimised.[85] In addition, Article 11 of the 1970 Convention provides that the export and transfer of "*ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit".*[86] The interpretations of Article 11 can vary. One can argue that restitution is available because acquisition through occupation, in this case in virtue of colonisation, is illicit and therefore null.[87] However, the notion of illicitness can mean different things in different jurisdictions, which undermines its effectiveness.

In law, the 21st century was a period of transition. Globally, demands for repatriation have grown in both volume and intensity. According to Andreas Giorgallis, international cultural restitution is an intermediate step between *lethe*, which means "oblivion", and *mnemosyne*, which means "remembrance".[88] Institutions have been established to facilitate negotiation, mediation, and conciliation. One example is the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, which dates from 1978.[89] However, the scarcity of binding law remains problematic. Contemporary international-law solutions may have a voluntary or a declaratory basis.[90] Voluntary-basis regulation entails returning cultural heritage, cultural property, and art upon the conclusion of special agreements that are preceded by negotiations as well as conciliation and mediation.[91] Declaratory-basis regulation can result from failure to recognise the injustices of the past.[92] The ease with which states, institutions, and private collectors can refuse to acknowledge those injustices makes the restitution process arduous and uncertain. At present, the First and the Second Protocol to the Hague Convention are the most effective international-law instruments for

[84] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.
[85] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.
[86] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.
[87] Marc-André Renold, Alessandro Chechi, Justine Ferland and Ece Velioglu-Yildizci, 'Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations' (2016) Directorate-General for Internal Policies of the European Parliament.
[88] Giorgallis (n 81).
[89] UNESCO Resolution 4/7.6/5 of the 20th General Conference 1978.
[90] Giorgallis (n 81).
[91] *Ibid.*
[92] *Ibid.*

restitution. Both provide that cultural property that is taken extraterritorially must be returned to its rightful owners.

7. Role of Domestic Legal Instruments and Case Law in Belgium

The history of the Belgian colonial empire between 1884 and 1960 is disputed. The rapid colonisation of the Congo after 1884 and that of Ruanda-Urundi, which began in 1916, left a highly incendiary political, social, and economic legacy. The former Congo Free State allowed King Leopold II of Belgium to expand his influence in the region and to appropriate resources such as rubber, ivory, diamonds, gold, copper, and zinc.[93]

During the 75 years of Belgian presence in the Congo, missionaries, political officials, citizens, and collectors took interest in Congolese art and expatriated vast numbers of artefacts to Belgium and to Europe as a whole. The atrocities that were committed in the Congo went unrecognised for decades. However, in 2020, King Philippe of Belgium apologised on behalf of the country for the harm that colonisation caused.[94] By February 2022, the Belgian Prime Minister Alexander de Croo had met with Congolese Prime Minister Jean-Michel Sama Lukonde in order to establish a joint committee that would study the artefacts that were looted during the colonial period.[95] The Belgian government provided the Congolese government with an inventory of 84,000 artefacts that are currently housed in the Royal Museum for Central Africa in Belgium. In a press release, the Belgian State Secretary for Scientific Policy Thomas Dermine wrote that the inventory would be an "*important step in the implementation of the new approach to… [w]orking together in complete transparency, on the basis of an inventory and provenance studies, within a committee composed equally of experts from both countries".*[96]

Belgium has adopted various domestic legal instruments that pertain to restitution, including the Criminal Code, Law 2003-08-05/32 on grave violations of international human rights, and the Flemish Parliament Act of 7 May 2004 on the organisation and funding of a cultural heritage policy

[93] Simon Katzenellenbogen, 'It Didn't Happen at Berlin: Politics, Economics and Ignorance in the Setting of Africa's Colonial Boundaries' in Peter Nugent and AI Asiwaju (ed) *African Boundaries: Barriers, Conduits and Opportunities* (Pinter 1996).
[94] Carine Dikiefu Banona & Jean-Sébastien Sépulchre, 'Belgium – Moving from Regrets to Reparations' (Human Rights Watch, 30 June 2020).
[95] Vivienne Chow, 'Inching Toward Restitution, Belgium Has Handed Over An Inventory of 84,000 Artifacts to The Democratic Republic Of Congo' (Artnet News, 22 February 2022).
[96] *Ibid.*

for heritage covenants and the provision of advice. In addition, the country has adopted various international-law instruments, including the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), and the decree on the Protection of Movable Cultural Heritage of Particular Interest (2003).

Several laws and decrees originate from the French-speaking, German-speaking, and Flemish-speaking communities because cultural matters are a regional competence at present. Article 136(34) of the Belgian Criminal Code (*Code penal*), which was introduced in 2003 through *Loi* 2003-08-05/32, provides that, in accordance with the 1954 Hague Convention, the destruction of cultural property and cultural heritage by voluntary action or negligence is punishable by law.[97] Article 136 of the Criminal Code entered into force on the same day as the Second Protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

Accordingly, the Article 136 offences are also crimes under international law. As per the provisions of that title, those offences, along with the war crimes that are referred to in the Geneva Convention of 1949 and in the First and Second Protocols of Protocols, which were adopted in 1977, are punishable by the laws and customs that are applicable to armed conflicts.[98] Furthermore, the Belgian Criminal Code accords with Article 8 § 2 of the Statute of the International Criminal Court. Therefore, crimes which are punishable by the Code as undermining the protection of persons and property are punishable by law.[99]

Until recently, African art was largely considered a part of Belgian cultural heritage. Accordingly, some have argued that there is no legal argument for restitution. However, after the provision of the 2002 inventory to the government of the Congo, the Belgian Parliament is now examining the possibility of rendering all objects that were obtained during the colonial era alienable.[100] At

[97] *Loi* 2003-08-05/32.
[98] *Code Pénal Belge* 1948.
[99] *Ibid.*
[100] Vivienne Chow, 'Inching Toward Restitution, Belgium Has Handed Over An Inventory of 84,000 Artifacts to The Democratic Republic Of Congo' (Artnet News, 22 February 2022).

present, it is illegal to remove items from the Royal Museum for Central Africa. The same is true of all works that are currently held in federal collections.[101]

In June 2022, King Philippe returned a ceremonial mask to the National Museum of the Congo on an indefinite loan. The government intends to create a new law which would provide for restitution on a "*case-by-case basis*".[102] Foreign authorities would be allowed to apply for the repatriation of artefacts. The applications would be reviewed by a committee that will comprise experts from the two countries.[103] This process would help the Congo to complete its journey to independence, and it would strengthen the cultural co-operation between the two countries.[104]

Unlike Belgium, which lacks cultural-heritage laws, other countries, such as the UK, have passed legislation on heritage, culture, and their preservation. These include the Ancient Monuments and Archaeological Areas Act 1979, the Dealing in Cultural Objects (Offences) Act 20003, and the Cultural Property (Armed Conflicts) Act 2017.

However, Belgium does hold a number of decrees, despite not having adopted as many statutes as its neighbouring nations. The Belgian instruments include the Decree on the Protection of Movable Cultural Heritage of Particular Interest of 2003, the 2004 Flemish Parliament Act on the organisation and funding of a cultural-heritage policy for heritage covenants and the provision of advice, and the 2005 Flemish Government Decree that implements the Heritage Act at museums, cultural-heritage publications, and cultural-heritage projects.

It is important to note that finances and time of creation are relevant criteria in EU and UK law.[105] Annex I of EC Regulation 116/2009 defines "cultural objects" as "*archaeological objects more than 100 years old which are the products of (1) excavations and finds on land or under water, (2) archaeological sites, (3) archaeological collections*".[106] Cultural objects and cultural heritage are

[101] Taylor Dafoe, 'Stopping Short of Restitution, King Philippe of Belgium Gives the Democratic Republic of Congo a Stolen Mask on Indefinite Loan' (Artnet News, 9 June 2022).
[102] *Ibid.*
[103] *Ibid.*
[104] Sarah Van Beuren, 'Restitution or Cooperation? Competing Visions of Post-Colonial Cultural Development in Africa' (Käte Hamburger Kolleg / Centre for Global Cooperation Research 2015).
[105] EC Regulation 116/2009 of 18 December 2008, OJ L 39/1 (2009); Council Directive 54 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of Member States Council Directive (EEC) 93/7 of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State OJ L 74/74, 27.3.93 (with amendments from 1997 and 2001).
[106] *Ibid.*

not defined in the same manner in many national laws. There are no nationwide and pieces of secondary legislation that govern foreign cultural heritage in, among others, Belgium, France, the Netherlands, and the UK. This makes it difficult for African states to seek restitution. At the same time, the current legislation obstructs the European trade in African art.

8. Independence and Ownership

Questions about cultural property were not resolved during the period in which most African countries became independent. Colonial states such as Belgium were unwilling to return artefacts which had already entered federal collections.[107] A number of former colonial empires, including not only Belgium but also France, the UK, and Spain, as well as many others, argued that the formerly colonised nations did not have the expertise or the resources to protect and conserve these collections. Many museum custodians and directors in Europe argued that the artefacts had to remain in Europe because they possessed appropriate means of conserving and protecting them.

In 1960, the Director of the Royal Museum for Central Africa, Lucien Cahen, wrote that it was not restitution but cultural collaboration in a "*context of exchange and in an atmosphere of understanding and mutual respect*" that would ideally be preferred.[108] A series of negotiations led to the conclusion of an agreement between Belgium and the Congo in 1974. The return of the artefacts remained optional rather than mandatory for Belgium.[109]

The plaintiff in any action for restitution must be able to demonstrate "ownership" of an artefact in order to support its claim. Many states depend on the cultural-heritage legislation that they have enacted to prove title. However, states do not always agree on what constitutes a "cultural artefact" and do not always identify the objects to which they ascribe special value comprehensively.[110] International-law instruments and intergovernmental organisations have played an important role in ownership disputes. After the ratification of the 1970 Convention, the then-President of the

[107] *Ibid.*
[108] Van Beuren (n 104).
[109] *Ibid.*
[110] Camille Labadie, 'Decolonizing Collections: A Legal Perspective on the Restitution of Cultural Artifacts' (Université du Québec à Montréal 2021).

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Zaire,[111] Mobutu Sese Seko (hereafter Mobutu) relied on the position of UNESCO to dispute the stance that Belgium had adopted in its negotiations with his government.[112]

As noted above,[113] the relevant soft-law instruments are not retroactive and therefore do not enable African states to take legal steps to ensure the return of the objects.[114] In 1973, Mobutu challenged the non-retroactivity clause in a speech at the 28th Session of the United Nations General Assembly. He said that it is "*natural and just to restitute to these underdeveloped countries their beacons of light, their authentic images of a continued future*".[115]

This speech was followed by a proposal for a resolution on the return of African objects, which was supported by nine other African states. Despite being passed with 113 votes for, zero against, and 17 abstentions, it proved difficult to enforce on a global scale.[116] However, these intergovernmental and international debates increased the pressure on European countries to co-operate with the restitution process.[117] Ultimately, this attention came to disrupt the art market.

9. Restitution, Gifts, or Co-operation in the Art Market

Many questions about restitution turn on linguistic subtleties. When one state claims restitution, the other often offers to structure the transaction as a gift rather than as a repatriation.[118] The gifts that Belgium made to Zaire in the 1970s and 1980s, which followed decades of demands for restitution from the formerly colonised state, were gestures of diplomatic co-operation.[119]

However, out of the 1,042 artefacts that were donated in this fashion, only 114 had actually belonged to the Royal Museum of Africa in Belgium. The rest had been taken in the 1960s from the Museum of Indigenous Life in the former capital of the Congo, Leopoldville.[120] These objects had been sent to Belgium for safekeeping during the independence conflict.[121] Therefore, legally,

[111] The Republic of Zaire (*République du Zaïre*) was a Congolese state that operated from 1971 to 1997. It had previously been known as the Democratic Republic of the Congo and currently uses the same name.
[112] *Ibid.*
[113] See Section II, Part B, Paragraph 2.
[114] Van Beuren (n 104).
[115] United Nations General Assembly, 2140th Plenary Meeting (1973).
[116] *Ibid.*
[117] Van Beuren (n 104).
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid*.

those objects had always belonged to the Congo – ownership of the Museum of Indigenous Life had been transferred to the Congolese government in 1961, after independence. It can be argued that countries such as Belgium, France, and the UK had legitimate causes for scepticism at the end of the 20th century due to the perilous political equilibria in the newly independent African countries. Indeed, a large number of items that had been gifted to African countries such as the Congo were discovered on the illegal art market only a few years after their return, a consequence of the chaos that engulfed African cultural institutions at the time.[122]

10. Implications for the Art Market

In the past, the art market has been described as comprising a "*myriad, often over-lapping, subspecialties that may be limited by region, by date, by medium, or by form... and archaeological and ethnographic materials... which their countries of origin consider cultural heritage*".[123] The post-colonial African demands for restitution and the 21st-century legal instruments that were discussed on the preceding pages have had significant implications for that market. Post-colonial and African art are traded across the globe, sometimes lawfully and sometimes illicitly. In light of the evolution of the law of cultural property and heritage and of international law, the past decades have witnessed "*adjudications of trans-national and international legal repatriation claims, choice-of-law* status quos *and rules, and statutory law overriding*".[124]

Predictably, this tendency has affected commerce. In addition, the development of concepts such as *lex culturalis*[125] and the corresponding principles, which revolve around alternative dispute resolution mechanisms, choice-of-law rules other than the application of the *lex situs,*[126] and the "*non-application of private international law rules*",[127] has also disrupted the market.[128] The same is true of the concept of *lex originis*, which calls for the application of the law of the jurisdiction

[122] Elif Hamutcu, 'Illicit Trade of Cultural Property: Who Owns African Art?' (2019) Columbia Undergraduate Law Review.
[123] Clemency Chase Coggins, 'A Licit International Traffic in Ancient Art: Let There Be Light' (1995) International Journal of Cultural Property.
[124] Christa Roodt, 'Restitution of Art and Cultural Objects and its Limits' (2013) The Comparative and International Law Journal of Southern Africa: Institute of Foreign and Comparative Law.
[125] *Lex culturalis* refers to a set of culturally sensitive principles integrated within international law tools.
[126] *Lex situs* refers to the law of position, meaning that the law of the jurisdiction in which the object is located applies.
[127] Alessandro Chechi, 'The Settlement of International Cultural Heritage Disputes: Towards a Lex Culturalis?' (European University Institute Law Department 2011) <https://cadmus.eui.eu/handle/1814/16056> last accessed 16 August 2023.
[128] Christa Roodt, 'Restitution of Art and Cultural Objects and its Limits' (2013) The Comparative and International Law Journal of Southern Africa: Institute of Foreign and Comparative Law.

from which an artefact originates.[129] States can draw on these doctrines to make cross-border claims for cultural heritage and property. *Lex culturalis* dovetails into the international system of restitution because it "*reconciles all moral, historical, cultural, financial and legal interests*".[130] However, at present, international cultural-heritage law and its instruments still lack uniformity due to an assortment of political, legal, social, and cultural factors.[131]

As noted previously, provenance and mode of acquisition are seldom ascertained by auction houses, private collectors, and art institutions. For example, *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts Inc*[132] highlighted issues with statutes of limitations and choice-of-law rules[133] as well as with the unfortunate similarities between the legitimate and the underground art market.[134] As Patty Gerstenblith wrote, antiquities are "*looted directly from the ground in ancient habitation areas and burial sites in order to supply the art market*".[135] In the light of the recent development of soft and hard law, limitation periods no longer supply an adequate legal basis for refusals to repatriate.

Consequently, the art market is becoming embroiled in cross-border restitution disputes.[136] The art market is not exempt from questions of morality. For example, if a sale is forced or occurs as a consequence of looting during occupation, there is a strong ethical claim for repatriation. Furthermore, the participants in the market are now subject to a stricter duty of diligence as a consequence of the emergence of new legal instruments, including the special rules that apply to "*stolen objects that fit within the categories set out in Article 3(4)*".[137] Article 3(5) of the 1995 UNIDROIT Convention provides that states can impose a 75-year limitation period on the recovery of stolen objects.[138]

11. Conclusion

[129] Aaron Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*' (Oxford University Press 2009).
[130] Chechi (n 127).
[131] Roodt (n 128).
[132] *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc.* 717 F 67 Supp 1374 (SD Ind 1989), affirmed 917 F2d 278 (US Court of Appeals 7th Circuit, 1990; no 89–2809) *cert* denied 112 S Ct 377 (1992).
[133] *Ibid.*
[134] Roodt (n 128).
[135] Patty Gerstenblith, 'Identity and Cultural Property: The Protection of Cultural Property in the United States' (1995) 75 Boston University Law Review 559.
[136] Roodt (n 128).
[137] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.
[138] *Ibid.*

In conclusion, the influence of post-colonial demands for restitution and regulation on the European art market is evident from the content of the modern law, both soft and hard, as well as from the nature of the contemporary art trade. Whatever the law, ethical and cultural considerations are of the essence. States must choose between internationalist and nationalist stances on cultural property.[139] Internationalism reflects the common interest in the "*preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives*", while nationalism has to do with the notion of a "*national cultural patrimony*".[140] The multi-billion-dollar art trade "*readily crosses borders*". Despite being highly organised, is still largely unregulated.[141] Private collectors, dealers, museums, and auction houses have historically tended to be indifferent to matters of provenance. Consequently, disputes about restitution are inevitable.[142] The European art market was estimated to be worth $19 billion as of 2017,[143] a figure that does not account for the illegal market, which is also highly developed in Europe and in the United States. This said, international databases of cultural heritage and looted art have facilitated the identification and return of artefacts and artworks in the past decades. Furthermore, instruments such as the Code of Ethics for Museums now guide museums when they must address provenance questions.[144]

In view of the proliferation of international and domestic regulation, the market is bound to change. Databases such as the Lost Art Register and the Lost Art Database, as well as institutions such as Interpol, facilitate tracking. The socio-political demand for the repatriation and restitution of objects from formerly colonised states also increases pressure on auction houses, collectors, dealers, and museums. Since European governments are increasingly reviewing African demands for restitution, the coming years will see substantial changes in the market. Given the large amounts of money that are involved, talk of restitution makes buyers and dealers nervous.[145] This anxiety is likely to persist until the global art trade changes profoundly.

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[139] John Henry Merryman, 'Cultural Property Internationalism' (2005) 12(1) International Journal of Cultural Property 11.
[140] Giorgallis (n 81).
[141] Roodt (n 128).
[142] *Ibid.*
[143] Christian Salm, 'Cross-Border Restitution Claims of Looted Works of Art and Cultural Goods' (European Parliament, November 2017) <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU(2017)610988_EN.pdf> last accessed 30 August 2023.
[144] International Council of Museums, 'Code of Ethics for Museums' (Paris: ICOM, 2004).
[145] Scott Reyburn, 'Restitution Fears Unsettle The Trade In African Art' (New York Times, 29 January 2019).

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The MFN clause under the OIC Agreement:

Analysis of *Itisaluna Iraq LLC and Others v Republic of Iraq*

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Abstract: *The Most Favored Nation (MFN) clause is one of the core protections envisaged in international investment agreements. It is intended to provide equal treatment among foreign investors and guarantee that they receive the same level of protection from the host state. Nevertheless, there is a lack of jurisprudence constante on the scope of its application in investment treaty arbitration (ITA). While extending the scope of the MFN clause to substantive protection is preponderantly accepted in ITA, albeit increasingly criticized, the debate on its application to dispute resolution provisions remains progressively heated. This article delves into the nuanced debate surrounding the scope of the MFN clause, particularly in relation to dispute resolution provisions. First, it begins by examining the controversial dichotomy of the MFN application to procedural matters. Afterwards, it explores the common principles of interpretation that play a pivotal role in shaping the interpretation of the MFN clauses. Second, it analyzes the recent Award rendered in Itisaluna Iraq LLC v the Republic of Iraq whereby the tribunal, by majority, declined its jurisdiction on the ground that the MFN clause as stipulated in the Organization of Islamic Co-operation Agreement (OIC) cannot be used to import dispute resolution provisions from bilateral investment treaties concluded between Iraq and other countries.*

Introduction

The Most Favored Nation ("MFN") clause is one of the core protections provided in several international investment treaties.[1] It has been defined in the Draft Articles of the International Law Commission as 'a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations'.[2] While access to justice and the MFN clause are both important principles in international investment agreements ("IIAs"), they can be in tension with each other. The MFN clause is intended to promote equal treatment

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[1] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012), 186; UNCTAD, *Most-Favored-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements*, vol 3 (United Nations 1999).

[2] International Law Commission, 'Draft Articles on Most-Favoured-Nation Clauses with Commentaries' (1978) 2 UNYBILC 16.

among investors, regardless of their nationality and guarantees that investors receive the same level of protection and rights as those granted to investors of other countries. On the other hand, access to justice is a fundamental principle in investment law, ensuring that investors can challenge states' actions that may be in violation of their rights. The tension arises because the MFN clause can be used by investors to cherry pick the preferred dispute resolution mechanism from a third treaty or to circumvent certain procedural prerequisites stipulated in the basic treaty. For instance, an investor may invoke the MFN clause to escape the host state's legal system by bypassing the precondition of resorting to national courts. This can be problematic because it deprives the host state of its right to regulate, limits the ability of its courts to exercise its jurisdiction over investment disputes involving foreign investors and exposes developing countries to the risk of costly investment arbitrations. Therefore, access to justice and the MFN clause are deeply intertwined and require careful balancing.

While the MFN clause is intended to promote equal treatment and protect investors, it must be balanced against the need for access to justice to ensure that investors are able to protect their rights and interests in investment disputes without rewriting the host states' consent as expressed in the Bilateral Investment Treaties (BITs) or the Multilateral Investment Treaties (MITs). This requires a nuanced approach that considers the specific circumstances and interpretation of each BIT, as well as the need to maintain a balance between investor protection and the host state's right to regulate. As such, identifying the scope of the MFN clause under BITs toward procedural matters such as dispute resolution is widely contested.

While extending the scope of the MFN clause to substantive protection is preponderantly accepted in investment treaty arbitration, albeit increasingly criticized,[3] the debate on its application to dispute resolution remains progressively heated. Since the *Maffezini* decision,[4] there has been a vigorous debate about the scope of application of the MFN clause to dispute resolution provisions.

[3] In identifying the scope of application of the MFN clause to substantive matters, some scholars warned about the risk of utilizing an overly wide teleological approach to interpretation and underscored the existence of some limitations that follows the application of the MFN clause to substantive matters. However, this jurisprudence falls outside the scope of this paper. See Tony Cole, 'The Boundaries of Most Favored Nation Treatment in International Investment Law' (2012) 33 Mich J Int'l L 537, 559–560; Anqi Wang, *The Interpretation and Application of the Most-Favored-Nation Clause in Investment Arbitration* (Brill Nijhoff 2022) 74.
[4] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000.

Tribunals are split into two schools of thought – the first school adopts a restrictive approach that limits the application of the MFN clause to substantive protection and accordingly, the MFN clause cannot be invoked to import dispute resolution provision from a third treaty, unless otherwise unequivocally stipulated.[5] The second adopts an expansive approach that extends the MFN clause to dispute resolution provisions regardless of the textual analysis of the respective BIT.[6]

In its award of 3 April 2020, the tribunal in *Itisaluna Iraq LLC and Others v the Republic of Iraq* (*Itisaluna v Iraq* or *Itisaluna* case) advanced a mixed approach between the first and the second school that is the focus of this note.[7] This is because even though the majority contended that an MFN clause could be used to import procedural matters as a matter of principle,[8] they underscored the uniqueness of the provisions of the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference 'OIC Agreement' and rightly noted that it '*does not fit comfortably into the mould of wider investment treaty jurisprudence*'.[9]

In the case beforehand, the Claimants invoked the OIC Agreement and the Japan-Iraq BIT by operation of the MFN clause in Article 8 of the OIC Agreement. Additional allegations were made against Iraq's unlawful direct and indirect expropriation, its violations of the minimum standard of treatment, national treatment and Fair and Equitable Treatment (FET). The tribunal held that it lacks jurisdiction ratione voluntatis and ruled in favor of the Republic of Iraq. In reaching its decision, the tribunal addressed two major issues, (1) the state consent to resort to the International Centre for Settlement of Investment Disputes (ICSID) by virtue of Article 17 of the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Agreement) and, (2) the applicability of the MFN

[5] Alejandro Faya Rodriguez, 'The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?' (2008) 25(1) J Int'l Arb 89; Emmanuel Gaillard, 'Establishing Jurisdiction Through a Most-Favored-Nation Clause' (2005) 233(105) NYLJ 3; Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) JIDS 97.
[6] *Maffezini* (n 4); *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005; *Suez, Sociedad General de Aguas de Barcelona SA & Inter Aguas Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006; *National Grid plc v Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004.
[7] *Itisaluna Iraq LLC and Others v Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020.
[8] ibid, paras 193–195.
[9] ibid, para 65.

clause in Article 8 of the OIC to import the state consent to resort to ICSID.[10] This paper focuses only on the latter matter and delves into the tribunal analysis in interpreting the scope of the MFN clause. It begins by examining the controversial dichotomy of the MFN applicability to procedural matters (Part 1). Afterwards, it summarizes the parties' pleadings before addressing the analysis of the *Istisaluna* tribunal concerning the scope of application of the MFN clause under the OIC Agreement and argues that the scope of the MFN clause does not intrinsically extend to dispute resolution provisions unless provided otherwise. As such, it concludes that even though the majority rightly rejected to import Iraq's consent to ICSID from Iraq-Japan BIT by virtue of the MFN clause as embedded in the OIC Agreement, they could have been more emphatic on the correct textual interpretation of the MFN clause (Part 2).

1. The application of the MFN clause to dispute resolution provisions under investment treaty arbitration

Although there is a lack of jurisprudence constante on its scope, the MFN standard is a public international law matter that must be interpreted in *'conformity with principles of justice and international law'*.[11] This section depicts the controversial debate on the scope of the MFN provisions on dispute resolution. It examines the divergent jurisprudence between an expansive approach and a restrictive one. It argues that the MFN clause, in essence, cannot be used to import dispute resolution mechanisms unless otherwise unequivocally stipulated.

1.1. The vexed question of the MFN interpretation on procedural matters

There is an eternal dichotomy in identifying the scope of application of the MFN standard to dispute resolution provisions. On the one hand, many scholars and tribunals adopted an expansive

[10] Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Agreement), signed in 1981, EIF in 1988, Article 8 provides that: "1. The investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors. 2. Provisions of paragraph 1 above shall not be applied to any better treatment given by a contracting party in the following cases: a) Rights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement. b) Rights and privileges arising from an international agreement currently in force or to be concluded in the future and to which any contracting party may become a member and under which an economic union, customs union or mutual tax exemption arrangement is set up. c) Rights and privileges given by a contracting party for a specific project due to its special importance to that state".

[11] Douglas (n 5) 100.

approach, whereby the MFN provision is perceived as the standard of protection that equally applies to substantive and procedural matters.[12] On the other hand, others adopted a restrictive approach confining its application to substantive matters[13] unless otherwise expressly provided.[14]

1.2.The expansive approach

This approach emerged after the famous *Maffezini* decision in 2000,[15] which triggered the debate on the scope of MFN provisions in investment treaty arbitration.[16] In this case, the tribunal permitted the Argentinian investor to use the MFN clause to bypass the requirement of an 18-month litigation period in Spain-Argentina BIT.[17] The *Maffezini* decision is a departure from the common understanding of the MFN function and proper operation under international law.[18] In identifying the MFN scope of application, the tribunal first relied on the Anglo-Iranian case whereby the International Court of Justice (ICJ) emphasized that the basic treaty created a juridical link between the investors' state and a third party treaty and granted the rights envisaged in the third treaty to the home state.

Otherwise, the basic treaty is completely isolated and independent from the third treaty and the latter has no legal effect on the state parties to the basic treaty pursuant to the principle of res inter alios acta.[19] As such, the tribunal stated that the subject matter of the MFN clause in the basic

[12] *Maffezini* (n 4); *Gas Natural SDG v Argentina* (n 6); *Suez, Sociedad General* (n 6); *National Grid v Argentina* (n 6); *Siemens AG v Argentina* (n 6).
[13] Douglas (n 5) 97, 105.
[14] Rodriguez (n 5); Gaillard (n 5); Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 344, 362; Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 256; *Garanti v Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, para 63; *Impregilo SpA v The Argentine Republic*, ICSID, ARB/07/17, Concurring and Dissenting Opinion of Prof Brigitte Stern, 21 June 2011, para 80; *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006 paras 90-91; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award, 2 July 2013, para 7.3.9; *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Separate and Dissenting Opinion of J Christopher Thomas, 7 October 2011, para 17; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005; *H&H Enterprises Investments, Inc v The Arab Republic of Egypt*, ICSID Case No ARB/09/15, Excerpts of the Award, 6 May 2014, para 358; *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction 29 November 2004, para 119; *Vladimir Berschader and Moïse Berschader v Russian Federation*, SCC Case No 080/2004, Award, 21 April 2006, para 181; *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, Award 8 December 2008, paras 160, 167; *A11Y LTD v Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, paras 104-107.
[15] *Maffezini* (n 4).
[16] Douglas (n 5) 101.
[17] *Maffezini* (n 4) paras 53–54.
[18] Douglas (n 14).
[19] *Maffezini* (n 4) para 44.

treaty must first be determined before invoking the MFN to import third treaty provisions.[20] Afterwards, it referred to the ejusdem generis principle to underscore that the MFN clause must be applied to the same category of rights by referring to the *Ambatielos* case and established that dispute resolution provisions are *'inextricably related to the protection of foreign investors'*.[21] Nevertheless, it cautioned about the risk of treaty shopping[22] and that the MFN provision cannot be invoked to bypass specific considerations, inter alia, public policy.[23]

In reaching its decision, the tribunal misunderstood the finding of the Commission in the *Ambatielos* case that it did support the operation of the MFN clause to import jurisdictional matters from a third treaty.[24] On the contrary, in the *Ambatielos* case, the MFN clause was invoked to establish a denial of justice claim for the prejudice Mr Ambatielos alleged to have suffered before the English courts.[25] Other tribunals exposed this interpretation.[26] For example, in *Plama v Bulgaria*, the tribunal noted that: *'in the Ambatielos Case … that ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty'*.[27] Following the *Maffezini* decision, there has been a surge of cases against Argentina that repeatedly adopted the *Maffezini* expansive approach.[28]

Allowing this expansive approach to continue would be difficult for states to predict the scope of their liability. Further, not only will it put states at risk of potential dispute resolution mechanisms to which they did not consent in the basic treaty, but it will also give carte blanche to all foreign investors to re-write the treaty's provisions. This is because public policy consideration construes a wide spectrum of interpretation and thus, it is left in its entirety to the discretionary power of the

[20] ibid para 45.
[21] ibid para 54.
[22] ibid para 63.
[23] ibid paras 62, 64–65.
[24] ibid para 50.
[25] *Greece v United Kingdom (Ambatielos)*, Award, 6 March 1956, 12 Reports of International Arbitral Awards 107; *Salini* (n 14) paras 106-112.
[26] *Berschader* (n 14) para 175; *Salini* (n 14) paras 106–112.
[27] *Plama* (n 14) paras 215, 217.
[28] *Maffezini* (n 4).

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respective adjudicators leaving respondent states vulnerable to the threat of costly potential investment disputes.

1.3.The restrictive approach

Although tribunals' analysis might vary in this approach, all confirm that the interpretation of an MFN provision shall not exceed what the contracting states consented to as expressed in the basic treaty.[29] Therefore in this approach, an MFN clause cannot extend to dispute resolution provisions unless there is unequivocal evidence to the contrary.[30] For example, in *Daimler v Argentina*, the tribunal provided that:

> *... as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.*[31]

In this line of argument, Douglas rightly observed that:

> *a most favoured nation (MFN) clause in the basic investment treaty does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty unless there is an unequivocal provision to that effect in the basic investment treaty.*[32]

Further, in her concurring and dissenting opinion in *Impregilo v Argentina*, Stern asserted that *'[a]n MFN clause cannot enlarge the scope of the basic treaty's right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the*

[29] Christopher Greenwood, 'Reflections on "Most Favoured Nation" Clauses in Bilateral Investment Treaties' in Stephan Schill et al. (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 559–61.
[30] Rodriguez (n 5); Gaillard (n 5); Douglas (n 14); McLachlan et al (n 14); *Impregilo SpA* (n 14); *Telenor Mobile* (n 14); *Daimler* (n 14); *Plama* (n 14); *H&H Enterprises Investments* (n 14); *Salini* (n 14); *Berschader and Berschader* (n 14); *Wintershall Aktiengesellschaft* (n 14).
[31] *Daimler* (n 14) para 164.
[32] Douglas (n 14) 344.

conditions provided for in the basic treaty'.[33] This position conforms with the majority adopted in *Itisaluna v Iraq*.[34] Even though the two approaches are extremely divergent in their views, both adopt the same principles of treaty interpretation and customary international law in interpreting the notion of the MFN clause.

1.4.The MFN and the principles of interpretation

This part first discusses the primary treaty interpretation instrument, the Vienna Convention on the Law of Treaties of 1966 (VCLT). Second, it examines the core principles of customary international law adopted in interpreting the MFN provisions, ejusdem generis and effet utile. Then it highlights the principle of separability that a few tribunals adopted in limiting the scope of application of the MFN clause to substantive matters.

1.5.The Vienna Convention on the Law of Treaties

The principles of treaty interpretation are set out in Articles 31 and 32 of the VCLT, which reflect principles of customary international law. Thus, in interpreting the MFN clause in investment treaties, tribunals usually consider both Articles.[35] Article 31 of the VCLT provides the 'General Rule of Interpretation'.[36] It provides that:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …*

This Article contains three distinctive principles of interpretation. The first is the interpretation must be in good faith, which follows directly from the pacta sunt servanda rule, *i.e.* Article 26 of the VCLT.[37] Second, it must consider the text's ordinary meaning as an expression of the parties'

[33] *Stern* (n 14) para 80.
[34] *Itisaluna* (n 7) para 195.
[35] ILC Draft Articles 1978 (n 2) 2.
[36] Romesh Weeramantry, 'Treaty Interpretation, the ICSID Convention and Investment Treaties' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016) 481–98.
[37] Article 26 provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

intentions. Third, this interpretation is to be made in the context of the treaty in light of its object and purpose.[38] A further resort to supplementary means of interpretation is applicable through Article 32 of the VCLT.[39] Nevertheless, because most MFN provisions are vague, they can give several interpretation scenarios. Unlike the MFN clause in the OIC, which expresses limitations that exclude importing dispute resolution.[40] However, the majority in the *Itisaluna* case decided not to emphasize the textual interpretation of the MFN clause under the OIC.[41]

1.6.The expression of consent

It is viewed that the provisions of a treaty represent the states' consent to the texts as given, not as assumed, which shall not be altered without prior consent. To illustrate, many scholars view the dispute resolution mechanism in investment treaties as demonstrating an 'offer to arbitrate'[42] that foreign investors cannot alter via the MFN clause.[43] For example, in his dissenting opinion, Thomas asserted that:

> *it is common ground between the parties, agreed by all members of the Tribunal, and well accepted in investment treaty arbitration that the State's prior treaty-based offer must be accepted by the claimant[44]… I find it difficult to see that the Claimant's invocation of a dispute settlement mechanism found in another treaty in order to vary the terms of the present Treaty is an acceptance of the offer to arbitrate on the terms on which the offer was made.[45]*

Therefore, in interpreting the scope of the MFN clause, a tribunal must consider the clear offer that the state parties made in the basic treaty. This is what the majority in the *Itisaluna* case asserted in analysing that the offer to arbitrate in Article 17 of the OIC agreement does not contain the ICSID arbitration. Thus, it cannot be imported from the Iraq-Japan BIT.[46]

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[38] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 UNYBILC 221.
[39] ibid.
[40] *Itisaluna* (n 7) para 197.
[41] ibid para 194.
[42] Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1412–13.
[43] Douglas (n 5) 108; Stern (n 14) para 53; Jan Paulsson, 'Arbitration without Privity' (1995) 10(2) FILJ 232.
[44] *Hochtief* (n 14) para 17.
[45] ibid para 26.
[46] *Itisaluna* (n 7) paras 110–111.

Ejusdem generis principle

A further significant rule of customary international law that is consistent with Article 31(3)(c) of the VCLT is the ejusdem generis.[47] Under this rule, an MFN clause shall be applied to the treatment of the same kind as the treatment stipulated in the MFN clause.[48] This principle is stated in the ILC draft articles on the MFN clauses. Article 9(1) provides that: *'under a most-favoured-nation clause, the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause*'.[49] Tribunals have adopted the ejusdem generis rule when deciding the scope of an MFN clause.[50] For example, in the *Al-Warraq* case, the tribunal stipulated that the MFN clause in the OIC agreement can be used to import the FET from UK-Indonesia BIT. It said: *'the Tribunal is of the view that the MFN clause applies to import other clauses as long as the ejusdem generis rule applies*'.[51]

In conclusion, the principle of ejusdem generis is a significant rule of interpretation that must be applied not to extend the scope of the MFN clause beyond what the state parties have agreed. However, the majority in *Itisaluna* case decided not to address any rule of textual interpretation in determining the scope of the MFN clause under the OIC Agreement.

1.7.The principle of effet utile

Under international law and in the jurisprudence of the ICJ, it is undoubted that the provisions of a treaty, i.e. the MFN clause, must be effectively interpreted rather than ineffective.[52] Many tribunals asserted this doctrine.[53] For example, in *Eureko v Poland*, the tribunal stated that:

[47] Article 31(3)(c) provides that: '… any relevant rules of international law applicable in the relations between the parties'; International Law Commission, Draft Articles 1978 (n 2) 27; *Ambatielos* (n 25) 107.
[48] Stephen Fietta, 'Most Favoured Nation Treatment And Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?' (2005) Int ALR 132; Andrew Newcombe and Lluis Paradell, *Law And Practice Of Investment Treaties: Standards Of Treatment* (Kluwer Law International 2009) 193–232.
[49] International Law Commission, Draft Articles 1978 (n 2) 30; International Law Commission, 'Final Report of the Study Group on The Most-Favoured-Nation Clause' (2015) 2 UNYBILC 212.
[50] *Ambatielos* (n 25) 107; *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, paras 541, 551; *ICS Inspection and Control Services Ltd v Argentina*, PCA Case No 2010-9, Award on Jurisdiction, 10 February 2012, para 297; *Daimler* (n 14) paras 211–12, 215–16; Plama (n 14) para 189; Berschader (n 14) para 195.
[51] *Al-Warraq* (n 50) para 551.
[52] *ICS* (n 50) para 317.
[53] *ICS* (n 50) para 317; *Eureko BV v Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, para 248; *Noble Ventures Inc v Romania*, ICSID Case no ARB/01/11, Award, 12 October 2005, para 50.

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> *it is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.*[54]

1.8.The separability of the arbitration agreement

Although this principle is not commonly adopted in interpreting the MFN clause, a few tribunals noted that an MFN clause, unless otherwise explicitly agreed, is a substantive protection that must be separated from the procedural protections in the Investor-State Dispute Settlement provision (ISDS).[55] To illustrate, importing a dispute resolution mechanism from a third treaty by virtue of an MFN clause will disrupt the principle of separability of the arbitration provisions.[56] For example, in *H&H v Egypt*, the tribunal asserted that:

> *[d]ispute resolution provisions are separable from the remainder of the treaty and "constitute an agreement on their own"; accordingly, "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them".*[57]

2. Factual background of *Itisaluna v Iraq*

This section summarizes the factual background of the case, the parties' arguments and the analysis of the majority of the Tribunal.

2.1. Overview of the facts and the tribunal decision

This case concerns two companies, Itisaluna Iraq and MSI, incorporated under the laws of the Kingdom of Jordan, and two other entities, VTEL Holdings and VTEL MEA incorporated under the laws of Dubai UAE ('the Claimants' or 'the Investors'). In 2006, MSI paid USD 20 million to

[54] *Eureko* (n 53) para 248.
[55] *Douglas* (n 5) 97; *Stern* (n 14) para 31.
[56] *Plama* (n 14) para 212.
[57] *H&H* (n 14).

conclude a licensing agreement with Iraq's National Communications and Media Commission (CMC) to launch voice data and internet services in Iraq.[58] The Investors filed a request for arbitration in 2017.[59] They claimed that their right to operate their international gateways under the licensing agreement was impaired by the Iraqi Council of Ministers' decision to prohibit such operations in 2008.[60] In 2014, as the security situation in Iraq deteriorated, the Investors objected that they were banned from laying optical fibre cables. Consequently, Iraq's CMC increased the Investors' fees, despite the latter's various pleas. Thus, it violated its obligation as a regulator and eventually failed to negotiate the renewal of the Investors' licenses.[61] Against this background, the Investors initiated their case claiming that the Republic of Iraq ('the Respondent' or 'Iraq') breached its obligations under the OIC Agreement of national treatment, expropriation, full protection and security (FPS), and FET.[62]

In June 2018, the tribunal bifurcated the proceedings pursuant to the parties' agreement to address Iraq's objection ratione voluntatis as a preliminary matter.[63] The core issue of the award was whether the tribunal had jurisdiction under Article 25(1) of the ICSID Convention, which provides that both parties must consent in writing to submit their dispute to the ICSID arbitration.[64] On the one hand, Iraq contended that the tribunal lacks jurisdiction ratione voluntatis because Article 17 of the OIC Agreement,[65] concerning the dispute resolution mechanism, does not comprise ICSID

[58] *Itisaluna* (n 7) para 5.
[59] ibid para 25.
[60] ibid para 26.
[61] ibid para 26.
[62] ibid para 28.
[63] ibid paras 14–15.
[64] *Itisaluna* (n 7) paras 20-21, 40; Convention on the Settlement of Investment Disputes between states and nationals of other states, Ch II, Article 25 stipulates that: "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. *When the parties have given their consent, no party may withdraw its consent unilaterally*…" 18 March 1965.
[65] OIC Agreement, Article 17 provides that: "1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures: (1) Conciliation: a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. The parties concerned may request the Secretary General to choose the conciliator. The General Secretariat shall forward to the conciliator a copy of the conciliation agreement so that he may assume his duties. B) The task of the conciliator shall be confined to bringing the different viewpoints closer and making proposals which may lead to a solution that may be acceptable to the parties concerned. The conciliator shall, within the period assigned for the completion of his task, submit a report thereon to be communicated to the parties concerned. This report shall have no legal authority before a court should the dispute be referred to it. (2) Arbitration: a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute. b) The arbitration procedure begins with a

arbitration. Furthermore, it asserted that its written consent to ICSID arbitration could not be derived from a comparator treaty, Iraq-Japan BIT, by operation of Article 8(1) of the OIC Agreement.[66] On the other hand, the Investors argued that the tribunal has jurisdiction under Article 17 which constitutes written consent to resort to arbitration, and by virtue of the MFN clause in Article 8(1) of the OIC Agreement, Iraq's consent to ICSID arbitration provided in Article 17 (4)(a) of the Iraq-Japan BIT is invoked.[67]

On 3 April 2020, the tribunal, by majority,[68] declined its jurisdiction and upheld Iraq's objections to jurisdiction ratione voluntatis under the OIC Agreement.[69] Nevertheless, Dr Wolfgang Peter, the arbitrator appointed by the claimants, dissented the award. He contended that the MFN clause could be used to import Iraq's consent, provided in Iraq-Japan BIT, to resort to ICSID arbitration.[70]

2.2. The Claimants' pleadings on jurisdiction

The Claimants rested on Article 8(1), MFN clause, of the OIC Agreement to establish Iraq's consent to ICSID arbitration given in Article 17(4)(a) of Iraq-Japan BIT. They argued that this article contains a more favourable dispute resolution clause than the one stipulated in Article 17(2)(b) of the OIC Agreement.[71] They premised their pleadings on establishing the tribunal's jurisdiction on two contentions. The first is that Iraq's general consent to arbitration is established in Article 17 of the OIC Agreement. This consent is supplemented by importing Iraq's consent to ICSID arbitration in the Iraq-Japan BIT operation of the MFN clause of the OIC Agreement. The second is that Iraq's consent to arbitration and consent to the ICSID can be imported from the Iraq-

notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitration Tribunal. c) The Arbitration Tribunal shall hold its first meeting at the time and place specified by the Umpire. Thereafter the Tribunal will decide on the venue and time of its meetings as well as other matters pertaining to its functions. d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."

[66] Itisaluna (n 7) para 20.
[67] *Itisaluna* (n 7) para 21.
[68] Sir Daniel Bethlehem QC (the President of the tribunal) and Professor Brigitte Stern (the arbitrator appointed by the Respondent).
[69] *Itisaluna* (n 7) 105.
[70] ibid paras 226–242.
[71] ibid paras 71, 76.

Japan BIT by operation of the MFN clause in Article 8(1) of the OIC Agreement without regard to the ISDS clause in Article 17 of the OIC Agreement.[72]

2.3. Iraq's objection to jurisdiction ratione voluntatis

In response, Iraq's objection to jurisdiction was premised on the lack of consent to arbitrate under the OIC; Article 17 of the OIC considers only state-to-state dispute resolutions, and even assuming, arguendo, that it contemplates ISDS mechanism, it does not refer to ICSID arbitration.[73] Therefore, the tribunal lacks jurisdiction ratione voluntatis to decide on the possibility of importing Iraq's consent by operation of the MFN clause in the OIC Agreement.[74] The argument being advanced was that the MFN clause could not be used either to establish a non-existent consent[75] or be interpreted in a way to substitute the dispute settlement provision in the OIC with a completely new mechanism unless otherwise expressly stipulated in the MFN clause, which does not apply to Article 8.[76]

2.4. The tribunal analysis and award

The majority of the tribunal concluded that the MFN clause, Article 8, of the OIC Agreement could not import the Respondent's consent in writing to bring a claim before the ICSID stipulated in the Iraq-Japan BIT and thus, upheld Iraq's objection to jurisdiction ratione voluntatis.[77]

The majority began their analysis by addressing the central issue of whether the Claimants can import ICSID arbitration from Article 17 (4)(a) in Iraq-Japan BIT by operation of the MFN clause in the OIC Agreement.[78]

2.5. On the interpretation of the OIC Agreement

The majority of the tribunal highlighted that since the OIC Agreement is a multilateral treaty, 'considerable caution' must be given to any proposed interpretation that 'neither follows clearly

[72] ibid paras 78–80, 114–115.
[73] ibid paras 82, 92–96.
[74] ibid paras 83–85.
[75] ibid paras 99–106.
[76] ibid paras 83–87, 107–113.
[77] ibid paras 148, 223–235.
[78] ibid para 146.

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and necessarily from the plain and ordinary meaning of its terms nor derives from the clear and dispositive practice of all of its Contracting Parties, resting rather on the contested practice of one of its Contracting Parties alone'.[79] They rightly asserted that the practice of one party to the OIC, *i.e.* Iraq, in a bilateral context *'cannot be safely relied upon as a yardstick for the interpretation and application of that multilateral agreement'*.[80] Therefore, operating the MFN clause in a way that will create a 'variable framework' for the entire multilateral treaty would be *'the very antithesis of the principle underlying the MFN clause'*.[81] In this context, the majority highlighted that the interpretation of a multilateral agreement must neither fracture its multilateral character nor be done in isolation of its systemic nature.[82]

Against this background, the majority observed no connection between the interpretation of the OIC Agreement and the precedents raised by both parties.[83] Following this critical issue of interpretation, the majority illustrated prominent appreciations upon which they premised their final decision; the interpretation of Article 17 and the scope of application of the MFN clause in Article 8 of the OIC Agreement.[84]

2.6. On the interpretation of Article 17 and the consent to arbitration

In interpreting Article 17, the majority established that state parties of the OIC Agreement contemplated creating *'a bespoke mechanism'* for settling investor-state disputes arising under this Agreement.[85] This appreciation necessitates identifying the reference to *'conciliation'* provided in Article 17 and whether it is a mandatory prerequisite to arbitration or optional, as well as the question of consent to arbitration under the OIC. The majority concluded that conciliation is a condition precedent to resort to arbitration,[86] unlike the *Al-Warraq* tribunal. Article 17(2) constitutes the Respondent's consent to resort to arbitration, but not the ICSID arbitration.[87]

[79] ibid para 153.
[80] ibid.
[81] ibid.
[82] ibid para 154.
[83] ibid para 155.
[84] ibid para 156.
[85] ibid paras 167–168.
[86] ibid para 183.
[87] ibid paras 188–190.

2.7. On the interpretation and scope of application of the MFN clause

The majority noted that the essence of the dispute is whether the MFN clause in the OIC Agreement permits the incorporation of Iraq's written consent to ICSID from Iraq-Japan BIT.[88] In this respect, the majority's analysis here was sound because they relied on the terms used in the MFN clause to identify the possibility of importing Iraq's consent to resort to ICSID by virtue of the MFN clause as expressly stipulated in the OIC Agreement. In this view, they elucidated the essence of the proper application of an MFN clause by emphasizing that the MFN clause is 'amenable to limitation, whether expressly or implicitly, having regard to the terms in which the principle is expressed and its purpose in the context of the instrument in which it is found'.[89]

In this, the majority rested on the tribunal's analysis in the *Maffezini* case.[90] Although the *Maffezini* tribunal adopted an expansive approach, it warned about some significant public policy considerations that the operation of an MFN clause cannot bypass.[91] These limitations are the exhaustion of local remedies, fork in the road and the choice of a particular arbitration forum.[92]
In particular, the majority meticulously noted that despite the lack of clarity in many parts, the OIC Agreement constructed a *'clearly defined and particular dispute resolution regime'* that did not incorporate ICSID arbitration. This reveals that the state parties made a *'conscious decision'* to omit the ICSID arbitration.[93] They further added that the reading of Article 8(1) and (2)(a) together with Article 18 of the OIC Agreement create *'an MFN framework that is essentially designed to operate as a floor … rather than as a leveller of principle of wider application'*.[94] Therefore, they considered the OIC Agreement as establishing a unique *'systemic framework'* for the protection of investors, which they described as *'public policy considerations'*.[95]

Finally, in their concluding remarks, the majority warned about the risks of permitting treaty shopping by investors. It quoted the *Maffezini* analysis that *'a distinction has to be made between*

[88] ibid para 196.
[89] ibid.
[90] ibid paras 210, 212–222.
[91] ibid para 210.
[92] ibid para 211.
[93] ibid para 216.
[94] ibid para 217.
[95] ibid paras 218 and 220.

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the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand'.[96]

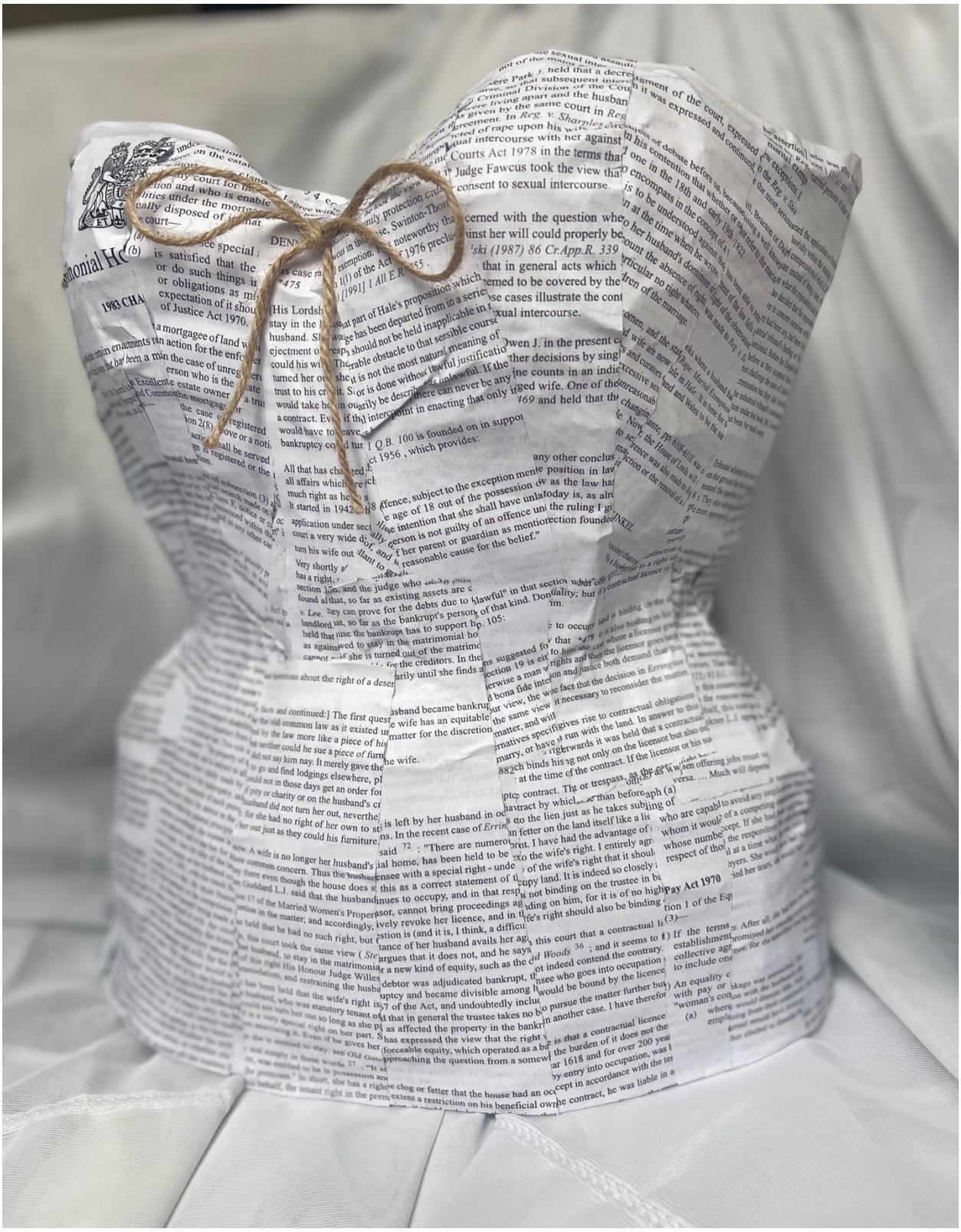
In conclusion, the award of the *Itisaluna* case is sound. While the majority's analysis was sharp, it could have been more emphatic by interpreting the text of the MFN clause in light of the customary international law rules instead of rejecting the Respondent's textual analysis in its entirety.[97] Although the majority warned about overcoming public policy considerations, they did not refer to Article 16 as a fork-in-the-road provision in the OIC Agreement, a public policy consideration that the MFN clause cannot circumvent.

Conclusion

Although the MFN standard exists in numerous investment treaties, its interpretation raises many issues. In deciding whether it can import dispute resolution mechanisms, jurisprudence has split between restricting and expanding approaches. In reaching their decisions, tribunals tend to apply rules of customary international law to reach a compelling interpretation of the MFN in question. Since the text of any treaty expresses how the state parties have chosen to promote and protect foreign investment, unless otherwise stipulated, the MFN clause in any treaty cannot be used by foreign investors as a carte blanche to cherry-pick dispute resolution provisions and incorporate them in the basic treaty. Allowing such behaviour to proliferate without proper scrutiny of the text will affect the equilibrium of the treaties and disrupt the whole investment treaty system. More attention must be paid to multilateral treaties, as the majority in *Itisaluna* illustrated. Although the majority in *Itisaluna* case provided significant analysis, they overlooked giving a proper interpretation of the MFN clause under the OIC Agreement. Against this background, the MFN debate will last so long as the current poor treaty provisions exist.

[96] ibid para 220.
[97] ibid para 194.

Laura MacLachlan, Laces of The Law



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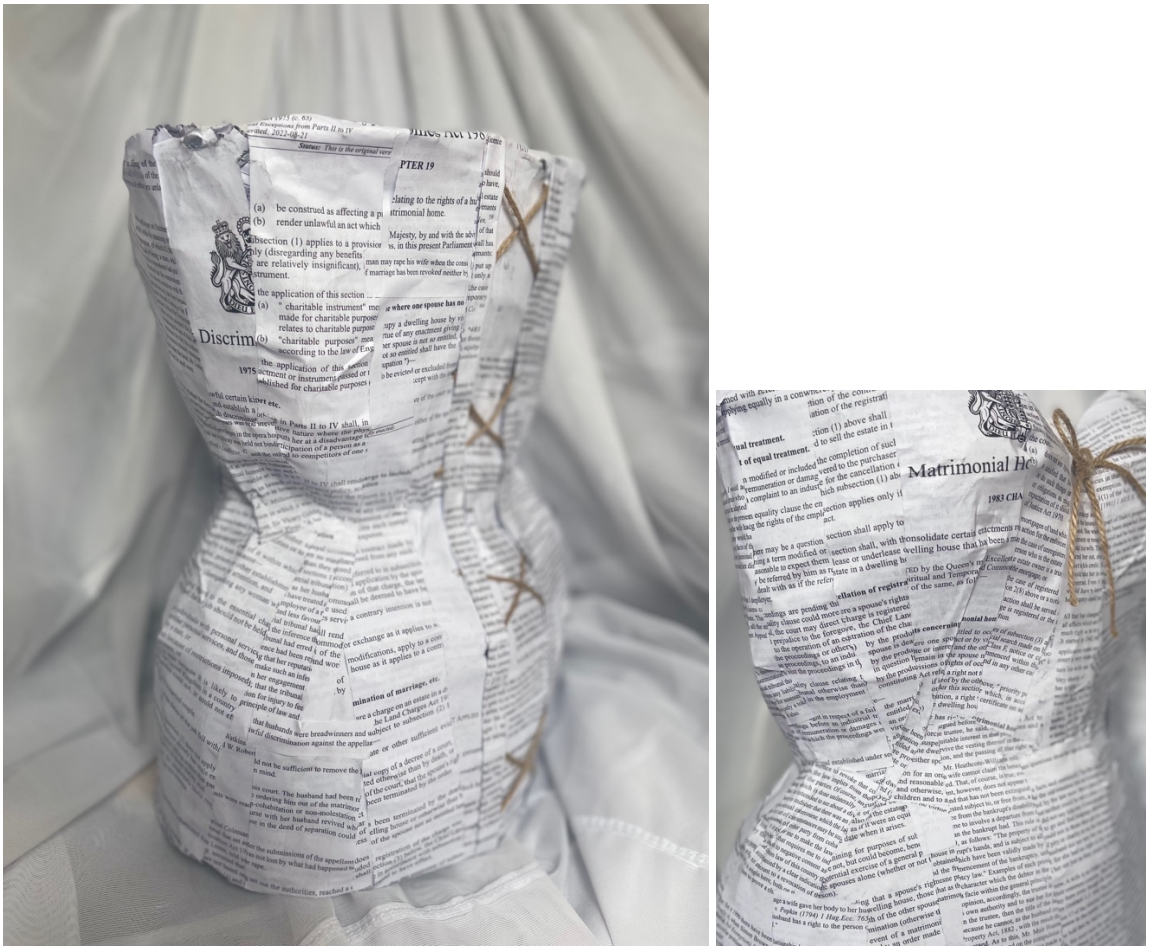

Laces of the Law (paper and chicken wire sculpture)

Walking along the halls of Middle Temple, I reflected upon rows of male judicial portraiture and asked myself where all the women were. As I crept around the corner of the final hallway, at last, a woman's portrait came into view. Having only been allowed to join the legal profession since 1919 after the passing of the Sex Disqualification (Removal) Act, women have a lot of catching up to do when it comes to filling these halls with portraits with female figures.

I began researching other historical laws that prejudiced and restrained women. We have come a long way from the days when women were unable to open bank accounts, pursue education, or obtain work. Women were subjected to marital rape and domestic violence without much legal interference under the guise of respecting the privacy of marriage. Female divorcees also had few

rights relating to the family home, which disincentivised them from escaping domestic violence. Historically, society perceived women as weak and incapable, thus some laws constrained women in a male-designed idea of what a woman's life should look like.

Such legal gender inequities were demonstrated in case law and legislation, but I wondered how I could capture this notion of the restraint and confinement of women in an art form. I came upon the idea of drawing a parallel between the law's construction of gender and the physical restriction of women's bodies through a corset. When I think of a corset, I think of oppression, restraint, and conformity to an ideal: an ideal designed by the male eye. Much like a corset, law was a tool to control women and fit them into a mould. The law laced women up into passive roles within society and stowed them away from public spaces. To capture this, I constructed legal documents into alternative forms. I took pages from various cases and legislations which sought to loosen these symbolic laces of the law that tightly confined women and shaped them into a corset. By doing this, I hope to encourage viewers to appreciate how laws have historically been tailored to fit a woman based on her gender, rather than her humanity.

If viewers look closely enough to appreciate the dates contained within the legal materials which comprise the art, they will realise that these jarring inequities are not merely historical relics. It is for that reason that I have left the laces tightened. I hope that my art may serve a dual purpose. First, an appreciation of how far legislation has developed to improve gender inequality. Second, to remind us of the strides we must take to address further concerns surrounding gender inequalities. I hope that viewers will question where else the laces of the law must be loosened, in order to allow women to embrace their true and individual forms and be free from legal biases.

Equal Access to Vaccines and Medicines –

How Can Patent Law Approach Pandemics Effectively?

Julia Suttrup*

Abstract: *Although IPRs are property rights giving their owners control over assets, they are not guaranteed unlimitedly. Therefore, this article will analyse the correlation between the protection of patents as a driving force for investment and innovation, on the one hand, and the unhindered access to healthcare technologies, on the other hand, with close attention to the Covid-19 pandemic. Keeping this relationship in mind, it will discuss legal and pragmatic solutions for guaranteeing equal access to vaccines and medicines, in order to find an effective approach to future pandemics. It will argue that there is not one perfect approach of patent law to pandemics, but a policy toolkit is needed that considers collaboration, as well as knowledge transfer and balances the scope of protection with IP limitations and exception.*

Introduction

'The COVID-19 pandemic has been a stark and painful reminder that nobody is safe until everyone is safe.'[1] As stated by European Council President *Charles Michel*, World Health Organisation (WHO) Director-General *Dr Tedros Adhanom Ghebreyesus* and 24 world leaders, Covid-19 has revealed many deficiencies in the pandemic preparedness of the international community. Since the declaration of Covid-19 as a 'pandemic' on 11 March 2020[2], the intellectual property (IP) system has been at the centre of the debate. The Covid-19 virus posed a new dimension to the question of equal access to vaccines and medicines. Therefore, balancing rights, political pressures and legal mechanisms has become more important than ever.

Supporting a waiver of intellectual property rights (IPRs) during the Covid-19 pandemic, for example, was supposedly part of a political tactic of the US to shift the focus from its export

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[1] Charles Michel, Tedros Adhanom Ghebreyesus and 24 world leaders, 'COVID-19 Shows Why United Action Is Needed for More Robust International Health Architecture' (30 March 2021). <https://www.eeas.europa.eu/delegations/un-geneva/covid-19-shows-why-united-action-needed-more-robust-international-health_en> accessed 8 January 2023.

[2] Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (*World Health Organization*, 11 March 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 8 January 2023.

restrictions to the pharmaceutical (pharma) industry.[3] Therefore, it must be kept in mind that IP law depends on policy priorities and the values pursued by a country.[4] Although the Covid-19 pandemic revealed the deficiencies of the international IP system with regard to equal distribution of vaccines, it can be seen as a warning for future pandemics in order to implement more effective mechanisms as part of a pandemic preparedness policy.[5]

This article aims to evaluate the current patent regulations and policies in the context of Covid-19 and suggest alternative solutions to find an effective patent law approach to a pandemic. First, the article will analyse the impact of patents on access to medicines during the Covid-19 pandemic to highlight legal issues that have to be solved for an effective pandemic approach. It then discusses different IP approaches that have either already been applied or can be applied during a pandemic considering compulsory licensing, a possible TRIPS[6] waiver and legal as well as pragmatic and local solutions. This article suggests that an effective IP approach to a health crisis such as Covid-19 is essential to address future pandemics.

This article will focus on analysing mechanisms that may facilitate access during a pandemic. The article does not claim to be comprehensive; it focuses on international solutions that are variably applicable. Regional solutions will only be discussed exemplarily due to the limited scope of this article.

1. The Impact of Patents during the Covid-19 Pandemic

During pandemics, such as Covid-19, countries struggle with securing availability and accessibility of medicines.[7] In September 2021, only 3 percent of the population in low-income countries received at least one dose in contrast to 60.18 percent in high-income countries.[8] By 4 January 2023, 72.86 percent of the population in high-income countries had been vaccinated

[3] Behrang Kianzad and Jakob Wested, '"No-One Is Safe Until Everyone Is Safe" – Patent Waiver, Compulsory Licensing and COVID-19' (2021) 5 European Pharmaceutical Law Review 71, 88.
[4] Ibid 90.
[5] See also Duncan Matthews, 'The Covid-19 Pandemic: Lessons for the European Patent System' (2022) 44 European Intellectual Property Review 221, 221.
[6] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1995.
[7] As specified in General Comment No. 14 of the UN Committee on Economic, Social and Cultural Rights 2000 para 12; Van Anh Le, *Compulsory Patent Licensing and Access to Medicines: A Silver Bullet Approach to Public Health?* (Springer International Publishing 2022) 2–3.
[8] United Nations, 'UN Analysis Shows Link between Lack of Vaccine Equity and Widening Poverty Gap' (*UN News*, 28 March 2022) <https://news.un.org/en/story/2022/03/1114762> accessed 8 January 2023.

at least once compared to less than a third in low-income countries.[9] Although these inequalities cannot be solely ascribed to patents, a correlation can be noticed.[10] As previously observed during the HIV/AIDS health crisis, the introduction of competition has led to a price decrease[11], where the supply of generic medicines improved access. While India excluded pharmaceuticals from patent protection and facilitated the production of generics pre-TRIPS, this is not possible anymore as TRIPS does not allow the exclusion of pharmaceuticals *per se*.[12] Although the least-developed countries are exempted from the obligation to implement TRIPS until 1 July 2034 and can still exclude pharmaceuticals from patent protection[13], they face different challenges such as the lack of bargaining power and production capacity.[14] The developing and least-developed countries have been pressured into so-called TRIPS-plus treaties that oblige those countries to apply IP protection standards that go beyond TRIPS.[15]

As predicted by *Achal Prabhala* and *Ellen 't Hoen*[16], this problem is aggravated by so-called patent thickets or families. There is a trend of patenting pharmaceutical variants causing multiple patent applications with minor modifications, which leads to longer patent terms and less access.[17] The duration of patents might seem irrelevant to the Covid-19 pandemic where fast response was the most imperative consideration and waiting for the expiration of patent protection is not an option so far. However, the development of Covid-19 vaccines relies on known and already patented technologies. For example, the mRNA vaccine field is covered by patent thickets, which hinder access to such information.[18] Patent thickets create artificial scarcity by limiting the production of goods due to strategic decisions.[19] They make the development of life-saving drugs more complex and expensive because manufacturers need to

[9] United Nations Development Programme, World Health Organisation and University of Oxford, 'Global Dashboard for Vaccine Equity' (*UNDP Data Futures Platform*, 4 January 2023) <https://data.undp.org/vaccine-equity/> accessed 8 January 2023.
[10] See section 3.2. of this article and Mousumi Dutta, Zakir Husain and Anup Kumar Sinha (eds), *The Impact of COVID-19 on India and the Global Order: A Multidisciplinary Approach* (Springer Nature Singapore 2022) 268–269.
[11] Germán Velásquez, *Vaccines, Medicines and COVID-19: How Can WHO Be Given a Stronger Voice?* (Springer International Publishing 2022) 80.
[12] Dutta, Husain and Sinha (n 10) 268–269.
[13] See TRIPS, art 66; Johanna Gibson, *Intellectual Property, Medicine and Health* (2020) 55.
[14] Kianzad and Wested (n 3) 79; Franziska Sucker and Kholofelo Kugler, 'The Proposed Covid-19 TRIPS Waiver: Not a Silver Bullet but Part of a Solution for Africa's Covid-19 Health Crisis' (2022) 19 Manchester Journal of International Economic Law 37, 42.
[15] Kianzad and Wested (n 3) 79.
[16] Achal Prabhala and Ellen 't Hoen, 'We'll Find a Treatment for Coronavirus – but Drug Companies Will Decide Who Gets It' (*The Guardian*, 15 April 2020). .<https://www.theguardian.com/commentisfree/2020/apr/15/coronavirus-treatment-drug-companies> accessed 8 January 2023.
[17] Velásquez (n 11) 79.
[18] Siva Thambisetty et al, 'Addressing Vaccine Inequity during the COVID-19 Pandemic: The TRIPS Intellectual Property Waiver Proposal and Beyond' [2022] The Cambridge Law Journal 1, 14–15.
[19] Ibid 5.

consider and pay royalties for a great number of patents.[20] Therefore, such patent thickets have been pivotal in the discussion about access to vaccines and medicines during the COVID-19 pandemic.[21]

Publication delays and a lack of information within the patent disclosure process further impede access to Covid-19 pharmaceuticals. Even though the patent bargain includes the need to publish the patent application as an offset to the guaranteed monopoly rights, such publication does not need to take place before the expiration of 18 months from filing.[22] In the case of patents related to key Covid-19 vaccines, this period did not end before autumn 2022.[23] Through follow-on patents, the publication requirement can even be pushed to a later date.[24] In those 18 months, the focus of attention shifted from vaccines to medicines. However, it remains unclear how many patents related to Covid-19 vaccines have been granted.[25] Even if patent applications had already been disclosed earlier, the burden of disclosure would not have been high. In relation to vaccines, details of the manufacturing process are often not revealed, as in the case of *Moderna*[26], or are spread over multiple applications.[27]

Given these access impediments, IPRs play a fundamental role when the pharmaceutical market operates in such a dysfunctional or inequitable way as it has been seen during the Covid-19 pandemic.[28]

2. How can Patent Monopolies be Limited?

During the Covid-19 pandemic, it became clear that introducing export bans for patented pharmaceuticals and limiting their distribution is not an effective way to secure access to vaccines or medicines.[29] This article believes that the limitation of patent monopolies should be considered to find an effective patent law approach to pandemics.

[20] Kianzad and Wested (n 3) 87; Xiaodong Yuan and Xiaotao Li, 'Pledging Patent Rights for Fighting Against the COVID-19: From the Ethical and Efficiency Perspective' (2022) 179 Journal of Business Ethics 683, 684–685.
[21] Yuan and Li (n 20) 684–686.
[22] For example, see Convention on the Grant of European Patents (EPC) 1977, art 93.
[23] Matthews (n 5) 226.
[24] Thambisetty and others (n 18) 14.
[25] Ibid.
[26] Nikou Asgari and Hannah Kuchler, 'Moderna CEO "Didn't Lose Sleep" over US Backing of Patent Waiver' (*Financial Times*, 6 May 2021) <https://www.ft.com/content/607bf143-3360-4543-8cb4-b1a1c42fc41f> accessed 8 January 2023.
[27] Thambisetty and others (n 18) 14.
[28] Ibid 5.
[29] As seen in the US and Bangladesh concerning *Remdesivir*: Kianzad and Wested (n 3) 74–75.

2.1. Compulsory Licensing

Compulsory licensing in Article 31 TRIPS allows for the use of a patented innovation without the authorisation of the right owner. It can only be issued in the case of public interest, anti-competitive conduct or non-commercial government use.[30] In the event of a national emergency or other circumstance of extreme urgency, there is no need to make efforts to obtain a voluntary license. In this case, the right holder only has to be informed.[31]

In 2001, the WTO member states recognised the adverse effects for developed countries whose pharmaceutical companies received most of the patent benefits and in developing countries whose citizens need IP-protected medicines.[32] Therefore, they adopted the Doha Declaration which modified the original TRIPS Agreement in order to make the TRIPS flexibilities more accessible. Paragraph 6 of the Doha Declaration (implemented as Article 31*bis* TRIPS) was supposed to ease access to essential medicines for those countries that are not able to manufacture them themselves.[33] It waives the requirement to use a compulsory license predominantly for supplying the domestic market of the authorising country that is stated in Article 31(f) TRIPS.[34] However, some countries such as the US and the EU opted out of Article 31*bis* TRIPS.[35] This has been interpreted as a 'misguided effort to protect the commercial interest of their pharmaceutical companies'[36]. In view of Covid-19, the opt-out clause could be one of the factors leading to a less effective mechanism of compulsory licensing: countries that opted out are not able to import those pharmaceuticals that are produced under a compulsory license. In the case of a global health crisis like the Covid-19 pandemic, the opt-out clause eliminates a large part of the global market[37] for selling those vaccines and medicines and therefore the production costs and simultaneously the price per dose rise.[38] Hence, the limitation of the export market leads to higher manufacturing costs and less profit affecting those countries that should actually benefit from the provision.

[30] Sapna Kumar, 'Compulsory Licensing of Patents During Pandemics' (2022) 54 Connecticut Law Review 57, 63.
[31] TRIPS art 31(b).
[32] Le (n 7) 3.
[33] Ibid.
[34] Declaration on the TRIPS agreement and public health (Doha Declaration) 2001 para 6.
[35] Annex to TRIPS art 1(b) (including fn 3).
[36] Frederick M Abbott and Jerome H Reichman, 'Facilitating Access to Cross-Border Supplies of Patented Pharmaceuticals: The Case of the COVID-19 Pandemic' (2020) 23 Journal of International Economic Law 535, 24.
[37] For example, if India produces drugs under a compulsory license for countries in Africa and Latin America, the Indian manufacturer cannot supply countries that opted out like Canada and the European Union with the same products (see also ibid 25).
[38] Ibid.

As the case of *Rwanda and Canada*[39] has proven, there is little-to-no profit for the generic producer because the manufacturing process is limited to the specific case and quantities. Furthermore, the whole process of this flexibility is too slow and complicated by requiring both exporting and importing country to comply with an endless list of conditions before the drug can be distributed in the country of need.[40] The lawsuit against a compulsory license for Remdesivir in Russia demonstrated the procedural and temporal challenges when using compulsory licenses for combating a pandemic.[41] Due to the fact that compulsory licenses can only be granted for existing patents, not patent applications, the process is decelerated further.[42] In timely pandemics like Covid-19, a patent that will be granted in several years will not meet the demand of the public. If the process of compulsory licensing is not facilitated, it will be ineffective for Covid-19 and comparable timely pandemics.

Despite these experiences, Bolivia[43] and Antigua and Barbuda[44] have filed a notification of intention/need to use the compulsory licensing mechanism under Article 31*bis* TRIPS during the Covid-19 pandemic. Bolivia was even able to secure a deal with the Canadian generic manufacturer *Biolyse* that was willing to produce and export vaccines if a license, voluntary or compulsory, is acquired. Until this point, Canada has not taken any steps to secure a compulsory license. Prior efforts to secure a voluntary license were also unsuccessful.[45]

In 2020, Ecuador[46] and Chile[47] adopted a resolution that enables the respective minister of health to issue compulsory licenses for Covid-19-related patents. Other countries such as

[39] See formal notification: WHO Council for Trade-Related Aspects of Intellectual Property Rights, 'Notification under Paragraph 2(a) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health' (2007) IP/N/9/RWA/1.
[40] Kianzad and Wested (n 3) 83.
[41] Ibid 74.
[42] Olga Gurgula and John Hull, 'Compulsory Licensing of Trade Secrets: Ensuring Access to COVID-19 Vaccines via Involuntary Technology Transfer' (2021) 16 Journal of Intellectual Property Law & Practice 1242, 1248.
[43] WHO Council for Trade-Related Aspects of Intellectual Property Rights, 'Notification under the Amended TRIPS Agreement: Notification of Need to Import Pharmaceutical Products under the Special Compulsory Licensing System' (2021) IP/N/9/BOL/1.
[44] WHO Council for Trade-Related Aspects of Intellectual Property Rights, 'Notification under the Amended TRIPS Agreement: Notification of Intention to Use the Special Compulsory Licensing System as an Importing Member' (2021) IP/N/8/ATG/1.
[45] Kianzad and Wested (n 3) 83; Le (n 7) 4.
[46] Resolución para requerir al Gobierno Nacional el establecimiento de licencias obligatorias y otras medidas [...] (Ecuadorian Resolution to require the National Government to establish compulsory licenses and other measures) 2020, art 2.
[47] Proyecto de Resolución para el otorgamiento de licencias no voluntarias contempladas en el Artículo 51°N° 2 de la ley n° 19.030 de propiedad industrial [...] (Chilean Resolution for the granting of non-voluntary licenses referred to in Article 51°N° 2 of industrial property law n° 19.030) 2020 (896) para II.2.

Germany[48] amended their laws in order to simplify the process for compulsory licensing. Although some compulsory licenses were granted for the use of drugs during Covid-19[49], no compulsory licenses have been issued for Covid-19 vaccines so far.[50] Issuing one compulsory license does not seem to guarantee access to vaccines as this tends to involve more than one patented innovation.[51] Until the end of September 2021, 417 Covid-19 vaccine-related patent applications have been filed; most of them by single applicants.[52] What is needed is a compulsory license per vaccine, not per patent. Yet, such a provision could not be agreed on.[53]

Another disadvantage of the current compulsory licensing system is that the data for making a vaccine is not included in the patent disclosure.[54] A broad majority of pharmaceutical companies does not share their vaccine technologies through access pools like C-TAP and refuse to license those technologies to manufacturers. If such data cannot be accessed, the manufacturers will have to ascertain the know-how by themselves. This does not only require a lot of effort, but it also takes time, which leads to a deceleration of the fight against timely pandemic like Covid-19.[55] For this reason, the current scope of compulsory licenses is not broad enough.

Nevertheless, compulsory licensing has also been recognised as leverage for negotiations about voluntary licenses.[56] In the case of the drug *Kaletra*, the initial process of a compulsory license in Israel was not pursued further as AbbVie Inc. voluntarily ensured the removal of any barriers to the supply of the drug.[57] Therefore, any possible sovereign intervention can have a psychological effect on the patentee leading to price cuts or accelerated access to

[48] Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite (German Act for protecting the population in the event of an epidemic situation of national importance) 2020 art 1(5).
[49] South Centre, 'Scope of Compulsory License and Government Use of Patented Medicines in the Context of the Covid-19 Pandemic' (2021) <https://www.southcentre.int/wp-content/uploads/2021/03/Compulsory-licenses-table-Covid-19-2-March.pdf> accessed 8 January 2023.
[50] 'Time Is Running out for COVID Vaccine Patent Waivers' (2022) 603 Nature 764, 764.
[51] So-called patent thicket as described in section 2 of this article.
[52] World Intellectual Property Organization., *Patent Landscape Report: COVID-19-Related Vaccines and Therapeutics* (2022) 6, 17.
[53] 'Time Is Running out for COVID Vaccine Patent Waivers' (n 50) 764.
[54] Ibid.
[55] Olga Gurgula, 'Accelerating COVID-19 Vaccine Production via Involuntary Technology Transfer' (South Centre 2021) Policy Brief 102 2–3.
[56] Also argued by Robert Grohmann et al, 'Germany, UK, USA: Are Patent Exceptions The Cure To COVID-19?' (*JD Supra*, 15 April 2020) <https://www.jdsupra.com/legalnews/germany-uk-usa-are-patent-exceptions-35625/> accessed 8 January 2023 and by Duncan Matthews in Julia Crawford, 'Covid Vaccines: How to End the Wait for Billions of People' (*SWI swissinfo.ch*, 3 December 2021) <https://www.swissinfo.ch/eng/covid-vaccines--how-to-end-the-wait-for-billions-of-people--/47125808> accessed 8 January 2023.
[57] Cynthia Koons, 'The Vaccine Scramble Is Also a Scramble for Patents' (*Bloomberg*, 12 August 2020) <https://www.bloomberg.com/features/2020-covid-vaccine-patent-price/> accessed 8 January 2023.

pharmaceutical products that are protected by patents.[58] The threat of compulsory licensing can also have an adverse effect and motivate pharmaceutical companies to rely even more on trade secrets that cannot be accessed by the current compulsory licensing system.[59]

2.2. The TRIPS Waiver

In October 2020, India and South Africa proposed the possibility of a temporary waiver of all IPRs related to the 'prevention, containment or treatment of COVID-19'[60] to the TRIPS Council. In order to overcome existing barriers created by IPRs, this waiver proposal is more comprehensive than existing rules under TRIPS.[61] The proposal notes that developing countries are affected by Covid-19 measures disproportionally[62] and face particular difficulties regarding compulsory licensing.[63] Controversies surrounding the IP waiver became particularly clear in the EU's alternative proposal that formally backed the waiver, but also emphasised the threat of an indefinite TRIPS waiver and the importance of IPRs.[64] The EU's proposal suggested alternatives like voluntary licenses and transfer of technology and know-how as well as the abolishment of export bans.[65] Although the US surprisingly backed the proposal in May 2021[66], this waiver has not brought the promised success. At the 12th Ministerial Conference in June 2022, the waiver negotiations came to a preliminary end. The result was a declaration that resembles the EU Waiver Proposal in many aspects.[67] What some claimed as a success[68], is, however, more of a narrow exception to TRIPS than a true waiver.[69]

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[58] Grohmann and others (n 55).
[59] Gurgula and Hull (n 42) 1248.
[60] WTO Council for Trade-Related Aspects of Intellectual Property Rights, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19 (Original Waiver Proposal)' (2020) IP/C/W/669 para 12.
[61] Ibid 10.
[62] Ibid 4.
[63] As described in section 2 of this article and WTO Council for Trade-Related Aspects of Intellectual Property Rights, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19 (Original Waiver Proposal)' (2020) IP/C/W/669 para 10.
[64] European Parliament, 'Resolution on Meeting the Global COVID-19 Challenge: Effects of the Waiver of the WTO TRIPS Agreement on COVID-19 Vaccines, Treatment, Equipment and Increasing Production and Manufacturing Capacity in Developing Countries' (2021) 2022/C 67/05 para 6.
[65] Ibid 7–11.
[66] Office of the United States Trade Representative, 'Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver' (5 May 2021) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver> accessed 8 January 2023.
[67] Matthieu Dhenne, 'Covid-19 "Patent Waiver": Revolution or Tempest in a Glass of Water?' (*Kluwer Patent Blog*, 22 June 2022) <https://patentblog.kluweriplaw.com/2022/06/22/covid-19-patent-waiver-revolution-or-tempest-in-a-glass-of-water/> accessed 8 January 2023.
[68] Like India as analysed in Priti Patnaik, 'What the TRIPS Waiver Discussions at the WTO Tell Us About Indian Diplomacy' (*The Wire*, 23 June 2022) <https://m-thewire-in.cdn.ampproject.org/c/s/m.thewire.in/article/diplomacy/trips-waiver-indian-diplomacy/amp> accessed 8 January 2023.
[69] Also criticised by WHO Council on the Economics of Health for All, 'The New WTO Decision on the TRIPS Agreement' <https://cdn.who.int/media/docs/default-source/council-on-the-economics-of-health-for-all/who_councileh4a_statement-15july2022.pdf?sfvrsn=fce7e6e3_3&download=true> accessed 8 January 2023.

Allowing for the re-export of Covid-19 vaccines in exceptional circumstances, eases the enforcement of Article 31*bis* TRIPS and improves the previous approach.[70] However, the waiver experienced many limitations compared to its original proposal, questioning its characteristic as a waiver after all.

First, the final waiver decision confers discretion to member states with regard to remuneration that has to be paid for a compulsory license ('adequate remuneration […] in instances of national emergencies, pandemics, or similar circumstances'[71]), but does not abstain from remuneration completely as the original waiver did.[72] While the waiver has originally been intended to 'continue until widespread vaccination is in place globally and the majority of the world's population has developed immunity'[73], later amendments to the proposal led to a temporal limit of five years.[74] Furthermore, the final version of the waiver is only in place for vaccines, not for diagnostics and therapeutics.[75] It is also limited to countries without existing production capacity. Other countries have been urged to opt-out of the decision.[76] This is problematic as countries with existing production capacities are the ones that are most likely to make use of the waiver.[77] Finally, the waiver is limited to patents, copyright and industrial designs. It does not relate to trade secrets as originally intended.[78]

The claim for a waiver is particularly backed by the argument that research for vaccines has been heavily financed by public funds.[79] The concern is that the public will pay twice if IPRs are enforced: once when paying taxes as the tax money flows into those funds and secondly

[70] See section 3.1. of this article.
[71] WTO Ministerial Conference, 'Ministerial Decision on the TRIPS Agreement (WTO Waiver Decision)' (2022) WT/MIN(22)/30, WT/L/1141 para 3(d).
[72] WTO Council for Trade-Related Aspects of Intellectual Property Rights (n 59).
[73] Ibid 13.
[74] WTO Ministerial Conference (n 69) para 6.
[75] Ibid 8.
[76] Ibid 1 including fn 1.
[77] Dhenne (n 66).
[78] Also criticized by the WHO Council on the Economics of Health for All (n 68).
[79] As stated by James Love in Ren Grace, 'Progress On COVID-19 Technology Pool Inches Along As Sister Initiative To Pool Vaccine Procurement Accelerates' (*Health Policy Watch*, 25 September 2020). <https://healthpolicy-watch.news/progress-on-covid-19-technology-pool-inches-along-as-sister-initiative-to-pool-vaccine-procurement-accelerates/> accessed 8 January 2023; Priti Krishtel and Rohit Malpani, 'Suspend Intellectual Property Rights for Covid-19 Vaccines' [2021] BMJ 1 <https://www.bmj.com/lookup/doi/10.1136/bmj.n1344> accessed 8 January 2023.

when purchasing health technologies.[80] This problem can be solved by finally enforcing the Bayh-Dole Act in the US[81] and implementing a similar provision on an international level.

Some may claim that IPRs are not the main barrier to pharmaceutical access, but manufacturing capacity. For this reason, a comprehensive TRIPS waiver may not be effective in guaranteeing access to vaccines and medicines.[82] However, this has been proven otherwise in the case of Hepatitis B vaccines where the Indian firm *Shantha Biotechnics* was able to develop a generic version of the vaccine at a significantly lower cost.[83]

It has also been claimed that the real problem is the trade barriers and bottlenecks in supply chains as well as the shortage of raw materials and lack of willingness of high-income countries to share vaccines.[84] The waiver may lead to a 'race for raw materials'[85] that endangers safe and efficient manufacturing processes. According to *Pfizer's* CEO *Albert Bourla*, less experienced manufacturers may compete for the same materials leading to a decrease in such ingredients for established vaccine producers.[86] On this basis, some claim that an IP waiver could lead to less quality, efficiency and safety of the pharmaceuticals. For safety reasons, some argue that a waiver should not remove regulatory controls.[87] However, such a requirement can be a determining factor for developing countries as they do not have the capacity for enforcing those regulatory requirements.[88] As opposed to licensees, independent manufacturers would have to obtain their own marketing authorisation despite the waiver, which may cause delays.[89]

[80] United Nations Secretary-General's high-level panel on access to medicines, 'Final Report - Promoting Innovation and Access to Health Technologies' (2016) 27 <https://static1.squarespace.com/static/562094dee4b0d00c1a3ef761/t/57d9c6ebf5e231b2f02cd3d4/1473890031320/UNSG+HLP+Report+FINAL+12+Sept+2016.pdf> accessed 8 January 2023.
[81] See section 3.3.1. of this article.
[82] As indicated by several states like Brazil and by the EU in WTO Council for Trade-Related Aspects of Intellectual Property Rights, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19 - Responses to Questions' (2021) IP/C/W/672 paras 2.5 and 2.14 and by Dutta, Husain and Sinha (n 31) 271.
[83] Justin Chakma and others, 'Indian Vaccine Innovation: The Case of Shantha Biotechnics' (2011) 7 Globalization and Health 9.
[84] International Federation of Pharmaceutical Manufacturers & Associations, 'IFPMA Statement on WTO TRIPS Intellectual Property Waiver' <https://www.ifpma.org/wp-content/uploads/2021/05/IFPMA_Statement_WTO-TRIPS-Intellectual-Property-Waiver_5May2021.pdf> accessed 8 January 2023.
[85] Kevin Breuninger, 'Pfizer CEO Opposes U.S. Call to Waive Covid Vaccine Patents, Cites Manufacturing and Safety Issues' (*CNBC*, 7 May 2021) <https://www.cnbc.com/2021/05/07/pfizer-ceo-biden-backed-covid-vaccine-patent-waiver-will-cause-problems.html> accessed 8 January 2023.
[86] Albert Bourla, 'Today I Sent This Letter To Have a Candid Conversation With Our Colleagues About the Drivers of COVID-19 Access and Availability' <https://www.linkedin.com/pulse/today-i-sent-letter-have-candid-conversation-our-drivers-bourla/?trackingId=d3cDOlWvR4SUfMQpxVeLbw%3D%3D> accessed 8 January 2023.
[87] Kianzad and Wested (n 3) 86.
[88] Ibid.
[89] Max Planck Institute for Innovation and Competition, 'Covid-19 and the Role of Intellectual Property' 2–3 <https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/2021_05_25_Position_statement_Covid_IP_waiver.pdf> accessed 8 January 2023.

It is also highly unlikely that a waiver of trade secrets can be enforced effectively.[90] Therefore, access to vaccines and medicines will still depend on the willingness of the patent owner to share their manufacturing knowledge.[91] The influence of the pharmaceutical industry on vaccine distribution will remain. For this reason, it is important to learn from deficiencies of the existing IP regulations that the Covid-19 pandemic revealed and consider other legal and pragmatic solutions.

2.3. Legal Solutions

Since neither compulsory licensing nor the TRIPS waiver as it was ultimately adopted has brought the promised success, the Covid-19 pandemic required other solutions to remove barriers that hindered access to vaccines and medicines. The following legal solutions could make pharmaceuticals more accessible.

2.3.1. Governments as Right Holders

When thinking about accessing medicines, patents do not necessarily have to be overridden or waived. Another approach could be an amendment of the benefiting parties of a patent. Putting governments in charge of the usage and licensing process of patents instead of private companies that seek to make a profit with patents could make medicines more accessible to the population. A provision that implements this idea can be found in US law: the Bayh-Dole Act[92] specifically allows the government to gain control of patent-protected innovations that have been publicly funded.[93]

The Act has, however, not been used in the context of drugmakers.[94] During the anthrax crisis in 2001, the US government only threatened to override *Bayer's* patent rights regarding the treatment *Cipro* but did not put this threat into action as *Bayer AG* voluntarily increased

[90] See section 3.3.3. of this article and Max Planck Institute for Innovation and Competition, 'Covid-19 and the Role of Intellectual Property' 2 <https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/2021_05_25_Position_statement_Covid_IP_waiver.pdf> accessed 8 January 2023.
[91] Dhenne (n 66).
[92] An Act to amend the patent and trademark laws (Bayh-Dole Act) 1980 (Public Law 96-517).
[93] While the inventor remains the owner, the US government 'shall have a nonexclusive, non-transferrable, irrevocable, paid-up license' for those inventions that have been publicly funded according to 35 USC § 202(c)(4). Furthermore, 35 USC § 203 assigns 'march-in' rights to government agencies so they can grant a license for the patented, publicly funded invention themselves in the case of health needs for example.
[94] Koons (n 56).

production and lowered prices.[95] Furthermore, the US narrowed or gave up its Bayh-Dole rights in the case of some Covid-19 vaccine development contracts leading to an outcry from consumer advocacy groups that demanded the inclusion of safeguards for securing access to publicly funded vaccines.[96] Thus, this flexibility would not only have to be adopted in other jurisdictions, but also be enforced consequently by each government.

2.3.2. Increasing Transparency

Greater transparency within the patent granting process may present another solution that guarantees access to pharmaceuticals. Two factors play a crucial role when considering this solution: (i) publishing the patent application earlier than the current period of 18 months[97] and (ii) raising the bar for disclosure.

Article 8(2) TRIPS indicates that the publication of a patent application can be accelerated in national health emergencies. As time is an important aspect in a pandemic, this mechanism makes vital information available faster. It also facilitates legal certainty for generic manufacturers as they receive information about possible infringement risks and licenses they should obtain.[98] It should, however, not be forgotten that an earlier publication date can also lead to negative implications. As the relevant state of the art includes published patent applications[99], later filed patent applications that are related to the same pharmaceutical bear the risk of not being new anymore and therefore not being patentable. For this reason, a shift in the publication date should only be implemented if it is limited in scope and time.[100]

Secondly, the disclosure requirement[101] stating that a person skilled in the art must be able to carry out the invention by using the disclosed information could be enforced more strictly. As some IP owners claimed that even a waiver of patents would not enable other manufacturers to produce the vaccines[102], the question arises whether the burden of disclosure is high enough. After all, patents are partly justified by the patent bargain that allows for the protection of

[95] Stewart Heather, Charlotte Denny and Andrew Clark, 'Bayer Bows to Pressure on Anthrax Antidote' (*The Guardian*, 23 October 2001) <https://www.theguardian.com/business/2001/oct/23/anthrax.businessofresearch> accessed 8 January 2023.
[96] Koons (n 56).
[97] See for example EPC art 93(2); Patent Cooperation Treaty (PCT) 1978 art 21(2)(a).
[98] Matthews (n 5) 227.
[99] EPC art 54(3).
[100] Matthews (n 5) 226–228.
[101] See for example TRIPS art 29(1); EPC art 83.
[102] Asgari and Kuchler (n 26).

monopolies because innovative information is published in exchange.[103] Therefore, insufficient disclosures can also lead to the revocation of a patent as regulated in Article 138 European Patent Convention. At the same time, it should not be forgotten that only a person skilled in the art shall be able to produce the invention. Thus, basic know-how in the pharmaceutical sector can be expected and does not have to be included in the disclosure.[104] Furthermore, the protection of trade secrets as guaranteed by many countries and regions[105] should not be undermined. In the end, balancing those interests depends on national and regional interpretation and implementation of the disclosure requirements. Finally, the above measures relate to the accessibility of information and do not directly allow for the earlier use of such information.

2.3.3. Accessing Know-How

Another solution can be a complementary mechanism for accessing know-how protected by trade secrets. Threats of a broad compulsory license may lead to an improved position in negotiations with pharmaceutical companies. This mechanism could address the trend towards increased protection of inventions through trade secrets instead of patents.[106] A compulsory license for trade secrets could be based on states' national and international obligations to protect public health. Specifically in pandemics such as Covid-19, national emergency laws may justify measures that protect the population against the pandemic. The broad language of statutes like the French emergency law[107] allows for compulsory licenses of trade secrets, too. A unified provision to compulsory licenses for trade secrets, especially on an international level is desirable in order to make effective use of compulsory licensing and the TRIPS waiver, which are currently impeded by the exclusiveness of trade secrets.[108]

Although theoretically effective, it remains questionable whether a compulsory license for trade secrets is enforceable in practice. It will not be verifiable if something that has been a secret before is (fully) disclosed in the context of a compulsory license. Such a compulsory license

[103] Lionel Bently at al, *Intellectual Property Law* (5th edn, Oxford University Press 2018) 425.
[104] Matthews (n 5) 228.
[105] In the EU for example by the Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157 2016.
[106] Gurgula (n 54) 3.
[107] Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (French Emergency Law aimed at dealing with the Covid-19 epidemic) 2022.
[108] Gurgula and Hull (n 42) 1251–1252.

must also be enforced sensitively, as a knowledge transfer is irreversible and therefore the process of knowledge sharing is more cumbersome than accessing patent documents.[109] Furthermore, a compulsory license for trade secrets should allow the use of clinical test data in order to avoid duplication of those trials that would slow down the process of receiving the necessary marketing authorisation and make it more expensive.[110]

2.3.4. Antitrust Mechanisms

Finally, a solution may be found in antitrust law. Articles 8(2), 31(k) and 40(1), (2) TRIPS allow for the consideration of competition law aspects in the area of patent law. Article 31(k) TRIPS incorporates an additional mechanism for using compulsory licensing in the case of anti-competitive practices. Similar to the Doha Declaration and Article 31*bis* TRIPS, there is no need to negotiate with the right holder before issuing the license or to use the compulsory license primarily for the supply of the domestic market in the case of anti-competitive practices.[111] Beyond that, such a license can be granted without termination and it allows for the consideration of the anti-competitive character of such practices when determining the amount of remuneration leaving more flexibility to the granting authority.[112] However, Article 31(k) TRIPS is mainly bound to the same procedural challenges as other compulsory license mechanisms. Thus, it faces similar challenges as the ones already described[113] and cannot guarantee access to Covid-19 pharmaceuticals.

A more effective tool to fight abuses of IPRs could be competition law *per se*.[114] Anti-competitive behaviour is contrary to the general aim of patent law to increase consumer welfare and innovation.[115] Independently of compulsory licensing, Articles 8(2) and 40 TRIPS enable the member states to act against anti-competitive practices on a national level. Anti-competitive practices can be the refusal to license, excessive pricing and the abusive use of patent thickets.[116]

[109] Kianzad and Wested (n 3) 87.
[110] Gurgula and Hull (n 42) 1259–1260.
[111] See TRIPS art 31(b), (f) and (k).
[112] See ibid art 31(k).
[113] See also Duncan Matthews and Olga Gurgula, 'Patent Strategies and Competition Law in the Pharmaceutical Sector: Implications for Access to Medicines' (2016) 38 European Intellectual Property Review 661, 662.
[114] Ibid.
[115] Behrang Kianzad and Timo Minssen, 'How Much Is Too Much? Defining the Metes and Bounds of Excessive Pricing in the Pharmaceutical Sector' (2018) 2 European Pharmaceutical Law Review 15, 26.
[116] Kianzad and Wested (n 3) 89–90.

In the context of HIV/AIDS, the use of competition law for fighting anti-competitive patent practices has already been demonstrated. In *Hazel Tau*[117], HIV/AIDS patients complained against *GlaxoSmithKline* and *Boehringer Ingelheim* to the South African Competition Commission. The patients claimed that those two companies 'abused their dominant positions by charging excessive prices for their patented antiretroviral medicines'.[118] Although the Competition Commission found that their claim was justified, the Competition Tribunal did not have to make a decision because the parties settled by agreeing on a license to local generic manufacturers.[119] While the case was based on a violation of South Africa's Competition Law[120], it demonstrated that competition law can be used for accessing life-saving medicines. A similar approach could be used during Covid-19 by acting against anti-competitive practices like the refusal of voluntary licenses in Canada (*Biolyse*), Bangladesh (*Incepta*), Israel (*Teva*) and Denmark (*Bavarian Nordic*).[121]

Nevertheless, some regions and countries are hesitant to implement or enforce such a mechanism: the US has little legal basis for challenging anti-competitive practices like excessive pharmaceutical pricing.[122] In the EU, Article 102(a) of the Treaty of the Functioning of the European Union[123] (TFEU) can be applied to take action against those practices. Nevertheless, competition authorities are reluctant to intervene as they are afraid of interfering with the fragile balance between IP law specifically the incentive to innovate and competition law.[124] Furthermore, the competition law approach depends on the specific circumstances of a case and does not provide solutions that make pharmaceuticals accessible in general.[125]

It should, however, be kept in mind that, rather than patent law, competition law is equipped with mechanisms against abusive practices.[126] In this way, the most promising legal solutions are the application of competition law, particularly Articles 8(2) and 40 TRIPS, and the implementation of an international rule that allows governments to gain control of publicly

[117] *Hazel Tau & others v GlaxoSmithKline, Boehringer Ingelheim & others* [2002] 2002Sep226, prepared by UNCTAD's Intellectual Property Unit.
[118] Ibid.
[119] Ibid.
[120] Namely Competition Act No. 89 of 1998 (South African Competition Act) 1998 art 8(1)(a), (b) and (c).
[121] Ashleigh Furlong, 'Big Vaccine Makers Reject Offers to Help Produce More Jabs' (*POLITICO*, 14 May 2021) <https://www.politico.eu/article/vaccine-producers-reject-offers-to-make-more-jabs/> accessed 8 January 2023.
[122] Kianzad and Minssen (n 112) 27.
[123] Treaty on the Functioning of the European Union [2012] OJ C 326/01.
[124] Matthews and Gurgula (n 110) 666.
[125] Kianzad and Minssen (n 112) 16, 27.
[126] Matthews and Gurgula (n 110) 667.

funded patents. However, each legal solution cannot guarantee access to vaccines and medicines during Covid-19 on its own. Therefore, a combination of legal solutions would be most effective.

2.4. Pragmatic and local solutions

In addition to legal solutions, pragmatic and local solutions also facilitate access to vaccines and medicines in a pandemic. These approaches adapt to the local situation and are less complex and bureaucratic than legal solutions. In the case of Covid-19, various pragmatic and local initiatives have been initiated with different levels of success.

IP pools that guarantee access to patented innovations and manufacturing know-how could be a solution.[127] IP pools are private agreements between IP owners in order to use, manage and administer each other's IP. Although it can be time-consuming as well as financially and politically burdensome, its main advantage is the consolidation of IPRs and therefore the prevention of patent thickets and fragmentation.[128] However, initiatives such as C-TAP and the UN Medicines Patent Pool were unsuccessful in combating Covid-19.[129] Although the Medicines Patent Pool distributed over nine billion doses of generic HIV/AIDS, hepatitis C and tuberculosis drugs to low- and middle-income countries, this success was heavily based on the collaboration of pharmaceutical companies, generic manufacturers and product developers.[130] C-TAP has not received support from the pharmaceutical industry that owns most of the relevant IP and data. As stated by the *International Federation of Pharmaceutical Manufacturers & Associations*, pharmaceutical companies do not understand the benefits of the initiative.[131] Concerning trade secrets and know-how, this is particularly reasonable because pharmaceutical companies risk losing control over valuable IPRs if they disclose them to IP pools like C-TAP.[132] Thus, such pools will need more incentives like rewards or remuneration for sharing IPRs in the future.

[127] Grace (n 77).
[128] Jorge L Contreras and others, 'Pledging Intellectual Property for COVID-19' (2020) 38 Nature Biotechnology 1146, 1147–1148.
[129] Sucker and Kugler (n 14) 58–59.
[130] Katrina Perehudoff and Jennifer Sellin, 'COVID-19 Technology Access Pool (C-TAP): A Promising Human Rights Approach' (*Medicines Law & Policy*, 18 June 2020) <https://medicineslawandpolicy.org/2020/06/covid-19-technology-access-pool-c-tap-a-promising-human-rights-approach/> accessed 8 January 2023.
[131] Grace (n 77).
[132] Gurgula and Hull (n 42) 1243.

Compared to this global pragmatic solution, the geographical proximity of local approaches can lead to savings on costs and time and therefore may be more efficient.[133] Due to challenges concerning national manufacturing capacities, the idea of pooling resources and saving costs by using cross-border collaborations appeared. In particular, regional hubs with manufacturing and distribution facilities that are owned and managed in conjunction with several countries have been suggested.[134] Legally, Article 31*bis*(3) TRIPS enables the collaboration of developing or least-developed countries with regard to compulsory licensing in order to make use of economies of scale and facilitate the local production of pharmaceuticals. However, similar to other compulsory licensing mechanisms, high requirements[135] make Article 31*bis*(3) TRIPS inflexible and highly unlikely to be applied for combating Covid-19. Furthermore, such collaborations have been under political pressure. National constraints and incentives often take precedence over regional cooperation and coordinated responses.[136]

Despite the political challenges for a local hub, first attempts have been made. The WHO has launched an mRNA technology transfer hub that aims to provide financial, technical and logistical support.[137] In cooperation with the mRNA hub, the Nant South Africa Vaccine Manufacturing Campus has been established as the first manufacturing facility in Africa that produces vaccines from the outset. However, this initiative is not expected to produce vaccines before 2025.[138] The mRNA hub faces difficulties in implementation: as it relies on IP transfers and access to technological know-how, South African President *Cyril Ramaphosa* was hoping for a TRIPS waiver to support the project.[139] Regarding the limitations of the waiver, the initiative faces difficulties. Although the hub was able to reproduce *Moderna's* mRNA vaccines, the pharmaceutical company has not agreed to license its IP to the hub.[140]

[133] Kerry Cullinan, 'South Africa to Become Africa's First MRNA Vaccine Manufacturing Hub – WHO Asks Big Pharma to Support Scaleup' (*Health Policy Watch*, 21 June 2021) <https://healthpolicy-watch.news/africas-first-mrna-hub-to-be-set-up/> accessed 8 January 2023.
[134] Sucker and Kugler (n 14) 58.
[135] Half of the members of the regional trade agreement that forms the basis for such collaboration need to be least-developed countries as defined by the United Nations.
[136] Alfonso Medinilla, Bruce Byiers and Philomena Apiko, 'Discussion Paper No. 272: African Regional Responses to COVID-19' (European Centre for Development Policy Management 2020) 17 <https://ecdpm.org/application/files/5916/5546/8629/African-regional-responses-COVID-19-discussion-paper-272-ECDPM.pdf> accessed 8 January 2023.
[137] Sucker and Kugler (n 14) 58.
[138] Cyril Ramaphosa, 'Official Launch of Nant-SA Vaccine Manufacturing Campus' (*South African Government*, 19 January 2022) <https://www.gov.za/speeches/president-cyril-ramaphosa-official-launch-nant-sa-vaccine-manufacturing-campus-19-jan-0> accessed 8 January 2023; Sucker and Kugler (n 14) 59.
[139] Cullinan (n 130).
[140] 'Why a Vaccine Hub for Low-Income Countries Must Succeed' (2022) 607 Nature 211.

A compromise may be projects like Turnkey which ships modular turnkey mRNA vaccine facilities to Rwanda, Senegal, Ghana and potentially South Africa. *BioNTech* equips the so-called BioNTainers with manufacturing solutions. Although *BioNTech* will run the facilities initially, the company aims to transfer know-how to local partners so they can independently operate the manufacturing facilities in the long term. The vaccines are distributed for domestic use and exported to other African states on a non-profit basis. Importantly, BioNTainers can produce vaccines against malaria, tuberculosis, and HIV.[141] For this reason, they can provide accessible medicines in the context of other pandemics and should be part of a general pandemic preparedness policy. Nevertheless, it must be kept in mind that the shipping of turnkey solutions does not equal the transfer of IPRs. Thus, local production is still controlled by *BioNTech* and does not increase technological autonomy.[142]

Local initiatives such as the mRNA technology transfer hub can be more efficient than broad global projects. However, they are often impeded by the IP strategies of pharmaceutical companies. To take full effect of those local approaches, legal solutions for accessing IPRs must be found. An initiative like Turnkey could be a compromise between the interests of IP owners and the interests of the people in need of pharmaceuticals.

3. Conclusion

The discussion regarding access to vaccines and medicines is a question about justifying patent rights in general. Based on an argument that there will be no innovation without rewards, high drug prices may cover the expenses of developing the drugs.[143] *Pfizer's* CEO *Bourla* stressed that limiting or even waiving IPRs could discourage investment in innovation.[144] As shown, however, the justification of incentivising research and development by protecting patents as monopolies must be rethought. Social and consumer welfare that poses one of the main objectives for IPRs[145] are only accomplished to a certain degree in the current pandemic. The profit pharmaceutical companies make by selling Covid-19 vaccines and medicines exceeds the

[141] BioNTech SE, 'Press Release "BioNTech Introduces First Modular MRNA Manufacturing Facility to Promote Scalable Vaccine Production in Africa"' (*BIONTECH*, 16 February 2022) <https://investors.biontech.de/news-releases/news-release-details/biontech-introduces-first-modular-mrna-manufacturing-facility/> accessed 8 January 2023; Elaine Ruth Fletcher, 'BioNTech To Ship Modular MRNA Vaccine Facilities in Containers to African Countries to Jump-Start Production' (*Health Policy Watch*, 16 February 2022) <https://healthpolicy-watch.news/biontech-to-set-up-modular-mrna-vaccine-production-facilities-in-africa/> accessed 8 January 2023.
[142] Fletcher (n 138).
[143] Koons (n 56).
[144] Bourla (n 83).
[145] TRIPS, art 7.

manufacturing costs considerably.[146] Additionally, it is questionable whether there is a need to provide incentives and rewards for those Covid-19 pharmaceuticals that have already been invented before the pandemic or that have been publicly funded. Incentives may also be created by other systems than the patent system itself. State subsidies for research[147] are only one of the possible solutions outside the IP system that could lead to a departure from a market-orientated approach.

Generally, it should be kept in mind that there is not one perfect solution to the Covid-19 pandemic or any other future pandemic. Thus, several of the above-described mechanisms should be used in combination with each other to approach pandemics more effectively. To guarantee pandemic preparedness, a policy toolkit is needed that considers collaboration as well as knowledge transfer and balances the scope of protection with IP limitations and exceptions.[148] Although pandemics challenge the global population, at the centre of such a solution should be the flexibility to adapt the scope of IP rights to local characteristics. Governments should also be granted an effective mechanism to gain control over the patent licensing process during a pandemic in order to guarantee access.

As the international community has realised the problems a global health crisis can pose, the WHO adopted a decision to strengthen pandemic prevention, preparedness and response.[149] Although the WHO has not published the conclusions of the intergovernmental body that has been established for discussing the proposal in further detail, the first proposal did not refer to IPRs. It remains to be seen whether the world has learned from the Covid-19 pandemic and will be able to guarantee equal access to vaccines and medicines in future pandemics because 'nobody is safe until everyone is safe'.[150]

[146] Kianzad and Wested (n 3) 73 and 75.
[147] Ibid 91.
[148] See also Duncan Matthews and Timo Minssen, 'US Covid IP Waiver U-Turn Alone Will Not Solve Vaccine Crisis' (*Financial Times*, 17 June 2021) <https://www.ft.com/content/1d5f8a3e-e26a-4eee-b4b5-7166e761cc26> accessed 8 January 2023.
[149] World Health Assembly, 'The World Together: Establishment of an Intergovernmental Negotiating Body to Strengthen Pandemic Prevention, Preparedness and Response' (2021) SSA2(5).
[150] Michel, Ghebreyesus and 24 world leaders (n 1).

Promises Made, Promises Kept
Open Access as a Tool for Breaking Barriers to Research Publications
(A Review of John Willinsky, *Copyright's Broken Promise: How to Restore the Law's Ability to Promote the Progress of Science* (MIT Press, 2022)

Abhijeet Kumar*

The promise made in the constitution of intellectual property law (specifically in this book – copyright) is for it to be a vehicle that promotes the progress of science and the useful arts. This promise is argued to be failing (or rather, broken) in its objective by John Willinsky in his book *Copyright's Broken Promise: How to Restore the Law's Ability to Promote the Progress of Science*". Willinsky makes a compelling case, through convincing arguments and illustrations, for a need to reform US Copyright Law to achieve universal open access to research and scholarship. Willinsky builds his argument by exposing the limitations of existing copyright framework where research publications are treated as just-another-literary-work, which creates a barrier around such publications through exclusive rights and paywalls, which inevitably forces the user-in-need to adopt means of circumvention that are inadequate, and often illegal. Willinsky argues, and rightly so, that existing copyright understanding is incompatible with the concept and purpose of academic research, which is to enrich public knowledge for the betterment of society. Willinsky proposes *'research publications'* as a new and distinct category of work in copyright.

Willinsky's proposal finds its context in the Covid-19 pandemic, which exposed the fault line of the copyright regime, whereby its stakeholders (publishers, research organisations, libraries, funding agencies, and governments) realised the limitations and value of the regime vis-à-vis open access. Willinsky relies on the example of consensus reached amongst the stakeholders for

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providing open access to the Covid-19 related research publications and data, either by suspending the copyright temporarily or by waiving the restrictions, to achieve the desired openness for scientific advancement in the face of global health crisis. He relies on a wealth of examples from different fields of science, which reiterates the same finding that the existing system acts as a hindrance to dissemination, collaboration, and innovation, all of which is essential for scientific progress.

Willinsky takes readers on the journey of the open access evolution over the last three decades and talks at length about the achievements and shortcomings of existing regimes from different stakeholders' perspectives. Relying on examples, he talks about how researchers like the idea of open access in principle, but their experience differs across disciplines as the practices are varying. This is illustrated by how open access is supported by federal agencies as a public access policy, and how university libraries have advocated for more access at affordable pricing. It is further illustrated by the way publishers attempted to foster open access by adopting different licensing models, despite facing criticism and competition. Society also has polarised views on open access, which is directly attributable to their economic and cultural situations. Willinsky draws attention to a general consensus amongst various stakeholders that open access supports further research and innovation. He then defines the slow, unsteady, and expensive progress in that direction, alongside the statutory hindrance of the copyright regime, as a market failure.

In response, he proposes borrowing the *'statutory license'* model from the music industry and cable television and applying it to *'research publications'*. This requires publishers to make the work available through open access immediately upon publication, as they continue to receive royalty payments from institutional users (*e.g.* universities, industries, research institutes) and funding agencies. He proposes the development of new norms and practices among researchers to share their work with others through open access. For the purposes of royalty payments to publishers, he proposes the matter to be taken up by copyright royalty judges, who would set the rate based on fair market value and public interest criteria. With all the apprehensions raised by Willinsky, the proposal, along with the benefits that it offers, seems workable, especially against the backdrop of the failure of the scholarly publishing market.

Willinsky's proposal is supported by arguments based on judicial decisions, legal scholarship, economic theory, and several personal anecdotes. He believes that, even though the adoption of the proposal has certain limitations, specifically from an international implication perspective, it offers a vehicle for global public good and enhances collaboration, innovation, education, democracy, and justice.

The book provides a clear and concise overview of the relationship between copyright law and scientific development. Its arguments are backed by constitutional, legal, economic, and historical analysis, as well as Willinsky's own experience (which, in my opinion, are shared experiences of most researchers). The book would appeal to a wide audience: from policymakers and practitioners to scholars and students. The language used is clear and made more accessible through use of tables, charts, graphs, and other informational sources for those interested in further readings. Without being dogmatic or dismissive, Willinsky adopts a balanced tone throughout, acknowledging the merits and challenges of opposing views.

Willinsky's book is an invaluable contribution to the ongoing discourse on open access and copyright reforms. While the biggest challenge, in my view, still lies in the global adoption of the proposals on new forms of work and the statutory licensing regime, the feasibility of this solution, for a long-standing problem, makes it worthwhile to explore the same further. The book challenges readers to rethink their assumptions and expectations of copyright law. Particularly, it questions how the law should support research and scientific advancement, by modifying its original jurisprudential boundaries to meet the needs of the digital age.

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