COLONIALISM AND THE EU LEGAL ORDER

This book shows how Europe's history of colonialism has shaped the development of the EU legal order. It offers an account of the impact European colonialism has had on the application of law, on the methods of actors, on the workings of institutions, and on changes in EU membership over time. Using different case studies, the sixteen chapters of this book address questions concerning how colonial continuities in EU law can be identified; how to understand the present application of EU law through the history of colonialism; and how Europe's colonial history casts new light on EU legal theory and concepts. This book is intended to sharpen analysis of the history, as well as of the present and future application, of EU law. This title is also available as open access on Cambridge Core.

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COLONIALISM AND THE EU LEGAL ORDER

Edited by

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CHAPTER 1

Colonialism and the EU Legal Order

An Introduction

HANNA EKLUND

1.1 INTRODUCTION

The purpose of this book is to show ways in which Europe's century-spanning history of colonialism has shaped the development of the European Union (EU) legal order. It is an account of the impact European colonialism has had on the formation of legal categories, on the drafting and application of primary and secondary law, on the methods of actors and the workings of institutions, and on the changes in EU membership over time.

The book should serve as an exemplification of how individuals, living on the European continent and elsewhere, have been affected by the ways in which EU law has carried through colonial-era legal practice and reasoning into our times.[1] In so doing, this book aspires to expand accounts of, and to visualize, people who have been affected by how the laws of the European integration project have been, and continue to be, constructed. These include people using the CFA franc in Benin; fishers in Greenland; North African railway workers in France; Algerian winemakers in the post-war era; or recipients of child allowance in West Africa in the 1970s.

Placing the study of the EU's legal order in the context of European colonialism serves several functions.[2] It calibrates the classic narrative of what

[1] Between 1957 and 1967 European Economic Community (EEC) law, and between 1967 and 1993 European Communities (EC) law or 'Community Law'.

[2] See earlier examples of such inquiries in different areas of EEC/EC/EU law: F. Snyder, 'New Directions in European Community Law' (1987) 14 *Journal of Law and Society* 167; J. Scott, *Development Dilemmas in the European Community* (Maidenhead: Open University Press, 1995); D. Caruso and J. Geneve, 'Melki in Context', in F. Nicola and B. Davies (eds.), *EU Law Stories* (Cambridge: Cambridge University Press, 2016), p. 506; N.

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has influenced the EU's construction and function. While the proposition that post-Second World War, inter-European peace animated the idea of a united Europe still stands, colonialism also shaped the outlook and methods that characterized the early days of European integration.[3] In this way, the chapters of this book will position the operation of EU law in the history of how colonialism connected different parts of the world, and open up the discussion about how the EU's laws, institutions, and actors interconnect with colonialism and decolonization.[4] Just as reference is made to the history of the Second World War as a means of understanding why the EU came to be, Europe's role in the history of colonialism should also be a point of reference in explanations of how EU law came to develop.[5]

El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester: Manchester University Press, 2020); J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24 *University of California Los Angeles Journal of International Law and Foreign Affairs* 163; D. Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' (2021) 50 *Industrial Law Journal* 506; S. R. Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 6; H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831.

[3] As has been shown by *inter alia* A. Mazrui, 'African Attitudes to the European Economic Community' (1963) 39 *International Affairs* 24; C. Cosgrove, 'The Common Market and Its Colonial Heritage' (1969) 4 *Journal of Contemporary History* 73; G. Garavini, *After Empires: European Integration, Decolonization, and the Challenge from the Global South 1957–1986*, Oxford Studies in Modern European History (Oxford: Oxford University Press, 2012); V. Dimier, *The Invention of a European Development Aid Bureaucracy: Recycling Empire*, Palgrave Studies in European Union Politics (Basingstoke: Palgrave Macmillan, 2014); P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism*, Theory for a Global Age (London: Bloomsbury Academic, 2014); K. K. Patel, *Project Europe: Myths and Realities of European Integration* (Cambridge: Cambridge University Press, 2020); M. Brown, *The Seventh Member State: Algeria, France, and the European Community* (Cambridge, MA: Harvard University Press, 2022); E. Marker, *Black France, White Europe: Youth, Race, and Belonging in the Postwar Era* (Ithaca: Cornell University Press, 2022).

[4] Third World Approaches to International Law (TWAIL) scholarship has examined the multiple ways in which international law has been shaped by colonialism. See A. Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 *European Journal of International Law* 7 for an account of the origins of TWAIL and the political and intellectual context in which it emerged.

[5] On the point that Europe's colonial history has been ignored by EU institutions, see K. Nicolaïdis, '"Southern Barbarians"? A Postcolonial Critique of EUniversalism', in K. Nicolaïdis, B. Sebe and G. Maas (eds.), *Echoes of Empire: Memory, Identity and Colonial Legacies* (London: I.B. Tauris, 2014), p. 283; A. Sierp, 'EU Memory Politics and Europe's Forgotten Colonial Past' (2020) 22 *Interventions* 686.

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Understanding more about colonialism and the EU legal order is not merely, although is importantly also, a historical exercise. It has the potential to constitute a starting point for examinations of current EU law. This book attempts to link the way in which EU law has been drafted and applied with the ideologies and assumptions that sustained the practice of colonialism, in particular that of racial hierarchies and the justification of unequal treatment of people governed by the same state. It is a central concern of many of the authors of this book to seek an answer to the question of whether and how the 'rule of colonial difference', that is to say, treating people differently based on race and ethnicity, reverberates in the EU of today.[6]

Many of the chapters aim to expand the account of where and to whom the EU legal order has reached, yet the attention of this book taken as a whole is directed inwards and towards the EU. This perspective acknowledges that colonialism, and its aftermath, inflicts damage upon the colonizer, not just the colonized – in this case on a European regional organization founded by states, some of which have had, and still have, colonies located all over the globe. While more often than not such a perspective has been secondary to a focus on what colonialism did to colonized societies, it is nevertheless recurrent in the history of anti-colonial thought. An early influential example is Aimé Césaire's description in the essay *Discourse on Colonialism*,[7] which in part probes the damages that colonialism did to the European society, stating that the European colonizer has 'overthrown, one after another, the ramparts behind which European civilization could have developed freely'.[8] The chapters of this book will give examples of where colonialism appears to have impaired the development of the EU's laws and institutions.

It is the aspiration of this editor that the book will be part of a dialogue around the questions of how colonialism has shaped EU law, what it means for the legal system and those subjected to it that colonialism

[6] P. Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1994), p. 16.

[7] A. Césaire, (introduction by R. D. G. Kelley), *Discourse on Colonialism; A Poetics of Anticolonialism* (New York: Monthly Review Press, 2000). This version of *Discourse on Colonialism* was first published in French in 1955.

[8] Césaire, *Discourse on Colonialism*, p. 75.

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has shaped EU law, and how these connections should inform our understanding of the EU both in terms of its internal workings and its external activities, historically as well as today. Answering these questions, one may hope, could sharpen the analysis of, and prescriptions for the reform of, contemporary EU law and incline the EU to become a humbler and more mindful interlocutor on the global stage.

Having provided a definition of the meaning of colonialism used in this book (Section 1.2), and a background account of how the EU has regulated Member States' colonies from 1957 until today (Section 1.3), this introduction will turn to three broad themes that emerge across the following fifteen chapters. Section 1.4 outlines the ways in which this book establishes colonial continuities in EU law. Section 1.5 considers how present EU law can be understood through colonial history. Section 1.6 examines how colonialism casts new light on the theory and concepts of EU law. Lastly, Section 1.7 introduces the structure of this book, which is divided into four parts – 'Law', 'Actors', 'Exits', and 'Futures' – based on the case studies used by the authors to examine the connection between colonialism and the EU legal order.

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1.2 DEFINITION: THE DUAL MEANING OF COLONIALISM

Colonialism is a capacious and contested term. It is commonly, including in this book, taken to stand both for a form of rule and for a historical period of European territorial expansion. Nazmul Sultan describes the meaning of colonialism as having dual and intertwined claims. Colonialism encompasses both 'a historical reference for the global event of European imperial expansion' and an analytical category denoting 'a territorial form of rule by one people over another'.[9] Sally Engle Merry refers to the same duality as the narrow and broad definition of colonialism:

> In its broader sense, it is a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavors to impose its cultural order onto the subordinate group(s). In

[9] N. Sultan, 'What Is Colonialism? The Dual Claims of a Twentieth-Century Political Category' (2025) 119 *American Political Science Review* 435–448 at 437 and 441.

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> its narrower sense, the term generally refers to the European political, economic, and cultural expansion into Latin America, Africa, Asia, and the Pacific during the last four hundred years.[10]

All chapters of this book reference the European colonial enterprise, which accelerated in the fifteenth century in North and South America, and culminated in the late nineteenth century in Asia and Africa. Colonialism, as a reference to this long historical passage of time, does not benefit from a summary as it 'encompasses vastly different geographical regions, quite different historical periods, distinctive styles of colonialism among different European nations, and extraordinary diversity in the cultures of the peoples who were colonized'.[11]

The latter stage of European colonialism in Asia and Africa in particular, sometimes referred to as 'late colonialism',[12] has in contemporary discourse, as in this book, become 'constitutive of the meaning of colonialism'.[13] The Berlin West Africa Conference of 1884 to 1885, in which the method and policy of the partition and continuous colonization of Africa was agreed on by European states, the United States, and the Ottoman Empire, stands as a symbol of this intense period of colonization.[14] While explanations of this conference have varied over time and place, it has remained 'an evocative and emotional historical problem' that has 'captured the imagination of the world'.[15] The imagery of European states 'carving up' the African continent between themselves and the notion of the 'scramble for Africa' have persisted as descriptions of nineteenth-century European colonialism and shaped the meaning

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[10] S. E. Merry, 'Law and Colonialism' (1991) 25 *Law & Society Review* 889–922 at 895.

[11] Merry, 'Law and Colonialism', 895.

[12] M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996), p. 6.

[13] Sultan, 'What Is Colonialism?', 437.

[14] The General Act of the Berlin Conference on West Africa, 26 February 1885 was signed by the United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, the United States of America, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and the Ottoman Empire. No African political leaders were present.

[15] G. N. Uzoigwe, 'Reflections on the Berlin West Africa Conference 1884–1885' (1984) 12 *Journal of the Historical Society of Nigeria* 9. See also M. Craven, 'Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade' (2015) 3 *London Review of International Law* 31.

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of the term colonialism. Kwame Nkrumah frames this period as 'the best illustration' of colonialism.[16] Nkrumah explains the 'European capitalist aggressiveness' manifested in the ways in which political leaders of 'Great Britain, France, Germany, Spain, Portugal, Belgium and Italy' looked 'beyond the seas for markets and storehouses of wealth and resources in order to consolidate their individual states and guarantee their economic security' at times of economic insufficiency at home.[17] In this longer quotation Nkrumah captures the frantic and incessant process of late European colonialism in the text *Towards Colonial Freedom*:

> In 1881 France extended her colonial sway over Tunis and, the year following, Britain secured control over Egypt. In 1884 the first German colony was established at Angra Pequena Bay in South-West Africa. The occupation of Togoland and Cameroons in West Africa followed. The spectacular advent of Germany as a colonial power provoked the jealousy of France. A French force was despatched to seize the unoccupied territory between the Cameroons and the Portuguese colony of Angola. This became the French Congo. In 1894 the tricolour was raised over Timbuktu, Dahomey and the Ivory Coast. The whole of the western Sudan was soon under French occupation. In 1885 a protectorate was established over Madagascar. Then ensued the Anglo-French colonial jealousy which culminated in a crisis in 1898 when the occupation of the Sudanese port of Fashoda threatened to upset Britain's colonial annexations within that area. France withdrew and the Eastern Sudan came under the control of Britain. … Italy felt herself cheated of a possible field of expansion by the moves of Britain and France. […] In 1882 Italy occupied Assab, and three years later Massawa was taken. In 1898 Italian Somaliland was formed into a colony.[18]

It is with the repercussions of this epitomizing yet fathomless period of European colonial expansion in the late nineteenth century, especially in Africa, that the chapters of this book predominantly grapple. Several different countries in Europe and Africa, and ways in which people

[16] K. Nkrumah, *Towards Colonial Freedom: Africa in the Struggle against World Imperialism* (Accra: Guinea Press Limited, 1962).

[17] Ibid., p. 19.

[18] Ibid.

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living in those places have been affected by EU law for reasons that link to the colonialism described in the quote, are discussed in the chapters of this book.

However, some of the chapters that follow also consider colonialism elsewhere and in earlier periods. Ulla Neergaard (Chapter 13) and Stephen Coutts (Chapter 14) will show respectively how Denmark's colonization of Greenland, and the United Kingdom's colonization of Ireland, which dates back to at least the twelfth century, also exemplify how early European colonialism has shaped the EU's legal order. This is particularly evident with regard to the dynamics underpinning changes in EU membership status. While the period that has dominated the definition of colonialism, and the inquiry of this book, is the European expansion into Africa and Asia from the late nineteenth century onwards, the links between the history of European colonialism and the development of EU law are complex and span multiple centuries.

The analytical meaning of colonialism as a form of rule is portable beyond the historical period of European colonial expansion. The colonial form of rule is characterized by one group's domination of another group, which 'includes a definition of the dominated population as different and inferior, usually expressed in an idiom of race'.[19] Sultan explains how what defined the method and ideology of European colonialism became a concept. He writes: 'That European rule over the rest of the world was inseparable from developmentalism, racial hierarchy, economic exploitation, and psychological degradation was already well-known in the nineteenth century. It was only, however, in the interwar era that all these phenomena came together under the rubric of the colonial'.[20]

Many of the authors in this book are interested in testing the presence of colonial ways of reasoning and thinking, especially in terms of understanding the place of race in past and contemporary EU law and policy. The chapters by Karim Fertikh (Chapter 4), Lionel Zevounou (Chapter 5), Diamond Ashiagbor (Chapter 6), Veronica Corcodel (Chapter 8), Janine Silga (Chapter 9), and Iyiola Solanke (Chapter 16) all address at

[19] Merry, 'Law and Colonialism', 895.
[20] Sultan, 'What Is Colonialism?', 447.

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length questions of how EU law has sustained or ignored difference in treatment based on race, and how that practice stems from colonialism.

For the authors of this book, colonialism means a historical period of colonial expansion by EU Member States to-be, characterized by unjust domination, economic exploitation, and racial hierarchies. Several authors further explain and theorize those characteristics of colonialism with the aim of understanding the ways in which they interconnect with EU law.

1.3 THE EU'S REGULATION OF COLONIALISM FROM 1957 TO TODAY: STRUCTURE AND LANGUAGE

The question of how to maintain a colonial order while negotiating a new form of European economic, political, and legal integration is certainly present at the founding moment of the EU. In 1957, when the Treaty of Rome created the European Economic Community (EEC), four of the original six Member States were colonial powers: France, Belgium, Italy, and the Netherlands. The law of the nascent EEC was adapted to assume a colonial inheritance from its Member States.

After long negotiations over how to integrate the colonies into the EEC, the drafters of the Treaty of Rome agreed to a Part IV that regulated the 'association' with the EEC of 'overseas countries and territories'.[21] The latter was a euphemistic term already used in French colonial administration to designate colonies. At no point during the Treaty of Rome negotiations was any political leader from a colonized country or territory in attendance, consulted, or represented.[22]

The 'association' meant that the EEC Member States' colonized territories were not completely included in, nor totally excluded from, the EEC. The central provision of Part IV is Article 133 EEC, which stated that the Member States would agree 'to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and Netherlands'. Concretely, this meant, first, a close trading relationship between the EEC and the 'associated countries

[21] See on this point Cosgrove, 'The Common Market and Its Colonial Heritage'; Garavini, *After Empires*; Hansen and Jonsson, *Eurafrica*; Patel, *Project Europe*; Brown, *The Seventh Member State*.

[22] Eklund, 'Peoples, Inhabitants and Workers', 837 ff.

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and territories', through which the latter were to be gradually included in the EEC's tariff system. The consequence of this was an open trade area controlled by Brussels. Further, with the EEC came the European Development Fund for associated African countries, which was to be administered by the EEC Commission. The fund ensured that companies from all six EEC Member States could compete for tenders financed by the fund, for instance infrastructure projects or extraction of raw materials, in colonized territories associated to the EEC. In her extensive work on the operation of the European Development Fund in this period, Véronique Dimier has shown how, 'businesses were not just challenged by the new international landscape but benefited from the opportunities it offered, particularly those provided by development aid'.[23] In her chapter in this book, Dimier (Chapter 10) shows how personnel trained in colonial administration brought a specific colonial approach to law, especially a malleable approach to discretionary decision-making, into their work with the European Development Fund. This was particularly true of the process of awarding tenders to EEC-based or EEC-controlled businesses looking to establish or continue their enterprises in colonized territories.

As the Treaty of Rome 'associated' colonized territories to the EEC, the treaty simultaneously arranged legal categories, namely those of peoples, inhabitants, and workers, to exclude individuals who lived in colonized territories from legal benefits and representation.[24] These core categories of the Treaty of Rome separated people who were considered ethnically and racially European citizens from people who were not so considered, but who were subjected to, or citizens of, a Member State through colonialism. In so doing, foundational EU law replicated parts of colonial era citizenship laws of France, Belgium, the Netherlands, and Italy, which were designed to accept distinctions based on ethnicity and race between individuals subjected to the same state.[25] This is a theme that many of the authors in this book develop.

[23] S. E. Stockwell and V. Dimier (eds.), *The Business of Development in Post-Colonial Africa* (New York: Springer International Publishing, 2020); and see Dimier's seminal publication *The Invention of a European Development Aid Bureaucracy*.

[24] Eklund, 'Peoples, Inhabitants and Workers'.

[25] B. Manby, *Citizenship in Africa: The Law of Belonging* (London: Bloomsbury Publishing, 2021).

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While the association regime's provisions on trade and business investment were precise, and the legal distinction between the rights of the 'peoples of Europe' and the 'inhabitants of the overseas countries and territories' was sharp, there was no provision in the Treaty of Rome regulating the event of independence of an 'associated country or territory', and there is still no such provision in Article 198 Treaty on the Functioning of the European Union (TFEU), which has kept the language of Article 133 EEC.[26] In 1957 the scale of the association regime, in terms of the geographical area it covered and the populations it subjected, was considerable. The 'associated countries and territories' were listed in Annex IV to the Treaty of Rome as follows:

> French West Africa: Senegal, French Sudan, French Guinea, Ivory Coast, Dahomey, Mauritania, Niger, and Upper Volta;
>
> French Equatorial Africa: Middle Congo, Ubangi-Shari, Chad and Gabon;
>
> Saint Pierre and Miquelon, the Comoro Archipelago, Madagascar and dependencies, French Somaliland, New Caledonia and dependencies, French Settlements in Oceania, Southern and Antarctic Territories;
>
> The Autonomous Republic of Togoland;
>
> The trust territory of the Cameroons under French administration;
>
> The Belgian Congo and Ruanda-Urundi;
>
> The trust territory of Somaliland under Italian administration;
>
> Netherlands New Guinea

Algeria, Guadeloupe, Martinique, French Guiana, and Réunion were regulated separately in Article 227 EEC as integral parts (departments) of France. This meant that they were more closely integrated into the Common Market than those colonies that were associated. The repercussions of Article 227 for Algeria and its population are discussed in the chapters by Amel Benrejdal Boudjemaa (Chapter 12) and Daniela Caruso (Chapter 3). As Megan Brown also notes in her book, which frames Algeria as the seventh EEC Member State, Algeria's inclusion in

[26] Though it now reads 'special relations with Denmark, France, the Netherlands and the United Kingdom'. Thus Italy and Belgium have been taken off the list, and the United Kingdom presumably will be taken off the list in the next treaty.

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Article 227 happened as the Algerian War of Independence was ongoing.[27] Many of the countries listed in Annex IV to the Treaty of Rome were independent countries only a few years after the treaty was signed. For instance, most of 'associated' West Africa was independent by the end of 1960, namely, Senegal; the Republic of Mali (formerly French Sudan); Côte d'Ivoire; Dahomey (later Benin); Mauritania; Niger; and Upper Volta (later Burkina Faso).

Simply put, the drafting of the association regime happened amidst a global wave of decolonization, hence processes through which colonized countries became independent. The first wave of decolonization from European colonialism occurred in North and South America beginning in the late eighteenth century leading up to the First World War. In Africa and Asia a similar pattern began around the Second World War and continued well into the 1970s.[28] From this latter post-Second World War period onwards, the manifold processes of decolonization in Africa and Asia intertwined with a global trend towards rendering formal colonialism 'a juridically unacceptable international norm'.[29] In April of 1955, just over a year before the Intergovernmental Conference negotiating the Treaty of Rome started in the Château de Val-Duchesse, the Bandung conference took place in Indonesia. If the Berlin West African conference stands as a historic symbol of European colonialism in the late nineteenth century, the Bandung conference stands as a symbol for the global movement of decolonization in the 1950s and 1960s. During the conference in Bandung, political leaders from Asian and African countries discussed the premisses of global justice and what a reformed world order should look like after colonialism.[30] In this same period, the

[27] Brown, *The Seventh Member State.*

[28] For a very detailed discussion of how to precisely date these developments and account for the exceptions to this broad picture, as well as the situation in the Caribbean, see B. Etemad, *Possessing the World: Taking the Measurements of Colonisation from the Eighteenth to the Twentieth Century* (New York: Berghahn Books, 2007). On the role the United States played as a successor power to European colonialism in the Caribbean, see J. A. Thomson, *A Sense of Power: The Roots of America's Global Role* (Ithaca: Cornell University Press, 2015), p. 32.

[29] Sultan, 'What Is Colonialism?', 443.

[30] L. Eslava, M. Fakhri and V. Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2017).

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United Nations was an important, if imperfect, institutional medium for decolonization. Antony Anghie summarizes:

> Virtually every facet of the UN system participated in this project: the provisions in the UN Charter that dealt with non-self-governing and trusteeship territories, the famous General Assembly Resolutions articulating the right to self-determination and the opinions of the International Court of Justice (ICJ) in Western Sahara and Namibia, all addressed this question. The modern doctrine of self-determination, then, was formulated in response to the whole phenomenon of colonialism.[31]

The foundation of the EU's association regime was laid as a global community steadily moved towards rejecting colonialism and as the right to self-determination was claimed by peoples all over the globe. In this historical context, the drafters of the Treaty of Rome deliberately rejected the idea of using the word 'peoples' to describe those living in the 'overseas countries and territories'.[32] Instead, the word 'inhabitants' of the 'overseas countries and territories' was used. The drafters of the Treaty of Rome, most importantly the French delegation, did not wish to replicate or align the EEC language used to describe colonized peoples with the language of decolonization used in different texts and fora of the United Nations.[33] In future EU treaty revisions it would be opportune to reconsider the use of 'inhabitants' in Article 198 TFEU to describe those living in 'associated countries and territories' and replace it with 'peoples', so that within EU law the possibility of claiming the right to self-determination on the part of colonized territories is unequivocally recognized.

In lieu of any formal legal procedure, an oblique 'note to the reader' was attached to the Treaty of Rome at some point in 1967, acknowledging the independence of several formerly associated countries.[34] During the 1960s, new legal arrangements were instated between the EEC and formerly 'associated' states. An early example is the Yaoundé Convention of 1963 between the EEC, eighteen 'Associated African States', and Madagascar. In

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[31] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), p. 196.

[32] See further on this point Eklund, 'Peoples, Inhabitants and Workers', 843 ff.

[33] Ibid., 846. The language remains the same in Article 198 TFEU.

[34] Ibid., 842.

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her chapter, Marise Cremona (Chapter 2) shows how the formation of the EU legal principles of direct effect and reciprocity was influenced by the postcolonial relationship underlying the Yaoundé Convention.

The list of 'associated countries and territories' later expanded in 1973 when the United Kingdom and Denmark joined the EC with former colonies still within their jurisdictions. Moreover, Ireland, which also joined in 1973, is a former colony of the United Kingdom. The territorial implications of that long history were again brought to light when the UK voted to leave the EU in 2016, as Stephen Coutts shows in Chapter 14. In 1986, Spain and Portugal entered the EC with colonized territories within their respective jurisdictions – a fact that still has repercussions for the geography of EU migration policy, as shown by Veronica Corcodel in Chapter 8.

The legal construction whereby Member States' colonies are associated with the EEC/EC/EU has remained through all treaty iterations, into the Lisbon Treaty, and is now found in Part IV TFEU and Annex II.[35] The Maastricht Treaty of 1992 introduced the category 'Outermost Regions' to encompass territories more embedded in Member States' constitutional structures, following the same logic as Article 227 EEC. This construction is now found in Article 349 TFEU.

In 2021 the European Council issued a new 'Decision on the Association of the Overseas Countries and Territories (OCTs)',[36] which details the structure of the association regime. Recital 11 of the preamble states:

> The special relationship between the Union and the OCTs is moving from a development cooperation approach to a reciprocal partnership to

[35] The following is the list in Annex II, note that the UK colonies are still listed and will presumably be removed in the next treaty revision: 'Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Saint Pierre and Miquelon, Saint-Barthélemy, Aruba, Netherlands Antilles: Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten, Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, Bermuda.'

[36] Council Decision (EU) 2021/1764 of 5 October 2021 on the association of the Overseas Countries and Territories with the European Union including relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other (Decision on the Overseas Association, including Greenland), OJ 2021 L 355/6.

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> support the OCTs' sustainable development. The progress achieved so far should be consolidated and reinforced. Moreover, the solidarity between the Union and the OCTs should be based on their unique relationship and their belonging to the same European family.

The euphemistic language is striking for the twenty-first century reader; 'special relationship', 'unique relationship', and 'family'. The European practice of reorganizing the language used to describe a colonial relationship in the post-war period onwards has been subject to sustained criticism.[37] As this book aims to contribute to the debate around the role of colonialism and the EU's laws and institutions it is meaningful to ask the question: what would happen if the preamble's language recognized the colonial nature of the relationship? What function do the euphemisms actually serve at this point? The decision's language cannot be understood as diplomatic, as this would imply that its opaqueness is in fact tactful, and serves all parties. Rather, more careful and accurate policy language would make the premiss of the 'reciprocal partnership' more transparent, which might serve the exchanges between the EU and the authorities of the 'overseas countries and territories'.[38]

Following the overall structure of the association regime since 1957, the 2021 decision details policy governing trade between the EU and the 'overseas countries and territories', as well as the specific funds used for, and aims of, development aid.[39] It contains, like previous such decisions,

[37] Early, Nkrumah wrote: 'Such expressions as colonial charter, trusteeship, partnership, guardianship, international colonial commission, dominion status, condominium freedom from fear of permanent subjection, constitutional reform and other shabby sham gestures of setting up a fake machinery for gradual evolution towards self-government are means to cover the eyes of colonial peoples with the veil of imperialist chicanery.' Nkrumah, *Towards Colonial Freedom*, p. 16.

[38] Compare with the resolution adopted by the European Parliament on 17 January 2024 on a European Historical Consciousness, emphasizing the need to consider 'the tragic periods and dark elements of Europe's history not only to be a vigorous reminder of past mistakes whose repetition is to be avoided, but also as a call to work jointly towards democratic and inclusive societies in the Union and globally'. European Parliament resolution of 17 January 2024 on European historical consciousness (2023/2112(INI)).

[39] Thematically, development aid is now centred on sustainable development and the 'blue' and 'green' economy, compared to the social and economic development language of the first decades of the association regime. This transformation would benefit from further research.

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provisions emphasizing that '[t]he Union, the OCTs and the Member States to which they are linked shall regularly engage in a comprehensive and political dialogue'.[40] While this is a meaningful development when compared to the original construction of the association regime, which did not recognize any involvement of the political leadership of the 'overseas countries and territories', the unilateral nature of this type of council decision should nevertheless be underlined.[41] Many of the chapters in this book question the EU style of decision-making vis-à-vis former and current colonies of its Member States, as will be discussed in Section 1.4.

The fact that it is 'OCT law', as the provisions regulating the 'association of overseas countries and territories' are called in EU vernacular, that has constituted the EU's formal regulation of colonialism and continues to so do is referenced in many of the chapters. Ulla Neergaard's chapter (Chapter 13), in particular, explores the exceptional story of Greenland, which has gone from being a member of sorts (although not a Member State) of the then EC through Denmark, to withdrawing from the EC while remaining in 'OCT status'. The backdrop of Neergaard's chapter is the EU's recently significantly increased interest in the Arctic region for geopolitical reasons. The colonial relationship between Denmark and Greenland sustains the EU's claim to a physical presence in the Arctic region today.

Of equally current relevance, as this chapter was being written a violent protest was taking place in New Caledonia, a French colony and an 'associated overseas country and territory' of the EU. In late spring of 2024 France proposed a constitutional amendment that would give French citizens who have been living in New Caledonia for over a decade the right to vote in local elections. Protests subsequently erupted because many in New Caledonia oppose extending voting rights to French settlers, believing that this will impede the political struggle for independence from

[40] Article 13 of Council Decision (EU) 2021/1764.

[41] F. Cherubini, in a forensic account of different typologies of decisions in EU law, concludes that 'legislative decisions of general application, which are rather rare and find their best and almost unique examples in the field of Overseas Countries and Territories […] cannot be distinguished from regulations, except in name'. F. Cherubini, 'Decisions under the Law of the European Union: "You May Be Six People, But I Love You"' (2022) 41 *Yearbook of European Law* 117–161 at 161.

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French colonial rule. The proposal was withdrawn later that summer. This episode exemplifies that rather than coordinating a 'European family', the EU participates in governing a colonial situation, which in the specific case of New Caledonia, is the subject of sustained challenge from people desiring independence from this form of rule.

The structure of the association regime, as well as the nature of the language used to describe and justify it, has remained without major changes since 1957. What has changed, importantly, is the number of countries and territories 'associated'. The existence of 'associated overseas countries and territories' means that EU law will look different depending on where you are standing in the world. The EU's legal order claims expansive inclusivity of territories based on colonial 'links', yet it does so through specific provisions, decided in Brussels, that determine how peoples and societies concerned can benefit from EU law. The association regime is an important way in which colonialism and the EU legal order interconnect. The subsequent Sections 1.4–1.6 will further discuss such connections, highlighting the themes that the chapters of this book bring to the fore.

1.4 ESTABLISHING COLONIAL CONTINUITIES

The question of continuity between a colonial history and the present is contentious. Partha Chatterjee exemplifies how the idea of continuations, first between pre-colonial times and colonial times, and then between colonial times and postcolonial times, has always been the subject of struggle.[42] Positions in favour of, and against, seeing and discussing connections between past and present prompt questions about how to write history and how to comment on our contemporary society.

The authors of this book, in line with a central proposition of postcolonial scholarship, acknowledge that the impact of colonialism on the development of EU law did not end with formal decolonization.[43] The

[42] Chatterjee, *The Nation and Its Fragments*, p. 27.

[43] 'It is a central argument of all TWAIL scholarship that the formal end of colonialism did not bring about the end of colonial relations, and thus, TWAIL scholars have focused on tracing how colonial relations have continued, in varied and complex forms, in a supposedly decolonized world.' Anghie, 'Rethinking International Law', 9.

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question then becomes how to theorize that impact, and to distinguish between different forms of connections between past and present.

Identifying continuity is not the same as drawing a comparison between then and now. Section 1.5 will discuss the reappearance of law and politics similar to those of the colonial era in our times, and the question of how we may use comparisons between then and now to sharpen critique of today's law and politics. Such an exercise is distinguishable from, while related to, the question of colonial continuities. Two propositions thus exist side by side: the EU legal order has been shaped by the continuity of colonial law and policy; and it is of importance to analyse and discuss the reappearance of laws and policies that bear similarities to those of the colonial era in the EU of today.

In this book, colonial continuity means a situation in which EU law in some form enables the continuation of a colonial legal practice of one of its Member States, and sometimes with the result that it is elevated to EU-level law and policy. The association regime discussed in Section 1.3 is one good example of colonial continuity.

As a regional organization founded in 1957, the EU is one step removed from the first colonial encounter between European states, later EU Member States, and countries located on different continents that were colonized. EU law came after the initial 'large-scale transfer of laws and legal institutions' from the colonizer to the colonized had already taken place.[44] The EU, therefore, is not inventing colonial law and policy as much as it is adapting to assume and continue a colonial inheritance from its Member States.

Early literature on law and colonialism studied with great sophistication the ways in which law constituted the colonial enterprise and how colonial law affected colonized societies and their legal systems.[45] Sally Engle Merry, in reviewing this body of literature, pointed out how the relationship between colonialism and law is not merely 'the simple process of imposition of law: instead there are spaces of resistance, struggles among colonizers, and forms of accommodation by colonized'.[46] Merry

[44] Merry, 'Law and Colonialism', 890.
[45] Ibid.
[46] S. E. Merry, 'From Law and Colonialism to Law and Globalization' (2003) 28 *Law & Social Inquiry* 569–590 at 569.

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shows that colonial law is not merely, though is also, a vehicle of domination. It also provides avenues of resistance to colonial power. This means that when we think of colonial continuities in EU law we are not only searching for ways that the EU carries through a colonial posture of domination over others, but are also looking for patterns of resistance to colonial legal politics.

It is of analytical importance that 'continuity' be interpreted strictly, underlining that the word refers to the unbroken operation of something over time. As Antoine Vauchez also points out in Chapter 15, the use of different words to analyse the meaning of colonialism today, such as '"legacies", "continuities", "footprints", "imprints", "traces"' betrays a certain lack of analytical robustness. Ann Stoler makes the same point regarding the terminology and explains that such 'rubrics instill overconfidence in the knowledge that colonial histories matter – far more than they animate an analytic vocabulary for deciphering how they do so'.[47] She cautions that an overly wide analytical language risks, quoting Michel Foucault, 'ready-made syntheses'.[48]

With this in mind, taking law as a prism through which to search for continuity has certain benefits. Law is by nature and design suited to concretizing the unbroken operation of a form of rule, including its politics and reasoning. Legal actors in particular provide, as Vauchez explains in his chapter, a 'privileged entry-point into the study of continuities'. Law and legal actors frequently work with tradition and precedent, including when tradition and precedent is being challenged. Legal continuity, understood as the unbroken operation of a certain legal category or way of reasoning, has the benefit of being traceable through texts. Many of the authors in this book study primary law, secondary legislation, case law, administrative decisions, and archival materials such as letters, statements, and reports by bureaucrats and administrators working in national as well as EEC/EC/EU institutions. It is by piecing these documents together that many of the authors in this book show colonial continuity. Michel Erpelding ends Chapter 11 by describing the act of

[47] A. Stoler, 'Introduction', in A. Stoler (ed.), *Imperial Debris: On Ruins and Ruination* (Durham, NC: Duke University Press, 2013), p. 12.

[48] M. Foucault, *Archaeology of Knowledge* (Oxfordshire: Routledge, 1972), p. 22.

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identifying how previously overlooked or ignored colonial legal practices were in fact 'sources of inspiration' for the development of EU law:

> In that regard, they remind one of *spolia*, or individual stones extracted from dismantled structures and reused in more recent buildings, sometimes serving a slightly different purpose. Identifying these *spolia*, and thereby the continuities and discontinuities between past and present legal practices, might prove a useful contribution to present-day debates about European supranational institutions, their potentialities, and their limitations.

Alongside enabling colonial continuity, the EU has facilitated discontinuity with a colonial past too, as is shown in Stephen Coutts's chapter on the effects of Brexit on Ireland (Chapter 14). Coutts explains how Ireland's economy had historically developed in order to service rather than compete with the metropole, the United Kingdom, and that EU membership allowed Ireland to develop its industrial sector and diversify its trade. In other words, in Ireland's case EU membership was a vehicle for discontinuing colonial-era political and economic patterns established by the United Kingdom, which continued after Ireland's independence in 1921.

The existence of colonial continuity is a claim to be handled with care and precision. It is a claim that should be placed alongside signs of discontinuity and change. This book shows continuity through the prism of the application and interpretation of primary and secondary law, through the biographies and work of actors, as well as within the specific example of the policy and law that underpins the EU's global interaction, what in EU vernacular is called 'external action'.

1.4.1 APPLICATION AND INTERPRETATION. Many of the chapters in this book deal with the application and interpretation of EU law. The chapters by Karim Fertikh (Chapter 4), Daniela Caruso (Chapter 3), Marise Cremona (Chapter 2), and Lionel Zevounou (Chapter 5) are illustrative examples, which show the variety of ways in which colonial continuity can be traced beginning at the point of the EU's foundation, and through how EU law is applied by EU and national decision-makers, and interpreted by the Court of Justice of the European Union (CJEU).

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In Chapter 4, Karim Fertikh shows colonial continuity in the application of early EU social security law and the freedom of movement of workers provision. By exploring the archival material of ministries for social security of the then EEC/EC Member States, Karim Fertikh's chapter explains how the EEC/EC sustained the coexistence of a net of social security benefits for workers from Member States' former colonies alongside and on equal footing with the social security scheme for European workers in the late 1950s to the 1970s. Fertikh writes: 'EEC law responded to this perpetuation of the relationship between colonizers and colonized by treating colonial migration as a legitimate exception to the migratory European preference.' In the 1970s, contemporaneously to the United Kingdom's accession to the EC, Fertikh describes how different actors, including the CJEU, changed course and hierarchized the two legal regimes, leading to 'a racializing of the European border'. Fertikh is inviting his reader to consider the question whether the racial boundary, which he traces up to the 1980s, is visible today.

Daniela Caruso's chapter (Chapter 3) explores the multiple ways that colonialism conditioned the rise and fall of the Algerian wine industry. The rise of the wine industry was prompted by the needs of the French wine market during the period when Algeria was a French colony, and its fall by the construction of the EC's 1970 Common Wine Policy. Algeria became independent in 1962. Using the concept of 'non-party', Caruso outlines how the then EEC/EC continued a colonial form of rule-making and 'colonial wealth diversion' vis-à-vis Algeria in its wine regulation. She writes: 'Algeria's excision from the EEC's wine market was deeply harmful and yet not actionable – a pattern both specifically colonial and ubiquitous in space and time.' Today, Caruso shows, the short-sightedness of this continuation of colonial forms of rule-making in relation to Algeria is clearly visible, and she describes how short-term interests were allowed to prevail 'over geopolitical stability or transnational equity'.

Through a close reading of the *Bresciani* case,[49] which interprets the Yaoundé Convention,[50] in Chapter 2 Marise Cremona shows how the 'EU's complex colonial and decolonization inheritance has shaped the

[49] Case 87/75 *Bresciani*, ECLI:EU:C:1976:18.

[50] See also Section 1.3.

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legal concept of direct effect in its integration-led trade agreements, and indeed the nature of the EU's emerging external relations in the 1970s and beyond'. In EU law, if a provision has direct effect, an individual can invoke that provision in court vis-à-vis the state. Direct effect is a principle that expands and effectuates the application of EU law. Cremona explains how for the CJEU in *Bresciani* the non-reciprocal relationship between the EEC and former Member State colonies indicated a 'closeness' and therefore direct effect was both a 'manifestation and an instrument of the integration of former colonies into the Community trading system'. Cremona shows colonial continuity through the CJEU's legal interpretation, and how an 'EU-centricity' has lived on in trade agreements still in force today.

Chapter 5 by Lionel Zevounou shows the relationship between the application of EU law and colonial continuity from a different angle. Zevounou shows how discrimination based on race in relation to North African public sector railway workers in France has deep colonial roots and continued for decades after decolonization, and how this discrimination has coexisted with the EU's principle of non-discrimination based on race, including the Charter of Fundamental Rights of the EU and the Race Equality Directive from 2000.[51] Through an analysis of the ways that French judges refuse to acknowledge the concept of 'race', Zevounou shows the reader how a continuum of colonial racial discrimination exists side by side with the EU's – undoubtedly applicable – primary and secondary law guarantees against discrimination.

1.4.2 ACTORS. In Chapter 15, which considers the growing literature on the entanglement between EU law and colonialism, Antoine Vauchez explains how a colonial perspective can inform and transform our understanding of EU law. Vauchez suggests a research agenda that centres 'on *processes of transfer*, reinvention, adaptation and incorporation that allow both continuities *and* discontinuities to be accounted for'. In such processes of transfer, Vauchez continues, 'lawyers (together with bureaucrats) are arguably key producers of continuities, and therefore

[51] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

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provide a privileged entry-point into the study of continuities between the (post-)colonial contexts and European law projects'. The chapters by Véronique Dimier (Chapter 10) and Michel Erpelding (Chapter 11) illustrate Vauchez's point.

Véronique Dimier's chapter opens with a quote from a French colonial bureaucrat: 'We must pretend to follow the laws.' Dimier shows how personnel trained in colonial administration went on to serve in EEC institutions, and in particular in the European Commission in its work executing the EEC's development policy through the European Development Fund (EDF). These bureaucrats brought 'a colonial attitude towards legal compliance' to these new EEC institutions. This attitude entailed purporting to '"adapt" general colonial regulations to the nuances of African realities', a position that in turn served to validate 'variability and flexibility of colonial regulations and the role of colonial officials'. These attitudes were forged in the nature of colonial lawmaking, which Dimier notes is 'discriminatory and derogatory'; 'within the same territories, two legal systems coexisted, tailored for two distinct populations and delineated along racial lines'. She traces this colonial attitude to law through the actors of the European Commission working with the EDF at the outset. She concludes by noting how in 2006 the Commission still encouraged its delegation working with aid in Eritrea to show 'flexibility and constructiveness'.

Michel Erpelding explains the legal and personnel continuities between the Mixed Courts of Egypt and the Mixed Court of Tangier, which were established within a colonial context in the late nineteenth century, and the CJEU. He shows that these mixed courts, instated to guarantee the individual rights of Westerners and competent to examine treaty-based claims by individuals against sovereign states, contributed to the origins of European law. Most notably, Erpelding shows how in the early 1950s Nicola Catalano, an influential early judge of the CJEU, wrote an opinion outlining a prototype principle of primacy of treaty law during his time as Legal Counsel to the International Zone of Tangier. The principle of primacy later became a foundational general principle of EU law. In his chapter, Erpelding evinces that European law did not draw its origins from individual Western legal traditions and institutions alone, but also 'from legal institutions and practices developed on Europe's colonial "peripheries"'.

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1.4.3 GLOBAL INTERACTION. In Chapter 2, Marise Cremona shows how, in its earlier external trade case law, some members of the CJEU understood trade relations between former colonies and the EEC as a 'privileged relationship', and relationships between the EEC and other states (in the example she analyses Portugal, a former colonial power) as representing the 'classical international legal order'. This type of distinction in the EU's interaction with the world, which expresses a paternalistic approach towards Member States' former colonies, is visible in Ulla Neergaard's chapter (Chapter 13), which addresses Greenland, and the chapter by Amel Benrejdal Boudjemaa (Chapter 12), which concerns the EU's relationship with Algeria.

In addition to showing the remarkable trajectory of how Greenland became an 'overseas country and territory',[52] Ulla Neergaard also shows how the EU is relying on Greenland's continuous status as a Danish colonial territory to establish a new Arctic policy. Neergaard calls this policy 'Eurarctic', as it is reminiscent of the 'Eurafrica' idea, which influenced European colonial policy in the first half of the twentieth century and according to which the African continent relied on Europe for its development, economic, political, and cultural, while Europeans relied on the African continent for resources. Through this lens Neergaard explores how 'Danish colonialism is at the core of the EU's "passage" to the Arctic', as the EU's interest in the Arctic centres on 'support for sustainable development, security interests and possible access to natural resources'.

Amel Benrejdal Boudjemaa opens her chapter by asking 'how was it possible for Algeria, a Muslim country in the southern Mediterranean, to join the EEC under the Treaty of Rome and remain a "member" until 1976, when its withdrawal was formalised, even though it had gained independence in 1962?' Benrejdal Boudjemaa shows that we can identify an answer to this question by understanding 'European needs and interests, especially those of the French', and by appreciating the EU's 'flexible approach to borders'. She then follows the continuation of an approach, self-centred and flexible towards borders, vis-à-vis Algeria through various generations of EU 'external'

[52] See also Section 1.3.

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policy: the Euro-Mediterranean Cooperative Proposal; the Union for the Mediterranean; and the European Neighbourhood Policy. While explaining how the EU and Algeria have shared interests in the Mediterranean region, which can sometimes be addressed in a mutually beneficial manner, Benrejdal Boudjemaa notes how the EU in general cannot help but approach Algeria with a combination of paternalism and self-interest. It is, she concludes, a 'challenge of continuity'.

In 2024 it was proposed that the EU should have a new commissioner for the Mediterranean, the rationale being that a long-neglected region should get the EU's undivided attention and 'comprehensive partnerships' should be developed.[53] Benrejdal Boudjemaa points out how a continued colonial posture, meaning self-serving and paternalistic, towards Algeria and other former European colonies in the Mediterranean region, has always been unconstructive and short-sighted. Perhaps the EU has failed to notice this. Caruso writes in Chapter 3: 'The tables have turned, and while EU legal scholars justly dissect the past in light of postcolonial insights, the fact remains that some bridges were burnt and no amount of European soul-searching will build them up again.'

What, then, can remedy what has been lost by the EU's continuous colonial posture towards former European colonies? In an essay in *European Law Open,* reviewing the EU's interaction with the rest of the world through the example of 'norm-exportation', Sarah Nouwen asks: 'How can the EU avoid an autobiographical understanding of itself?' She answers: '[C]ritical reflexivity and the ensuing humility are [...] essential to recognize continuities between European colonialism and the present.'[54] Making the same connection between history and humility as Nouwen, many authors in this book explicitly or implicitly recognize that beginning to discontinue colonial practices would require an EU that interacts with the world with humility and self-awareness.

[53] Statement at the European Parliament Plenary by President Ursula von der Leyen, candidate for a second mandate 2024–2029, 18 July 2024.

[54] S. M. H. Nouwen, 'Exporting Peace? The EU Mediator's Normative Backpack' (2022) 1 *European Law Open* 26–59 at 54.

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1.5 UNDERSTANDING THE PRESENT

Some chapters of this book, as discussed in Section 1.4, lay out patterns of legal documents, archival material, and personal biographies from the 1950s and 1960s onwards to show how colonialism continued and shaped the development of EU law after formal decolonization, in some cases until today. Other chapters start by analysing the current state of EU law and policy and use the history of colonialism to better understand why the present looks the way it does. While the former approach establishes unbroken colonial continuity, the latter approach examines reappearances of law and politics equivalent to that of the colonial era and compares the past with the present. Drawing an analytical distinction between these two approaches does not mean that they are mutually exclusive. In fact, many of the chapters in this book, for instance those authored by Daniela Caruso (Chapter 3), Diamond Ashiagbor (Chapter 6), Ulla Neergaard (Chapter 13), and Kako Nubukpo (Chapter 7), use these approaches side by side. Rather, the distinction shows that there are different ways to initiate analyses of how colonialism has shaped EU law. Such analyses can start in the past and move forward, or start in the present and search backwards.[55]

In laying out her opinion on the relationship between history and the legal politics of the present, Lauren Benton clarifies:

> A more effective way to bridge past and present concerns lies in making legal politics an object of analysis, a move that in turn reflects a commitment to tackling the problem of structure and agency in law. Analysis of legal politics in any period can help yield insights about its functioning in other times and places, in particular by pointing, via analogy, to dynamics in the relation of power and law, and in law's relation to inequality and difference.[56]

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[55] See also J. Go for a typology of how 'a colonial past impacts the present': J. Go, 'Reverberations of Empire: How the Colonial Past Shapes the Present' (2024) 48 *Social Science History* 1.

[56] L. Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *Journal of the History of International Law / Revue d'histoire du droit international* 7–40 at 10. This article is part of an informative debate about the relationship between history and international law, see also A. Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021).

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In many chapters of this book it becomes clear that studying colonial legal politics teaches us about EU law's relation to inequality and difference in the past as well as today. Several of the authors in this book, in different ways and through different examples, observe the pervasiveness of unequal treatment based on race and ethnicity in Europe and find in colonialism a context that provides further explanations. This is true of, for instance, the chapters by Lionel Zevounou (Chapter 5), Diamond Ashiagbor (Chapter 6), Veronica Corcodel (Chapter 8), Janine Silga (Chapter 9), and Iyiola Solanke (Chapter 16). Understanding present EU law with reference to the ways in which colonial legal politics operated means clarifying the pervasiveness of unequal treatment and illustrating the recurrence of using law to draw distinctions between people based on race and ethnicity. Noting the recurrence of what Chatterjee named the 'colonial rule of difference' today, has more critical power than simply observing contemporary discriminatory practices without acknowledging similar laws and policies that preceded them.[57]

However, when contextualizing the reappearance of legal techniques typical of the colonial era, or using comparisons between then and now to sharpen critiques of today, determinism should be avoided. In relation to how colonial entanglements iterate through the decades, Ann Stoler points out that it is important not to 'gloss over the creative, critical, and sometimes costly measures people take to become less entangled – or to make something new of those entanglements'.[58]

Certain legal and political practices, such as using law to discriminate based on ethnicity and race, are not a constant presence but may reside and may reappear in society. Framing analysis of how the legal practice of today relates to the practice of the colonial era does not benefit from being presented as uninterrupted, as this would risk losing nuance, miss out on counter-examples, and ascribe roles of perpetrator and victim deterministically, which in turn risks limiting the number of situations that could benefit from comparison between the present and colonial history.

Instead, and as many of the chapters in this book show, a constructive starting point is to provide answers to questions that acknowledge a

[57] Chatterjee, *The Nation and Its Fragments*, p. 16.
[58] Stoler, 'Introduction', p. 8.

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connection between past and present. Do techniques typical of colonial lawmaking reappear today and how are they visible? What accounts for such reappearances? The underlying ethos of this analysis of how the present connects to the past is that a richer understanding of how we got to where we are is a way of beginning to undo some of what we are critical of in the present.

1.5.1 ILLUSTRATING, AND UNDOING, RACISM. EU institutions have repeatedly acknowledged that racism, between individuals and on a structural level, is a significant societal problem facing the EU and people living in the EU.[59] In different ways, the chapters by Veronica Corcodel (Chapter 8), Janine Silga (Chapter 9), and Iyiola Solanke (Chapter 16) observe racist practices within EU law. Corcodel examines the 'racialized sedentary bias' in current EU migration law and traces its colonial roots. Janine Silga shows the 'legacy of the hierarchical human order stemming from colonial racism' in contemporary EU development policy. Iyiola Solanke shows how EU law is underpinned by 'ideas that may be harmful to racialized peoples' and how a decolonial approach to the research and teaching of EU law can undo some of those presumptions, ideas, and structures.

Veronica Corcodel starts the analysis of her chapter with the difference between how EU migration law was used to respond to the 2015–2016 and 2022–2023 refugee 'crises', the latter in the context of the Russo-Ukrainian war and the former in the context of conflicts in the Middle East and Africa. She identifies how these differentiated EU legal arrangements replicate colonial law and policy, in particular how the 'racialized sedentary bias', according to which 'the desirable or normal state of the colonized population was perceived as their remaining in their place of origin', recurs as a guiding principle of EU migration policy. Corcodel explains how 'the impoverished situation in the Global South came to shape a bias of "bogus" refugees, underpinning policies and practices of regional containment in continuity with the colonial sedentary bias'.

[59] See for example: European Commission, A Union of Equality: EU anti-racism action plan 2020–2025, COM(2020) 565 final; and The European Union Agency for Fundamental Rights Report, 'Encouraging Hate Crime Reporting – The Role of Law Enforcement and Other Authorities' (2021).

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Differently from the reception of refugees fleeing the Russo-Ukrainian war, 'the 2015 approach, under which the figure of the asylum seeker from the Global South is overshadowed by that of the irregular migrant, carried forward a pre-existing racialized "non-entrée regime"'.

Janine Silga describes how the merging of two EU policy fields – development and migration – through the use of 'migration-based conditionality', namely conditioning aid to a country on its readmission of nationals, reveals a 'legacy of the hierarchical human order stemming from colonial racism'. Silga traces the emergence of migration-based conditionality in the context of the external dimension of the EU migration policy, and then follows its use to the Samoa Agreement, which is the latest framework agreement between the EU and African, Caribbean, and Pacific countries. Silga explains how 'readmission and return of third-country nationals staying irregularly in the EU has become a priority (if not *the* priority) of the external dimension of the EU migration policy', and the ways in which 'migration-based conditionality has emerged as a way of inciting and coercing non-EU countries into following the same logic'. Silga's chapter shows how, when looking at EU migration policy and EU development policy simultaneously, 'racism becomes an evident part of the equation'.

Iyiola Solanke's chapter poses the question of what happens when we take colonialism as the starting point for our interaction with EU law, including its research and teaching. Her chapter looks to the future and lays out a vison for the principles that would guide a decolonization of research and teaching of EU law, and how this in turn would 'open up the world of European integration and EU law to a new generation of Black scholars and audiences, both in Europe and beyond'. She explains how in the context of education, decolonization refers to 'the long-term pedagogical impact of political colonization, such as the continued use of the colonizers' language and scholarship to teach and assess learning'. In this context, Solanke explains the need to reduce 'racial homogeneity … in relation to research, teaching, management and leadership in the EU and EU law'. Among others things, decolonization 'is part of a larger agenda: it is ultimately about social justice and building a strong and intentionally anti-discriminatory democracy in Europe'.

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The chapters by Corcodel, Silga, and Solanke, while different, start with the contemporary state of EU law and the field of EU legal studies and find in colonialism an explanation, and in Solanke's chapter, in decolonization a remedy. Placing the question of how racism features in EU law, its application as well as its research and teaching, in the context of colonialism shows the ways in which the problems European society is facing today are not new but have iterated for a long time. The infliction of racism in EU law and European society is what Aimé Césaire called the 'boomerang effect of colonization'.[60]

1.6 REASSESSING THEORIES AND CONCEPTS

The chapters of this book show how the case studies and examples produced by acknowledging the role of colonialism in European integration benefit the study of legal concepts that have long preoccupied those engaged in the theorization of EU law. Sovereignty, federalism, legal pluralism, and citizenship feature in many of the chapters, not as self-referential and self-contained descriptions of how the EU works, but as openings for further perspectives and comparisons. Such perspectives and points of comparison are often situated in Africa, rather than within Europe or the United States. Kako Nubukpo's chapter (Chapter 7) on the EU's role in the quest for monetary sovereignty in West Africa, Michel Erpelding's chapter (Chapter 11) on the impact of quasi-federal legal systems situated in North Africa on early CJEU jurisprudence, and Diamond Ashiagbor's chapter (Chapter 6), which contrasts the social dimension of the federated systems of the EU and the African Union (AU), are all illustrative examples of such perspectives and comparisons.

In different ways, this book shows that the meaning and function of legal concepts used in EU law will be thickened if colonialism is taken into account. This means incorporating further examples of where, how, and in relation to whom EU law concepts have been used. As evinced in the chapters cited, the geography of which places have shaped EU law is expandable. One way that such expansion of conceptual meaning happens is through the circulation of legal concepts, which Antoine

[60] Césaire, *Discourse on Colonialism*, p. 41.

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Vauchez writes about in Chapter 15. Vauchez writes that scholarship that considers the role of colonialism in EU law brings out the 'circulation of legal categories used to define post-national forms of relationship (*union, community, federalism, association*) both as they are currently used and as they circulate back and forth between the colonial and the European contexts'. In other words, documenting and analysing such circulation alters the meaning of legal concepts.

In his book *The Nation and Its Fragments*, Chatterjee goes one step further and explains that as the 'rule of colonial difference is part of a common strategy for the deployment of the modern forms of disciplinary power' then the 'history of the colonial state, far from being incidental, is of crucial interest to the study of the past, present, and future of the modern state'.[61] Using Chatterjee's conceptual circle, the fact that discrimination based on ethnicity and race exists (one expression of the rule of colonial difference) in Europe today, indicates that the construction of the 'colonial state', by which Chatterjee means the state constructed for colonial rule, can explain the workings of the modern European state.

Chatterjee's work focuses on state and nation, and how these concepts were determined by the way colonialism transmitted between colonizer and colonized. To this idea of circulation we can add Aimé Césaire's more forceful framing of the same phenomenon, namely, and as cited earlier, as the 'boomerang effect of colonization'. A possible way of thinking about some of the chapters in this book is that they are concerned with a conceptual boomerang effect. The ways in which concepts such as federalism, pluralism, sovereignty, and citizenship were used and forged during and since colonialism, and most importantly how they were grafted on the rule of colonial difference, when recognized by scholarship, inevitably shoots back into EU legal theory. This boomerang effect gives the concepts new layers of meaning and the theory of their application new examples and case studies.

Of particular importance, as the chapters by Kako Nubukpo (Chapter 7), Diamond Ashiagbor (Chapter 6), and Stephen Coutts (Chapter 14) discussed in this section show, is how an expanded understanding of these

[61] Chatterjee, *The Nation and Its Fragments*, p. 18. See also Anghie, *Imperialism, Sovereignty and the Making of International Law.*

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concepts shows the effects of EU law and policy on people's everyday life. Increasing the granularity of these concepts by recognizing how they are constituted by colonialism offers a more precise view on how they interact with people's lives. When colonial contexts are included in the study of these concepts in EU law, the groups of people and life situations they describe are expanded, compared to excluding colonialism when interpreting the meaning of these concepts. In Diamond Ashiagbor's chapter this is evident in an account of how EU federalism's shortcomings in promoting social and labour protection impacts the lives of people in Europe, and in Africa. In Stephen Coutts's chapter it is seen in an account of how EU law scaffolded and neutralized a postcolonial plural legal order to the benefit of people living and working across the Northern Irish border. In Kako Nubukpo's chapter it can be found in an account of how the EU has inserted itself into the definition of what constitutes monetary sovereignty in West Africa, which directly concerns the 140 million people using the CFA franc currency on a daily basis.

1.6.1 FEDERALISM. The Constitution of the United States and the jurisprudence of the United States Supreme Court is the classic comparison for EU law scholars analysing the federalism of the EU. This is the case even though the formation of the federal system of the United States significantly predates the founding of the EU.[62] Frederick Cooper has written about the debates over federalism and confederation, which happen contemporaneously to the founding of the EU in the late 1950s within what until 1958 was the French Union and thereafter the French Community, as well as within the Pan-African movement.[63] Cooper

[62] Miller and Nicola argue that this comparison between the EU and the US has overlooked or underestimated 'periods when the US federal judicial power promoted racial segregation, did not adequately protect minority rights through equal protection doctrines, or endorsed freedom of contract to entrench laissez-faire policies'. J. Miller and F. G. Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutionalism', in J. Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford: Oxford University Press, 2023), p. 321.

[63] F. Cooper, 'Federation, Confederation, Territorial State: Debating a Post-imperial Future in French West Africa, 1945–1960', in A. Arato, J. L. Cohen and A. von Busekist (eds.), *Forms of Pluralism and Democratic Constitutionalism* (New York: Columbia University Press, 2018), p. 33. And see also S. O. Oloruntoba (ed.), *Pan Africanism, Regional Integration and Development in Africa* (London: Palgrave Macmillan, 2020).

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explains that the failure to form a federation in this era of decolonization has been mistakenly attributed to 'the inexorable drive of people to have their own nation-states, and it is easily forgotten that the nation-state was a fall back option for the leaders most involved at the time'.[64] The rich debates of this period (predominantly but not limited to the 1950s and 1960s) in Africa, notably among West African political leaders such as Mamadou Dia, Léopold Senghor, and Kwame Nkrumah on the ability of federalism to encompass heterogeneity and multinationality, have so far not been carefully considered within debates about EU federalism. Diamond Ashiagbor's chapter, however, is an illustrative example of how the debates of the Pan-African movement in the era of decolonization cast light on the workings of the EU today.

In Chapter 6, Diamond Ashiagbor makes this comparison between the EU and the AU's federated systems, and the ways in which their respective integration processes are interconnected. Ashiagbor's chapter first shows how the EU's regional integration project, especially how it 'embeds that market in the "social"', owes much to the 'racial capitalism of European colonial dominance over the territory and resources of other regions'. She describes two processes happening in parallel within European integration, namely, how it has relied on colonial extraction abroad and the ways in which, at home, there were '(racial) hierarchies within, or exclusions from, the post-war European ideal of the solidaristic social state'. She then goes on to illustrate the processes through which development of the EU's social dimension 'influences and constrains the policy space available for another regionalism project, the African Union, to develop its own version of social regionalism'.

1.6.2 SOVEREIGNTY. The sovereignty question in EU law has always been a challenge to its legal theory and many have sought to answer what form of sovereignty does the interaction between the EU's legal system and that of its Member States create. Neil MacCormick summarized the impasse by observing that while 'sovereignty has not passed to the organs of the Union, the same analysis confirms

[64] Cooper, 'Federation, Confederation, Territorial State', p. 33.

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that sovereignty has not remained with the individual Member States either'.[65]

Examining the place of colonialism in the development of EU law shows that the question of sovereignty is not limited to the interaction between the EU and its Member States, but is also a question of how the EU interacts with former, and current, colonies of the Member States.[66]

'We know sovereignty when we see it – at least we think we do', Lauren Benton writes when theorizing the many 'forms of attenuated and partial sovereignty' in the long history of European colonialism.[67] There is a rich literature on the concept of sovereignty in colonial studies. Several of these accounts, like Benton's, focus on how sovereignty for formerly colonised states was never absolute and never complete.[68] In the context of decolonization and the attainment of sovereignty of newly independent states, Chatterjee has shown how the very fulfilment of sovereignty became intertwined with the notion of development, as 'development' became a standard through which to assess readiness for sovereignty.[69] Ann Stoler, following the same line of reasoning, writes that it is of importance to '[shift] emphasis from fixed forms of sovereignty and its denials to gradated forms of sovereignty and what has long marked the technologies of imperial rule – sliding and contested scales of differential access and rights'.[70] The role EU law has played, and still plays, in sustaining scaled sovereignty, typical of colonialism and its aftermath, should inform the debates about the meaning of sovereignty in EU law, theoretically as well as practically. A case in point is Kako Nubukpo's chapter (Chapter 7), which casts light on the role played by

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[65] N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259.

[66] R. Adler-Nissen and U. P. Gad (eds.), *European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories* (Oxfordshire: Routledge, 2013).

[67] L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010), p. 279.

[68] See Anghie, *Imperialism, Sovereignty and the Making of International Law* and for the specific example of sovereign debt see P. Penet and J. F. Zendejas (eds.), *Sovereign Debt Diplomacies: Rethinking Sovereign Debt from Colonial Empires to Hegemony* (Oxford: Oxford University Press, 2021).

[69] Chatterjee, *The Nation and Its Fragments*, p. 205.

[70] Stoler, 'Introduction', p. 8.

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the EU in the quest for monetary sovereignty in Benin, Burkina Faso, Côte D'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

Nubukpo's chapter shows how current EU decision-making continues France's colonial currency policy in West Africa. The CFA franc is a currency circulating in fourteen African countries divided into two monetary zones in West and Central Africa. Created by France as a currency for its colonies in 1945, in two council decisions taken in 1998 and 2021 the EU first accepted that the CFA franc would be pegged to the euro rather than the French franc, and then increased its own involvement in the future reform of the CFA franc. Thus since 1999 the CFA franc has been pegged to the euro. The French Treasury guarantees convertibility between the CFA franc and the euro and in exchange the countries whose currency is the CFA franc must deposit 50 per cent of their foreign exchange reserves in the French Treasury. Nubukpo explains the detrimental effect of this regime on the economic and political life of West Africans. The set-up of the CFA franc gives African and European 'ruling elites advantages in terms of repatriation of capital from the African franc zone to the eurozone', and 'eurozone companies established in the African franc zone can easily repatriate their profits to the eurozone due to the guaranteed convertibility of the CFA franc into euros and the free movement of capital between the two zones'. Most importantly, however, Nubukpo explains how to discontinue the CFA franc, introduce a new currency in West Africa, the eco, and in so doing instate monetary sovereignty in the region.

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1.6.3 LEGAL PLURALISM. Sally Engle Merry has explained the many facets of legal pluralism in colonized societies. She refers to legal and anthropological research leading up to the 1970s that theorized the interconnections of 'indigenous and European law' in colonial and postcolonial societies as 'classic legal pluralism'.[71] What then followed in socio legal research, and which drew on 'classic legal pluralism', but took the concepts of legal pluralism to non-colonial settings, she describes as 'new legal pluralism'.[72] Despite the existence of this rich scholarly

[71] S. E. Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869–896 at 872.
[72] Ibid. at 872.

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tradition, in the theorization of legal pluralism or constitutional pluralism in EU scholarship, it is rare to find a comparison or reference to the legal pluralism of colonial societies.[73] This is the case even though the links would appear to be manifold because the Member States that are former or current colonial powers orchestrated and participated in the plural legal contexts constituted by colonial law.

Lauren Benton and Sally Engle Merry have identified how the legal pluralism of colonial contexts explains global legal ordering and the distribution of power, historically and today. For Merry, the legal pluralism of colonial law provides ‘a framework for understanding the dynamics of the imposition of law and of resistance to law, for examining the interactive relationship between dominant and subordinate groups or classes’.[74] In Benton’s explanation:

> The architecture of the plural legal order had simultaneously a discursive importance – it was […] the object of continual struggle over definitions and markers of cultural difference – and a structural dimension that acted to shape and constrain political and economic interactions. Further, this double-sided quality of conflicts over the relation of multiple legal authorities reproduced knowledge about power that carried across both internal and external borders.[75]

Stephen Coutts’s chapter (Chapter 14) shows how a colonial plural legal context can iterate and transform over long periods of time through the very specific example of the effects of the United Kingdom’s exit from the EU (Brexit) on Northern Ireland. Brexit, Coutts explains, revealed how EU law had worked to facilitate the ‘resolution of a postcolonial conflict with cross-border dimensions, which had persisted until the end of the last century in the north-west of Europe, namely what were known euphemistically as “the Troubles” in Northern Ireland’. Coutts explains

[73] For one example, however, see F. Snyder, ‘The Unfinished Constitution of the European Union: Principles, Processes and Culture’, in J. H. H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), p. 65.

[74] Merry, ‘Legal Pluralism’ at 890.

[75] L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002), p. 254.

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in detail how single market law 'provided the context within which a postcolonial conflict with cross-border dimensions could be managed'. The post-Brexit law then, in Coutts's analysis is an 'imperfect substitute' that lays bare yet another 'form of legal pluralism or even legal entanglement'.

In Coutts's account, and through the work of Merry and Benton, the concept of legal pluralism shows that colonial law and its aftermath is not one-sided. In a colonial or postcolonial context the concept of legal pluralism clarifies how there might be more than one answer to the question of who is subjugated and who is ruled, or how power is distributed through law. In Coutts's chapter, in contrast to many of the other accounts of the relationship between EU law and colonialism in this book, EU law serves the function of reordering a (post-)colonial situation to the point of lessening its tensions and ameliorating its power structures.

1.6.4 CITIZENSHIP. In this book, as discussed in Section 1.5, there are several examples of people being governed by different generations of EU law without being granted equal treatment. The individuals in these examples are subjected to EU law through current or past colonial relationships with Member States. Several of the chapters show the ambiguity of the legal status of these individuals due to their not being straightforwardly included in EEC/EC/EU law as citizens or as nationals of a Member State, nor categorized in EEC/EC/EU law as a third country national.[76]

Accounts of colonial differentiated treatment of people calibrates the story of how and in relation to whom EU citizenship rights have developed over the decades. It casts light on those who have been excluded from its protection. EU citizenship proper, which was introduced in the Maastricht Treaty in 1992, at its core guarantees the right to vote in local elections and to move and reside within the EU without being

[76] During the Treaty of Rome negotiations a distinction was already drawn between the people of former colonies, the people of current colonies, and third country nationals, and the distinction between nationals and citizens in relation to colonized territories featured at several points in the negotiations. See Eklund, 'Peoples, Inhabitants and Workers'.

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discriminated against based on nationality.[77] Before the Maastricht Treaty and since the Treaty of Rome, the right to move without being discriminated against based on nationality was granted solely to those who had the status of worker. In their respective chapters, Karim Fertikh (Chapter 4) and Lionel Zevounou (Chapter 5) show examples of how national and EEC/EC/EU protection offered to workers has been grafted on to colonial distinctions between workers considered racially and ethnically European and workers not so considered. In her chapter, Diamond Ashiagbor (Chapter 6) explains how 'the exclusion of racialized workers and colonial subjects is not merely an exclusion from the *national* welfare state and labour market institutions, but also from social citizenship *within the EU* – because that social citizenship within the EU is premised on these national institutions'.

These three chapters show how the legal developments culminating in EU citizenship intersect with examples of how individuals subjected to, or citizens of, Member States due to colonialism have been treated differently based on race and ethnicity. The legal technique sustaining such difference in treatment relies on scaled or hierarchized citizenship or nationality status, which is typical of colonial legal systems and in particular of colonial citizenship laws. In this book, the racial hierarchies central to colonial law are a recurrent point of reference. For instance, in Chapter 10 Véronique Dimier describes the colonial legal system in which future EEC Commission public officials were trained as, 'within the same territories, two legal systems coexisted, tailored for two distinct populations and delineated along racial lines'. In Chapter 12 Amel Benrejdal Boudjemaa writes that as a newly decolonized state, 'Algeria was unable to perceive its relationship with the Europeans as anything other than a different form of colonialism, especially in the realm of workers' rights. It must be remembered that under colonial rule, Algerian workers did not enjoy genuine equal rights alongside the Europeans.'

In relation to colonial citizenship laws specifically, Emmanuelle Saada and Bronwen Manby have both explained how the main legal technical

[77] On the architecture of EU citizenship rights see Article 20 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158.

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commonality was that only white Europeans possessed both citizenship and nationality status.[78] Though citizenship laws of the colonial era are divergent and opaque, they tended to be organized so that people from the colonies who had citizenship in the European colonizing state were excluded from being considered to hold the nationality of the colonizing state. When people from the colonies were designated as a nationality, such as 'French' or 'Belgian', it was not as citizens with rights to equal treatment but, rather, as subjects of France and Belgium. Zevounou's chapter shows precisely how nationality can be used to differentiate between citizens or workers governed by the same state and as Ashiagbor writes in dialogue with Zevounou's research: '[S]uch unequal treatment in relation to pay, working conditions, promotion opportunities, pensions and other social benefits was typically rationalized as legitimate differentiation based on nationality, rather than understood as illegitimate discrimination based on race.'

Acknowledging the impact of colonialism on citizenship rights in Member States, and by extension on the protection offered to workers, expands the definition of how citizenship has been organised in the EU since 1957. Including examples of how the 'rule of colonial difference' has permeated legal developments culminating in EU citizenship clarifies who has been included and who has been excluded from its gradually enlarged protection over the decades.

1.7 LAW, ACTORS, EXITS, AND FUTURES: INTRODUCING THE SECTIONS OF THIS BOOK

Most authors in this book met in Copenhagen in September 2022 for the conference Colonialism and the EU Legal Order. The themes discussed earlier, of how to identify colonial continuities in EU law, how to understand the present application of EU law through the history and practice of colonialism, and how EU legal theory and concepts can benefit from being framed by the context of colonialism, were already

[78] Manby, *Citizenship in Africa: The Law of Belonging* and E. Saada, *Empire's Children: Race, Filiation and Citizenship in the French Colonies* (Chicago: The University of Chicago Press, 2012).

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present during the conference proceedings in 2022. As the reader of this book will notice, while using different case studies, most chapters combine several of the themes, questions, and approaches discussed in this Introduction.

The book is divided into four sections reflecting the different case studies used by the authors to analyse the relationship between colonialism and the EU legal order. First, the book opens with eight chapters that concern colonialism and different areas of substantive EU law. This section features Marise Cremona's chapter on direct effect and external trade (Chapter 2); Daniela Caruso's chapter on the Common Agricultural Policy and trade with Algeria (Chapter 3); Karim Fertikh's chapter on the free movement of workers and social security (Chapter 4); Lionel Zevounou's chapter on workers' rights and discrimination based on race (Chapter 5); Diamond Ashiagbor's chapter on EU labour and social law (Chapter 6); Kako Nubukpo's chapter on the European Central Bank and the governance and reform of the CFA franc currency (Chapter 7); Veronica Corcodel's chapter on migration law (Chapter 8); and Janine Silga's chapter on EU development policy (Chapter 9).

The second section contains two chapters that investigate the links between colonialism and actors in EU institutions. This section features Véronique Dimier's chapter on actors in the EU Commission (Chapter 10) and Michel Erpelding's chapter on actors in the CJEU (Chapter 11).

The third section contains three chapters that analyse exits from the EU and how the history and aftermath of these exits relate to colonialism. This section features Amel Benrejdal Boudjemaa's chapter on Algeria's exit from the EEC (Chapter 12); Ulla Neergaard's chapter on Greenland's exit from the EC (Chapter 13); and Stephen Coutts's chapter on Northern Ireland's exit from the EU with Brexit (Chapter 14).

The fourth and last section contains two chapters that look towards the future and address the question of how we build on the knowledge and scholarship concerning the interconnections between EU law and colonialism. This section features Antoine Vauchez's chapter on the effects and function of the emerging field of EU law and colonialism (Chapter 15) and Iyiola Solanke's chapter on how to decolonize the research and teaching of EU law (Chapter 16).

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Hopefully, the reader of this book will notice cross-cutting themes and appreciate the incredible nuance and specific context of each individual chapter. The editorial ambition has been to present an eclectic yet harmonized selection of texts that together form a critical reflection on EU law's relation to colonialism. Ultimately, this book is intended to be a constructive part of analysis and debate about the history, present, and future of the EU legal order.

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PART I

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CHAPTER 2

Reciprocity and Direct Effect

Yaoundé and Trade Integration

MARISE CREMONA

2.1 INTRODUCTION

The *Bresciani* case is one of a group of early cases in which the legal effect of Community agreements, and their nature as a source of law, was considered and the first case in which a provision of the Yaoundé Convention was explicitly found to have direct effect.[1] In *Haegeman*, two years earlier, the Association Agreement with Greece had been declared to be an 'integral part of Community law', opening the way for preliminary references on the interpretation of Community agreements, as well as the possibility of direct effect.[2] During this period (between the early 1970s and the mid 1980s) a number of issues relating to the direct effect of international agreements were thrashed out, but ambiguities remained – and still remain.

This chapter explores the way in which the specific context of the *Bresciani* case, the trade relations established by the Yaoundé Convention between the Community and some of its former colonies, both influenced the Court's presentation of direct effect in *Bresciani* itself and raised questions about the relationship – still not transparent – between direct effect and the reciprocal (or non-reciprocal) nature of a trade agreement, in particular agreements founded on relationships of integration with the EU. In *Bresciani*, non-reciprocity was a signifier of the closeness of the relationship established by the Yaoundé agreement, and

[1] Case 87/75 *Bresciani*, EU:C:1976:18. The application of Yaoundé was simply assumed without discussing direct effect in Case 48/74 *Charmasson*, EU:C:1974:137.

[2] Case 181/73 *Haegeman*, EU:C:1974:41. See also Case 17/81 *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, EU:C:1982:129.

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direct effect both a manifestation and an instrument of the integration of former colonies into the Community trading system. This reasoning has been influential in the interpretation of integration-led agreements beyond the postcolonial context of Yaoundé. In focusing on the *Bresciani* case, we shed light on the way the EU's complex colonial and decolonization inheritance has shaped the legal concept of direct effect in its integration-led trade agreements, and indeed the nature of the EU's emerging external relations in the 1970s and beyond.

The chapter starts with a brief introduction to the background to the Yaoundé Conventions which were at issue in *Bresciani* (Section 2.2), before going on to the judgment itself (Section 2.3), some comments on subsequent case law and practice in relation to direct effect (Section 2.4) and an assessment of the ongoing significance of the case (Section 2.5).

2.2 THE YAOUNDÉ CONVENTION: BACKGROUND AND NEGOTIATION

The Schuman Declaration of 9 May 1950 claimed that 'with increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent'.[3] The Preamble to the original Treaty of Rome included a reference to the 'solidarity which binds Europe and overseas countries' – a reference which is still found today in the Preamble to the Treaty on the Functioning of the European Union (TFEU). France and Belgium in particular had pressed for the inclusion of specific provision in the EEC Treaty for their colonies, or overseas countries and territories (OCTs) as they were termed,[4] and in the event the EEC Treaty's Part IV established a 'special system of association' for 'the non-European countries and territories [with] which [the Member States] have special relations'.[5]

[3] Schuman Declaration, 9 May 1950. Available at bit.ly/43utL3z.

[4] Eklund aptly refers to the term 'overseas countries and territories' as an example of 'coded' colonial language: H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831 at 835.

[5] Art. 131 EEC. Art. 227(3) EEC provided that 'The overseas countries and territories listed in Annex IV to this Treaty shall be the subject of the special system of association described in Part IV of this Treaty.'

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According to Article 132 EEC, 'Such association shall have the following objects … Member States shall, in their commercial exchanges with the countries and territories, apply the same rules which they apply among themselves pursuant to this Treaty.'

Article 136 EEC provided for an initial five-year Implementing Convention, that was therefore due to expire in 1962, and for its replacement by the Council with 'provisions … for a further period'. In addition to this deadline, some of the OCTs had become independent, and the early introduction of the common external tariff gave rise to the need to revise the import tariff regime.[6]

These factors pointed to the need for a new agreement between the EEC and the newly independent former colonies.[7] The Council decided in October 1960 to embark on negotiations for a new agreement, and these opened in January 1961. The first Yaoundé Convention came into force in 1965 and was replaced after five years with Yaoundé II (1970–1975), and then – after the first EEC enlargement – with the geographically broader Lomé Convention.[8] The legal basis of these agreements was Article 238 EEC, providing for association agreements between the EEC and third countries.[9] According to Frisch, the use of the term 'association' in Part IV to describe the relationship between the EEC and the

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[6] Commission communication, 'Association des états d'outre-mer a la Communauté : considérations sur le futur régime d'association', 12 July 1961, COM (1961) 110, pp. 9–10.

[7] I. W. Zartman, *Politics of Trade Negotiations between Africa and the European Economic Community* (Princeton: Princeton University Press, 1971), p. 25.

[8] The first and second Yaoundé Conventions were concluded as mixed agreements between the EEC, the (then six) EEC Member States and eighteen associated states; OJ 1964 1431/64; OJ 1970 L 282/1. See further C. Cosgrove Twitchett, *Europe and Africa: From Association to Partnership* (Farnborough: Saxon House, 1978).

[9] Art. 238 EEC provided that 'The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures.' On contemporary debates over the scope of Art. 238 EEC see J. J. Costonis, 'The Treaty-Making Power of the European Economic Community: The Perspectives of a Decade' (1968) 5 *Common Market Law Review* 421 at 443–449. Interestingly in the context of this chapter, the proposal to use Art. 238 EEC as the basis for a multilateral agreement between the EEC and the remaining members of the Organization of European Economic Cooperation, including the UK, failed as a result of the UK's unwillingness to compromise its system of commonwealth trade preferences: Costonis, 'The Treaty-Making Power of the EEC', at 445.

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OCTs under colonial rule gave rise to an unwillingness on the part of some newly independent states to enter into an 'association' with the EEC on the basis of Article 238 EEC.[10] Indeed some chose not to do so.[11] And in fact, in *Bresciani*, both Advocate General Trabucchi and the Court emphasized the continuity between the original OCT association based on Article 136 EEC, and the Yaoundé Convention based on Article 238 EEC.

The French and Belgian insistence on including provision for the OCT in the Treaty of Rome was thus a significant factor in ensuring that the Community embarked upon a development policy, and the principles of that policy, being set out in the treaty itself, were (we might say) constitutionalized. Thus the Commission argued that the new association agreement – a building block of the EU's nascent development policy – was bound to espouse the objectives set out in Article 131 EEC: close economic relations with the OCTs, their economic and social development and 'the furthering of the interests and prosperity of the inhabitants of these countries and territories in such a manner as to lead them to the economic, social and cultural development which they expect'.[12] As we shall see, in *Bresciani* these objectives will be linked by the Court to the non-reciprocal character of the Yaoundé Convention.[13] Yaoundé was concluded with African countries with colonial links to France and Belgium and was therefore regional in nature. Germany and the Netherlands, and subsequently the Commission, were keen to expand EEC relations to other newly independent states in Africa and beyond (as reflected in

PROOFS

[10] D. Frisch, 'The Role of France and the French in European Development Cooperation Policy' in G. Bossuat and G. D. Cummings (eds.), *France, Europe and Development Aid: From the Treaties of Rome to the Present Day* (Vincennes: Institut de la gestion publique et du développement économique, 2013), pp. 109–120. For an exploration of the drafting history and colonial underpinnings of the provisions on the OCTs in the Treaty of Rome, in particular the term 'association', see Eklund, 'Peoples, Inhabitants and Workers'.

[11] E.g. Republic of Guinea, which did not join until 1975; on the consequences of this choice see Case 147–73 *Carlheinz Lensing Kaffee-Tee-Import KG v. Hauptzollamt Berlin-Packhof*, EU:C:1973:156.

[12] Commission communication, 'Association des états d'outre-mer a la Communauté : considérations sur le futur régime d'association', 12 July 1961, COM (1961) 110, pp. 7–8.

[13] See text at note 33.

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the Arusha agreement with Kenya, Uganda, Tanzania).[14] As Bartels has pointed out, these colonial relationships shaped EU development policy over decades and the EU's postcolonial 'preferences' towards some developing countries have only relatively recently been subject to challenge and adjustment.[15] The purpose of this chapter, however, is not to trace that influence, but rather to explore the ways in which the Court's interpretation in the *Bresciani* case of the economic integration found in the Yaoundé Convention has shaped its approach to the direct effect of trade agreements outside the development policy context.[16]

2.3 THE *BRESCIANI* CASE

The *Bresciani* case, perhaps fortuitously, concerned a public health inspection charge payable on goods (animal hides) imported into Italy from another Member State (France) and a Yaoundé party (Senegal). The question was whether the charge was a 'charge of equivalent effect to a customs duty' (CEE) and as such prohibited in intra-EU trade (Article 13(2) EEC) and Yaoundé trade (Article 2(1) Yaoundé). From the start, then, the Court was asked to consider Yaoundé alongside the EEC Treaty. The questions from the national court concerned the direct effect of the Yaoundé provision and whether the concept of CEE in Article 13(2) EEC also applied under Yaoundé.

In the background of the case were, on the one hand, earlier cases on the interpretation of the equivalent provision of the EEC Treaty,[17]

PROOFS

[14] Commission Memorandum on a Community Policy on Development Cooperation, 27 July 1971. SEC (71) 2700. Supplement 5/71 – Annex to EC Bulletin 9/10–1971.

[15] L. Bartels, 'The Trade and Development Policy of the European Union' (2007) 18 *European Journal of International Law* 715. Although the reference to solidarity with 'the overseas countries' is still in the Preamble to the TFEU (see text at note 4), Art. 21(2) Treaty on European Union includes among the objectives of EU external action the economic and social development of developing countries generally, and the integration of all countries into the world economy.

[16] On the influence of the colonial legacy on another aspect of external policy, see J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24(1) *UCLA Journal of International Law and Foreign Affairs* 163.

[17] Such as, e.g. Case 29/72 *Marimex*, EU:C:1972:126; Case 94/74 *IGAV v. ENCC*, EU:C:1975:81.

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and, on the other hand, the *Haegeman* judgment, according to which international agreements concluded by the Community are an 'integral part' of Community law and subject to the interpretational jurisdiction of the Court of Justice,[18] and the *International Fruit Company* cases of a few years earlier in which it had been held that The General Agreement on Tariffs and Trade (GATT) was not capable of creating directly effective rights.[19] The case prompted the question whether the potential for direct effect was a characteristic of the EEC Treaty not to be shared with other international agreements, or whether the ruling on the GATT was a particular case not necessarily to be extended to others. In its judgment, the Court initiated a line of case law on the direct effect of international agreements, an approach which – in its *Bresciani* foundations – owed a great deal to the way in which the EEC envisaged its relations with its Member States' former colonies, but which has since been applied much more broadly within the EU's sphere of influence.[20]

The Commission, in its submission, based its argument on the fact that Article 2 of the Yaoundé Convention expressly referred to the corresponding provisions of the EEC Treaty; in its view, since those provisions create directly effective rights, so too must Article 2 of Yaoundé.[21] The applicants too dwelt on this point, as well as relying on the origins of the Yaoundé Convention in Articles 131–136 EEC and on the *Haegeman* case.[22] No Member State government made submissions in the case.[23] While these arguments of the Commission and the applicants find their way into the judgment, the broader issues of direct effect and reciprocity discussed by the Court appear to have been prompted by the advocate general.

PROOFS

[18] *Haegeman*.

[19] Cases 21–24/72 *International Fruit Company*, EU:C:1972:115.

[20] See e.g. the cases cited in Section 2.4.

[21] Dossier de procédure original, affaire 87/75, CJUE 1743, Commission submission, p. 22.

[22] Dossier de procédure original, affaire 87/75, CJUE 1743, Report for the hearing, p. 7.

[23] A point to which Mendez draws attention with some surprise, given the potential precedential importance of the case; as he says, *Bresciani* 'laid bare the implications of *Haegeman*'. M. Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 *European Journal of International Law* 83 at 89.

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In his opinion, Advocate General Trabucchi started from the context in which the Yaoundé Conventions were concluded, emphasizing the continuity between the association with the OCTs established by Article 136 EEC and the Yaoundé Convention, and the express reference in Article 2(1) Yaoundé I to the corresponding provisions of the EEC Treaty, including Article 13 EEC.[24] Although Yaoundé II does not make this express reference, he attached no significance to that change.[25] While accepting that provisions of international agreements would not necessarily carry all the implications of similarly worded provisions in the EEC Treaty, he argued that there is no reason to suppose that the prohibition of customs duties and CEE in the Yaoundé Conventions was intended to mean anything different from its meaning in the EEC Treaty. Trabucchi went on to consider the issue of direct effect. He argued that reciprocity ('whether, in the light of its subject-matter and objectives, the international agreement with which we are concerned is based strictly on the principle of reciprocity') is relevant, not because direct effect depends on reciprocal implementation, but as indicating whether the agreement is in principle capable of direct effect.[26] Rejecting the possibility that all Community agreements as a matter of principle should be capable of direct effect, and stressing the difference between international law and Community law,[27] he went on to recognize the specificity of the Yaoundé Conventions, their continuity with the treaty provisions on OCTs and

PROOFS

[24] Art. 2(1) of Yaoundé I read (in the English translation): 'Goods originating in Associated States shall, when imported into Member States, benefit from the progressive abolition of customs duties and charges having an effect equivalent to such duties, resulting between Member States under the provisions of Articles 12, 13, 14, 15 and 17 of the Treaty and the decisions which have been or may be adopted to accelerate the rate of achieving the aims of the Treaty.' OJ 1964, p. 1431.

[25] Art. 2(1) of Yaoundé II read: 'Products originating in the Associated States shall, on importation into the Community, be admitted free of customs duties and charges having equivalent effect, but the treatment applied to these products shall not be more favourable than that applied by the Member States among themselves.' OJ 1970 L 282/1 and Case 87/75 *Bresciani*, opinion of AG Trabucchi, EU:C:1976:3, [1976] ECR 144, p. 147.

[26] Ibid., p. 148.

[27] The Advocate General (AG) refers to the 'characteristics and operational requirements peculiar to the Community system the essential nature of which clearly distinguishes the legal order of the European Community from that of international law'. It is these characteristics which underpin the doctrines of primacy and direct effect. Ibid., p. 148.

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their development objectives, reflected in their non-reciprocity and the fact that they offered 'privileges' (his word) to the associated countries.[28] He expressly reserves his views on the question whether the Community's international agreements *in general* may be capable of direct effect, basing himself on the special nature of the Yaoundé Conventions. The advocate general went on to find that the provision of the Yaoundé Convention at issue in the case, Article 2(1), satisfied the conditions for the creation of directly effective rights, as did its counterpart in the EEC Treaty.[29]

The Court's judgment, as far as concerns its interpretation of the Yaoundé Convention, followed the same line of reasoning as the advocate general.[30] Its starting point is the question of direct effect and the basis on which this is to be determined: 'regard must be simultaneously paid to the spirit, the general scheme and the wording of the Convention and of the provision concerned'.[31] Then, turning to the Convention, the Court starts with explaining its continuity with the provision for OCTs in Part IV EEC. It points to the absence of reciprocity in both Articles 2 and 3 (which provide for the removal of tariff and non-tariff barriers) and Article 61 (which envisages that provisions of the Convention, including Article 2, may be applied by the Community and Member States to countries which are as yet unable to reciprocate).[32] Whereas under Article 2 all customs duties and charges of equivalent effect will be abolished on imports into the EEC from the associated states, Article 3 provides that 'each Associated State may retain or introduce customs duties and charges having an effect equivalent to such duties which correspond to

PROOFS

28 Ibid., p. 149.

29 The AG applied the tests set out in *International Fruit Company*.

30 In the first part of its judgment the Court responds to the first two questions asked, on the interpretation of Art. 13(2) EEC and the date from which its direct effect could be invoked; the third and fourth questions concerned the interpretation and direct effect of the Yaoundé Convention.

31 *Bresciani*, para. 16.

32 Art. 61 of Yaoundé I provides: 'The Community and the Member States shall undertake the obligations set out in Articles 2, 5 and 11 of the Convention with respect to Associated States which, on the grounds of international obligations applying at the time of the entry into force of the Treaty establishing the European Economic Community and subjecting them to a particular customs treatment, may consider themselves not yet able to offer the Community the reciprocity provided for by Article 3, paragraph 2 of the Convention.'

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its development needs or its industrialization requirements or which are intended to contribute to its budget'. As the Court concludes, 'equality of obligation' was not the aim of the Convention: 'It is apparent from these provisions that the Convention was not concluded in order to ensure equality in the obligations which the Community assumes with regard to the associated states, but in order to promote their development in accordance with the aim of the first Convention annexed to the Treaty'.[33]

However, in the Court's view, this lack of reciprocity or 'imbalance' which is inherent in the 'special nature' of the Convention 'does not prevent recognition by the Community that some of its provisions have a direct effect'.[34] Having decided that there is no structural barrier to direct effect, the Court turned to the specific provision. Here the Court relied on the automaticity of the obligation in Article 2 of Yaoundé, and the fact that it is not subject to any reservation on the part of the Community, as well as its explicit reference to Article 13 EEC: 'By expressly referring, in Article 2 (1) of the Convention, to Article 13 of the Treaty, the Community undertook precisely the same obligation towards the associated states to abolish charges having equivalent effect as, in the Treaty, the Member States assumed towards each other'.[35]

So, in *Bresciani*, directly effective rights, 'which the national courts of the Community must protect' – a part of the special character of Community law – may arise also from a development agreement which is special in the types of relations it establishes: based not on reciprocity of obligation and explicitly linked to the Community system. In holding that non-reciprocity of obligation is not a barrier to direct effect the Court linked the direct effect of the Convention with its 'special nature'; and that specificity was derived from its postcolonial (and development) context, which (in the words of Trabucchi) were the basis of a 'privileged' relationship. This is in contrast to the fully reciprocal GATT which had been found incapable of direct effect in the *International Fruit Company* case.[36]

Thus the non-reciprocal nature of the relationship was a signifier of its closeness, of the degree to which the associated states were integrated

[33] *Bresciani*, para. 22.
[34] Ibid., para. 23.
[35] Ibid., para. 25.
[36] *International Fruit Company*.

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into the Community system, a form of integration of which direct effect was a part. Reciprocity (or its absence) was also, a few years later, to play a part in defining the 'essential characteristics' of Community law, the Court rejecting the idea that Member States were entitled, in the case of a breach of obligation by another Member State, to reciprocate by suspending performance of their treaty obligations.[37] In this sense, non-reciprocity is both characteristic of the special nature of European integration, and linked to the integration between the EEC and its former colonies. But in the case of Yaoundé it is integration based on imbalance, on dependence rather than equality.[38]

Interestingly, though, this case was not simply regarded as specific to Yaoundé. The criteria used by the Court, and especially its references to reciprocity, were influential in later cases that were concerned with very different types of agreement.

2.4 *BRESCIANI*, RECIPROCITY AND THE DIRECT EFFECT OF INTERNATIONAL AGREEMENTS

The possibility that some of the Community's international agreements could give rise to directly effective rights had been accepted in the *International Fruit Company* case (although denied to the GATT in that

[37] Case 325/82 *Commission v. Germany*, EU:C:1984:60, para. 11: 'A Member State cannot, in any circumstances, plead the principle of reciprocity and rely on a possible infringement of the Treaty by another Member State in order to justify its own default.' Later, in Case C-5/94, *The Queen v. Ministry of Agriculture ex parte Hedley Lomas*, EU:C:1995:193, para. 27, AG Léger draws a contrast in this respect between Community law and international law: 'Nothing is more alien to Community law than the idea of a measure of retaliation or reciprocity proper to classical public international law.' See further W. Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt' (2017) 28 *European Journal of International Law* 935.

[38] The limits to the principle of non-discrimination in the successor Lomé Convention, for example, can be seen in Case 65–77 *Razanatsimba*, EU:C:1977:193, paras. 13–14: 'The wording of [Art. 62 of the Lomé Convention] does not purport to provide equality of treatment between nationals of an ACP [African, Caribbean and Pacific Group of States] state and those of a Member State of the EEC. More particularly, that Article does not oblige either the ACP states or the Member States of the EEC to give to the nationals of a state belonging to the other group treatment identical to that reserved to their own nationals.' On the distinctions embedded in the Treaty of Rome itself, see Eklund, 'Peoples, Inhabitants and Workers'.

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case),[39] and some earlier cases such as *Haegeman* had effectively assumed direct effect.[40] In *Bresciani* for the first time the Court both addressed the issue explicitly and gave a positive answer. While the specificities and context of the Yaoundé Conventions helped to underpin the Court's ruling, they also raised a number of questions.

How significant was the postcolonial character of the Yaoundé Conventions, their development objectives and the consequent 'privileged' nature of the relation it established? How were these ideas to be translated to other types of agreement? How significant was it whether the agreement was an association agreement, that is, one designed to establish close and ongoing links between the EEC and the partner country or countries? And how significant was it that the agreement was designed to establish a trading regime that reflected intra-EEC trade relations, with explicit reference to or replicating provisions of the EEC Treaty?

In *Haegeman* the agreement in question was the Association Agreement with Greece, a close neighbour.[41] Other association agreements with neighbouring countries, such as Turkey and Morocco, and – later – the European Free Trade Association States and countries of central and eastern Europe, have also been found capable of direct effect, although not every individual provision might meet the tests for direct effect.[42] In all these cases, the element of close integration with the Community/Union system is emphasized. However, *Bresciani* is also cited as authority for the position that direct effect is not limited to agreements with neighbours or potential future members. Thus the *Bresciani* reasoning was applied to the Lomé Convention, the successor to Yaoundé, again linking non-reciprocity to the development aims of the agreement, and

PROOFS

[39] *International Fruit Company*.

[40] *Haegeman*; *Charmasson*.

[41] A few years later, in *Pabst & Richarz*, para. 26, the Court referred to the provision on taxation in the Association agreement with Greece as 'part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community by the establishment of a customs union, by the harmonization of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law'.

[42] Case 12/86 *Demirel*, EU:C:1987:400, paras. 14–25; Case 37/98 *Savas*, EU:C:2000:224, paras. 51–54; Case C-18/90 *Kziber*, paras. 20–21; Case T-115/94, *Opel Austria GmbH v. Council of the European Union*, EU:T:1997:3, paras. 101–102; Case C-162/00 *Pokrzeptowicz-Meyer*, EU:C:2002:57, paras. 25–27.

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holding that it did not prevent provisions of Lomé from having direct effect: 'Those conventions [Yaoundé and Lomé] are characterized by a quite appreciable imbalance in the level of obligations undertaken by the contracting parties. Their general aim is to promote the economic and social development of the non-member countries participating in them, in particular through an improvement in the conditions of access for their products to the Community market'.[43]

And more recently in the context of the Cooperation Agreement with the Cartagena States, the Court held:

> [T]he fact that this article appears in a cooperation agreement does not mean that, as a matter of principle, individuals cannot rely upon it. It is settled case-law that the fact that such an agreement is intended essentially to promote the economic development of the non-member countries party to it, confining itself to instituting cooperation between the parties without being directed towards future accession of those countries to the European Union, is not such as to prevent certain of its provisions from being directly applicable.[44]

The judgment in *Bresciani*, therefore, ensured that direct effect, as a potential characteristic of EU external agreements, was not to be limited to agreements establishing relations with near neighbours and possible future members but could be extended to other types of association and cooperation agreement, especially where their aim was that of the economic and social development of the partner countries. The language of economic and social development is carried over into broader development policy from Article 131 EEC where it was used in the colonial OCT context.[45] As Roes puts it, *Bresciani* suggests 'that when a treaty's objectives are this closely aligned with those of the EU Treaties, the Court was much more willing to accept that it is capable of creating rights for individuals'.[46]

[43] Case 469/93 *Chiquita Italia*, EU:C:1995:435, paras. 31–35.

[44] Case C-160/09 *Ioannis Katsivardas – Nikolaos Tsitsikas OE v. Ypourgos Oikonomikon*, EU:C:2010:293, para. 35, citing *Bresciani*. See also *Kziber*, para. 21.

[45] See text at note 15; see further Eklund, 'Peoples, Inhabitants and Workers', 848–850.

[46] T. Roes, 'Establishing Direct Effect of Provisions of International Agreements: *Bresciani*' in G. Butler and R. A. Wessel (eds.), *EU External Relations Law: The Cases in Context* (Oxford: Hart Publishing, 2022), p. 75.

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But what of free-trade agreements (FTA) with countries that neither establish an association nor seek to replicate the conditions of intra-EEC trade? It is here that a second group of questions raised by *Bresciani* is brought to the fore, since in such cases reciprocity may appear to be an important feature of the relationship.[47] The Court's references to reciprocity in *Bresciani* leads us to question the significance of reciprocity in determining the direct effect of an agreement. How important is (non-) reciprocity of *substantive* obligation, as a stamp of a 'privileged' relationship which may support an argument that the agreement may create directly effective rights? How relevant is *enforcement* reciprocity: if direct effect is not explicitly provided for should the EU grant direct effect where the other contracting party or parties may not do so?

In *Polydor* and *Kupferberg*, decided a few months apart in 1982, these questions were raised before the Court in the context of the FTA with Portugal (not at that time a Member State) and the Court approached the answer in different, complementary, ways.[48] The *Bresciani* case is in the background in both cases. Advocate General Rozès, acting in both *Polydor* and *Kupferberg*, sought to distinguish the FTA with Portugal from the Yaoundé Convention, in particular the non-reciprocal nature of the obligations in the latter and its explicit references to provisions of the EEC Treaty. The FTA with Portugal, in contrast, was an example of traditional, reciprocal international law (what the advocate general called 'the classical international legal order') between arms-length parties and dependent on non-judicial forms of dispute settlement, and should not readily be granted direct effect where that is not an explicit part of the agreement on both sides.[49] Substantive reciprocity, she suggests, is linked to reciprocity in implementation and enforcement:

[47] In order to obtain an exemption from the GATT's most favoured nation obligation under Art. XXIV GATT, an FTA should abolish restrictions on substantially all trade on a reciprocal basis. See further G. Marceau and C. Reiman, 'When and How Is a Regional Trade Agreement Compatible with the WTO?' (2001) 28 *Legal Issues of Economic Integration* 297; P. Hilpold, 'Regional Integration According to Article XXIV GATT, between Law and Politics' in A. von Bogdandy and R. Wulfrum (eds.), 7 *Max Planck Yearbook of United Nations Law* (Leiden: Brill, 2003) p. 219.

[48] Case 270/80 *Polydor*, EU:C:1982:43; Case 104/81 *Kupferberg*, EU:C:1982:362.

[49] Case 270/80 *Polydor*, opinion of AG Rozès, EU:C:1981:286, p. 355.

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> To recognize a provision of that Agreement as having direct effect without the guarantee that an individual may rely on the provision in Portugal on the same terms and with the same results in relation to legal protection would, by reason of the absence of reciprocity, lead to the Community's being at a disadvantage and that would not correspond to the discernible intention of the Contracting Parties.[50]

The Court's judgment in *Polydor*, in contrast, sidestepped the question of direct effect. It did not mention the *Bresciani* case and instead focused on the substantive scope of the provisions in the FTA, comparing them to, and interpreting them more narrowly than, the equivalent provisions of the EEC Treaty. It refused to extend its case law on the exhaustion of intellectual property rights within the Community to the prohibition of quantitative restrictions and measures of equivalent effect in the FTA: as a result, the direct effect of those provisions did not arise. The Court stressed the different objectives of the FTA and the EEC Treaty and cautioned against the assumption that treaty provisions using similar language will necessarily carry the same meaning.[51] In particular, the absence in the FTA of the institutional mechanisms for adopting harmonized regulatory solutions to trade obstacles ('positive integration') militated against giving an extensive reading to the prohibition of measures of equivalent effect to quantitative restrictions ('negative integration').[52]

In *Kupferberg* the Court did address the question of the direct effect of, in this case, the prohibition in the FTA of discrimination in relation to taxation. The advocate general, as we have seen, was concerned about the lack of reciprocity in the enforcement of the agreement, in the 'legal protection' afforded to the different Contracting Parties. The submissions of the French and Danish governments also stressed this point and sought to distinguish *Bresciani* on the ground that the FTA with Portugal, unlike Yaoundé, was based on the principle of reciprocity. The Court, however, held that a potential difference between the parties in recognizing direct effect (judicial enforcement) did not undermine the reciprocal nature of the agreement, since under international law all parties

PROOFS

[50] Case 104/81 *Kupferberg*, opinion of AG Rozès, EU:C:1982:137, p. 3674.
[51] *Polydor*, paras. 14–19.
[52] Ibid., para. 20.

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are under an obligation to implement their commitments in good faith, and may do so using a variety of legal means.[53]

Kupferberg laid down some basic principles relating to direct effect, including the important ruling that the question of whether or not a provision of a Community (or Union) agreement is directly effective is a matter of EU law and therefore for the Court to decide.[54] No doubt prompted by the arguments of the Member States, the Commission and the advocate general who were seeking to explore the extent to which the *Bresciani* reasoning was relevant to a reciprocal FTA, the Court argued that, while in *Bresciani* a substantive imbalance 'does not prevent' direct effect, neither does an imbalance in enforcement reciprocity. The judgment also made clear that direct effect is not simply an attribute of a special class of non-reciprocal association agreements such as Yaoundé. The case opened the door to a widespread acceptance of direct effect of bilateral agreements in the EU's neighbourhood, as well as the successors to the Yaoundé Conventions.[55]

While these cases were not all concerned with the Union's relations with its former colonies, the agreements in question were bilateral in nature, establishing relationships of close economic integration with the Community (and then Union).[56] As is well known, the approach of the Court to multilateral agreements, including the GATT/World Trade Organization (WTO),[57] the UN Convention on the Law of the Sea,[58] the Kyoto Protocol[59] and even the UN Disabilities Convention,[60] has taken a different trajectory. The reasoning for denying direct effect to these agreements has varied, depending on the nature of the obligations and whether the agreement in question was concerned with establishing a

PROOFS

53 *Kupferberg*, para. 18.

54 Ibid., para. 14.

55 See *Chiquita Italia*, *Ypourgos Oikonomikon* and *Kziber*.

56 The Yaoundé and Lomé Conventions, like the EEA, are 'essentially bilateral' in character, since they are concluded between the Community (or Union) and its Member States on the one part and the partner states on the other: the Lomé Convention was referred to by the Court of Justice as establishing 'an essentially bilateral ACP-EEC cooperation' in Case C-316/91, *Parliament v. Council*, EU:C:1994:76, paras. 29 and 33.

57 *International Fruit Company*; Case C-149/96 *Portugal v. Council*, EU:C:1999:574.

58 Case C-308/06 *Intertanko*, EU:C:2008:312.

59 Case C-366/10 *Air Transport Association of America and Others*, EU:C:2011:864.

60 Case C-363/12, *Z*, EU:C:2014:159.

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general regulatory regime rather than the creation of individual rights. But in the leading case on the WTO, the question of reciprocity is given prominence. In *Portugal v. Council*, the WTO is distinguished from 'the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations or create special relations of integration with the Community'.[61] The WTO, in contrast, depends on reciprocity and the Court – while referring to *Kupferberg* – highlights the need for reciprocity in enforcement: '[T]he lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' … may lead to disuniform application of the WTO rules'.[62]

An important element in all these cases is the desire to allow scope for the political institutions to manage the implementation and enforcement of the EU's international obligations. In recent years, EU practice has altered in respect of bilateral trade agreements concluded with developed economies such as South Korea, Japan, Singapore or Canada, expressly removing the possibility of direct effect.[63] The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, for example, provides that 'nothing in this Agreement shall be construed as … permitting this Agreement to be directly invoked in the domestic legal systems of the Parties'.[64] The agreements with Japan, Singapore and Ukraine contain similar provisions.[65] Instead, the agreements provide for arbitration-based dispute settlement and, in some cases, investor-state dispute

PROOFS

[61] *Portugal v. Council*, para. 42.

[62] Ibid., para. 45.

[63] A. Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 *Common Market Law Review* 1125.

[64] Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJ 2017 L 11/1, Art. 30.6.1.

[65] Economic Partnership Agreement between the EU and Japan, OJ 2018 L 330/3, Art. 23.5; Free Trade Agreement between the EU and Singapore, OJ 2019 L 294/3, Art. 16.16; and EU-Ukraine Association Agreement, OJ 2014 L 161/3. Here, the statement on direct effect is oddly placed, in a footnote to the heading of chapter 14, on dispute settlement. See also Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ 2012 L 354/3, Art. 336; Association Agreement with Central America, OJ 2012 L 346/3, Art. 356.

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settlement. In Opinion 1/17 on the CETA, considering the compatibility of these arrangements with the EU Treaties, the Court refers both to the exclusion of direct effect and to 'the need to maintain the powers of the Union in international relations' in the context of the FTA's reciprocal enforcement mechanisms.[66] Again the absence of direct effect is linked to reciprocity, what we might call 'equality of arms' between the EU and its trading partner. As Advocate General Bot observed in his opinion on the CETA:

> in practice all the free trade agreements recently concluded by the European Union expressly exclude their direct effect. The main reason … is to guarantee effective reciprocity between the parties, in a manner consistent with the objectives of the common commercial policy. … the approach adopted bears witness to the Court's wish, in the interests of preserving reciprocity in the application of the agreement, not to place the European Union at a disadvantage as compared to its most important trading partners, thereby preserving the European Union's position on the international stage.[67]

So modern practice takes the view that when concluding FTAs with 'important trading partners' substantive reciprocity (a condition of WTO compatibility) requires enforcement reciprocity, and this tends to exclusion of direct effect and the adoption of alternative enforcement mechanisms, including investor-state arbitration.[68] This is a shift from the *Kupferberg* reasoning (it is actually closer to the position adopted by Advocate General Rozès in *Polydor* and *Kupferberg*) and is based on the idea that these arm's length reciprocal FTAs are very different in character from the close relations envisaged by Yaoundé and subsequent

[66] Opinion 1/17, EU:C:2019:341, paras. 77 and 117. C. Rapoport, 'Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)' (2020) 57 *Common Market Law Review* 1725.

[67] Opinion 1/17, opinion of AG Bot, EU:C:2019:72, paras. 91–92.

[68] Interestingly, if outside the scope of this chapter, the exclusion of judicial enforcement via direct effect has been accompanied by a movement on the part of the EU towards a quasi-judicialization of systems of investor-state arbitration; see further G. Sangiuolo, 'An International Court System for a Transformative Europe?' in I. Bosse-Platière and C. Rapoport (eds.), *The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges* (Cheltenham: Edward Elgar, 2019).

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association agreements, and also it seems from FTAs that are embedded within relationships of economic integration with the EU's neighbours, where direct effect has been more readily accepted.

2.5 CONCLUSION

Are we then to regard *Bresciani* as a relic of history? It has indeed been argued that 'the fact that the judgment's holding is closely linked to the special nature of the Yaoundé Convention has attenuated its use as a precedent'.[69] Nonetheless I would want to argue that *Bresciani*, a case where the former colonial status of the parties to the agreement was central to the argument, has played an important part in shaping the Community's approach to direct effect, and it is an impact which still has repercussions. In fact, while modern practice in respect of bilateral agreements seems very different to the *Bresciani* reasoning, that reasoning can help us to understand these shifts in practice.

First, in following on from *International Fruit Company* and *Haegeman*, *Bresciani* establishes both that the EU's bilateral agreements may create directly effective rights, and that whether they do so depends not only on the nature of the specific provision but also on the nature of the agreement as a whole – or, perhaps better, of the relationship established by the agreement: the 'spirit' as well as the general scheme and wording of the agreement.[70] Second, by referring in *Bresciani* to the non-reciprocal nature of the Yaoundé Convention, the Court brought reciprocity into the picture when assessing whether or not a particular Union agreement may be directly effective. And it is still in the picture. Current agreements founded on reciprocity, whether the WTO or FTAs with developed economies such Canada, Japan or the UK, depend on (reciprocal) international dispute settlement systems such as arbitration rather than (potentially non-reciprocal) domestic judicial enforcement. The emphasis is on the ability of the EU to assert itself through the instruments of international law.

[69] Roes, 'Establishing Direct Effect of Provisions of International Agreements: *Bresciani*', p. 70.

[70] *Bresciani*, para. 16.

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But not all the EU's external relationships are of this kind. Many agreements, especially those with its Member States' former colonies, other developing and emerging economies and with its neighbours involve, alongside reciprocal trade liberalisation, a relationship based on EU-directed integration – on sharing, to a greater or lesser extent, in the EU's own logic of integration.

> [T]o a greater or lesser extent, they are substantively based on EU law, aiming to export it to other places. Such treaties rarely, if at all, contain norms that the EU is uncomfortable with or that would require it to change its legislation; instead, they radiate EU law outwards, and thus hardly constitute a threat to the autonomy of the EU.[71]

The Yaoundé Conventions (alongside the associations with Greece and Turkey) may be said to have set a precedent in this respect. They established a close trade relationship between the parties, deliberately reflecting the pre-existing treaty provision for the Member States' OCTs and including references to the EEC Treaties. The particular type of non-reciprocity found in the Yaoundé Conventions is no longer a feature of EU trade agreements, but the EU-centricity of Yaoundé is a continuing characteristic of such integration agreements with the EU. These relationships based on integration with the EU model, as the Court recognized in *Bresciani*, are compatible with the creation of directly effective rights. The postcolonial context specific to Yaoundé becomes part of the broader legal context of these agreements, helping to clarify the part played by reciprocity in interpreting the EU's international relationships.

PROOFS

[71] J. Klabbers, 'The Reception of International Law in the EU Legal Order' in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law* Vol I. (Oxford: Oxford University Press, 2018), p. 1217. As Klabbers goes on to say, 'It should come as no surprise, therefore, that the CJEU has in general been very well disposed towards such treaties: it could afford to be, since such behaviour would involve little political costs, at least not in the sense of having to accept rules difficult to reconcile with the fundamentals of the EU's constitutional construct.'

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CHAPTER 3

The Common Agricultural Policy and Southern Rivalries

The Case of Algerian Wine

DANIELA CARUSO

PROOFS

3.1 INTRODUCTION

First occupied by France in 1830 and then annexed in 1847, Algeria was still French when the 1957 Treaty of Rome entered into force. As such, Algeria joined the European Economic Community (EEC) and remained an integral part of it until 1962, when the signing of the Évian Accords marked the end of a long war against French rule and ushered in Algerian independence.

The peculiarity of Algeria's participation in the project of European legal integration has caught the attention of several scholars over the past decade – most notably Megan Brown, whose justly acclaimed book is provocatively titled *The Seventh Member State*.[1] This flare of scholarly attention to Algeria's European – as opposed to just French – linkages is part of a larger wave of studies, aimed at unearthing the inherent connections between the post-Second World War implosion of the colonial order and the birth of the EEC. Since Peo Hansen and Stefan Jonsson brought the 'untold history of European integration and colonialism' into the limelight, many in the social sciences have taken to explore this stretch of history in depth.[2] Current historiographies connect the start of European

[1] M. Brown, *The Seventh Member State, Algeria, France, and the European Community* (Cambridge: Harvard University Press, 2022).

[2] P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London: Bloomsbury, 2014), pp. 1–16; K. A. Nicolaïdis, B. Sèbe and G. Maas (eds.), *Echoes of Empire: Memory, Identity and the Legacy of Imperialism* (London: I. B.

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legal integration not only to the political desire of the six founding states to intertwine their economies for the sake of peace and prosperity, or to the Cold War imperative of shoring off Soviet expansion, but also to the need to enable and legitimize through EEC structures the management of Member States' former and extant imperial interests.[3]

In such studies, Algeria can claim the centre stage for several reasons.[4] First, among the many possessions and territories of the founding members, Algeria was the only place outside of continental Europe to be specifically mentioned in the main body of the Treaty of Rome.[5] Second, for the first five years of its EEC membership, France fought against Algeria's independence with utter violence – in stark contrast with the European aspiration to peace famously put forth by France's own foreign minister Robert Schuman. This striking dissonance has rightly prompted research and reflection on some of the most troubling contradictions at the roots of the European integration project. Third, Algeria's importance to European historiography has only grown with Brexit, as 'Algexit' provides an example *avant la lettre* of legal, economic, and political disentanglement from the European Union.[6]

In this volume, Amel Benrejdal Boudjemaa (Chapter 12) revisits the whole arc of this riveting story, offering a most welcome Algerian perspective on the laws and policies of the EU over time and across a range of issues. This chapter zooms in, instead, on a discrete strand of the story, namely the rise and fall of the Algerian wine industry: the EEC regulation

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Tauris, 2015); K. K. Patel, *Project Europe: A History* (Cambridge: Cambridge University Press, 2020); M. H. Davis, *Markets of Civilization: Islam and Racial Capitalism in Algeria* (Durham: Duke University Press, 2022); E. Marker, *Black France White Europe: Youth, Race, and Belonging in the Postwar Era* (Ithaca: Cornell University Press, 2022).

[3] Hansen and Jonsson, *Eurafrica.*

[4] P. Nugent, 'Book Reviews' (reviewing O. White, *The Blood of the Colony: Wine and the Rise and Fall of French Algeria* (Cambridge: Harvard University Press, 2021)) (2021) 16 *Journal of Wine Economics* 231 ('As colonies go, Algeria was singular'); K. K. Patel, 'The Latency of the European Colonial Past' (2022) 1 *European Law Open* 1 at 2 ('Algeria is a very special case').

[5] See Hansen and Jonsson, *Eurafrica*, and Brown, *The Seventh Member State* (documenting France's insistence on granting Algeria privileged Treaty status in the hope of containing the swelling tide of independence).

[6] K. K. Patel, 'Something New under the Sun? The Lessons of Algeria and Greenland', in B. Martill and U. Staiger (eds.), *Brexit and Beyond: Rethinking the Futures of Europe* (London: University College London Press, 2018), p. 114.

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of wine production – one important facet of the Common Agricultural Policy – had a devastating impact upon the exports of Algerian wine and led to the eradication of a thriving industry.[7] In some ways, the wine saga confirms that Algeria's path through the early days of European legal integration was one of a kind. A uniquely profitable Algerian industry, established by France for its own benefit in colonial times, was thrown out of business through EEC law; and this occurred precisely when Algeria, finally an independent nation, was poised to reap the full profits of wine exports. The extractive violence of racial capitalism, typical of colonial dynamics, leaps to the eye here.[8] At the same time, the following pages aim to show how unexceptional, in one important respect, the wine parabola was. At a higher level of abstraction, the facts and the laws briefly outlined in this chapter were anchored in a common, ubiquitous, and resilient legal framework. It is a framework that, to this day, masks asymmetries of power and enables economic actors, including states and regional entities, to ignore the negative externalities they generate.

The chapter proceeds as follows. Based on the work of scholars from other disciplines, Section 3.2 briefly recalls key events of the Algerian wine saga. This overview illustrates how at law, its special status notwithstanding, Algeria had no redress whatsoever against EEC tariff and non-tariff barriers, and highlights the legal entrenchment of an imperial pattern of centralized, unilateral rulemaking.

Section 3.3, for context, connects the collapse of Algerian wine exports to the larger dynamics of the Common Agricultural Policy and outlines the natural rivalry between Mediterranean countries – some in Europe, some beyond its borders – which share a similar climate

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[7] See G. Meloni and J. Swinnen, 'The Rise and Fall of the World's Largest Wine Exporter (and Its Institutional Legacy)' (2014) 9 *Journal of Wine Economics* 3; White, The Blood of the Colony; and J. Bohling, *The Sober Revolution. Appellation Wine and the Transformation of France* (Ithaca: Cornell University Press, 2018).

[8] On racial capitalism in the colonial experience of Algeria see Davis, *Markets of Civilization*, p. 8 (discussing the racialization of Algerian Muslims under French rule and the use of religion as a basis for legal exclusion and economic precarity). On racial capitalism in European legal integration see J. Miller and F. G. Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutional Imaginaries', in J. Komárek (ed.), *European Constitutional Imaginaries* (Oxford: Oxford University Press, 2020); and D. Ashiagbor's chapter in this volume (Chapter 6).

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and produce similar goods. In matters of wine, Algeria found a fierce competitor in the south of Italy, which in the 1950s and 1960s vied for access to French markets perhaps as much as Algerian exporters did. This glance at the political economy of Europe and its neighbourhood helps to highlight distributional tensions between three different types of trade relations: the deals that are struck among the Member States through common EEC policies; the external trade policies of the EEC; and the bilateral accords entered into by singular Member States with non-EU partners, which remain to this day legitimate wherever the EU lacks exclusive competence.

Section 3.4 adds a theoretical perspective to the narrative. Across a variety of legal systems, basic principles of both private and public (international) law, while having no apparent link to empire-building and colonialism, allow to this day for the perpetuation of power asymmetries redolent of colonial arrangements. The fact that the EEC, in reorganizing its own wine markets, single-handedly shut down a large stream of Algerian profit was a terribly consequential power move and a striking example of colonial wealth diversion. Yet, it also followed a very common pattern – one not confined to colonial arrangements – in which the law systematically enables and blesses agreements between two or more states, typically benefiting the parties of such agreements while extracting or diverting wealth from non-party states or nations. In many cases, this pattern breeds ruin for non-parties and allows short-term interests to prevail over geopolitical stability or transnational equity.

The chapter ends by referencing the contribution of Amel Benrejdal Boudjemaa to this volume, which offers insights not only on past events, but also on the significance of revisiting such events at the present time, when Algeria occupies a very different geopolitical place than it did when the EEC was established.[9] In hindsight, it is easy to see how the excision of Algeria from the Common Market was but a triumph of short-termism. The solar panels that now cover vast patches of Algerian desert, all made in China, attest to ever closer Sino-Algerian energy deals. This time around, Europe might be the one left out.

[9] Chapter 12.

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3.2 WINE

The story of Algerian wine – namely the rise and fall of Algerian wine exports – is a tale of epic proportions and a powerful illustration of colonial dynamics.[10] In a nutshell: at the end of the nineteenth century, wine production in Algeria turned from a fringe economic activity of ancient origin to an impressive twentieth-century operation of international proportions. The trigger for this transformation was the phylloxera epidemic that swept through the French countryside in 1879, threatening to put French winemakers out of business. Algeria's fertile soil became then, in line with the odious colonial trope of virgin lands waiting to be conquered, the uncontaminated place where healthy grapes could grow, thanks not only to the hospitable climate of the country's northern hills, but also to the availability of cheap labour. In line with the racialized order of colonial economies, ownership remained French; Algerian peasants worked the fields; and the French-Algerian middle class took care of management and cellar operations. To be sure, the growth of this industry into the mid twentieth century was far from linear: as soon as French agronomists managed to stem the epidemic in the metropole and resume wine production at home, Algerian wines began to be perceived as in competition with French ones. Algerian exports started to face, then, regulatory obstacles and custom duties which France would introduce from time to time to appease its own vintners. Nevertheless, Algerian producers had their supporters in France.[11] Algerian wine, therefore, continued to flow more or less abundantly to the metropole and beyond.

Of special interest to this chapter is the fact that a significant part of such flows consisted of *vin de coupage* (blending wine): unusually strong and unbeatably affordable, this variety was used by French wine manufacturers to enhance the alcohol content of their own brands. Algerian blending wines enjoyed a privileged export regime even at times of protectionist legislation. The French law that, in 1930, prohibited the

[10] White, *The Blood of the Colony*.

[11] Nugent, 'Book Reviews', 231–233.

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blending of foreign wines with domestic ones affected Moroccan and Tunisian exports, but not *vin de coupage* coming from Algeria.[12]

Overall, Algerian wine exports conquered the world's markets. When Algeria, through France, joined the EEC, it was the largest exporter of wine in the world and the fourth biggest wine producer.[13]

EEC Treaty Article 227 made it clear that Algeria would partake of the common market for goods, which meant it would soon be able to export its wine not just to France, but to the entire EEC without any tariff or non-tariff barrier.[14] Famously, such prospects did not materialize. Having gained independence, through the 1960s Algeria embarked on a journey of disentanglement from France that would involve the nationalization of local industries, including wine production, hoping to reap and keep revenues once siphoned away by French ownership. Such hopes for the economy of the newly independent country found support in the Évian Accords: in matters of trade, France and Algeria would maintain 'privileged relations' including low barriers to Algerian wine exports.[15] The other Member States initially followed suit.[16] But as the reality of Algeria's independence seeped in, the idea of trade openness to Algerian products began to fade. Germany and the Benelux countries kept applying to Algerian products the tariff reductions that existed between the six founding states in 1962. Italy was instead eager to erect barriers and, by 1968, gave Algeria third-country treatment.[17] France

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[12] J. Meloni and J. Swinnen, 'Algeria, Morocco, and Tunisia', in K. Anderson and V. Pinilla (eds.), *Wine Globalization: A New Comparative History* (Cambridge: Cambridge University Press, 2018), pp. 441 and 451.

[13] Meloni and Swinnen, 'The Rise and Fall'.

[14] See K. Nicolaïdis, 'Southern Barbarians? A Post-Colonial Critique of EUniversalism', in K. Nicolaïdis, B. Sèbe and G. Maas (eds.), *Echoes of Empire: Memory, Identity and the Legacy of Imperialism* (London: I. B. Tauris, 2015), pp. 283 and 286–287.

[15] 'Algeria: France-Algeria Independence Agreements (Evian Agreements), Declaration of Principles Concerning Economic and Financial Cooperation', Preamble Point 3, (1962) 1 *International Legal Materials*, pp. 214 and 221.

[16] 'By March 1963, the Six agreed to maintain the "status quo" in which independent Algeria would continue to enjoy the same preferential tariff rates, migrant social security regime, and customs regulations that it did when it was a juridical part of metropolitan France.' Brown, *The Seventh Member State*, p. 183.

[17] See Commission of the European Communities, Directorate General for Information, 'Cooperation Agreements between the EEC and the Maghreb Countries' (1982), p. 3 (available at https://aei.pitt.edu/7755/1/7755.pdf).

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continued to receive Algerian products mostly on a duty-free basis, but ended up buying much less Algerian wine than it had promised to do over the 1960s.[18] When Algeria clarified its intention to push France out of the management of Algerian energy resources, France used the 'wine card' as payback and in 1970 blocked Algerian wine imports altogether.[19]

The *coup de grâce* for Algerian wine exports came by means of EEC law. The Common Wine Policy, as designed by the EEC in 1970, set up a system that would protect EEC wine prices from non-EEC competitors, open up borders between Member States, and introduce rules on wine production and quality.[20] The new tariffs and countervailing duties vis-à-vis third countries – a category in which Algeria would now belong – were steep, but wine-making rules and quality restrictions went even further and locked out of the EEC wines that had traditionally been imported, most prominently from Algeria. Restrictions on the practice of *coupage*, for instance, drew a sharp line between Community wines and imported ones – a line that could not be crossed at any price.[21] The new regime proved disastrous for Algerian exporters.[22] Algeria – a predominantly Muslim country surrounded by neighbours of similar faith – had little internal demand for wine and failed to find alternative wine purchasers abroad. This sudden loss of market share, coupled with the realization that the wine industry had always been – symbolically and at law – a purely French creation, led to a massive abandonment of Algerian wineries.[23] In 1971, an Algerian decree ordered the uprooting of 25,000

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[18] G. Meloni and J. Swinnen, 'The Political Economy of European Wine Regulations' (2013) 8 *Journal of Wine Regulation* 244 at 266–268.

[19] The Italian newspaper *L'Unità* reported in July 1971 that since September 1970 not a single litre of Algerian wine had crossed into French territory. 'Echi e Notizie', L'Unità, 18 July 1971, p. 13, https://archivio.unita.news/assets/main/1971/07/18/page_013.pdf.

[20] Regulation (EEC) No. 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine, OJ 1970 L 99/1, Title II: Trade with Third Countries.

[21] Regulation 816/70, Article 26(4): 'The coupage of an imported wine with a Community wine and the coupage on Community territory of imported wines shall be prohibited except by way of derogation to be decided by the Council.'

[22] D. Caruso, 'Non-parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective' (2018) 59 *Harvard International Law Journal* 389–430 at 419.

[23] Ibid.

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hectares of 'useless' vineyards – a colonial legacy that the newspaper *El Moudjahid* did not hesitate to define as 'poisonous'.[24] Even visually, the change was stunning. As recounted by Albert Camus in his autobiographical last novel, extensive vineyards had been a defining feature of the Algerian countryside.[25] Within a few years, however, that picture would be replaced by sights of uprooted vines and deserted cellars.[26]

3.3 SOUTH–SOUTH RIVALRIES

While Algeria lay to the south of the EEC, Italy was undoubtedly the southernmost of the six official founding states. Besides, Italy carried within itself the predicament of north–south divisions, and its vexed Southern Question posed a political conundrum well known to European intellectuals.[27] This economic and political imbalance could hardly go unnoticed in the 1950s. In relative terms, the destructive force of the Second World War had pummelled the fledgling industries in the south of Italy more viciously than the northern ones, thereby deepening an economic dualism as old as the 1861 unification of the Italian peninsula.[28] Since the end of the Second World War, the Allies had feared that the pockets of abject poverty typical of the southern Italian regions would be breeding grounds for communist propaganda, and the Truman administration had seen it appropriate to direct some of the Marshall funds towards the development of such areas.[29] When convened by Gaetano Martino to the 1955 Messina

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[24] The left-leaning Italian newspaper *L'Unità* heralded this decree as a laudable act of emancipation. 'Echi e Notizie', L'Unità, 18 July 1971, p. 13.

[25] A. Camus, *Le premier Homme* (Paris: Gallimard, 1994). See also P. Birebent, *Hommes, vignes et vins de l'Algérie française 1830–1962* (Nice: Editions Jacques Gandini, 2007).

[26] Meloni and Swinnen, 'The Rise and Fall'. See also K. Sutton, 'Algeria's Vineyards: An Islamic Dilemma and a Problem of Decolonization' (1990) 1 *Journal of Wine Research* 101, at 113–115 (noting how 'culturally inappropriate' the wine industry was in Algeria).

[27] See D. Caruso, 'Direct Concern in Regional Policy: The European Court of Justice and the Southern Question' (2011) 17 *European Law Journal* 804.

[28] 'Business: Hope in the Mezzogiorno', Time Magazine, 13 June 1955.

[29] Help for the reconstruction of the south came to Italy directly from the Marshall plan and also from the World Bank. See S. Lorenzini, 'Ace in the Hole or Hole in the Pocket? The Italian Mezzogiorno and the Story of a Troubled Transition from Development Model to Development Donor' (2017) 26 *Contemporary European History* 441.

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Conference, the foreign ministers of the other five European Coal and Steal Community states couldn't but notice – along with the many beauties of the Sicilian landscape – the depth of devastation and the challenges of reconstruction.[30]

The founders of the Community, well aware of southern poverty, knew that the Common Market would likely bring prosperity only to some areas and saw it as their joint responsibility to correct such imbalances.[31] It was clear to political elites in the 1950s that the liberalization envisaged by the early Community treaties might outlaw some of the special regimes, such as state aids, that were part of Rome's strategy for the Mezzogiorno.[32] Italy's entry into the Common Market came therefore with several South-friendly provisions: Article 92(3) of the EEC Treaty, which allowed for intra-national transfers to poorer regions; the European Social Fund, aimed at boosting employment; the European Investment Bank, presided by Italy in the early years of the Community;[33] and a special Protocol, annexed to the EEC Treaty upon Italian insistence, making it clear that the EEC would pay attention to

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[30] See A. M. Oteri, 'La città fantasma. Danni bellici e politiche di ricostruzione a Messina nel secondo dopoguerra (1943–1959)' (2007) *Storia Urbana* 63 (reporting that after the Second World War Messina was reduced again to a state similar to the one in which it found itself after the 1908 earthquake).

[31] The Protocol concerning Italy, attached to the 1957 Treaty of Rome, referred to 'dangerous tensions' that might arise from high unemployment in certain regions of Italy. It read in English: 'THE MEMBER STATES OF THE COMMUNITY TAKE NOTE of the fact that the Italian Government is carrying out a ten-year programme of economic expansion designed to rectify the disequilibria in the structure of the Italian economy, in particular by providing an infrastructure for the less developed areas in Southern Italy and in the Italian islands and by creating new jobs in order to eliminate unemployment; …. AGREE, in order to facilitate the accomplishment of this task by the Italian Government, to recommend to the institutions of the Community that they should employ all the methods and procedures provided in this Treaty and, in particular, make appropriate use of the resources of the European Investment Bank and the European Social Fund; ARE OF THE OPINION that the institutions of the Community should, in applying this Treaty, take account of the sustained effort to be made by the Italian economy in the coming years and of the desirability of avoiding dangerous stresses in particular within the balance of payments or the level of employment, which might jeopardise the application of this Treaty in Italy.'

[32] Caruso, 'Direct Concern', 817.

[33] Protocol on the Statute of the European Investment Bank (EIB) annexed to the EEC Treaty, March 25, 1957.

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the development of its southernmost flank.[34] In a Europe of six, the south of Italy had become the south of the whole Community and the inspiration for its regional policy.[35]

Italian politicians, who had fought hard for such attention, were extremely wary of their Mediterranean competitors, who also vied for special treatment. In a Eurocentric perspective, facilitating agricultural expansion in post-war Italy was a matter of fairness in north–south relations. It was therefore clear that the newly established Community would have to protect southern Italian agriculture from Algerian competition. Algeria's first president Ahmed Ben Bella was well aware of such dynamics and in the wake of independence, expressed his understandable antipathy for the nascent Common Agricultural Policy.[36]

[34] Caruso, 'Direct Concern', 817–818 (footnotes omitted): 'There is no univocal account of the distributional effects of EEC policies upon the Italian South. The inception of the CAP certainly allowed for a shift of resources towards agricultural regions, and agriculture accounted for a larger share of Southern economies. On the other hand, for many years, the Community's agricultural policy was centred on price support rather than infrastructural development, and therefore by design, it brought more help to those rural areas where infrastructures were already in place and productions abundant – namely the centre-north. Only in 1992 was the CAP reformed to correct its regressive distributional impact. In terms of industrialisation, the interventions of the Community in favor of Southern economies also had ambivalent effects. On one hand, the European Investment Bank contributed real money to the projects sponsored by the Cassa del Mezzogiorno (a financial institution set up in 1950 with the task of funding the infrastructural development of the South). On the other hand, the bulk of the Community's industrial policy was geared towards boosting Italy's northern industrial poles, making it impossible for the South to ever catch up.'

[35] C. Spagnolo, 'Appunti per una storia regionale dell'integrazione Europea nel Mezzogiorno', in C. Spagnolo and R. De Leo (eds.), *Verso una Storia Regionale dell'Integrazione Europea* (Bari: LiberAria, 2010), pp. 18–19 (defining the Mezzogiorno as the first laboratory of Community regional policy and noting some French interest in the policy because of France's overseas territories). See also S. Tarditi and G. Zanias, 'Common Agricultural Policy', in R. Hall, A. Smith and L. Tsoukalis (eds.), *Competitiveness and Cohesion in EU Policies* (Oxford: Oxford University Press, 2001), pp. 179 and 195.

[36] Patel, 'Something New under the Sun?', p. 115: 'The Algerian War of Independence … was fought mainly to shake off the yoke of French rule. But, unsurprisingly, the Front de Libération Nationale (FLN) also wanted to cut the connection with the EC. Looking back a few months after independence had been won, Algeria's first president Ahmed Ben Bella deplored the "300 years of colonial domination" and heavily criticised the EC, particularly its nascent Common Agricultural Policy.'

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Wine was a core issue. While wine production had traditionally been abundant throughout Italy, from Piedmont to Sicily, it was in the south that blending wines and table wines were mostly produced. Per Owen White's account, '[T]he Treaty of Rome in March 1957 promised integration for Algeria's agricultural goods, but with it the ominous prospect of new competition from cheap Italian wines that tariffs had virtually excluded from the French market before'.[37]

In the mid 1960s, Italian politicians made their worries known in Brussels. Megan Brown explains:

> As the Six extended aid to Algeria, roadblocks arose in the form of individual state concerns. Italian representatives raised now-familiar complaints about the menace to their state were a Maghrebi accord to go forward, given that Italy's agricultural production closely mirrored that of the southern shores of the Mediterranean. Italy's representatives bristled at their state losing out to Algeria, a concern exacerbated by older fears about being cast as less than European. They complained that "the sacrifices to be agreed upon will be made practically by a single region – already underprivileged in relation to the rest of the Community – of a single member state." This would be compounded by labor migration rights, which would endanger nationals from "the only country in the Community that still has an excess of laborers," while proving advantageous to the other member states.[11]
>
> In other words, Italian officials believed their economy and citizens had the most to lose were the EC to embrace the Maghreb too wholeheartedly.[38]

And so it happened. In summer 1970, as noted, France blocked Algerian wine imports completely, and soon thereafter the EEC made sure there would no longer be special tariff arrangements with any of the Member States. Regulation 816/70 erected a comprehensive system of tariffs and countervailing duties on all imported wines, guaranteeing price protection from cheap imports to all EEC wines.[39] Qualitative barriers, such as

[37] White, *The Blood of the Colony*, p. 205.

[38] Brown, *The Seventh Member State*, pp. 220–221, referring in endnote 11 to: EEC Council, 'Relations avec les pays du Maghreb: Aide-mémoire du secrétariat', S / 38 / 65, January 14, 1965, annex II: 'Déclaration générale faite par la délégation italienne à l'occasion de la réunion du 9 décembre 1964'.

[39] Regulation 816/70.

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the noted restrictions on the practice of *coupage*, enhanced the strength of the new regime. It is worth noting that, from the standpoint of southern Italy, where the production of strong and sweet wine was abundant, the elimination of Algerian competition would be of crucial value.[40]

To be sure, the relative distributional impact of the 1970 Common Wine Policy on the different regions of Italy is a matter for debate.[41] Regulation 816/70, outlined earlier, was complemented by Regulation 817/70 of the same year, which elevated the status of 'quality wines' then typical of the Italian north while rare in the south.[42] There is strong evidence, however, that the dismantlement of the Algerian wine trade resulting from the 1970 EEC reforms gave a relative boost to southern Italy's wine exports and was advantageous, at least in the short term, to winemakers in the Mezzogiorno.[43] For Algeria, by contrast, this was the end of an epoch. From an Algerian perspective, the unprecedented limitation of its exports to Europe was wrongful in multiple ways: as a French breach of the Évian Accords and other promises of preferential trade; as a form of undue French and European retaliation against just assertions of Algerian independence, such as the nationalization of its energy resources; and as a signal that the EEC was in no hurry to extend

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[40] The architects of the new policy understood full well that maintaining the flow of wine exports was 'of great importance' to the Algerian economy, and in 1971 allowed for a 'temporary partial suspension of the Common Customs Tariff duties on wine originating in and coming from Algeria'. See Regulation (EEC) No. 2313/71 of the Council of 29 October 1971 on the temporary partial suspension of the Common Customs Tariff duties on wine originating in and coming from Algeria, OJ 1971 L 244/10. But they did so only until 31 August 1972 – surely a momentous date in the contested timeline of Algexit. See Brown, *The Seventh Member State* (recounting Algeria's non-linear, protracted, and fractured process of separation from the EEC).

[41] G. Meloni and J. Swinnen, 'The Political Economy of Regulations and Trade: Wine Trade 1860–1970' (2018) 41 *World Economy* 1567. For critical remarks on the EEC wine policy, particularly in matters of blending wine ('vino da taglio'), see M. Soldati, *Vino al Vino. Alla ricerca dei vini genuini* (Milan: Mondadori, 1977), pp. 237–239.

[42] Regulation (EEC) No. 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions, OJ 1970 L 99/20. Southern regions have since developed a thriving industry of quality wines, eligible for special protection on European and international markets.

[43] In the wine year 1969/1970, 90% of wine imports into France consisted of Italian wine. Such surges would lead to the 'wine war' between France and Italy in 1973–1974 and to an EEC corrective market intervention. Meloni & Swinnen, 'The Political Economy of European Wine Regulations', 268–269.

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to Algeria the trade privileges that its neighbours in the Maghreb had already received in 1969.[44] Yet, by EEC law, Algeria had no remedy.

3.4 NON-PARTIES

The regulation of wine production, distribution, and sale in the EEC is a seemingly inexhaustible fountain of Court of Justice of the European Union cases. Many of these are well known and EU jurists intuitively understand the large economic stakes of the controversies underlying them. Usually, such cases concern conflicts between two well-defined types of legal rules: on the one hand, state regulations, which reflect political settlements among local economic actors as well as local habits of wine production or consumption; on the other hand, EU law – often its primary imperatives (free movement of goods, as in *Commission v. UK*, *Wine and Beer*, or fundamental rights, as in *Hauer*), but other times secondary legislation demanding the approximation of state laws and practices (as most recently in *Weingut A*).[45] In all these cases, the EU judiciary interprets EU law only after considering an alternative legal stance reflecting the interests of national or sub-national constituencies. What is more, the judicial representation of relevant stakeholders (states or private parties) amplifies the arguments that such stakeholders may have already voiced in the process of drafting and adopting the rules in question: a double chance to be seen in the architecture of a complex legal system. To be sure, there is no guarantee that being 'in the room where it happens' results in net benefits for all participants: there are myriad reasons why a party fully involved in rule-drafting, or fully represented in disputes concerning such rules, could ultimately find itself holding the short end of the stick.[46] What

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[44] On the 1969 Agreements reached by the EEC with Morocco and Tunisia, which were trade agreements only and would later be subsumed into the more complex cooperation arrangements of 1976, see Commission of the European Communities, Directorate General for Information, 'Cooperation Agreements between the EEC and the Maghreb Countries' (1982), p. 3.

[45] Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, ECLI:EU:C:1979:290; Case 170/78, *Commission v. United Kingdom, Tax arrangements applying to wine*, ECLI:EU:C:1983:202; and Case C-354/22, *Weingut A*, ECLI:EU:C:2023:916.

[46] D. Kukovec, 'Regional Trade Agreements and Global Justice' (2020) *Harvard International Law Journal* Online.

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remains, nevertheless, a prerogative of *parties* – as opposed to outsiders – is a relatively higher degree of visibility and voice.

Not so, however, when the impact of rules made by insiders is felt by *non-parties*, as when the Algerian wine industry was dealt a deadly blow by arrangements made among the six EEC states in matters of wine commerce.[47] Not only did Algeria, by then definitely a non-party, have no say whatsoever in the making of the 1970s wine rules;[48] it also had no way to challenge such rules at a later point in time and was left to its own devices in trying to make up, or not, for the lost market share.

In a way, this complete lack of representation is typical of colonial dynamics: the colony cannot but accept and receive rules made in the metropole.[49] In Amel Benrejdal Boudjemaa's words, 'determining the future of Algeria from the outside' was precisely what Europe did in colonial times.[50] Yet, something else is also at work here – a diffuse legal sensibility that originates in private law but permeates legal regimes of all kinds, and works to normalize the harm that the deals concluded by some parties inflict upon non-parties. A brief detour through private law territory may efficiently illustrate why Algeria's excision from the EEC's wine market was deeply harmful and yet not actionable – a pattern both specifically colonial and ubiquitous in space and time.[51]

In private law, contracts cause negative externalities all the time, but such harms are conceptualized as the price society must pay for the sake of competition:[52] 'There is nothing intrinsically wrong in a

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[47] Caruso, 'Non-parties', 389.

[48] To be sure, crucial features of European wine policy, such as the system of Appellations d'Origine Contrôlée, originated from the commerce of wine between France and Algeria. See Bohling, *The Sober Revolution*.

[49] See H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831–854 at 840 (documenting how 'the heads of delegation and the Drafting Group on the Overseas Countries and Territories codified "association" without involving any form of political representation from the countries that were to be associated').

[50] Chapter 12.

[51] Caruso, 'Non-parties', 389.

[52] *Vegelahn v. Gunter*, 167 Mass. 92, 106 (1896) (Holmes, C. J., dissenting). ('The doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged.')

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contract's benefitting its parties to the detriment of a third party. Such is the nature of a free market and the inevitable result of the principle of freedom of contract. Indeed, this should normally be expected'.[53]

The rule, then, is that the harm to non-parties is privileged. It is, in old parlance, *damnum absque injuria*: real harm, but resulting from privileged conduct, and therefore not a trigger of legal remedies.[54] The rule has exceptions, mostly in torts law and antitrust, but a hallowed rule it remains.[55] Where actionable legal remedies (injunctions or actions for damages) exist, they are for the most part distributionally ambivalent: they can be equally mobilized by market actors of all types, including dominant ones, and therefore do not necessarily ameliorate the fate of weaker parties.[56] Theoretical support for the 'rule' rests on a widespread faith in the self-healing properties of free markets: it is commonly assumed that in a dynamic market with full mobility of people and resources, the non-party which was harmed by the contracts of others will reinvent herself to stay financially afloat, and might one day be even better off.

Decades of dominant neo-liberal thinking have normalized this kind of reasoning, to the point of obscuring the fact that markets are often far from seamless and that alternative business opportunities are more available to some non-parties than others.[57] All the time, non-parties suffer unredeemable loss as a consequence of deals made among others.

As noted by famed scholars of international law,[58] on the stage of the world economy, where states constantly conclude bilateral treaties

[53] B. Porat, 'Contracts to the Detriment of a Third Party: Developing a Model Inspired by Jewish Law' (2012) 62 *University of Toronto Law Journal* 347–401 at 348. Porat moves on to seek possible exceptions at law to this premise.

[54] See generally E. P. Weeks, *The Doctrine of Damnum Absque Injuria Considered in Relation to the Law of Torts* (San Francisco: Sumner Whitney, 1879).

[55] See, for a critical account of such a rule, A. Bagchi, 'Other People's Contracts' (2015) 32 *Yale Journal of Regulation* 211–256, at 221. ('Contract law does not adequately account for the harm that we inflict on third parties by joint agreement.')

[56] Caruso, 'Non-parties', 417.

[57] V. A. Schmidt and M. Thatcher (eds.), *Resilient Liberalism in Europe's Political Economy* (Cambridge: Cambridge University Press, 2013).

[58] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green & Co., 1927), p. ix. See J. Sgard, 'Contracts, Treaties, and the Public Space (Comment)' (2019) 59 *Harvard International Law Journal* 20 (highlighting the intellectual origin of the contract/treaty analogy).

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or enter regional agreements, similar dynamics occur as in private markets and, more importantly, similar legal constructs – including the presumptive legality of most types of indirect economic harm – apply. And while private-law relations may be embedded in state-based systems of solidarity and mechanisms for redistribution, relations between sovereign nations often occur in a vacuum, so that losses lie where they fall. Regional free trade agreements, as well as customs unions, produce ripple effects in the world economy and predictably harmful externalities. Further, when the parties to such agreements create law- and policy-making institutions such as those of the EU, they can continue to hurt non-parties with a stream of trade-diverting rules, such as key provisions of Regulation 816/70 EEC. In limited circumstances, when trade arrangements made between two or more states hurt other nations, remedies exist in international trade law too, but they do little to offset the chasm between haves and have-nots in the global economy.[59] The institutional mechanisms for redressing global injustice remain marginal, even when – as in the case of Algeria vis-à-vis EEC members – there are seemingly strong ties between outsiders and deal makers. This means that, like Algerian vintners in the early 1970s, non-parties are regularly left without recourse. All they can do is seek alternative strategies for economic development. Algeria did just that.

3.5 CONCLUSION

The Algerian wine saga offers a broad cautionary tale. Like other actors with significant power in the global market economy, the EU can enter deals or make decisions hurtful to states that are, or have become, non-parties vis-à-vis Europe. One line in a technical regulation, while fully legitimate and mostly well intentioned, could be enough to wipe entire industries out of existence. There are, of course, reasons to celebrate the

[59] Caruso, 'Non-parties', 389 (positing that 'actionable remedies in favor of non-parties to trade agreements are analytically helpful, but remain distributionally ambivalent') and Kukovec, 'Regional Trade Agreements' (arguing that 'the hierarchical structure of global production needs to be considered when addressing inequality perpetuated by trade diversion').

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EU's power to export its values and to influence the regulatory choices of other nations, for instance in matters of safety standards or data privacy.[60] But different, darker sides of the same power exist. When externalities are negative, and especially when they are felt by those with lesser bargaining power, the EU is legally privileged to ignore them, but it does so at its own peril.

The fall of the Algerian wine industry is not only an early illustration of trade diversion resulting from a 'megaregional' *avant la lettre*. Even more relevant is the distributional complexity of its background. The founders of the EEC were institutionally bound to boost trade inside the Common Market, and also inclined to ameliorate the economic conditions of Europe's south. The complete collapse of Algerian wine exports may have seemed the natural by-product of policies designed to pursue such goals. Arguably, however, ruining Algeria's most profitable export was *not* beneficial to the EEC. If anything, European leaders would have had an interest in sustaining the Maghrebi economy, not least because, were Algeria to realize its yet under-tapped mineral wealth, it would become a great market for European exports.[61] In hindsight, maintaining better relations with Algeria might have eased a variety of European worries concerning migration management, political instability in the Mediterranean, oil and gas supplies in times of shortage, and so forth.[62] Instead, with its wine policy, the EEC signalled an abrupt break from Algeria – one that affirmed President Ben Bella's intuitive distrust of the European integration process.

Today, at times, the relation between the EU with its members on one side and Algeria, a non-party, on the other seems cooperative and coherent across sectors. As Benrejdal Boudjemaa observes about current Mediterranean partnerships, 'one should not deny the European will

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[60] A. Bradford, *The Brussels Effect. How the European Union Rules the World* (Oxford: Oxford University Press, 2020).

[61] Hansen and Jonsson, *Eurafrica*, pp. 125–128.

[62] Ibid.; D. Caruso and J. Geneve, 'Trade and History: The Case of EU-Algeria Relations' (2015) 33 *Boston University International Law Journal Online*; D. Caruso and J. Geneve, '*Melki* in Context. Algeria and European Legal Integration', in F. Nicola and B. Davies (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017), p. 506.

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to engage with Algeria in a mutually beneficial manner, based on common interests'.[63] At other times, the relation still seems to evolve 'haphazardly', just as it did, according to the Commission, in the 1960s.[64] Indeed, in a world characterized by an ample degree of economic liberty for states as well as corporate entities, one deal may defeat the purpose of another; insiders to one agreement will be outsiders in other contexts. Well-meaning EU gestures towards non-parties may be undercut by rules decided by the Member States among themselves (e.g. the liberalization of the energy market); and even when the parties stay the same, the benefits of the agreement reached in one area may be offset by the harms of seemingly unrelated conduct. There is, as well, the complication of independent initiatives of individual states – for instance on migration control – or large investors or multinationals. Today, as in the 1960s, such quagmires make it hard to identify distributional vectors, and difficult to devise tailored corrective strategies.

And then there is China. As Benrejdal Boudjemaa aptly remarks, we now live 'in an era where China is emerging as a global power'.[65] China supported Algerian independence on day one, and strong economic and political ties have since developed between the two countries. While Algeria's agricultural output is both more abundant and more diverse than in the 1960s, it is in the deserts that the real profits lie. Not only is Algeria enjoying remarkable success in the oil and gas sector, due to the upward pressure on hydrocarbon prices resulting from the war in Ukraine; but the Algerian government is also investing in green energy. Its desert lands are being equipped with solar panels at a pace with which some sunny areas in the EU (again, Italy's deep south) cannot keep up.[66] In terms of trade balance, Algeria imports heavily from China, while being a net exporter to Europe.[67] Individual EU Member States and large investors compete for opportunities in

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[63] Chapter 12.

[64] See Commission of the European Communities, Directorate General for Information, 'Cooperation Agreements between the EEC and the Maghreb Countries' (1982).

[65] Chapter 12.

[66] *Sarà in sicilia la più grande fabbrica europea di moduli solari*, Materia Rinnovabile/Renewable Matter, 26 January 2024.

[67] S. Jackson, 'China in the Maghreb: Threading the Needle of Algeria and Morocco', Wilson Center (5 February 2024).

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Algeria, which is now picking and choosing its business partners simply because it can. The tables have turned, and while EU legal scholars justly dissect the past in light of postcolonial insights, the fact remains that some bridges were burnt and no amount of European soul-searching will build them up again.

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CHAPTER 4

Racializing the European Border

Free Movement of Workers and the (Former) Colonies

KARIM FERTIKH

4.1 INTRODUCTION

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When commenting on the consequences of a possible United Kingdom (UK) accession to the European Economic Community (EEC), the eminent British legal specialist Otto Kahn Freund pointed out the risk of a dual standard regarding migration. One of the founding figures of German labour law who fled to the UK after 1933, Kahn Freund (1900–1979) had become a professor at the London School of Economics and a prominent labour and social security law specialist – serving as president of the International Association for Labor Law and Social Security from 1960 to 1966. At a 1962 conference discussing the first negotiations of the UK accession to the EEC, Kahn Freund made it clear that from a legal perspective the British accession to the EEC might tarnish 'Britain's good name' by establishing a racially based migratory regime between European and extra-European migration.[1] This was, to his eyes, 'the most serious issue the European freedom of movement poses'. This issue was not only raised during the UK accession discussions. In the 1950s, most European countries were still empires or had only recently ceased to be empires.[2] At this nascent time of European integration, the freedom of movement of workers proclaimed by the Treaty of Rome 1957 and its consequences on the workers from the colonies had already been the cause of agitation among policymakers and legal specialists alike. It was as if two competing (imperial and European) communities

[1] London School of Economics (LSE), Otto Kahn Freund papers, 166: talk on England and Europe, 11 January 1962 (my translation from the German original).

[2] S. R. Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 6.

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were raising questions of principles on the best ways to define freedom of movement, one of the core tenants of any transnational community.

This conundrum was part of a debate that caused a great deal of tension during the negotiations leading up to the Treaty of Rome, and which saw several U-turns between the 1950s and the 1970s. These U-turns were not solely European, that is to say refracted in EEC and later EC law; the national policies of the former colonial powers, which progressively ceased to consider themselves global communities, played a key role in the transformation of the migratory regimes emerging from European integration.[3] These debates were carried over (and transfigured) into EEC/EC law, paving the way towards a double standard in personal mobility and to a racialized European border: a liberal migratory regime within Europe corresponded to a less liberal one between Europe and the postcolonial countries. This chapter aims to shed light on this dual migratory regime and on how it came about.

Part IV of the Treaty of Rome establishing the EEC stated that the freedom of movement of workers would – at some point – be granted to the colonies rebranded, to use the coded colonial prose of the EEC treaty, as 'overseas countries and territories'.[4] Article 135 EEC states: 'Subject to the provisions relating to public health, public safety and public order, the freedom of movement in Member States of workers from the countries and territories, and in the countries and territories of workers from Member States shall be governed by subsequent conventions which shall require unanimous agreement of Member States'.[5]

From a contemporary perspective, the freedom of movement of workers incorporated more than the simple right to access EEC territory. Article 51 EEC of the Treaty of Rome stated a range of provisions granting worker access to welfare and social security rights. Without social security provisions, the freedom of movement would have been mere formulae. These provisions show that the geographical scope of

[3] N. El-Enany, *Bordering Britain. Law, Race and Empire* (Manchester: Manchester University Press, 2022); S. Laurens, *Une politisation feutrée. Les hauts fonctionnaires et l'immigration en France (1962–1981)* (Paris: Belin, 2009).

[4] H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831.

[5] Emphasis added.

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the EEC was by no way restricted to the European 'mainland' countries. The Common Market was perceived to be a new means of continuing European colonial domination: in the words of the Ghanaian and Pan-Africanist leader Kwame Nkrumah, the concept of 'Eurafrique [was] forged in the framework of the negotiations for the Common Market'.[6] The focus of most research on Eurafrica thus far has been its economic and commercial dimensions,[7] together with the developmental ideology that legitimized the continued entanglement of the two continents.[8] Less attention has been paid to its human dimension. As some recent pioneer research on the metamorphosis of the Algerian membership to the EEC have demonstrated, the human dimension cannot, however, be overlooked.[9] In looking at the ways the EEC framed labour migrations and anchored the European project to the Eurafrican imaginary, this chapter contributes to the ongoing questioning of 'Euro-whiteness' and the drawing of the European frontier, resulting in racialized populations being excluded from the free movement provisions.[10]

The issue of migration goes beyond the formal right to immigrate to include social rights, rights that the EEC law has guaranteed to EEC migrant workers. Indeed, the EEC treaty provisions regarding the freedom of movement encompassed social security rights as well. Under these provisions workers are guaranteed social security rights (the right to pensions, to unemployment benefits, to health insurance etc.) when they leave their employment country; the right to cross borders would mean little

PROOFS

[6] K. Nkrumah, *L'Afrique doit s'unir* (Paris: Payot, 1964), p. 217; Larsen, 'European Public Law after Empires', 16.

[7] P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London: Bloomsbury, 2014).

[8] F. Cooper, 'Modernizing Bureaucrats, Backward Africans, and the Development Concept' in F. Cooper and R. Packard (eds.), *International Development and the Social Sciences* (Berkeley: University of California Press, 1997), pp. 64–92; C. Decker and E. McMahon, *The Idea of Development in Africa: A History* (Cambridge: Cambridge University Press, 2021); V. Dimier, *The Invention of a European Development Aid Bureaucracy: Recycling Empire* (Basingstoke: Palgrave Macmillan, 2014).

[9] M. Brown, *The Seventh Member State: Algeria, France, and the European Community* (Cambridge: Harvard University Press, 2022).

[10] El-Enany, *Bordering Britain*; H. Kundnani, *Eurowhiteness. Culture, Empire and Race in the European Project* (London: Hurst & Co., 2023); E. Marker, *Black France, White Europe: Youth, Race, and Belonging in the Postwar Era* (Ithaca: Cornell University Press, 2022).

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if workers lost their social rights by doing so. As early as 1958, European regulations ensured that social benefits (for instance, family allowances) be paid 'beyond borders' and that the 'equal treatment' between nationals and foreigners be secured in this domain.[11] In the post-Second World War era, equality of treatment and the non-discrimination principle came to be core tenets of international law. European law had hence to confront the (post-)imperial reality of most of the EEC Member States and to forge a (defensible) coherence between rights granted to European migrant workers and those granted to (post-)imperial workers. Taking the example of the pension for retired workers, should German citizens having to flee Central European countries to Germany in 1945 be treated better than Italians in the same situation? Should a Belgian citizen be treated better than a French one when both had worked in the Belgian colonies? Should racialized workers from the French Community,[12] and later from the French and British (former) colonies, enjoy freedom of movement on the EEC territories as 'European' citizens? These issues are of major importance if one is to understand how EEC/EC law has contributed to global inequalities, welfare institutions being crucial in redistributing wealth and exacerbating inequalities between racialized and European workers.[13]

In order to explore these issues, this chapter focusses on a community of 'artisans of legal techniques': officials in labour ministries of the EEC/EC countries who write the international standards regarding social security law.[14] Some of these 'artisans of legal techniques' had had

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[11] E. Comte, *The History of the European Migration Regime: Germany's Strategic Hegemony* (London: Routledge, 2017); K. Fertikh, 'From Territorialized Rights to Personalized International Social Rights? The Making of the European Convention on the Social Security of Migrant Workers (1957)' in M. Baar and P. van Trigt (eds.), *Marginalized Groups, Inequalities and the Post-War Welfare State* (London: Routledge, 2019), pp. 29–48.

[12] Included the countries belonging to the French East and Western Africa (AEF and AOF) as well as Madagascar, here named 'Oversea Territories' (as they were usually called in the 1950s). Algeria and the Oversea Départements (regrouping the 'old' colonies) were treated apart, even if some regulations/debates concerned both.

[13] G. K. Bhambra and J. McClure, *Imperial Inequalities: The Politics of Economic Governance across European Empires* (Manchester: Manchester University Press, 2022); and G. K. Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism' (2017) 23 *European Law Journal* 395.

[14] I. van Hulle, *Britain and International Law in West Africa* (Oxford: Oxford University Press, 2020).

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colonial experience. From the 1950s to the 1970s, social security bureaucrats in European countries with a sense of activism wrote international rules for circulation and social security, be it in Europe or in the rest of the world. In the realm of the welfare state and international policymaking, they pushed through bilateral and multilateral agreements as well as corresponding regulations.[15] They constructed a 'legal regime' – that is to say, the patterns structuring the relations between separate legal authorities – regarding the social rights attached to the freedom of movement of workers or more generally of migrant workers and their families.[16] Several questions arise. How did this public policy network discuss the coexistence of these two forms of communities? How was the link between the new EEC and the postcolonial communities established? How was a racialized border, severing the human ties between Europe and Africa, established?

This chapter is divided into two parts. First, it shows that from the 1950s to the 1970s two legal regimes relating to migration and social rights coexisted on a (formally) equal footing, the European and the postcolonial. Second, this chapter shows how these two legal regimes were hierarchized in the 1970s, and contributed to racializing the European border.

4.2 COMPETING COMMUNITIES (1950S–1970S)

The sets of regulations regarding labour mobility indicate that two systems of preference coexisted: a European (EEC) system, and a post-imperial one. The latter, devoted to maintaining the extractive colonial economy, structured a relatively liberal migratory regime between the European countries and their former colonies in order to maintain transnational polities. The 1960s saw the emergence of a new global order following the 'fall of the European international law',[17] in which new standards promoted by the UN institutions, such as the legal imperative of

[15] Fertikh, 'From Territorialized Rights to Personalized International Social Rights?', p. 29.

[16] L. Benton, *Law and Colonial Cultures. Legal Regimes in World History (1400–1900)* (Cambridge: Cambridge University Press, 2001).

[17] Larsen, 'European Public Law after Empires', 15.

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'non-discrimination', rendered difficult the use of explicit racial reservations within European law and administrative practices.

4.2.1 BARGAINING THE IMPERIAL PRIVILEGE. At the time the Treaty of Rome and its implementation were being negotiated, the colonial powers were eager to share the burden of developmental aid, but much less eager to grant EEC workers access to their colonial territories.[18] The administrations of the colonial powers feared uncontrolled southward migration would jeopardize their domination and reallocate colonial benefits. They developed a system within which the influx of southward migration from Europe would not unsettle the precarious colonial authority.

In the European political imaginary until the end of the 1960s, sub-Saharan Africa was a place of settlement for Europeans. Europe was considered the overcrowded continent, not Africa – with the exception of North Africa. The role of this exception should not be overlooked: some EEC Member States were reluctant to allow Algerian immigration but overcame this reluctance when they agreed to incorporate Algeria in the framework of the 1961 EEC Regulation on the Freedom of Movement.[19] Nevertheless, Africa south of the Sahara was a marginal contributor to migration to Europe. Taking the example of France, in the mid 1960s, the decade when most 'Black African' immigrants arrived in the country, the actual numbers were, in fact, negligible: in 1964, 73,000 sub-Saharan Africans were living in France, 11,000 of whom were students.[20] In contrast, White immigration in Africa was important. Large numbers of British immigrants had settled in their old colonial domain: in the 1960s numbering 50,000 in Kenya and 230,000 in Rhodesia, today's Zimbabwe (to say nothing of South Africa). While the French population in France's former colonies in sub-Saharan Africa was far smaller, it was nevertheless considerable. In 1956, nearly 90,000 'Europeans' (the French administrative word meaning 'White', most of them being from mainland France)

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[18] Cooper, 'Modernizing Bureaucrats', pp. 64–92; Decker and McMahon, *The Idea of Development in Africa*; Dimier, *The Invention of a European Development Aid Bureaucracy*.

[19] Regulation n°15 relatif aux premières mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté, Official Journal 57, 26 August 1961, pp. 1073–1084 and p. 1083.

[20] R. Delerm, 'La population noire en France' (1964) 19 *Population* 515.

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were part of the colonial economy and administration in French West Africa.[21] Decolonization did not put an end to this White presence. General data on this topic is lacking: as Abou Bamba notes, scholars seem to have ignored (and misnamed as 'expatriates') White migrants in the Global South.[22] Abou Bamba deplores this shortcoming of the literature, underlining particularly the lack of data on aid workers ('coopérants' in French). In 1965, nearly 10,000 'coopérants' were living in sub-Saharan Africa.[23] They were not, however, the only category of Europeans (mostly French) working and living in Africa. By the mid 1970s, the French population in Côte d'Ivoire alone amounted to 40,000 (compared to 11,000 in 1960). Other studies show similar trends. In 1963, 50,000 French citizens were estimated to have been living in Dakar, the largest town of Senegal (15 per cent of its population) – even if this number was perhaps exaggerated.[24] By 1967, 3,600 French citizens had settled in Gabon, a country rich in natural resources; 1,200 living in its major port, Port-Gentil, a town of 23,000 inhabitants.[25] In 1959, more than 115,000 Europeans (most of them Belgian nationals) were living in Congo-Leopoldville.[26]

At the time of the negotiations on the Treaty of Rome, scientific institutions close to colonial administrations not surprisingly stressed the risk that European integration could lead to uncontrolled southward European migration. The French Academy for Colonial Science, a scientific institution attached to the Ministry for Overseas Territories, was vocal about the threat that European immigration would pose to the overseas territories, pointing out that this view was shared by the African representatives in the French institutions.[27] They feared further

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[21] B. Kamian, 'Les villes dans les nouveaux États d'Afrique occidentale' (1963) 4 *Revue Tiers Monde* 65, p. 70.

[22] A. B. Bamba, 'Conspicuous, Yet Invisible: Migration, Whiteness and the French Residents of Ivory Coast, 1950–1985' (2015) 13 *Journal of Modern European History* 549.

[23] P. Decraene, 'États francophones : le nombre de travailleurs blancs s'accroit', Le Monde diplomatique, December 1965, p. 3.

[24] Kamian, 'Les villes dans les nouveaux États d'Afrique occidentale'.

[25] J. Bouquerel, 'Port-Gentil, centre économique du Gabon' (1967) 20 *Les Cahiers d'Outre-Mer* 247.

[26] C. Blanchart, *Le rail au Congo Belge Tome III – 1945–1960* (Brussels: Masoin, 2008).

[27] L. Mérat, 'Considérations générales sur l'évolution politique et nos colonies d'exploitation et de peuplement', Comptes rendus des séances de l'Académie des sciences coloniales, 16 May 1950.

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that the Eurafrican community would mainly consist of immigrants from 'overpopulated nations' such as Germany, the Netherlands and Italy.[28] Other colonial institutions shared this worry. In the mid 1950s, a report by the Belgian 'Congrès colonial' (colonial congress) clearly stated that European integration would mean a demographical risk of White migration to Congo and to Rwanda-Urundi:

> Two observations are immediately obvious:
>
> - Italy as well as Germany and Holland would be particularly desirous of sending their emigrants overseas because of the constant demographic pressure that these countries are experiencing within their borders;
> - the perception of the dangers of immigration and massive European colonization by foreign elements are serious for the development and future of the indigenous populations, as well as for the safeguarding of their national sovereignty.[29]

The French delegation's position was that the 'free movement of workers' should be treated as a separate issue and postponed to later negotiations. Belgian Minister for Colonies (1947–1950) and for Foreign Affairs (1958–1961) Pierre Wigny (who took part in the EEC negotiations) also feared European immigration to Black Africa. He was hostile to any situation where Belgium could lose its control over European emigration to Africa. It was concerning, he had already written in a 1949 report on the European Political Community, that Italy, Germany and the Netherlands might try to 'flood the Belgian Congo with their migrants'. A complete integration of the French and Belgian overseas territories within the Common Market would only be possible when these territories reached a level of development deemed sufficient – the 'lack of development' being an argument commonly used to justify a dual standard in international law.[30] Then, as the minister of the overseas Gaston Defferre wrote, 'a Common Market including European countries and Overseas

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[28] Comptes rendus des séances de l'Académie des sciences coloniales, Discussions, July 1952.

[29] Brussels, Belgian Diplomatic Archive, 13925: Congrès colonial national, 'L'intégration des territoires d'outre-mer dans la communauté politique européenne' (1954).

[30] D. R. Maul, *Human Rights, Development and Decolonization: The International Labour Organization, 1940–70* (Geneva: International Labour Office, 2012).

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Territories would be established'. In short, the design of this 'Eurafrican Common Market' had to consider the specificities of the 'underdeveloped' world:

> One of the principles of the Common Market is the free movement of persons. Given the overpopulation and the high underemployment rate in some European countries such as Italy, we may expect that this free movement would provoke rather important movements of population to the Overseas Territories. For reasons less economic than human, it is necessary to prevent an excessive flux which would certainly give rise to negative psychological reactions. This would harm the evolution of the indigenous institutions and cause riots opposing Europeans and Africans, as we have had many examples in North Africa. It is therefore impossible to establish free movement of men between Africa and Europe as a principle without any precaution. Besides, I think that our European partners will themselves question this with the desire to prevent an inflow of the Algerian populations to their territories.[31]

Controlling which European populations would benefit from this extractive economy was another reason why Article 135 EEC of the Treaty of Rome postponed the Eurafrican freedom of movement to later discussions. To French and Belgian negotiators during the preparation of the EEC treaty, allowing European immigration to Africa would have unsettled the political and economic situations. A Eurafrican freedom of movement would have multiplied 'low quality' White immigration to the Black continent causing social problems and general dissatisfaction. It would have counterbalanced the efforts made by the colonial powers to 'upgrade' White immigration by privileging the highly skilled technicians and aid workers the African governments were competing to recruit.[32] On the other hand, the presence of Europeans in Africa and the participation of the continent in the Eurafrican community was necessary. When defining the position of the Ministry for Overseas Territories in the framework of the negotiations leading to the Treaty of

[31] La Courneuve, French Diplomatic Archive, 20QO719: letter from Gaston Defferre (minister of the overseas) to the prime minister, 17 May 1956.

[32] Pierrefitte-sur-Seine, National Archive of France (from now on: NAF), AG/5(F)/356 (fonds Foccart): correspondence.

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Rome, Gaston Defferre stated that the overseas territories had to be part of the Common Market, which he rebranded the 'Eurafrican Common Market'.[33] If not, he was afraid the economic ties of France and its colonies would be severed, and France would rapidly lose political ground in Africa. European integration should therefore be delayed in order to ensure that the French maintained the upper hand in the region, as the presence of Europeans in Africa was (and still is) essential to the colonial extractive economy. The imperial and postcolonial community, characterized by a relatively liberal circulatory regime, guaranteed the economic structure arising from colonization. As Megan Brown shows in her book on Algeria, it took political decisions by the Algerian leadership to loosen the grasp of French industrial players over the economy in this country and to open it up to industries from other EEC countries.[34]

4.2.2 PRESERVING POSTCOLONIAL COMMUNITIES THROUGH EEC LAW. The relations between the mainland countries and their former colonies were not severed by decolonization: former colonies might be independent, but that did not mean that their European past was left behind. EEC law responded to this perpetuation of the relationship between colonizers and colonized by treating colonial migration as a legitimate exception to the migratory 'European preference' EEC law strove to establish.

Former imperial powers perpetuated the human interdependencies with their former colonies. Nadine El-Enany shows how the 1948 British Nationality Act was about 'mysticism': the theoretical rights of Commonwealth citizens, subsumed in the same 'nationality', to travel to Britain was 'a magic trick of sorts, a legal sleight of hand that would conjure a British imperial polity anew'.[35] This 'mystical', all-encompassing Nationality Act did not prevent Britain from bureaucratically making it more difficult for racialized Commonwealth citizens to access its territory without shutting the door to White settlers. However, it did not

[33] La Courneuve, French Diplomatic Archive, 20QO719: letter from Gaston Defferre (minister of the overseas) to the prime minister, 17 May 1956.

[34] Brown, *The Seventh Member State*, p. 222 and following.

[35] El-Enany, *Bordering Britain*, p. 80; also see G. K. Bhambra, 'Brexit, the Commonwealth, and exclusionary citizenship', Open Democracy, 8 December 2016.

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formally erase the imperial polity. France chose another path to maintain its imperial polity. The discussions on the nationality code of the French Community (the name given to the colonial domain by the Constitution of the Fifth French Republic adopted in 1958) were indeed just at their beginning in 1960 when the French Community was dissolved.[36] Nevertheless, with the dissolution of the French Community in 1960, the newly independent countries concluded a range of agreements with France granting, on the basis of reciprocity, freedom of movement, equality of treatment and de-territorialized rights to social security. Until the middle of the 1970s, French diplomacy sought to maintain a transnational community between France and its former African colonies.[37] French diplomats considered the freedom of movement of persons of crucial importance. A memorandum issued in 1963 recalled the paramount importance of the free circulation of persons within the former French Community as a legal 'principle' affirmed in a multilateral agreement concluded on 22 June 1960 with six African states. It reads: '[E]ach national from a member state of the Community can freely enter the territory of another one, journey in it or settle down as resident in the place of his/her choice.'[38] Where such agreements were not reached, the old liberal imperial migratory regime stood tacitly in place. Some former colonies (Côte d'Ivoire, Mali and Mauritania) did not enjoy this legal protection, but were informally included in the same mechanism granting French nationals a privileged but non-formal access to their territories, the memorandum continued.[39]

This perpetuation of the defunct imperial territoriality appears in the web of treaties that the colonial powers concluded with their former colonies in the domain of social security. The issues of free migration and access to social security were, however, posed with the same 'legal techniques' in the EEC and postcolonial communities. At a 1963 conference on 'Labour law and the Common Market', focussing on the possible consequences of a British accession to the EEC, the soon-to-be Oxford

[36] NAF, AG/5(F)/356: Executive Council of the French Community: decisions on the citizenship and the nationality, 11–12 December 1959.

[37] Laurens, *Une politisation feutrée.*

[38] La Courneuve, French Diplomatic Archive, 1089INVA276.

[39] La Courneuve, French Diplomatic Archive, 1089INVA276: memo, January 1963.

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professor Otto Kahn Freund stressed that the 'freedom of migration' promoted by the EEC would be 'illusory if not coupled with legal and factual equality' (he called this a 'positive equality', distinct from the removal of barriers). He made social insurance the first item where equality mattered and concluded by describing the European social security coordination: 'Nothing revolutionary in this country (Great Britain). We have a network of such conventions with Commonwealth and European countries.'[40] As a matter of fact, from 1947 to the end of the 1970s, Britain had developed a social security agreements network covering twenty of its former colonies, and the other colonial powers developed the same extensive network of agreements. When the country acceded to the EC in 1973, parts of this network were already in place, especially with the countries of the old Commonwealth and the Caribbean.

The networks of agreements on social security rights illuminate the maintenance of imperial polities (see Map 4.1). These treaties served the interests of European nationals at the same time as they created a burden for the social security of their former colonies. They could represent a non-negligible part of the formal sector (the informal sector being de facto excluded from social protection). By the mid 1960s, 20 per cent of the child allowances paid in Gabon, a former French colony, benefited foreigners, with half of those French nationals.[41] Similarly, in 1977, with an eye to maintaining imperial polities, UK officials pushed for an agreement with Iran, a country where Britain had had influence since the beginning of the twentieth century. The social security officials underlined that the 200 British companies in Iran employed 5,000 British people, compared to the 300 to 400 Iranians working in Britain. Nevertheless, as self-serving as these agreements may have been, they were written in a formally egalitarian language, and did not differ much from the EEC/EC agreements themselves.

These postcolonial polities were a given that EEC law had to deal with. EEC law sought to preserve the liberal migratory regime between former colonial powers and newly independent countries. Under the

[40] LSE, Otto Kahn Freund papers, 100: Edinburgh lecture, 18 June 1963.

[41] K. Fertikh, 'Une décolonisation de la sécurité sociale. D'une "modernisation" coloniale française à sa remise en cause en Afrique subsaharienne' (2023) 133 *Genèses* 27.

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Map 4.1 Network of social security regulations in 1974: postcolonial polities.

pressure of French civil servants, the EEC forged a system where the EEC freedom of movement (and the correlative 'European preference' in migration) did not jeopardize the defunct imperial communities. A pinnacle of the Common Market, the freedom of movement of workers provision, aimed at rationally administering labour mobilities, authorized mobilities of unemployed workers from EEC territories without the resources to employ them to territories lacking workforce. This system was called 'international compensation' as it sought the rational allocation of workforce on an international level.[42] In this system, the national

[42] La Courneuve, French Diplomatic Archive, QO20/714: memo, 1959.

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bureaucracies agreed on a 'European preference'. Migration from an EEC country should be privileged if nationals were unable to satisfy the existing job offers, meaning that vacant job offers had to be *first* proposed to EEC recruitment offices. At the 'European Coordination Bureau for Labour Compensation' (in the General Directorate 'Social Affairs' of the EEC Commission), the EEC officials seemed, however, to have never been truly satisfied with this 'mechanism' of 'compensation'. The first annual report of the European Bureau of Coordination in 1963 lamented that European workers had not truly been given any such priority.[43]

The EEC freedom of movement regulations did, in fact, include a reservation: migration from within Europe could not supersede migration from former colonies. In a 1960 memorandum, the Juridical Service of the EEC Commission issued a statement regarding the 'non-European countries and territories having special relations with Belgium, France, Italy and the Netherlands' and the consequences of their newly acquired independence.[44] This document pushed forward the notion of 'special relations': the Juridical Service identified 'political dependence' and 'lack of self-determination' as the basis for the continued 'association' of these territories with the EEC. Given the uncertain situation of the independent countries regarding the existing set of international treaties, the legal experts of the EEC used the 'vague' notion of 'special relations' to grant these former colonies special status under EEC law (whereas the 1961 regulation applied only to Algeria). The two regulations of 1961 and 1968 relating to freedom of movement took the notion of 'special relations' into consideration in Article 42(3) and Article 42(3) respectively: the European freedom of movement should, according to the regulations, not jeopardize the obligation of European countries towards countries with which they have or have had 'special relations'.[45] Legally

[43] Florence, Historical Archive of the European Union, BAC6/1977_529: annual report of the technical committee for free movement (1962–1963).

[44] Brussels, Belgian Diplomatic Archive, 17089: memo, 13 February 1960.

[45] Regulation n°15 relatif aux premières mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté, Official Journal 57, 26 August 1961, pp. 1073–1084, p. 1083) read: 'Le présent règlement ne porte pas atteinte aux obligations qui découlent pour les États membres des relations particulières qu'ils entretiennent avec certains pays ou territoires non européens par suite de liens institutionnels existants ou ayant existé entre eux'; and Regulation (EEC) No. 1612/68 of the Council

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speaking, the regulations took into account 'existing or previously existing institutional bonds' and stated that nothing should endanger the obligations that these bonds had generated in regard to freedom of movement. This legal concept, 'special relations', expressed these relations between Member States and their former European colonies, and built a legal architecture combining both postcolonial and European communities.

4.2.3 MAINTAINING THE UNITY OF INTERNATIONAL LAW. During the first decade of the EEC, EEC law limited the legal inequalities towards (former) colonies in its dispositions related to freedom of movement. It did so by the effect of the non-discrimination principle, used as an argument in negotiations. At the time, the contemporaries contemplated with difficulty a dual standard regarding freedom of movement and social security.

EEC law was put under pressure by the pervasive international concept of non-discrimination. In the case of Algeria (the only country where freedom of movement applied as an effect of the 1961 regulation), Megan Brown explained the sinuous positions taken by the French authorities in the negotiations for the Treaty of Rome.[46] One of the most detailed position papers preparing the 1961 regulation stressed the discriminatory character of excluding Algerian workers from the regulation. This paper by the secretary for economic affairs at the Algiers Governorate, Salah Bouakouir, sheds light on the prevailing conception. A student of the École Polytechnique, Bouakouir is representative of the indigenous elite educated in the French system and was a member of the Académie des sciences coloniales (Academy of Colonial Sciences), the most important

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of 15 October 1968 on freedom of movement for workers within the Community, OJ 1968 L 257/2, p. 3 read: 'This Regulation shall not affect the obligations of Member States arising out of: – special relations or future agreements with certain non-European countries or territories, based on institutional ties existing at the time of the entry into force of this Regulation; or – agreements in existence at the time of the entry into force of this Regulation with certain non-European countries or territories, based on institutional ties between them. Workers from such countries or territories who, in accordance with this provision, are pursuing activities as employed persons in the territory of one of those Member States may not invoke the benefit of the provisions of this Regulation in the territory of the other Member States.'

[46] Brown, *The Seventh Member State*.

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scientific institution of colonial France. He was probably at the time feeding secret intelligence to the Front de libération nationale (National Liberation Front), which was fighting the war in Algeria. In 1961, Bouakouir drowned in the Mediterranean Sea. Some say that his death was the result of a targeted assassination by the French military. In his 1959 paper designed to prepare the negotiations on the first regulation on the free movement of workers, he stressed that the freedom of movement of Algerians could not be denied: Algerians, like the other inhabitants of the overseas Departments, were considered French, and there was no specific information on their documents that could be used to sort them. He insisted that any such denial could only be seen as 'racial discrimination'. But, given that this claim could be reversed and could open Algeria to European migrants, the Algerian governor would not oppose a separate negotiation. The Algerian administration would especially welcome trained workers and technicians, that is: highly skilled workers.

The debates about the EEC social security coordination illuminate the single standard of social security international law, and the reluctance to establish an openly hierarchized legal standard which would make EEC workers better off than racialized postcolonial workers. One of the fiercest struggles undertaken by the French social security officials at the time was to prevent the EEC system from becoming explicitly more generous than the agreements existing with the other countries, and especially France's former colonies. The French agreements (formally) granted the workers from France's former colonies the same kind of social security guarantees enjoyed by the EEC workers – that is, benefits adjusted to the local standard of living. In 1966, France was paying family allowances to 221,892 children living in Algeria whose fathers were working in France. By 1973, 689,700 children were benefiting from French allowances abroad, most of them in the former colonies.[47] In most of these countries, allowances were paid at the rate of the country where the children resided or through a complex system of reimbursement; in other words, at a lower rate than children in France. This situation was inherited from the colonial era. When they negotiated the European Convention on the Social Security of Migrant

[47] NAF, 1980044739: 'Maternité et accords bilatéraux', 10 December 1968.

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Workers (which then became EEC Regulations 3 and 4),[48] the French negotiators imposed the same mechanism (payment at the rate of the country of residence). In a file dedicated to the international relations regarding family allowances, the French social security officials fiercely defended this uniform 'doctrine' (as they called it) of allowances for non-resident children being inferior to those for residents. This system was seen as 'discriminatory by other EEC states and international organizations', and the Commission demanded that not only the Member States should enjoy full equality but overseas territories as well.[49] For the French Ministry of Social Affairs, such an attack on its doctrine was unacceptable. Its officials therefore took a hard line in the EEC negotiations on social security. They argued that aligning the allowances paid abroad with the French rate would oblige them to revise every existing agreement, and especially the agreements with France's former colonies. The ministry established that the 689,700 children receiving family allowances abroad cost a global sum of 297 million francs in 1973 (less than 10 per cent of this total went to EC families). This represented 431 francs per child per annum, far less than what a child in France would have received. In this matter, one of the main arguments of the French Department for Social Security of the ministry was the 'formidable risk of a contagious effect':[50] it saw all of these agreements as inspired by a single set of principles so that better treatment of European workers from EC countries would have a domino effect on a whole series of agreements.[51] The employees of the ministry argued that the different agreements, although diverse in their shaping, derived from a *single philosophy* adjusting the allowances to the local standard of living: 'in spite of the apparent diversity, there is a unity of view in the positions taken

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[48] Fertikh, 'From Territorialized Rights to Personalized International Social Rights?', pp. 29–48; Règlement n° 3 concernant la sécurité sociale des travailleurs migrants, OJ 1958 30/561 (replaced by Regulation (EEC) No. 1408/71, 14 June 1971) and regulation n°4 fixant les modalités d'application et complétant les dispositions du règlement n° 3 concernant la sécurité sociale des travailleurs migrants, OJ 1958 30/597 (replaced by Regulation (EEC) No. 574/72, 21 March 1972).

[49] NAF, 19800447/36: Note pour Monsieur le Ministre (no date, 1975).

[50] NAF, 19800447/37: position of the French PM, meeting of the EEC Council, 7 December 1976.

[51] NAF, 19800447/37: note for the social security minister, 15 November 1974.

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by France in its multilateral and bilateral agreements' in social security, stated an internal report to the minister of social affairs.

In the 1960s and 1970s during the accession negotiations, the British welfare elite recognized the potentially discriminatory effects of EC law on the citizens of the Commonwealth countries as well. They feared the choice for Europe could be a choice against the Commonwealth and its racialized immigrants. The British specialists from the Department for Health and Social Security (DHSS) contemplated anxiously the dual standard arising from the EC social security regulations. Britain had already concluded twenty social security agreements with Commonwealth countries offering a lower protection than the protection provided by the EC regulations. In a note to A. Patterson, the head of the DHSS who had led numerous international negotiations on social security since the 1940s, another civil servant cautioned him about the danger of the discriminatory consequences of the EC law on the Commonwealth citizens if the UK entered the EC. In a note of 23 June 1970, he underlined the costs of the regulations should the Irish Republic join the EC as well, and stated further:

> The most delicate immediate repercussion might be the repercussion on our treatment of the immigrants from India, Pakistan and West Indies of our acceptance of the obligation to provide various measures of social support, including family allowances, for the dependants of nationals of members of the Community who have come here but left their families behind. It might seem odd to do this for Italians and Germans but not for coloured immigrants from the new Commonwealth countries … Pressure may be exerted on us by other Commonwealth countries concerned about the immigrant population here. If such pressure does arise, it is not hard to envisage the emotions which it would generate, or the difficulty of finding convincing arguments with which to fend it off. On the other hand, the cost of giving in to the pressure could well be relatively heavy and adverse to the balance of payments. While obviously the risk of having to face this dilemma is quite irrelevant to our negotiations with the Community, Ministers will recognize that potentially a decision to adhere to the Treaty of Rome could produce either some embarrassing situations or considerable extra costs in this indirect way.[52]

[52] Kew, British National Archive (from now on: BNA), PIN 34/282.

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The description of the problem pointed to a moral issue. The note picked out the two EC countries, Italy and Germany, against which the UK had waged the Second World War and underlined the discrimination ('coloured immigrants') at a time when South African Apartheid was the subject of general reprobation. The voices of the most renowned legal specialists joined those of the bureaucrats. Otto Kahn Freund, considered the founder of social law as an academic discipline in the UK, advocated the same coherence when negotiating Britain's accession to the EC in the 1970s. For him, freedom of movement must not be allowed to drift into a double standard of White versus racialized migration:

> To conclude, let me come to the most serious issue the European freedom of movement of workers poses. This issue may not exist for the other European countries to the same extent. At the moment, the situation is so: each member of the British Commonwealth can immigrate and can seek a job here without limitation. It does not matter if he comes from a still existing colony such as the West Indies islands or from an independent member of the Commonwealth such as India or Pakistan. A law proposal is currently being debated in Parliament which seeks to severely reduce this right. Is it then surprising that many protest against the growing complication of immigration from the overseas countries and the simultaneously growing facility of the immigration of Western workers? … If the door is now open for the Italian worker for instance, but closed for the coloured West-Indian worker from Jamaica or Barbados for whom it used to be open, this could be interpreted as the influence of a racial prejudice. And this is interpreted this way in the West Indian. What is at stake here is the good name of Great Britain on the issue of the struggle against racial prejudice. It would be terrifying should the British government give the impression that it has used the EEC accession as an opportunity to stop or limit the immigration of Black or dark-skinned British citizens. The Western EEC member states should keep in mind that the freedom of movement of workers in the Common Market has to cover the British citizens of colonial (for instance West-Indian) origins living in Great Britain if the country enters the EEC.[53]

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[53] LSE, Otto Kahn Freund papers, 166: talk on England and Europe, 11 January 1962 (my translation from the German original).

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In the view of the postcolonial states, European and other international rules should follow similar paths so that the change in one set of rules did not affect the other one. In the 1970s, this situation changed drastically.

4.3 A RACIALIZED EUROPEAN BORDER (1970S–1980S)

If racial discrimination was not considered an acceptable option any longer, how has the current racially differentiated migratory regime been established? Racialization has often taken side roads, avoiding the use of openly discriminatory legal techniques.[54] Nevertheless, in the 1970s, political pressures pushed the EC bureaucrats to endorse a dualization of the international standard. The debates surrounding the accession of the UK to the EC make it clear: the issue at hand was for the contemporaries to hierarchize the freedom of movement and the related social rights. This legal dualization racialized the EC border and elevated the European workers and citizens to privileged legal subjects. This hierarchy has prevented non-European people from accessing not only European territory but also the wealth accumulated on the continent by the exploitation of the colonies.

4.3.1 THE IMPOSSIBLE SINGLE STANDARD. The idea of a single zone between Europe and its former colonies, guaranteeing the freedom of movement of workers, was not seen as utopian. In 1962, the EEC Commission proposed opening a general negotiation on the freedom of movement with the newly independent African countries.[55] By the mid 1970s, the EC regulations on social security had a global scope: they were European only in origin (Map 4.2).[56] Following Part IV of the Treaty of Rome, the French colonies of New

[54] L. Zevounou, 'Raisonner à partir d'un concept de "race" en droit français' in L. Zevounou (ed.), *Race et droit* (Paris: IFJD, 2021), pp. 21–100.

[55] Florence, Historical Archive of the European Union, HAUE, CEAB1_392: document regarding the Euro-African conference, 12 June 1961.

[56] Règlement n° 3 concernant la sécurité sociale des travailleurs migrants, OJ 1958 30/561 (replaced by Regulation (EEC) No. 1408/71, 14 June 1971) and regulation n°4 fixant les modalités d'application et complétant les dispositions du règlement n° 3 concernant la sécurité sociale des travailleurs migrants, OJ 1958 30/597 (replaced by Regulation (EEC) No. 574/72, 21 March 1972).

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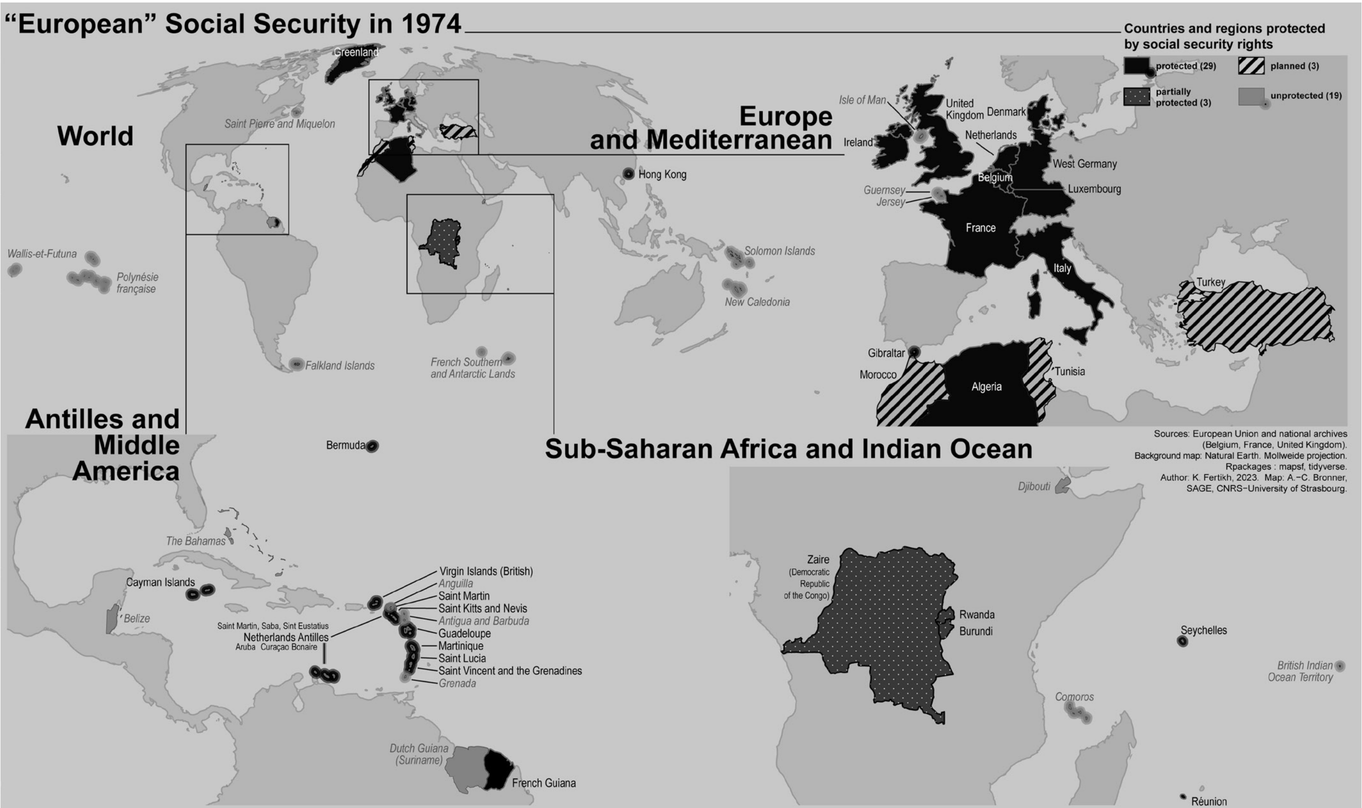

Map 4.2 'European' social security in 1974.

Caledonia, Comoros, Djibouti, Saint Pierre et Miquelon and Polynesia were not (and still are not) included in the territory of the EC (now EU) law regarding the freedom of movement and social security. Nevertheless, under pressure from its partners, France extended the scope of the EC regulations to its 'old colonies' in the Caribbean and in the Indian Ocean as they were considered part of the French territory (as '*départements*'). By the mid 1970s, the social dimension of the EC with its social security regulations hence covered large parts of the world: from Algeria to Congo (for European workers), from Greenland to much of the Antilles Islands and to Hong Kong. It covered some of the dependent territories of the European countries and independent countries. Megan Brown has shown that Algeria has long 'benefited' from a status of quasi-Member State in regard to social security.[57]

The national authorities of the (former) colonial states were reluctant to expand the international European law to their former colonies with which they were linked by bilateral agreements. At the end of the 1960s, there was no clear notion of protecting the European border, and the revised Association Agreement with Turkey passed in 1970, for instance, entailed a freedom of movement for workers provision. When the EC came to negotiate Association Agreements with Morocco, Algeria and Tunisia, the EC negotiators pushed the idea of extending to them the provisions regarding the freedom of movement and social security, noting that it would not change the current situation because of the network of agreements between them and most of the EC countries. For the EC countries, however, these Association Agreements posed a serious issue.

On the one hand, an EC memorandum discussed at length opposing the equality of treatment proposed for the workers from Turkey and the Maghreb, but eventually concluded that 'it would be difficult to exclude the principle of the equality of treatment under national legislation. Equality of treatment is the first principle of the international instruments in social security.'[58] In the minutes on a meeting

[57] Brown, *The Seventh Member State*.

[58] BNA, T227/4152: EEC Turkey association, 20 December 1973.

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of the General Secretariat of the French government on this topic, it was noted: 'All of these association agreements entailed nevertheless an equality of treatment clause, a formula that sunk into the grammar of international social law at the time. This provision will support some decisions of the European Court of Justice relating to social security or pension rights.'[59]

On the other hand, these Association Agreements did not come to shape a Euro-Mediterranean space of free circulation. The clause on free mobility for Turkey adopted in 1970 was never implemented, and other countries did not even glimpse such a clause. Colonial history played its part here, especially regarding financial repercussions in the field of social security. The British DHSS feared for the situation of Gibraltar and the costs (estimated at 2.5 million pounds) that would result for the territory if an equal standard were given to the 4,000 Moroccans working on the Rock and representing 25 per cent of the working population. Here as well, the contagious effect was a potent argument for opposing a single standard. The DHSS feared 'the political repercussions arising from any agreement on our part to export family allowances and the costs of medical treatment outside the territory of the Community' as well: these agreements 'would likely give rise to demands from Commonwealth countries that their immigrant workers here should receive privileges' of the same kind as those granted to the Maghreb countries.[60] The DHSS expressed its opposition to the export of the most expensive benefits (pensions, benefits for industrial injuries).[61] The French department was worried by the costs that would result from an integration of Algeria into the European scheme, given that the EEC project planned to export the family allowances to the rate of the country of employment. As it did with the EEC, France paid lower-rate allowances organized through a system of reimbursement. A report dramatized the costs of a new doctrine: 'For Algeria alone, the costs would rise from 132 million francs to 500.' It would, furthermore, put the Algerians in the situation they were

[59] NAF, 19800447/36: note on the meeting of the General Secretariat of the Interministerial Committee, 27 October 1972.

[60] BNA, T227/4152: financial implication for the UK in the social security and NHS fields (1974).

[61] BNA, T227/4152: confidential note of the DHSS, 27 March 1974.

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in before independence. For these reasons, the department deemed the proposition unacceptable.[62] It was joined in this by other countries, such as Germany and Denmark, which feared the extension of the social security regulations to the countries associated with the EC (North African countries and Turkey especially).[63]

4.3.2 DRAWING THE RACIAL LINE. The role of national bureaucracies in the formal racialization of the European border was pivotal and contrasted. Whereas bureaucracies in charge of migration (Home Offices under their various denominations) politicized their action and supported an anti-immigration policy in the 1970s, the social bureaucracies kept an eye on international regulations but did not prevent European and other international laws from going their separate ways. Because the post-imperial international law was made of bilateral agreements lacking the resilience of EC law, it progressively lost ground in the 1970s without dramatic break.

Altogether, by the end of the 1960s, the presence of racialized workers on European soil came to pose a political problem – step by step, the European integration has established a legal dual racial standard, suppressing the (unequal) competition between the postcolonial and European communities. This dual standard did not, however, come into being without debate and technical difficulties. In the 1970s, the British accession to the EC hit a stumbling block over its 1948 Nationality Act, which at the time encompassed 850 million people. Nearly every Member State opposed a British position that would have threatened – so they thought – their countries with an uncontrollable immigration of Pakistani and Indian migrants.[64] The issue at stake was how to exclude holders of a British passport (in other words, British citizens) from the Commonwealth countries. In an extensive exchange defining how to recognize a British national (contained in a file entitled 'Definition of "Nationals of the UK" under the Treaty of Accession'), Britain put in place a special 'endorsement' of its national passports, carrying the

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[62] NAF, 19800447/36: report of the Ministry of Social Affairs, 22 November 1972.

[63] NAF, 19800447/37: note from director of social security to the M. Méric (head of the bureau for international conventions, French Ministry of Social Affairs), 17 July 1976.

[64] Koblenz, German Federal Archive, Bundesministerium für Arbeit, 15664/6.

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mention that its carrier is ‘a British national for EC purposes’, reading: ‘Holder has the right of abode in the United Kingdom.’[65]

In this period when immigration came to represent a major political issue, EC law proved more resilient than other international regulations, giving birth to an increasingly explicit dual standard. In 1975, France deployed a policy aimed at reducing the immigrant population on its soil and introduced a system to decrease the generosity of its social security benefits for non-nationals.[66] The international standards resisted some of these demands formulated within the framework of the immigration policy. The French social security officials torpedoed a project to impose on non-EC foreigners a period of one year during which they would not be granted certain social security benefits, arguing that it would be contrary to international rules. Moreover, under pressure from both the International Labour Organization and the EC, they extended maternity allowances, which had been reserved for French nationals, to all residents. Altogether, such pressure gave rise to better protection for EC citizens. The first draft of a decree granting foreigners a subsidy to return to their home country targeted both postcolonial and European migrants, especially Italian workers. Italian workers, however, because they were protected by EC legislation, disappeared from its final version. Furthermore, in its 1986 *Pinna* ruling, the European Court of Justice (later Court of Justice of the European Union) compelled the French administration to ‘treat equally’ EC children living abroad and to grant them the same allowances as children residing on French soil.[67] With this ruling, the Court imposed a dual legal standard which provides postcolonial workers with a lower level of social protection than that enjoyed by European workers. Meanwhile, bilateral treaties have gradually lost their relevance in this area. Currency devaluations in the countries of the South and the absence of any adjustment to benefit levels have reduced the allowances paid to the children of racialized migrant workers in those countries to token levels.

[65] BNA, PIN 34/445: memorandum on the identification of United Kingdom nationals (1974); El-Enany, *Bordering Britain*, p. 194.

[66] NAF, 198 00 447/38, Ministry of Social Affairs: note from the Department of Social Security, 30 August 1976.

[67] Case 41/84 *Pietro Pinna v. Caisse d’allocations familiales de la Savoie*, ECLI:EU:C:1986:1.

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Although child support ran along different lines in Britain, the British authorities similarly cut off child benefits to the Commonwealth workers with children in their home countries through the suppression of the universal credit tax (Children Tax Allowances) in 1977. The new Child Benefit Scheme excluded non-resident children from any governmental support. Having no internationally binding agreements on family allowances with the notable exception of the EC regulations and an agreement concluded with Spain, this policy change primarily targeted postcolonial workers. A confidential note shed light on the intended unequal effect of this new piece of legislation:

> A high proportion of those adversely affected – for each non-resident child the pay packet of a basic rate taxpayer would be reduced by up to £62 per week – are immigrants and the measure may well be attacked as racially discriminatory, even though the same treatment would be given to immigrants from all countries except the EEC and Spain.[68]

In India and the West Indies this cut impacted 200,000 families and 560,000 children. Step by step, the protection of the post-imperial communities was withdrawn, and a dual standard in international law became established.

4.3.3 WHITE PRIVILEGE IN EUROPEAN LAW. As should by now be clear, EEC law and later EC law progressively established a dual standard. It translated racial considerations into legal statements. Throughout the 1970s, and especially in the *Bozzone* ruling in 1976, the European Court of Justice judgments cemented White privilege in dealing with two different legacies of European empires.[69] In general, the Court left African people aside to grant European workers the protection of the EC regulations but treated non-European empires differently than European ones.

Regarding the question of social security for Europeans, the European Court of Justice extended the EC territory to the former colonies. When Congo gained its independence, Belgium organized the legal status quo

[68] BNA, FCO 50/571: confidential note (1976).
[69] Case 87–76 *Walter Bozzone v. Office de Sécurité sociale d'outre-mer*, ECLI:EU:C:1977:60.

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in regard to the regime of property in an effort to preserve European interests (meaning: the interests of the White population in Congo). Among other institutions, Belgium retained possession of the part of the Congolese social security office (Office de Sécurité Sociale de l'Outre-Mer or OSSOM) concerning the Belgian workers (civil servants, technicians, managers) as well as all its financial assets. Through a law passed two weeks prior to independence, Belgium guaranteed the rights acquired by the Belgian workforce during the colonization of Congo.[70] The Belgian State had to preserve the social security rights its nationals acquired when they worked in the Belgian colonies during the colonial era. Between 1972 and 1977, the European Court of Justice repeatedly condemned the OSSOM because of its discriminatory nature: Belgian nationality was a precondition to receive pension benefits from the OSSOM.[71] The OSSOM did not consider the EEC workers in the former Belgian colonies to be 'migrant workers' in the sense of the EEC/EC law as they exerted a professional activity outside the territory of the Member State. The matter was of some financial importance: 20 per cent of the more than 60,000 persons insured in 1960 by the OSSOM were foreign nationals, half of them coming from an EEC country. In the *Bozzone* case, the European Court of Justice referred to the disposition of the Treaty of Rome related to the freedom of movement. The Court declared the colonial law of 1960 discriminatory as Congo was considered part of the Belgian territory at the time. In doing so, the Court extended the European jurisdiction to Congo, Rwanda and Burundi, and reserved the social security benefits to EEC nationals. In the cases of Congo or of Algeria studied by Megan Brown, the Court considers the colonial territory as part of the territory of the Member State when it comes to establishing the right to social security or other types of pensions. In the case of the Belgian Congo, this benefited only EEC migrants, that is: EEC nationals having worked in an EEC colony. This jurisprudence excluded de facto the non-Europeans.

This situation constituted a dual standard and hierarchized the types of imperial belonging along a racial border. Not only colonial states

[70] Brussels, Belgian Diplomatic Archive, 14294: note on the social security benefits (Congo, Urundi-Burundi), 27 October 1961.

[71] Brussels, Belgian Diplomatic Archive, 18 891: OSSOM files.

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had indeed been empires: Germany could be considered a continental empire until 1945 as well. The redrawing of the German borders during and after the Second World War had massive effects on the entitlements of the persons insured by institutions that either disappeared or relocated. Persons living in Poland or in Czechoslovakia would not be paid social benefits by German institutions. German refugees from Eastern Europe lost their German entitlements as they acquired their rights to pension or to unemployment benefits outside the state borders. To solve the domestic problem posed by the 20 million refugees on its soil, in 1960 Germany reformed its pension system. The main actor of this reform was Kurt Jantz. Born in Berlin, Jantz (1908–1984) had worked for the Department of Social Security at the Reichsarbeitsministerium (Reich Ministry of Labour) since 1938. After a short interlude in the aftermath of the Second World War (the reasons for which are unclear, but probably denazification related), he briefly worked as a university professor of theology before returning to state affairs in 1951. In 1953, he was appointed head of the Department of Social Reform at the Ministry of Labour. He remained in high-level positions throughout the 1960s and 1970s and represented Germany in the European social security institutions. In a nutshell, the reform he led granted German refugees on the soil of the Federal Republic social security rights as if they had never left German soil. The 1962 cover of the information bulletin of the Ministry for Labour and Social Order is a graphic representation of this legal fiction: the territory of German social security law was the whole 'Reich' in its 1919 borders (see Figure 4.1). In a way, social security reconstituted the defunct imperial community.

Yet, the situation raised a European issue: how should workers from other EEC/EC countries who had worked, whether as war prisoners or as migrants, in the eastern part of the German territory be treated? Should the 'equality of treatment' apply? In 1977, the *Fossi* ruling brought this question to the table.[72] Fossi worked in the Sudeten from 1942 to 1943 and under German law was socially insured by a German institution, the Sudetendeutsche Knappschaft (miners' association). The central question was what territory was covered under EEC/EC law, and for Germany,

[72] Case 79–76 *Carlo Fossi v. Bundesknappschaft*, ECLI:EU:C:1977:59.

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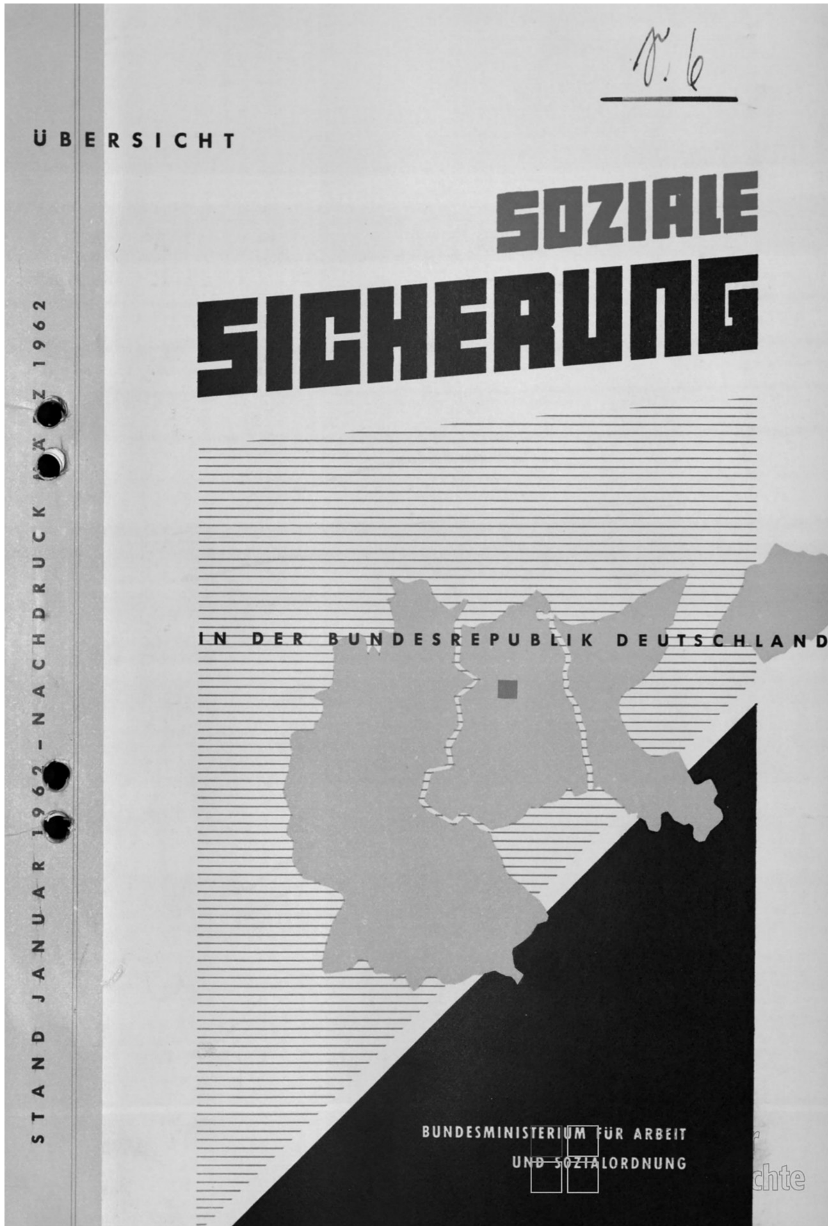

Figure 4.1 Leaflet of the Ministry for Labour and Social Order (Bundesminiterium für Arbeit und Sozialordnung), *Social Security in the Federal Republic of Germany* (*Soziale Sicherung in der Bundesrepublik Deutschland*) (1962). Source: Kurt Jantz papers (Munich, Institute of Contemporary History (Institut für Zeitgeschichte)). Photograph by Karim Fertikh.

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this could carry a heavy financial burden as all the territories annexed by the German Reich could be included (such as Luxembourg and Alsace). In a document he prepared in order to plead the German case in front of the European Court of Justice, Kurt Jantz argued that the Federal Republic of Germany and the Reich were two different states, and that there could be no comparison with colonial states – French Algeria and Belgian Congo.[73] In contrast to its legal statements regarding colonies, the European Court of Justice rejected the claim. It considered that the 1960 pension law was aimed exclusively at the German national community and was benevolent (and not a social security *right*), dedicated to alleviating the harshness of exile.

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4.4 CONCLUSION

To conclude, the interdependency between European mainland countries and their former colonies had an impact on EEC law and later EC law in the fields of free migration and social security. The Treaty of Rome paved the way to a dual standard for paradoxical reasons (preventing southwards migration, i.e. European countries flooding Africa with their low-skilled migrants). It treated European (Article 48 EEC) and African territories (Article 135 EEC) separately, postponing the freedom of movement for Africa to later negotiations – with the exception of the French 'old colonies' and of Algeria. The two polities did not immediately part ways, and the provisions of international law (embodied in bilateral treaties between former colonial powers and independent countries) and of EEC law remained comparable. A competition between postcolonial and European policies certainly was one of the reasons the 'European priority' on the labour market did not prevail in the 1960s. EEC law accepted the ad hoc idea that former colonies, having enjoyed 'special relations' with an EEC Member State, could not lose their privileged access to the labour market of their former mainland country for the benefit of EEC workers.

However, their exclusion from the scope of what had then changed name from EEC to EC regulations left African migrants less protected

[73] Munich, Institut für Zeitgeschichte, ED 431/24-3.

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in the 1970s when France and the UK repealed the bilateral agreements (and other provisions) on free migration, unlike European migrants who remained under the protection of the EC law. This dualization of the international system went hand in hand with the resilience of EC social security law whose dynamism left the postcolonial standards behind, and postcolonial workers less protected by the obsolescence of the bilateral agreements. This racial bordering of Europe, and the implicit racial hierarchies established by the means of international law, were not a given at the beginning of the process, but were rather the consequences of the immigration policies in the 1970s and of the legal forms of protection (bilateral/European) afforded to migrants.

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CHAPTER 5

Discrimination Based on Race

The Story of Moroccan SNCF Workers in France

LIONEL ZEVOUNOU

5.1 INTRODUCTION

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The European political project has long been presented (and indeed still is) as a vision built on two imperatives: peace and economic prosperity. By contrast, scant attention has been paid to the postcolonial and totalitarian legacies of the European political project and European law. A handful of groundbreaking studies have nevertheless explored the issue from the latter perspective. These include the book by Christian Joerges and Navraj Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, which examines the persistence of economic models and rationales inherited from totalitarian regimes.[1] In France, Antonin Cohen has highlighted the ambiguous genealogy of the term *Communauté* (Community), part of the Vichy legacy that gave rise to the European communities.[2] Other studies have also focused on colonial legacies in relation to the construction of Europe.[3] From the very beginnings of European integration (1946–1957), a number of countries were confronted with the aspirations of

This chapter is drawn from a monograph scheduled for publication in French in 2026. I would like to thank Hanna Eklund, Daniela Caruso and Karim Fertikh for their comments.

[1] C. Joerges and N. S. Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Oxford: Hart Publishing, 2003).

[2] A. Cohen, *De Vichy à la Communauté européenne* (Paris: Presses Universitaire de France, 2012).

[3] H. Peo and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London: Bloomsbury Publishing, 2014); J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24 *UCLA Journal of International Law and Foreign Affairs* 163.

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colonized peoples seeking to emancipate themselves from their respective empires.

The Indonesian revolution ended in 1949 with the defeat of the Netherlands.[4] The massacres of Sétif and Guelma (May–June 1945), the revolt in Madagascar (1947), and the war of independence in Indochina (1946–1954) challenged France's traditional colonial domination. After the signing of the Treaty of Rome, Belgium, for its part, was faced with the Congolese crisis (1960–1965), which marked the birth of the Organisation of African Unity and the pan-Africanist aspirations that accompanied it.[5] While post-war Europe was building itself around a political ideal of peace and economic prosperity, and seeking to erase the cumbersome legacies of its authoritarian regimes and colonial domination, colonial violence remained more present than ever outside the borders of the *Communauté*, as witnessed by the Suez crisis of 1956. Colonial domination, criticized by the emerging new international order, was being transformed and replaced by the concept of development.[6] By development, one should understand the presupposition of the progressive nature of industrialized countries compared to the countries referred to at the time as the 'Third World'. Borrowing from the evolutionary model, most economic theories of development attempted to 'naturalize' the causes of underdevelopment in the countries of the Global South by attributing them to several intrinsic factors that led to their backwardness – rather than to their colonial history.

The naturalization of underdevelopment has been roundly criticized by a number of economists, including Samir Amin and Thandika Mkandawire.[7] Drawing on the neo-Marxist tradition of dependency theories, these authors interpret underdevelopment as a process of incorporation of 'third-world' countries into the global capitalist system.

[4] D. Van Reybrouck, *Revolusi. L'Indonésie et la naissance du monde moderne* (Arles: Actes Sud, 2022).

[5] Y. Zerbo, 'La problématique de l'unité africaine. (1958–1963)' (2003) 212 *Guerres mondiales et conflits contemporains* 113.

[6] A. L. Stoler and F. Cooper, *Repenser le colonialisme* (Paris: Payot, 2013), pp. 98–103.

[7] S. Amin, *Accumulation on a World Scale. A Critique of the Theory of Underdevelopment* (New York: The Monthly Review, 1974); T. Mkandawire and A. Olukoshi (eds.), *Between Liberalisation and Oppression: The Politics of Structural Adjustment in Africa* (Dakar: Codesria, 1995).

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The signing of the first partnerships between the European Economic Community (EEC) and Africa, founded on an ideology that glorified Eurafrica, was a vector for the integration of Africa into the economic order promoted by Europe.[8] In this context, the African continent represented a source of raw materials that could guarantee a certain number of strategic supplies for European industry. The colonial pact lived on in the economic and development arenas, making Africa – and the Caribbean – a reservoir of cheap resources at the disposal of the European continent.

'Third-world' economists such as Raúl Prebisch, Hans Singer, and Jagdish Baghwati described this unequal balance of power as a deterioration in the terms of trade. Despite this criticism, a number of non-socialist African states saw the EEC's functionalist project as an ideal to be attained, hence the emergence of the Economic Community of West African States in 1975 and, subsequently, the West African Economic and Monetary Union in 1994.

There has been little discussion of the views of African intellectuals on the creation of the EEC. The advent of the EEC coincided with the fulfilment of pan-Africanist aspirations. In two seminal articles, Guy Martin, one of the leading thinkers on the subject, argued that the agreements signed between the EEC and African countries (the Yaoundé I and II Conventions signed in 1964 and 1971, and the Lomé Convention signed in 1975) helped to maintain pre-existing relationships of colonial domination.[9] In other words, the signing of these agreements perpetuated African countries' extroversion and dependence on the EEC. To quote Kwame Nkrumah: 'The State which is subject to [the said processes of dependence] is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside.'[10]

[8] Yaoundé I Convention (1964), OJ 1964 1431/64; Yaoundé II Convention (1971), OJ 1971 L 282/1.

[9] A. Mazrui, 'African Attitudes to the European Economic Community' (1963) 39 *International Affairs* 24; G. Martin, 'Les relations économiques Europe-Afrique dans le cadre de la convention de Lomé: néo-colonialisme ou nouvel ordre économique international?' (1979) 4 *Afrique et Développement* 57; G. Martin, 'L'Afrique face à l'idéologie de l'Eurafrique: Néo-colonialisme ou Panafricanisme?' (1982) 7 *Afrique et Développement* 5.

[10] K. Nkrumah, *Africa Must Unite* (Bedford: Panaf, 1963), p. 9.

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The analytical grid provided by dependency theories sheds light on the asymmetrical relationships that continue to exist between the North and South. Other studies have shown that the integration of the economies of the South would not have been possible without support from bourgeois class interests that were also part of the global capitalist system.[11] This chapter will build on these two premises (namely, the extroversion of African countries and the convergence of interests between the dominant classes of the South and North) to move forward in this discussion. In a recently published book, Megan Brown shows that during the Treaty of Rome negotiations, the issue of the free movement of workers, particularly Algerians, gave rise to significant tensions.[12] Although Algeria was still part of French territory in 1957, the common arrangements regarding the free movement of European workers did not apply to it. Article 227 of the Treaty of Rome fails to grant Algerian workers enjoyment of the free movement of workers and the ensuing social protection. To that end, the Treaty of Rome used the term *travailleurs des États membres* (workers from Member States) rather than *travailleurs nationaux* (national workers).[13] As Hanna Eklund notes, Article 135 of the Treaty of Rome distinguishes between two categories of workers: workers from Member States and workers from 'the overseas countries and territories'.

The aim of this article is to illustrate the colonial – and discriminatory – legacy attached to the status of workers from former colonies, by examining the treatment of Moroccan workers at France's state-owned national railway company the Société nationale des chemins de fer français (SNCF).[14] The mechanism excluding Algerian workers from the

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[11] I. Wallerstein, *The Modern World System* (Oakland: University of California Press, 1976); J. Depelchin, *From the Congo Free State to Zaire (1885–1974): Towards a Demystification of Economic and Political History* (Dakar: Codesria, 1992), pp. 182–208.

[12] M. Brown, *The Seventh Member State: Algeria, France, and the European Community* (Cambridge: Harvard University Press, 2022), pp. 132–143.

[13] H. Eklund, 'People, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 850–853.

[14] It is impossible to review the history of the railways in France within the scope of this article. However, it should be noted that the SNCF (French National Railways) was formed by the partial acquisition by the state of five large private companies in 1937. Complete nationalization took place following the Second World War.

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free movement of workers was not unique in this respect.[15] This chapter will illustrate the discriminatory treatment of Moroccan workers despite the entry into force of both the Charter of Fundamental Rights of the EU (CFREU) and, more importantly, the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, pp. 22–26, hereinafter the Race Equality Directive.

In 1963, France signed an agreement with the Kingdom of Morocco on exchanges of workers.[16] Article 8 of the agreement stipulates equal treatment for French and Moroccan workers.[17] Roughly 2,000 Moroccan workers were hired to fill menial positions in the railway sector: they were referred to as auxiliaries.[18] As will be shown, the concept of auxiliary workers became a device through which to discriminate based on race. Belgium, the Netherlands, and Germany also signed several labour exchange agreements with Morocco in 1963.[19] These agreements laid the foundations for the signing of the first Euro-Mediterranean agreement (signed with the Kingdom of Morocco) in 1996.[20] The agreements raise

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[15] On Great Britain: K. H. Perry, *London is the Place for Me: Black Britons, Citizenship and the Politics of Race (Transgressing Boundaries: Studies in Black Politics and Black Communities)* (Oxford: Oxford University Press, 2016).

[16] Labour Agreement of 1 June 1963 between France and Morocco, enacted in France by Decree no. 63/779 of 27 July 1963 promulgating the Labour Agreement of 1 June 1963 between France and Morocco.

[17] Article 8: 'Moroccan workers on French soil shall enjoy the same treatment as French workers with regard to hygiene, working conditions, safety, housing, wages, paid holidays and unemployment benefits. The French government shall take the necessary steps to ensure that these workers receive the best possible welcome in France, particularly as regards transport conditions, the organization of canteens, and medical assistance. In addition, until such time as a special agreement on social security matters has been concluded between France and Morocco, Moroccan workers in France shall continue to benefit in this respect from the status they enjoyed on the date of signing of this Agreement.'

[18] The auxiliary employment system is derived from the contract of service, which established a highly precarious employment relationship. This system has been applied to lower-level workers in the company since the end of the nineteenth century.

[19] N. El Qadim, *Le gouvernement asymétrique des migrations. Maroc/Union européenne* (Paris: Dalloz, 2015).

[20] EC/Morocco Euro-Mediterranean Agreement of 26 February 1996 Establishing an Association between the European Communities and Their Member States, on the One Part, and the Kingdom of Morocco, on the Other Part. Entry into force: 1 March 2000 (OJ 2000 L 70, 18 March 2000).

fresh questions about the nature of asymmetrical relations between the EU and non-member countries that are former colonies. Aside from the asymmetrical relation in terms of trade, as mentioned above, a further question is why and how EU law never managed to eradicate colonial-era legal practices, notably discriminatory practices, on the national level.

Most of the Moroccan workers at the SNCF were deprived of their basic social rights. They received significantly lower pay than nationals for equivalent work, their retirement pensions were well below that of permanent staff, they were denied access to vocational training throughout their careers, and they also lacked access to healthcare and certain social benefits. Enjoyment of these social rights was restricted to permanent railway staff of French nationality. This legal privilege is set out in what is usually referred to as the nationality clause, another way of safeguarding national preference. Chapter 5, Article 2 of the SNCF staff regulations, in the version covering 1970 to 1981, stipulates the 'General conditions for admission to the permanent service' in the following terms: 'To be admitted to a permanent position, all candidates must: a) *be French citizens or naturalized French citizens.*'[21]

English-language literature generally views racism in France through the lens of 'colour-blindness', a concept made popular in Europe by the work of Erik Bleich and Mathias Möschel, and in the United States by the seminal article by Neil Gotanda.[22] In France, the concept of 'colour-blindness' refers to the refusal to acknowledge racism or racial minorities in France. Although it is a helpful tool for understanding a number of issues, the concept needs to be further refined and developed. Racial discrimination in France is generally the result of 'hidden' administrative practices.[23] It is therefore impossible to study the effects of racial discrimination in an ahistorical manner – which is why it is crucial to highlight its social and legal depth.

[21] Emphasis added.

[22] N. Gotanda, 'A Critique of "Our Constitution is Color-Blind"' (1991) 44 *Stanford Law Review* No. 1 1; E. Bleich, *Race Politics in Britain and France: Ideas and Policymaking since the 1960s* (Cambridge: Cambridge University Press, 2003); M. Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (Oxfordshire: Routledge, 2014).

[23] A. Hajjat, 'Des discours républicains aveugles à la race? La question raciale entre texte public et texte caché' (2021) 12 *Sociologie* 419.

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The rationale for exclusion is generally to be found in the recesses of legal subcategories that establish a precarious status, backed by administrative practices that provide opportunities for discriminatory treatment. The sociologist Abdelmalek Sayad is arguably among those who put it best:

> *De jure* discrimination (between nationals and non-nationals) is reinforced by *de facto* discrimination (in the form of social, economic and cultural inequalities), which in turn finds justification and legitimacy in *de jure* discrimination: this circular reasoning in which *de jure* and *de facto* circumstances mutually support each other lies at the root of all segregation (slavery, apartheid, colonization, immigration, etc.) and all forms of domination (of slaves, black people, colonized peoples, immigrants, women, etc.) that give rise to racism, where *de jure* equality is denied on the pretext of *de facto* inequality and *de facto* equality is in turn impossible due to *de jure* inequality.[24]

In the case of Moroccan workers at the SNCF, at the heart of such exclusion as described by Sayad lies the nationality clause. This chapter shows how long-standing racial and socio-professional hierarchies have crystallized behind the interpretation of this clause, and how the clause has managed to coexist with the development of EU primary and secondary law aimed at protecting against discrimination.

Based on an analysis of this clause, I show how, firstly, in the case of Moroccan workers at the SNCF, the confusion between the enjoyment of social rights and railway worker status contributes to the production of racial otherness. Secondly, I revisit the sedimentation of interpretations leading to workers originating from the former colonies being excluded from the so-called nationality clause.

5.2 THE PROCESS OF DISCRIMINATING AGAINST MOROCCAN WORKERS AND ITS COEXISTENCE WITH NATIONAL AND EU PROTECTION AGAINST DISCRIMINATION

In itself, the nationality clause in the SNCF statutes does not contain any racist provisions; it sets out objective criteria for access to permanent

[24] A. Sayad, *L'immigration ou les paradoxes de l'altérité* (Paris: Raisons d'Agir, 2006), p. 55. (The author's translation.)

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positions, including access to citizenship through naturalization. There is nothing in the actual wording of the nationality clause that would suggest any form of discrimination, let alone racial discrimination. So where does the problem lie? Why, as in the case of the Moroccan workers at the SNCF, do we recognize the discriminatory nature of the nationality clause?

And on what basis were those responsible for enforcing the nationality clause able to deny the Moroccan workers the social rights associated with employee status when they were doing equivalent work? To gain a better understanding of this, we shall begin by examining the full legal scope of the nationality clause. As we have seen, it sets out a number of apparently neutral criteria for access to legal status as a railway worker (including acquiring French citizenship). This raises a key question: what was to be done with immigrant workers who performed tasks similar to those of permanent staff, but whose nationality prevented them from acquiring permanent status? After all, some Moroccan workers performed jobs that were supposed to be done by permanent staff. This raises the question of the principle of '*equal pay for equal work*' recognized by the French Court of Cassation, which stipulates that workers performing identical tasks are to be treated in the same way.[25] In the French legal system, there is at least one legal instrument that is supposed to make up for the lack of legislation requiring immigrant workers to be treated in the same way as permanent employees. Article 8 of the 1963 Franco-Moroccan Agreement cited above stipulates that French and Moroccan workers are to receive equal treatment. If, as everything seems to suggest, that agreement is valid, then it is entirely legitimate to consider that, in addition to permanent employee status, a similar system providing for salary and social benefits and an equivalent career advancement scale should be provided for foreign employees. In light of this, the fact that immigrant workers (Moroccans in this case) are subject to a different legal arrangement from permanent staff does not pose any major problem, provided that they enjoy the rights

[25] Cass. soc., 29 octobre 1996, No. 92-43. 680; Cass. soc., 31 octobre 2012, No. 11-20. 986. It is worth noting that this principle, derived from the ILO Equal Remuneration Convention, (C100) now extends to the right of non-discrimination: M-T. Lanquetin, 'Discrimination' in *Répertoire Dalloz de droit du travail* (Paris: Dalloz, 2023), paras. 327–355.

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conferred on all other workers, which are guaranteed by a number of international and national agreements in French law, EU law, and through international agreements.

The reality is quite different, as we can imagine. A ruling handed down by the Paris Court of Appeal on 31 January 2018 recognized the existence of discrimination on the grounds of nationality.[26] At this point in the demonstration, European readers from countries other than France may wonder how it came to be that neither the CFREU (whose Article 21 forbids discrimination on grounds of race) nor the Race Equality Directive, which implements the principle of equal treatment between persons irrespective of racial or ethnic origin, were cited in the ruling. Indeed, the ruling handed down by the Paris Court of Appeal failed to mention any of the foregoing anti-racism instruments of EU law. It only cited the violation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, pp. 16–22. However, the judges decided to set it aside, along with the violation of the Euro-Mediterranean Agreement of 26 February 1996, which entered into force on 1 March 2000,[27] even though Article 69 of the agreement provides for equal treatment of Moroccan workers. However, none of these provisions were cited by the Court of Appeal. Therefore, with regard to the treatment of Moroccan workers:

> no guarantee was initially provided to enable contract staff to move up to the 'supervisory staff' category, no provision was made to enable them to move up to the 'managerial staff' category, and, when it came to advancement to a higher position, contract staff were subject 'to the sole discretion of the company management, without any possibility of appeal'. In addition, regulatory provisions excluding the Chibani from certain positions were reinforced by practices that effectively confined them to lower-level

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[26] *Cour d'appel de Paris* 31 janvier 2018, n° 15/11747. This ruling was handed down after more than 800 Moroccan workers and workers of Moroccan origin lodged a belated complaint against the SNCF.

[27] EC/Morocco Euro-Mediterranean Agreement of 26 February 1996 Establishing an Association between the European Communities and Their Member States, on the One Part, and the Kingdom of Morocco, on the Other Part. Entry into force: 1 March 2000 (OJ 2000 L 70, 18 March 2000).

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> positions. The court noted that 'at certain sites, such as Dunkirk, Le Havre and Dijon, not a single contract employee was promoted to class B. All foreign contract employees working at the Gare de Lyon had strictly identical career paths.[28]

To understand the sizeable gap between what is allowed under EU law and the way EU law is actually applied in Member States in terms of anti-racism, it is helpful to delve into France's extreme reluctance to use the term 'race', thereby neutralizing the applicability of the various provisions against racism under French and EU law.[29] As I have already demonstrated, in the French legal system, national quarrels over the use of the word 'race' neutralize the effectiveness of the various anti-racist measures. This leads to a situation in which the main international and European instruments against racism (namely the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force on 4 January 1969, and, on the European side, Article 21 CFREU and the Race Equality Directive) are only very rarely taken into account by French judges. Although the scope of application of the Race Equality Directive's Articles 3(2) and 13 appears relevant in the case of the Moroccan workers, judges prefer not to invoke its provisions. As a result, it is as if the cardinal principle of primacy had no effective application in anti-racist matters.[30]

This reticence stems from ideological reasons expressed formally or informally through constitutional grounds pertaining to compliance with the principle of the indivisibility of the Republic (Article 1 of the Constitution). This context, which is linked to a colonial legal history in which various French governments have sought to neutralize the enforcement of provisions of international law likely to clash with their colonial policies, should be borne in mind to understand why appeal

[28] H. Belrhali, 'Les chibanis, des cheminots pas comme les autres?' (2019) *L'Actualité Juridique Droit Administratif* No. 6, 352.

[29] L. Zevounou, 'Raisonner à partir d'un concept de "race" en droit français' in L. Zevounou (ed.), *Race et droit* (Bayonne: Institut Francophone pour la Justice et la Démocratie, 2021), pp. 21–100.

[30] D. Fennelly and C. Murphy, 'Racial Discrimination and Migration Exceptions: Reconciling CERD and the Race Equality Directive' (2021) 39 *Netherlands Quarterly of Human Rights* 308–328.

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judges do not invoke EU law provisions containing the word 'race'.[31] In order to preserve a form of ideological 'consistency' in the legal system, French judges prefer to use the more neutral (and euphemistic) term 'discrimination'. In the case of Moroccan workers at the SNCF, the judges used the term discrimination on grounds of nationality even though it was clear that the discrimination was also racial in nature.

With regard to the excerpt about the Paris Court of Appeal quoted above, how can we account for the discrepancies between what the standards allowed, what they were supposed to guarantee, and the way they have been used by the people who were supposed to ensure their implementation? From a legal standpoint, it is one thing to consider that Moroccan workers cannot be granted railway worker status on the basis of the nationality clause; it is another to deduce from this that there can be no equivalent social protection for workers performing similar tasks. Confusing these two steps in the thought process amounts to implicitly conflating nationality with status as a worker. What are the implications of the nationality clause that allow it to be so construed as to deny thousands of Moroccan workers the fundamental recognition of their status as workers?

To understand how such an interpretation came to be 'self-evident', it is important to consider it in its socio-historical context, by analysing the institutionalization of the nationality clause. In other words, we must grasp the implicit meaning behind the expression: 'be French citizens or naturalized French citizens'.

To understand exactly how the nationality clause could give rise to discrimination, we need to look at the implicit meaning of the clause. Such discriminatory practices are products of socio-historical sedimentation and financial constraints which, over time, enabled the majority of competent bodies to interpret the nationality clause to mean that they (I am referring here to all workers not belonging to the permanent staff)

[31] It has been argued that both France and the United Kingdom ratified the European Convention for the Protection of Human Rights in order to avoid possible recourse by anti-colonial movements to the European Court of Human Rights: A. W. B. Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2010); P. Bonino, *La France face à la Convention européenne des droits de l'homme (1949–1981)*, PhD thesis, CY Cergy Paris University (2016).

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could not be recognized as fully fledged workers. Historically, this fringe of subordinate workers belonged to the auxiliary category in which the clause was embedded. Under such a system, being an immigrant implied much more than not enjoying the benefits associated with a certain status: being an immigrant also meant not being legally recognized as a worker at all. As far as immigrant workers from the former colonies were concerned, there is every reason to believe that the discriminatory treatment they received from the colonial authorities in their countries of origin continued in metropolitan France. Thus, the stigma attached to the implementation of an 'exceptional' labour law regime was linked to their status as workers from the former colonies.[32]

In this case, equal treatment of all workers (allowing for the introduction of differences, including differences of nationality) is replaced by the introduction of a socio-professional hierarchy (between groups of established workers and precarious workers) that opens up the possibility of multiple forms of discrimination, including racial discrimination.

Providing this historical context is crucial if we are to make sense of the fact that the SNCF – and therefore the people responsible for interpreting the nationality clause on a day-to-day basis – has remained completely silent on Article 8 of the Franco-Moroccan Agreement and on the practice of not including Moroccan workers in the catalogue of career paths.[33] This pattern of silent *contra legem* practices sheds light on the deployment of a broader system impeding the career development of Moroccan workers (through disregard for the fact that they have succeeded in professional examinations, and refusal to include

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[32] T. Stovall, 'The Color Line Behind the Lines: Racial Violence in France during the Great War' (1998) 103 *The American Historical Review* 737–769; J.-P. Le Crom and M. Boninchi (eds.), *La chicotte et le pécule: les travailleurs à l'épreuve du droit colonial français (XIXe-XXe siècles)* (Rennes: Presses Universitaire de Rennes, 2021); H. Mulonnière, *Administrer le travail des « Nord-Africains » en métropole: contribution à la socio-histoire de l'État en contexte impérial (1926–1946)*, PhD thesis, University Paris Nanterre (2023).

[33] The catalogue of career paths defines the grades and determines the conditions for advancement and seniority in the various professions represented in the SNCF. Not including 'Moroccans' or immigrant workers, even though they sometimes performed tasks identical to those of their counterparts belonging to the permanent staff, was tantamount to sounding the death knell for their careers: they had no prospects of career advancement and no formal proof of their seniority.

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contract workers on promotion lists and tables, to name but a few).[34] The most telling example was when the acquisition of French nationality by certain Moroccan workers did absolutely nothing to change their career paths. Evidence submitted to the Court of Appeal reported the following: '[…] out of 82 employees, 52 acquired French nationality during their career, but only 16 benefited from permanent status, while the SNCF refused to grant permanent status to the remaining 36 […] due to their age'.[35]

Ultimately – and this is the second step in the argument – it seems as if the common sense associated with the nationality clause as understood by the SNCF failed to apply to certain socio-professional groups (in this case, immigrant workers). This doubtless explains why, despite the naturalization of some Moroccan workers, the majority were denied access to permanent employment on the basis of another criterion: age. Age was used as a pretext to conceal the stigma attached to the broader exclusion of immigrant workers from the former colonies. Trapped in a legal system that denied them any prospects of career advancement, Moroccan workers (and immigrants in general) were seen by the SNCF as a homogeneous ethno-racial group excluded from the national identity (they remained 'immigrants' even when they were French). In this context, the term 'immigrant' was used in opposition to the majority identity (nationals).[36] This classification of Moroccan workers as members of

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34 This is not a value judgement but rather an acknowledgement of the clear contradiction between the provisions of the Franco-Moroccan Agreement and the way it was interpreted by those responsible for its implementation.

35 Submissions at the hearing of 26 June 2013 (Mr Z, a lawyer representing the Moroccan workers): 'The SNCF argues against Mr X that: "You were born on 1 January 1949 and obtained French nationality on 25 April 1994, at the age of 45 years and 3 months. Your application to join our permanent staff, submitted on 13 September 1994, was refused […] because you had already reached the age limit of 45 at the time of your naturalization and, as a result, you no longer fulfilled one of the conditions stipulated in our regulations. These conditions are subject to the approval of the Ministry, and it is therefore impossible for us to waive them."' Yet the SNCF was able to waive the age criterion, particularly after the Second World War and in 1982 under Minister Fiterman, in order to grant permanent status to former auxiliary staff.

36 To borrow an expression used by Colette Guillaumin in her definition of racism, where she shows that racism is based on a 'sign', i.e. a generic mark that classifies and distinguishes a majority group: C. Guillaumin, *L'idéologie raciste* (Paris: Folio Essais, 2002), pp. 106–111.

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their 'racial' group precluded any possibility of recognizing their merits or allowing them to advance in their careers.

The accumulation of practices assigning the identity of immigrants (and therefore inferior workers) to 'Moroccans' contributed to the institutionalization of a glass ceiling on the basis of the nationality clause. In this situation, the relationship between equality and race is a complex one. In theory at least, the nationality clause in no way precludes a differential and parallel treatment of immigrant workers that would be equivalent to that of permanent staff. However, behind the unspoken implications of this apparently egalitarian proclamation, a system was created whereby certain workers were classified as immigrants, despite their efforts to break free from that classification. This has prompted me to examine the sedimentation of interpretations of the nationality clause that have culminated in institutionalized discrimination.

5.3 THE FINANCIAL ARGUMENT

Placed in their socio-historical context, the inequalities generated by the SNCF's internal 'normative' system were neither a random occurrence nor the result of mere negligence. This system, which was carefully orchestrated by the public corporation and the state apparatus, created a questionable legal status on the fringe of legality: namely, that of auxiliary workers. The state (the Ministries of Transport, Budget, and Social Affairs) supported, albeit implicitly, the continuing existence of an auxiliary status, which in practice restricted the career development opportunities of Moroccan workers. One of the decisive pieces of evidence is an excerpt from the minutes of a meeting of a joint statutory committee (on which the minister of transport had a statutory seat) held in 2006. When asked about the possibility of abolishing the nationality clause, SNCF management stated:

> Although recruitment has been opened up to nationals of EU Member States, the SNCF has only hired 200 foreign staff members, a small number compared to the total number of recruits, which can be explained by the lack of interest shown by candidates from other countries. Furthermore, the inclusion of current foreign SNCF contract workers in the permanent staffing structure, which would result from the abolition of the nationality

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> clause, would generate an additional annual expense of 70 million euros for the company, which is approximately the amount of an annual wage negotiation. The financial burden on the SNCF would therefore be too high.[37]

Clearly, the financial argument has superseded the nationality argument. Initially, the SNCF statutes made the granting of railway worker status – and the associated social benefits – conditional on the acquisition of French nationality. A number of Moroccan auxiliary staff became French nationals at the end of the 1980s, but the SNCF imposed an age limit on them. Then, when jobs that had been closed to foreigners were opened up to EU nationals at the end of the 1990s, the SNCF used a financial argument to prevent them from being granted railway worker status. As a result, while EU and non-EU nationals were equally discriminated against, only EU nationals enjoyed the benefits associated with railway worker status. Although Moroccan workers were more numerous, they were excluded on the basis of a financial rationale aimed at dividing the European and Moroccan workforce.

The excerpt quoted above, which was a decisive factor in the ruling handed down by the Paris Court of Appeal on 31 January 2018, sounds somewhat self-incriminating. It bears witness to the pre-eminence of the nationality clause, viewed as the major obstacle to the career development of Moroccan workers. Equivalent social rights, guaranteed in principle by the bilateral Franco-Moroccan Agreement of 1963, are not even mentioned.

It is difficult to believe that recruitment procedures for Moroccan workers were organized haphazardly; this is all the less likely in light of the historical precedents involving internal migration on a similar scale between France and its former colonies.[38] The signing of the bilateral

[37] Excerpt from the minutes of the joint committee tasked with drawing up the status of collective labour relations between the SNCF and its staff, minutes of the 1,025th meeting held on 30 January 2006, p. 7.

[38] These include Réunion (where 2,150 minor children were distributed across mainland France) and the French Caribbean islands of Martinique and Guadeloupe through the BUMIDOM, the state office that organized flows of migrant workers to France in the 1960s and 1970s: G. Ascaride, C. Spagnoli and P. Vitale, *Tristes tropiques de la Creuse* (Troyes: Editions KA, 2004); I. Jablonka, *Enfants en exil. Transfert de pupilles réunionnais en métropole (1963–1982)* (Paris: Editions du Seuil, 2007); W. Bertile, P. Eve and G. Gauvin, et al., *Les enfants de la Creuse. Idées reçues sur la transplantation de mineurs de la Réunion en France* (Paris: Cavalier Bleu, 2011).

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agreement between France and Morocco coincided with the emergence of a new administrative structure governing labour from the former colonies.[39] Previously referred to as 'indigenous' workers, who enjoyed a relative ease of movement, after independence this workforce became known as 'immigrant' workers, subject to stricter administrative control. Without taking at face value the asymmetry described by Abdelmalek Sayad between dominated and dominant countries (generally former French colonies) in migration studies, it is impossible to ignore the postcolonial dimension of labour flows between France and Morocco.[40]

5.4 RACIAL DISCRIMINATION EXACERBATED BY A DIVISION BETWEEN EUROPEAN AND MOROCCAN EMPLOYEES

In a number of rulings, the Court of Justice of the European Union has confirmed that certain jobs previously reserved for nationals are now open to nationals of EU Member States (Article 45 of the Treaty on the Functioning of the European Union). Accordingly, at the end of the 1990s, the SNCF opened up access to railway worker status to EU nationals. For non-EU nationals, access was not on the agenda, even though certain political and civil society players were pressing for it. Thus, the divide that existed between French and non-French nationals was replaced by a divide between Europeans and non-Europeans. Discrimination persisted, however, insofar as the acquisition of a European nationality entitled people to rights and social benefits that were denied to other workers doing similar jobs (in terms of pensions, access to healthcare, etc.). In theory, the provisions of the Race Equality Directive Article 1 apply: 'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'

In light of the Race Equality Directive, the discrimination suffered by Moroccan auxiliary workers is both direct and indirect. It is direct in the sense that it creates less favourable conditions on the basis of ethnic origin; but it is also indirect in the sense that the apparently neutral criterion put

[39] S. Laurens, *Une politisation feutrée. Les hauts fonctionnaires et l'immigration en France* (Paris: Belin Littérature et Revues, 2009).

[40] Sayad, *L'immigration ou les paradoxes de l'altérité*, pp. 259–288.

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forward by the SNCF (as regards enjoyment of nationality) denies access to a number of social rights from which Moroccan workers are supposed to benefit. Admittedly, it could be argued that Article 3(2) of the directive applies: 'This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.' In the case of the SNCF's Moroccan workers, the difference in treatment applied by the SNCF on the basis of nationality is not in itself a problem in absolute terms. Instead, what is problematic and what makes it classifiable as indirect discrimination lies, under the terms of the directive, in the inseparable link between the enjoyment of railway worker status (under the nationality clause) and the associated social rights, which are supposed to be extended to all workers performing identical tasks, regardless of their nationality. In other words, the point is not to call into question a difference in treatment based on nationality so much as the consequences of such a difference in treatment, which in practice produce situations of exclusion based on race, via the nationality criterion. However, legal reasoning alone cannot explain the failure to enforce the Race Equality Directive in this case. To understand why it has not been implemented, it is vital to consider the historical dimension.[41]

The auxiliary category can be better understood by looking back at its historical origins. Its creation is closely linked to the history of the railways and the world of the working class in the nineteenth century and, in particular, to the historical status of the rail labourer, a working-class figure who hung around the tracks waiting to be hired on various terms: hourly, weekly or, at best, monthly. The status of permanent or 'commissioned' staff was obtained through determined social struggle; however, – and this is less widely known – the gains resulting from this improvement did not benefit all railway workers.[42] To put it in Robert Castel's terms, obtaining status

[41] Regarding the historical dimension of the continuity of certain forms of discrimination, I also refer the reader to the chapters by D. Ashiagbor and K. Fertikh in this volume (Chapters 6 and 4 respectively).

[42] It is impossible to discuss the general history of the condition of railway workers in detail in the scope of this article. However, the reader can refer to the following sources (in

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was the historical culmination of the contract of service. Paradoxically, the historical process took auxiliaries from a vulnerable status to one of social non-existence, a form of *disaffiliation*.[43] Auxiliaries hired out their labour in return for a wage. They could be dismissed at any time and remained dependent on the economic fortunes of the concession companies and subsequently the state-owned corporation; they were treated in a comparable way to domestic servants. For a long time, promotions were awarded 'on merit', until the forerunner of what would come to be known as 'permanent staff' status appeared in 1912 at the Compagnie des chemins de fer de l'État (State Railway Company). This change in employment categories followed the historic strikes of 1910, motivated by deplorable health and working conditions.[44] From the standpoint of nineteenth-century legal doctrine, it was a contractual relationship rather than a protected status, in the sense that an auxiliary was merely a 'commodity'.[45] They hired out their labour (and hence their bodies) in return for a meagre salary. They were subject to the same discipline as railway workers, even though they did not enjoy any of the social benefits associated with the latter status; to take one example, they could be dismissed at any time. The auxiliary system was a direct descendant of the legal forms of salaried employment of the early nineteenth century (contracts for works and services under Articles 1780 and following of the Civil Code).[46] Immigrant workers (or their nineteenth-century equivalents) were never in a position to influence the course of their legal destiny. The study of Moroccan workers highlights a singularity: their situation was linked to their non-national

French): G. Chaumel, *Les Cheminots. Histoire des ouvriers et employés de chemins de fer en France* (Paris: Librairie Marcel Rivière et Cie, 1945); J. Maurice, *Le charbon et l'escarbille : genèse et histoire du statut du personnel cheminot, de la seconde moitié du XIX*[e] *siècle à la veille de la Seconde Guerre mondiale*, PhD thesis, Sorbonne Université (2019).

[43] R. Castel, *Les métamorphoses de la question sociale. Une chronique du salariat* (Paris: Fayard, 1995), p. 14.

[44] Les Cahiers de l'Institut, Processus historique relatif à la représentation du personnel et au droit syndical dans les Chemins de fer, 3e trimestre, 2015, n° 54, pp. 18–20; C. Chevandier, *Cheminots en grève ou la Construction d'une identité* (Paris: Maisonneuve & Larose, 2002); and Maurice, *Le charbon et l'escarbille*, pp. 184–355.

[45] A. Supiot, *Critique du droit du travail* (Paris: Presses Universitaire de France, 2015), pp. 45–66.

[46] But also of the new-found awareness of pauperism and the birth of the industrial proletariat: Castel, *Les métamorphoses de la question sociale*, pp. 218–245.

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status, which generated forms of exclusion and stagnation in their career progression. Thus, the consequences of the discrimination suffered by Moroccan workers have their roots in France's colonial history and, more specifically, in the treatment of indigenous labour in metropolitan France.

The railway archives bear witness to this state of affairs. Prior to the 1937 collective agreement, the state railways agreement signed in 1920 foreshadowed in many respects what would become the nationality clause, specifying that the criterion of being a French citizen or naturalized French citizen does not apply to employees working on parts of the rail system located outside national territory.[47] It may only be waived on the said territory in exceptional circumstances.[48] The legal doctrine at the time was entirely consistent with this view. With regard to the criterion of employee nationality, one author states:

> a difficulty arises, however, in the case of Tunisian or Algerian candidates whose nationality is governed by the decrees of 24 October 1870 and 7 October 1871, and the laws of 4 February 1919 and 20 December 1923. The words 'be French citizens or naturalized French citizens' should be construed as meaning that they must be French nationals, which excludes certain natives of our colonies who are merely French subjects.[49]

This interpretation is in line with previous practices and legislation: company archives contain registers of foreign auxiliaries kept by the Ministry of Public Works as far back as 1898. After 1870, companies were required to justify the hiring of foreign workers.[50]

The nationality clause was originally justified by a combination of xenophobia and the government's commitment to security with regard to recruitment in the railway sector. Faced with competition from their

[47] The state-owned rail network was created by the Act of 13 July 1911, which incorporated the western network into the state-owned network. A ministerial order of 23 December 1911 defined the network's staff regulations, leading to the creation of commissioned staff, the forerunner of permanent staff.

[48] SNCF archives at SARDO, Le Mans, 726LM703.

[49] G. Aubert, *Étude sur le statut du personnel des compagnies de chemins de fer* (Paris: Rousseau, 1926), p. 71.

[50] Archives Nationales du Monde du Travail (ANMT) Lille 48 AQ 3379 Liasse 8 (a legal note dated 22 February 1917 from the War Ministry, on admission of foreigners as auxiliary or temporary employees on French lines).

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Belgian, Swiss, and English counterparts, French railway workers, particularly in the northern part of the country, demanded stronger protectionist measures during the economic crisis of 1873. The French government, for its part, used the defeat of Sedan as a pretext to tighten its control over the activities of foreign workers in a sector that was viewed as strategic at the time. In 1898, the Compagnie du Nord (Northern Company) was called upon to justify to the minister of public works the recruitment of several foreigners (but also women), which it did in the following terms:

> The 152 Belgians joined the Company before 1885; several are in the process of being naturalized; five others have been granted resident status. They all hold menial jobs as crewmen, surveyors, labourers and the like, mainly in the area adjacent to the Belgian border. Only one is a draughtsman in Paris; he has been with the Company since 1872. Eight Italians joined the Company prior to 1882; a ninth joined in 1888; all of them are manual labourers, and one is in the process of being naturalized. One of the three Swiss is a draughtsman in Paris and has been with the Company since 1878; the other two are joiners and surveyors. The others include four Russian workers who joined the Company before 1889; one Spanish worker who joined in 1873 and is awaiting naturalization; one Dutch roadmaster who joined in 1867; and one Monegasque driver who joined in 1876 and is awaiting naturalization.[51]

The nationality criterion in recruitment was therefore built on a negative image of the foreigner. It was implicitly accepted that foreigners could not hold important functions in the companies; they were assigned to subordinate roles and, very exceptionally, to managerial positions. In the same vein, indigenous workers were denied their social rights in 1917 (starting with access to the pension scheme), even when they worked as auxiliaries in the companies.[52] This double boundary (excluding both foreigners and indigenous people from the permanent staff) internalized a form of colonial heritage. In fact, the distinction between nationals and foreigners also reintroduced the distinction between nationals and indigenous people. Hence, racial otherness became embedded in the contours of nationality.

[51] ANMT 48 AQ 3379 Liasse 8.
[52] ANMT 48 AQ 3379 Liasse 8.

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Although they performed the same duties as other railway workers, the 'Moroccans' were never really recognized as railway workers in their own right, as the reference to nationality created exclusion and racialization.[53] The contours of these invisible social boundaries were drawn by legal and administrative categories. Norbert Elias' analysis of the distinction between 'established' and 'marginal' categories helps us to understand more precisely the distinction between auxiliaries and permanent staff (among railway workers).[54] The exclusion of immigrant workers or workers of immigrant origin was founded on legal standards that were themselves based on debatable criteria (age, nationality, lack of qualifications, suspicions of incompetence, etc.). What we have here is a differentialist type of racism, which does not use the word race:[55] Moroccan auxiliaries were never quite considered railway workers and, even when they were naturalized, they were still not really railway workers, as their years of service as auxiliaries were not counted towards their seniority.[56]

5.5 CONCLUSION

The system that generated the discrimination suffered by Moroccan workers was fuelled by a two-fold rationale, at once economic (including immigrants in the permanent staff would be too costly) and legal/administrative (excluding immigrants but expecting them to perform the same tasks as nationals). The combination of these two rationales has contributed to the fragmentation of the auxiliary workforce (housekeepers, immigrants, precarious nationals). Backed by the authority of legal standards and administrative practices, this system created multiple

[53] Understood here as the process of classifying a dominated group (immigrant workers) by means of the discriminatory use of the nationality criterion by the dominant group: E. Balibar, 'Racism and Nationalism' in E. Balibar and E. Wallerstein (eds.), *Race, Nation, Class: Ambiguous Identities* (New York: Verso Books, 1991), pp. 37–67.

[54] N. Elias, *Logiques de l'exclusion* (New York: Pocket, 2002).

[55] E. Balibar, 'La construction du racisme' in *Actuel Marx* vol. 38 (Paris: Presses Universitaire de France, 2005), p. 11.

[56] Emmanuelle Saada points out that the divide between nationality and citizenship continues to exist in various forms: E. Saada, 'Nationalité et citoyenneté en situation coloniale et post-coloniale' (2017) 160 *Pouvoirs: Revue d'Etudes Constitutionnelles et Politiques* 113–124.

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hierarchies pitting various categories of workers, sometimes performing the same tasks, against each other. Based on an economic analysis of the law, the dynamics of this system can be summed up as follows: 'how to maximize the (economic) "benefits" of immigration while minimizing the "costs" (particularly the social and cultural costs) incurred by the presence of immigrants'.[57] Here, race combines with class and gender, in the sense that the auxiliary status of immigrants cannot be dissociated from their temporary, and therefore economically interchangeable, nature.[58]

Examining the nationality clause and how EU law has not meaningfully remedied these practices is a good starting point for understanding one of the singularities of racism in France and perhaps in Europe. Behind the apparent neutrality of the nationality clause, the archetype *par excellence* of social rights-holders emerged in France in 1870 within the railway working class. In France, a 'national' was a French (white) male worker. In actuality, the reference to the national coincided with the signifier of the dominant group.[59] The case of the Moroccans working for the SNCF once again illustrates the relevance of a perspective based on the concept of racial capitalism, understood here as the possibility of a capitalist system whose working-class fragmentation was also the result of a broader process of racialization.[60] In this sense, the analysis of the treatment of migration in relation to Europe's colonial heritage would be worth exploring beyond France's borders. This book is undoubtedly a forerunner to future studies on a European scale.

PROOFS

[57] A. Sayad, *L'immigration ou les paradoxes de l'altérité*, p. 42.

[58] Along with immigrants, women (housekeepers, cleaners, and social services employees) in precarious jobs were the last to be integrated into the permanent staff. A great deal of research remains to be done on this subject, which has ties to feminist materialism.

[59] I use this term in the sense used by C. Guillaumin as a criterion of exclusion linking the biological to the social (in this case the Nation) – both reified and generalized – allowing the majority group to distinguish itself from the minority groups: Guillaumin, *L'idéologie raciste*, pp. 93–98.

[60] A partial list of studies on the subject: J. O. Calmore, 'Exploring the Significance of Race and Class Representing the Black Poor' (1982) 61 *Oregon Law Review* 201; C. Robinson, *Black Marxism. The Making of Black Radical Tradition* (Chapel Hill: The University of North Carolina Press, 2020); D. Ashiagbor, 'Race and Colonialism in the Construction of Labor Markets and Precarity' (2021) 50 *Industrial Law Journal* 506; M. Haley Davis, *Markets of Civilization. Islam and Racial Capitalism in Algeria* (Durham: Duke University Press, 2022).

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CHAPTER 6

Rethinking EU Social and Labour Law through Racial Capitalism

DIAMOND ASHIAGBOR

6.1 INTRODUCTION

In this chapter, I wish to consider the European Union (EU) integration project, and in particular the single market and the social/labour dimension of that market, through three frames of analysis: through the colonial lens with which this edited collection is preoccupied, in particular by reference to what has become known as 'racial capitalism'; by taking into account the temporal and the spatial dimensions of EU integration; and, finally, with regard to the ways in which the development of the EU's social dimension, or 'social regionalism', influences and constrains the policy space available to another regionalism project, namely the African Union (AU), to develop its own version of social regionalism.

The familiar accounts of the origins of the European integration project foreground the shared memory of the Second World War and the commitment to post-war reconstruction of Europe, in order to promote both peace and economic growth. Much less attention is paid to the other inheritance common to the EU Member States, that of empire, colonialism and decolonization. Yet, the EU integration project – and in particular the single market – owes much to what one might call the political economy of colonialism. My argument in this chapter is that the EU market integration project and the ability to embed that market

I am very grateful to Hanna Eklund and the other participants in the Colonialism and the EU Legal Order conference for comments on earlier drafts. A version of the arguments in this chapter has appeared in a special issue of *Transnational Legal Theory*; I am very grateful to Ivana Isailović for her comments on this earlier paper. The usual disclaimer applies.

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in the 'social' are premised on the 'racial capitalism' of European colonial dominance over the territory and resources of other regions, on European responses to the process of decolonization and also, to a lesser extent, on the continuing *neo*colonialism of the relationship between the EU and the AU, between the regionalism projects of former colonizing and colonized states.

This chapter explores the temporal and spatial aspects of the emergence of regional (EU) social and labour law against the backdrop of decolonization: the moment (temporal aspect) of decolonization occurred simultaneously with, and I would argue was woven into, the EU market integration/market creation project, such that the boundaries (spatial aspect) of the single market were never simply the territorial boundaries of the six Member States. Occurring contemporaneously with the formation of the European Economic Community (EEC), the process of decolonization has resulted in an EU which is deemed to be *post*colonial, however inaccurate it may be to assume that colonialism is wholly in the past.

A key contention of this chapter is that there has been no clean break between the colonial past of the constituent Member States of the EU and the *neo*colonial present of the European project: colonialism and empire are implicated in the version of capitalist modernity which the EU market-creating project represents, and enmeshed in the social dimension of that project. In pursuing this argument, I make use of the language of 'racial capitalism', one version of which contends that the emergence of capitalism was per se premised on global racialized inequalities, that race permeates the social structures emergent from capitalism. Further, as this chapter will explore, this colonialism has contemporary resonances and implications: in constructing the EEC, former colonial or imperial states created a sovereignty-pooling (market) integration project which enjoys largely asymmetrical ongoing trade relations with a regional integration project, the AU, comprising mainly former colonized states. Thus, European colonialism continues to reverberate, having a material impact on contemporary EU social and labour law; to shape EU–AU relations; and to determine the conditions of possibility for the evolution of a social dimension for the AU's own market integration project.

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6.2 COLONIAL FORGETFULNESS, DECOLONIZATION AND EU POST-WAR IDENTITY

March 1957 is a key moment in time, not only for the reasons already familiar to scholars of the EU. On 6 March, Ghana became the first country in sub-Saharan Africa to gain independence from (British) colonial rule, heralding a wave of independence by former colonies freeing themselves from rule by European states.[1] This was followed on 25 March by the signing of the Treaty of Rome, with narrative accounts emphasizing the technocratic and institution-building aspects of the new Communities, rather than any broader geopolitical ambitions.[2] Not surprisingly, therefore, a key assumption underpinning dominant understandings of the EU integration project is that colonialism and empire reside in the past, and were in any event an inheritance of the individual nation states, not attached to the EU project itself. This is a somewhat striking assertion, given the presence in the EEC Treaty of the express acknowledgement of Member States' continuing colonial entanglements, in Part IV on 'Association of the Overseas Countries and Territories' (see later). Characterizing Member States as the 'carriers' of colonialism conveniently erases the fact of the significant economic role played by colonial extraction in the construction of the *domestic* economies and industries which subsequently served as the foundation for the *common* or single market.

One way to understand the colonial underpinnings of the EU is through close attention to the temporal and the spatial dimensions of EU integration. This could be through use of language and conceptual frameworks from the emergent field of legal geography, with its spatial awareness and focus on the way in which space, time and law

[1] From the archive, 'Hoisting the Flag of Ghana', originally published in *The Manchester Guardian*, 6 March 1957. Seventeen sub-Saharan African states gained independence in 1960 alone, including Guinea, Cameroon, Senegal, Togo, Côte d'Ivoire (from France); Congo Kinshasa (from Belgium); Nigeria (from the United Kingdom).

[2] European Commission Audiovisual Service, 'Signing of the Treaties of Rome', Date: 25 March 1957, Location: Rome, Campidoglio/Capitol: 'This Treaty establishes the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) and foresees the implementation of a customs union and the creation of institutions: the Commission, the Council, the Assembly and the Court of Justice of the EC.'

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are co-constituted.[3] Or by using the language of the 'chronotope', the literary device adapted for sociolegal scholars by Mariana Valverde,[4] which requires 'that we consider how temporalization affects spatialization and vice versa',[5] namely, that the temporal and the spatial dimensions of life and governance affect each other and should be analysed together. Taking the lead from Valverde, who takes pains to emphasize that chronotopes do not amount to a grand theory, or a world-scale theory, or a classification system,[6] I am interested in the simplest level of analysis which the language of legal geography or chronotopes inspires, to make sense of the relationship between colonialism and EU integration across time and space/geography. For instance, by means of the Treaty of Rome's recognition of 'overseas countries and territories', locations (nations, even) outside the territorial continental boundaries of the EEC Member States became, juridically and constitutionally, part of the geographic reach of the new EEC.[7] In the meantime, decolonization struggles, such as the Algerian War of Independence (1954–1962),[8] meant the formal boundaries of the new European community, for instance with regard to the reach of the customs union, were subject to change,[9] once those overseas countries, territories, dependencies and settlements gained independence.[10] As

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[3] F. de Witte, 'Here Be Dragons: Legal Geography and EU Law' (2022) 1 *European Law Open* 113.

[4] M. Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (London: Routledge, 2015).

[5] Valverde, *Chronotopes of Law*, p. 22.

[6] Ibid., pp. 4–5 and 23.

[7] Treaty of Rome (EEC) Treaty Establishing the European Economic Community 1957, Part IV, Articles 131–136 (Association of the Overseas Countries and Territories). Algeria and the French overseas departments are regulated separately, in Article 227, so as to confer special treatment in relation to, for example, free movement of goods, liberalization of services, rules relating to competition.

[8] M. Brown, *The Seventh Member State: Algeria, France and the European Community* (Cambridge: Harvard University Press, 2022).

[9] EEC Treaty, Part IV – The Association of Overseas Countries and Territories, Article 133(1): 'Imports originating in the countries or territories shall, on their entry into Member States, benefit by the total abolition of customs duties which shall take place progressively between Member States in conformity with the provisions of this Treaty'.

[10] For example, of the eight countries and territories listed as part of 'French West Africa' in Annex IV to the Treaty of Rome, to which the provisions of Part IV of the Treaty

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Hanna Eklund has uncovered from a study of the archival material from the Treaty of Rome negotiations,[11] while the drafters of the treaty were well aware of anti-colonial sentiments and movements, not least of all as evidenced by the Suez Crisis, nevertheless the treaty itself was silent on the question of the legal implications of the acquisition of independence by the 'overseas countries and territories'. It was only in 1967 that '[a]n oblique acknowledgement' was made of the independence of several of the countries listed in Annex IV, in a two-page *avis au lecteur*, appended to the treaty.[12]

Despite, or rather because of, the endeavours to 'unite' Europe and Africa in the ultimately unsuccessful 'Eurafrica' project (see later), the prehistory of the EU integration project is one marked by a distinct amnesia in relation to Europe's colonial past.[13] Here, it is important to distinguish between acknowledgement of the colonial entanglements of the individual European nation states, which have been widely studied, and the rather under-theorized recognition that colonialism is a shared (Western) European experience,[14] one which significantly colours and shapes subsequent European integration. As Gurminder Bhambra observes, the assumption underpinning the EU project and self-understanding is that it is individual nation states, not the EU itself, which are the carriers of colonialism and responsible for its legacy. This is how she puts it: 'The articulation of cosmopolitanism as a specifically European phenomenon rests on a particular understanding of European history that evades acknowledging European domination over much of the world as significant to that history. It also disavows examining the consequences

applied, the following six gained independence in the first three years of the EEC: Senegal (4 April 1960), French Guinea (2 October 1958), Côte d'Ivoire (7 August 1960), Mauritania (28 November 1960), Niger (3 August 1960), Republic of Dahomey (1 August 1960). See also F. Cooper, 'Possibility and Constraint: African Independence in Historical Perspective' (2008) 49 *Journal of African History* 167.

[11] H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831.

[12] Ibid., 12.

[13] P. Pasture, 'The EC/EU between the Art of Forgetting and the Palimpsest of Empire' (2018) 26 *European Review* 545.

[14] P. Hansen, 'European Integration, European Identity and the Colonial Connection' (2002) 5 *European Journal of Social Theory* 483–498 at 485.

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of that domination for the contemporary multicultural constitution of European societies'.[15]

It is, though, important to recognize that the EU today is a legacy from a period when many Western European states operated as empires,[16] and that European integration was in no insignificant part a response to the need to forge a new 'European' identity and regional role of global significance in the aftermath of decolonization.[17] Let's unpack these two observations. First, the continuing colonial identity of Member States at the formal dawn of the EEC is exemplified most clearly in the recognition of 'overseas countries and territories' in the founding treaty framework,[18] with Belgium, France, Italy and the Netherlands entering the new Community with colonial holdings associated with though not integrated into the Community. More striking was the separate legal formulation conceived to deal with Algeria and the French overseas departments, which were constitutionally treated as parts of France and thus integrated into the Community, for instance being subject to treaty provisions such as those on free movement of goods and services though not to those on free movement of workers.[19]

Second, it is necessary to interrogate the fact that EU integration was taking place against a backdrop of decolonization. While decolonization was not a primary motive for European integration, it was an important complement, previously overlooked. Europe's global standing had already been shaken by world war, subsequently by Cold War

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[15] G. K. Bhambra, 'Whither Europe? Postcolonial versus Neocolonial Cosmopolitanism' (2016) 18 *Interventions: International Journal of Postcolonial Studies* 187–202 at 193.

[16] P. Hansen and S. Jonsson, 'Imperial Origins of European Integration and the Case of Eurafrica: A Reply to Gary Marks' "Europe and Its Empires"' (2012) 50 *Journal of Common Market Studies* 1028–1041 at 1032.

[17] S. R. Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 6–25 at 16; '[I]f decolonisation was the product of imperial decline in the former colonies, European integration was part of the response to imperial decline in the metropoles', Ibid. at 24.

[18] Treaty of Rome 1957, Part IV, Articles 131–136 (Association of the Overseas Countries and Territories).

[19] Treaty of Rome 1957, Article 227. As P. Hansen observes, the self-mythologizing notion of European integration as a symbol of peace requires reassessment given the continuation of war; in this case, the Algerian War 1955–1962 which spanned the signature of the Treaty of Rome in 1957, Hansen, 'European Integration', 487–488. See the important contribution offered by M. Brown in *The Seventh Member State*.

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and the creation of a bipolar world; and also crucially from the loss of hegemonic power which decolonization represented. This insight is neatly exemplified in the description of Nasser, president of Egypt, as 'the Federator of Europe'; in other words, that the 1956 Suez Crisis served – among other things – as a strong argument in favour of European integration.[20]

Indeed, as Peo Hansen and Stefan Jonsson argue, negotiations for integration were predicated on the very idea of bringing Africa as a 'dowry to Europe'.[21] In other words, Africa's natural resources – namely, land, labour and markets – were to be made available for the European project.[22] Hansen and Jonsson show how many of the projects seeking to institutionalize European cooperation, or even integration, up to and including the EEC, were premised on the assumption that Africa would be incorporated into this European project – the establishment of 'Eurafrica'.[23] The justifications for Eurafrica were myriad: access to land, access to raw materials, access to markets for European products – in exchange for? Indeed, the former 'civilising mission' justifying European involvement in Africa was rebranded using the discourse of 'development' and human rights.[24] It is clear, though, that what was to be offered in the creation of Eurafrica was a partial form of belonging or integration for colonized peoples: to be included were the resources of the continent and the labour *power* of the inhabitants rather than the *people* themselves, given the absence

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[20] Hansen, 'European Integration', 491–492. Suez also arguably, though less directly, led to British reappraisal of the benefits of integration: it was the beginning of the realization that the Commonwealth (an association of states comprising the UK and its former colonies) would not provide sufficient replacement to empire in terms of trade and global dominance, but the Common Market could indeed offer a substitute – not just in terms of trade and global status, but also in terms of the identity of being part of the 'communal European civilizing mission', Hansen, 'European Integration', 494.

[21] P. Hansen and S. Jonsson, 'Bringing Africa as a "Dowry to Europe"' (2011) 13 *Interventions: International Journal of Postcolonial Studies* 443.

[22] Hansen, 'European Integration'; P. Hansen and S. Jonsson, 'Eurafrica Incognita: The Colonial Origins of the European Union' (2017) 7 *History of the Present: A Journal of Critical History* 1; N. El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester: Manchester University Press, 2020), pp. 183–189.

[23] P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London: Bloomsbury Academic, 2014).

[24] Pasture, 'The EC/EU between the Art of Forgetting', 547.

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of free movement for workers.[25] Having been formally recognized and encoded in a treaty which incorporated the colonial possessions of the founding Member States,[26] 'Eurafrica' has become what Hansen and Jonsson, drawing inspiration from Fredric Jameson, refer to as a 'vanishing mediator': the term disappears from the major narratives of European integration.[27] However, discontinuity at the level of discourse hides continuity at the level of economics, and obscures the fact that the colonialism in the relationship between Europe and Africa has arguably not been erased but merely shifted to the terrain of neocolonialism. According to Kwame Nkrumah, first post-independence president of Ghana, the Treaty of Rome and the creation of the EEC represented 'the advent of neocolonialism in Africa', or 'collective colonialism',[28] referring to *neo*colonialism not because the phenomenon was novel but indeed because it was a continuation or revived form of imperial domination, in particular economically, over nominally independent states.[29]

For remarkably consistent perspectives on the colonial inheritance of the EU, vis-à-vis the Member States, it is instructive to consider the statements

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[25] Eklund, 'Peoples, Inhabitants and Workers', 833: 'People who were not considered ethnically and racially Europeans, but who were subjected to, or were indeed citizens of, a member state through colonialism, were excluded from legal benefits and equal political representation.'

[26] For one example of the continuation of colonial preferences, even after independence, see V. Dimier, *The Invention of a European Development Aid Bureaucracy: Recycling Empire* (New York: Palgrave Macmillan, 2014). Dimier argues how, through the establishment of the European Commission's Directorate-General for International Cooperation and Development and the European Development Fund, the EEC's development aid programme served as a vehicle for the pursuit of interests of donor countries, in particular France, for instance in the preferential access given to French consultancy firms providing technical assistance to newly independent African states devising development projects.

[27] Hansen and Jonsson, 'Eurafrica Incognita'; Pasture, 'The EC/EU between the Art of Forgetting', 551. On the 'remarkably thorough erasure of Algeria's EEC history from both European lore and scholarship until now', see Brown, *The Seventh Member State*, p. 16.

[28] K. Nkrumah, 'Address to the Ghana National Assembly, 30 May 1961' quoted in G. Martin, 'Africa and the Ideology of Eurafrica: Neo-Colonialism or Pan-Africanism?' (1982) 20:2 *The Journal of Modern African Studies* 221–238 at 229.

[29] 'The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside': K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (London: Thomas Nelson & Sons, 1965), p. 4.

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of European Commission presidents and high officials, spanning an almost fifty-year period. In 1975, president of the European Commission François-Xavier Ortoli observed that the Community was better placed to engage with the continent of Africa 'because the European Communities in contrast to some member states were less contaminated by a colonial past'.[30] A later president of the European Commission, José Manuel Barroso, speaking in 2007, referred to the EU as 'the first non-imperial empire'.[31] Such allusions to the EU as representing a more benign form of empire can, more recently, be seen in the October 2022 speech of EU High Representative for Foreign Affairs Josep Borrell who claimed that 'Europe is a garden' whereas '[m]ost of the rest of the world is a jungle, and the jungle could invade the garden'.[32] These perspectives contrast markedly with the sentiments expressed by the European Parliament, in particular in its resolution of January 2024 on European historical consciousness.[33]

6.3 RACIAL CAPITALISM AND THE BUILDING OF THE EU MARKET INTEGRATION PROJECT

Understanding how, as Hanna Eklund puts it, the structures of colonialism have shaped the EU legal order, requires a particular focus on the *economic* as well as the legal. To do so, I draw on the language of

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[30] Speech, François-Xavier Ortoli, European Parliament, Strasbourg, 18 February 1975 and De Cerexhe, Pourquoi l'Europe?, 17 July 1975 (ALT 614); quoted in Pasture, 'The EC/EU between the Art of Forgetting', p. 561.

[31] José Manuel Barroso, Strasbourg, 10 July 2007: in response to a question about the nature of the EU, Barroso replied that it is not a super state, a 'United States of Europe', neither is it an international organization such as the Organization for Security and Co-operation in Europe or Council of Europe. Rather, the EU is a unique creation which he contrasts to empires made through force. Instead, the EU is the world's first 'non-imperial empire'. Speech and link referred to in Pasture, 'The EC/EU between the Art of Forgetting', 562.

[32] European External Action Service (EEAS) Press Team, 'European Diplomatic Academy: Opening remarks by High Representative Josep Borrell at the inauguration of the pilot programme', 13 October 2022.

[33] 'The European Parliament … acknowledges the crimes committed by Nazi, fascist and communist totalitarian regimes as well as under colonialism, and the role these crimes have played in shaping historical perceptions in Europe': *European Parliament resolution of 17 January 2024 on European historical consciousness* (2023/2112(INI)), P9_TA(2024)0030. See also European Parliament, *Report on European historical consciousness* (2023/2112(INI)), A9-0402/2023, Committee on Culture and Education.

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'racial capitalism', which has gained prominence as a productive way to reconsider the relationship between law and political economy, historically and also in contemporary times. At their simplest, theories of racial capitalism contend that race and colonialism are deeply imbricated in the evolution of capitalism – with the emergence of capitalism predicated on global racialized inequalities, in particular Atlantic slavery; or, as Cedric Robinson would have it, with race permeating the social structures emergent from capitalism.[34] It is this *structural* analysis of race and political economy which is so compelling. Race or racism is in most legal accounts understood as *individualized* discrimination or prejudice. In contrast, I want to emphasize how race and racism operate at the level of social system, and also as a dominant rationality, to structure economic and societal institutions, for instance in relation to the aforementioned European colonial dominance over the territory and resources of other regions. As Rob Knox explains: 'Capitalism was born in Europe, and spread and consolidated its hold over the globe on the basis of European colonialism and imperialism. In the process, European states fundamentally transformed the political-economic systems of non-European societies.'[35]

As I have set out elsewhere,[36] the emerging tradition of economic sociology of law provides a helpful guide for conceptualizing, in a scalar manner, the economic and legal aspects of social life,[37] which are operating on four, mutually constitutive, levels: actions or actors, interactions,

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[34] C. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Chapel Hill: University of North Carolina Press, 2000), p. 2; S. Beckert and S. Rockman, 'Introduction: Slavery's Capitalism' in S. Beckert and S. Rockman (eds.), *Slavery's Capitalism: A New History of American Economic Development* (Philadelphia: University of Pennsylvania Press, 2016), p. 27; see also C. G. Gonzalez and A. D. Mutua, 'Mapping Racial Capitalism: Implications for Law' (2022) 2 *Journal of Law and Political Economy* 127.

[35] R. Knox, 'International Law, Race, and Capitalism: A Marxist Perspective' (2023) 117 *AJIL Unbound* 55.

[36] D. Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' (2021) 50 *Industrial Law Journal* 506.

[37] D. Ashiagbor, P. Kotiswaran and A. Perry-Kessaris, 'Introduction: Moving towards an Economic Sociology of Law' (2013) 40 *Journal of Law and Society* 1. Economic sociology of law entails applying sociological approaches (analytical, normative, empirical) to investigate relationships between law and economy, as both a theoretical framework and a methodological approach.

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regimes and rationalities.[38] 'Actions' and 'interactions' is a useful way to understand how most race discrimination in employment is conceptualized within law, for example as prejudice between individuals or within institutions. Legislative enactment at EU (and national) level focuses on 'less favourable treatment' and 'discrimination on grounds of racial or ethnic origin',[39] suggesting that 'race' is conceived as a matter of demographic attributes. By this account, racism exists at the smallest level of social action and is the product of acts or beliefs of individuals or groups. However, the EU directive also acknowledges the role of institutions in racialized ordering – for example in the concept of indirect discrimination, wherein facially neutral organizational rules have a differential impact – suggesting that legal rules can contain a more complex understanding of inequality, as operating at the level of social action. Further, to the extent that there is an awareness in law and policy of systemic racism in labour markets, not solely discrimination at the level of an organization, this comes closer to the recognition that racism structures societal institutions, and that 'race is inscribed and reinscribed in markets and other economic structures'.[40] As seen in the recognition of institutional racism, racism can be understood as a social *regime*, that is the broader culture that makes up society. The fourth level of analysis of society, economy and law turns to the *rationalities* behind a given regime or social order, such as modes of reasoning or 'ways of apprehending the world'.[41] My interest in this exploration of the racial underpinnings of markets, is in the regimes and rationalities that constitute market society

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[38] S. Frerichs, 'Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' in C. Joerges and J. Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart, 2011), pp. 65–84; A. Perry-Kessaris, 'Approaching the Econo-socio-legal' (2015) 11 *Annual Review of Law & Social Science* 57–74 at 59: 'Like all typologies, this one is idealized and should be treated not as a map of social life but rather as a device for clear thinking and communicating about social life. Furthermore, these levels are mutually constitutive.'

[39] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000 L 180/22. See also Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ 2000 L 303/16.

[40] D. Hirschman and L. Garbes, 'Toward an Economic Sociology of Race' (2021) 19 *Socio-Economic Review* 1171.

[41] D. Ashiagbor, P. Kotiswaran and A. Perry-Kessaris, 'Introduction', 60.

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at large. Racism or racial capitalism is thus the dominant rationality, or way of seeing the world, which I argue underpins the market economy and the racialized inequality of the contemporary labour market.

A further insight of economic sociology (and economic sociology of law), in particular the Polanyi-inspired variant,[42] relates to the importance of state action and social relations as *constitutive of* markets, but also that markets may be constrained by or *embedded within* institutions – for instance, institutions of labour law, social citizenship or welfare states as ameliorative of the human consequences of market opening and trade liberalization.[43] My interest here is in the potential scope for that Polanyian 'embeddedness' to occur at the level of the *region* as well as at the level of the *state*; namely, how can we understand the scope of regional collective action to ameliorate markets. And in exploring the scope for regional integration with a social dimension in the EU *and* in the AU, one may see that such social regionalism in one region (the EU) may operate to constrain the evolution of social regionalism in another (the AU).

That the EU's market-creation project was made possible by virtue of the 'embedded liberal bargain' is an argument I have pursued elsewhere,[44] but a further insight is that such social embedding, or social regionalism, was in turn made possible by virtue of colonial extraction – a *racialized* capitalism underpinning EU integration. The story of liberalism embedded at regional level, alongside the varying forms and depth of *state* or *domestic* intervention which John Ruggie had in mind,[45]

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[42] Frerichs, 'Re-embedding Neo-liberal Constitutionalism', p. 65; D. Ashiagbor, P. Kotiswaran and A. Perry-Kessaris (eds.), 'Special Issue: Towards an Economic Sociology of Law' (2013) 40 *Journal of Law & Society* 1. For a more Weberian-inspired economic sociology of law, see R. Dukes, 'The Economic Sociology of Labour Law' (2019) 46 *Journal of Law and Society* 396.

[43] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Massachusetts: Beacon Press, 2001). What Polanyi refers to as the 'double movement' or 'counter movement' relates to a political, regulatory response to the spread of markets, to the commodification of labour power and of land (the environment). The forces of *laissez-faire* economic liberalism are offset by principles of social protection: Polanyi, *The Great Transformation*, pp. 79–80, 136 and 138–139.

[44] D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 *European Law Journal* 303.

[45] J. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order' (1982) 36 *International Organization* 379.

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has become a more familiar characterization of the EU project: *EU* economic integration shored up by a social community built on adjustment mechanisms at the *national* level, such as social regulations, social transfers and public infrastructure, as well as by a growing body of social law and policy at the EU level.[46] But the colonial turn in EU studies means that as scholars we should be more alert to the contemporary echoes of the imperial past of the EU and its Member States. In particular, I would argue, industrialized nation states of the global North were able to embed the market through social transfers and (varieties of) welfare state regimes. The 'embedded liberalism' which underpinned the redistributive capacities of these individual states and, in due course, underpinned the redistributive capacities of the EU integration project itself, was predicated on the transfer of value from the global South – hence constraining any subsequent development of that region's own version of 'social regionalism'. The pattern of exchange between the 'core' and the 'periphery', the extraction of raw commodities from the South and the commodification of the labour power of colonial states made possible the redistributive welfare states of the global North – and, crucially, facilitated the functioning of the single market through the embedding of EU market liberalization within institutions of social citizenship at domestic level. Historian Giuliano Garavini, writing in 2012, observes: 'As developing nations in Asia and Africa became independent, they mainly came to be seen in western Europe as useful providers of labor and raw materials, potential outlets for surplus manufactures, junior partners to be preserved from the spread of international communism'.[47]

This neocolonial approach by individual nation states which had been colonial empires predates their entry into the EEC,[48] but found continuation within the efforts to build the EEC internal market. The point I

[46] Ashiagbor, 'Unravelling the Embedded Liberal Bargain', at 307 onwards.

[47] G. Garavini, *After Empires: European Integration, Decolonization and the Challenge from the Global South 1957–1986* (Oxford: Oxford University Press, 2012), p. 46.

[48] N. J. White, 'Reconstructing Europe through Rejuvenating Empire: The British, French, and Dutch Experiences Compared' (2011) 210 *Past and Present,* Supplement 6, 211 (also published in M. Mazower, J. Reinisch and D. Feldman (eds.), *Post-War Reconstruction in Europe: International Perspectives, 1945–1949* (Oxford: Oxford University Press, 2011)).

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wish to make here is that European integration coexisted with empire, but also that there was no clean break with the colonial past of the constituent Member States. Formal independence has left these underlying inequalities unchallenged. As Chantal Thomas puts it: 'The legal rules of the international economic order, though informed by liberal ideals of egalitarianism, perpetuate Northern economic hegemony by failing to address the entrenched economic inequality of the South resulting from the colonial era.'[49] A particularly striking example of the continuity of such economic hegemony is the colonial history of the CFA franc and its transition, as Kako Nubukpo traces, from being the currency of the 'French Colonies of Africa' to franc of the nominally independent 'African Financial Community'.[50]

Historically, African economies have been deeply integrated into the global economy; but the terms of that integration have been highly unfavourable to say the least. As Walter Rodney observes: 'Africa helped to develop Western Europe in the same proportion as Western Europe helped to underdevelop Africa.'[51] Western European powers appropriated economic surplus from their colonies, and this materially and substantially aided their own industrial transition from the eighteenth century onward.[52] It is also important, though, to recognize the continuing significance of 'colonial drain' in the *post-war* construction of European markets, labour markets and hence of the single market.

Revisiting the embedded liberal bargain through the lens of racial capitalism highlights the interconnections between the colonial inheritance, social solidarity and varieties of welfare state and labour market institutions in EU Member States. The resources to be fought over between labour and capital in the metropole, the concessions won by workers against capital and the resultant redistribution which made

[49] C. Thomas, 'Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development' (1999) 9 *Transnational Law & Contemporary Problems* 1.

[50] K. Nubukpo, Chapter 7 of this volume.

[51] W. Rodney, *How Europe Underdeveloped Africa* (New York: Verso, 2018), p. 86. See G. K. Bhambra, 'Colonial Global Economy: Towards a Theoretical Reorientation of Political Economy' (2021) 28 *Review of International Political Economy* 307–322 at 313.

[52] U. Patnaik and P. Patnaik, 'The Drain of Wealth Colonialism before the First World War' (2021) 72 *Monthly Review* 1–19.

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possible the social welfare state and industrial citizenship of individual Member States owe a great deal – even after formal independence – to colonial drain from countries of the global South. This subsequently enabled the embedded liberal bargain of the EU social market project.

6.4 COLONIAL EXTRACTION ABROAD AND SOCIAL 'SOLIDARITY' AT HOME

To illustrate the colonial underpinnings of the embedded liberal bargain at EU level, it is helpful to track its underpinnings at domestic level. Here, there is a parallel effect between the EU level and what occurs in national systems of social citizenship. Given the significance of colonial extraction for the resourcing of the post-war welfare state and related labour market institutions in European states such as the UK, how inclusive was that welfare state settlement of racialized others – non-white colonial subjects migrating to work in the metropole? To what extent were there (racial) hierarchies within, or exclusions from, the post-war European ideal of the solidaristic social state?

In the UK, legislation passed in 1946–1948, implementing the Beveridge Report,[53] introduced a welfare system which formally eschewed the poor law-era distinction between the 'deserving' and the 'undeserving' poor,[54] in favour of a system premised on universality: such

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[53] 'Social Insurance and Allied Services. Report by Sir William Beveridge' (London: His Majesty's Stationery Office, 1942). Implementing legislation comprised the National Insurance Act 1946; the National Health Service Act 1946, which came into force in 1948; and the National Assistance Act 1948.

[54] S. Deakin and F. Wilkinson trace the 'many continuities' from the original Elizabethan (sixteenth century) poor laws to contemporary social security. A key turning point was the Poor Law Amendment Act 1834, with its aim of deterring claims for relief so as to 'avoid "artificial" interference with the market rate for wages': S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005), p. 111; see generally chapter 3. Subsequently in the early twentieth century, the practice of requiring the 'undeserving' able-bodied poor to be incarcerated in workhouses in order to obtain relief, was abandoned in favour of means-tested assistance – cheaper than organizing relief through the workhouse but still stigmatized and discouraged. The Beveridgean welfare state for the most part abolished means-testing: N. Whiteside, 'The Beveridge Report and Its Implementation: A Revolutionary Project?' (2014) 24 *Histoire@Politique. Politique, culture, société* 24.

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as tax-funded, redistributive social support and flat-rate benefits.[55] At the same time, the British Nationality Act 1948 ushered in the new legal status of 'Citizen of the United Kingdom and Colonies',[56] which had the effect (if not the intention) of granting a right to enter and remain in the UK to all those born in the UK, in a British colony or in an independent Commonwealth state. Independent Commonwealth states in 1948 included Canada, New Zealand and the newly independent India and Pakistan.[57] Remaining British colonies at the time included territories and countries in Africa, Asia and the Caribbean, for instance, Kenya, Hong Kong, Jamaica. However, full access to the labour market and to the benefits of the welfare state were not in practice universally granted to racialized subjects.

The post-war welfare state was grounded on universality, but full belonging or citizenship required a particular type of participation in the labour market, and ideally within the primary labour market. Racialized and migrant workers in the UK, contracting for work under what we would now call atypical or non-standard terms and receiving lower hourly pay than British workers, would for instance be liable to pay lower social insurance contributions – and thus be disadvantaged when seeking to access welfare benefits in the event of unemployment, illness or accident.[58]

More broadly, across Europe and North America, post-war welfare states failed to fully benefit women, racial minorities, guest workers or immigrants; or actively excluded them from education, healthcare, secure employment, housing support, government-backed financial services and pension schemes.[59] As Lionel Zevounou shows in the case of migrants

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[55] Whiteside, 'The Beveridge Report and Its Implementation', 24.

[56] M. Dias-Abey, 'Determining the Impact of Migration on Labour Markets: The Mediating Role of Legal Institutions' (2021) 50 *Industrial Law Journal* 532.

[57] The full list comprised Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon: British Nationality Act 1948 s. 1(3). Citizens of Eire (Republic of Ireland) were in a special category, in most circumstances to be treated as British subjects.

[58] F. Williams, *Social Policy: A Critical Introduction: Issues of Race, Gender, and Class* (London: Polity Press, 1987), p. 7; M. O'Brien, 'The Beveridge Report: Its Impact on Women and Migrants' (2010) 2 *Socheolas: Limerick Student Journal of Sociology* 21 at 33.

[59] P. Paidipaty and P. Ramos Pinto, 'Revisiting the "Great Levelling": The limits of Piketty's Capital and Ideology for Understanding the Rise of Late 20th Century Inequality' (2021) 72 *British Journal of Sociology* 52–68 at 56.

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from the former French colony of Morocco recruited to work in the SNCF (Société Nationale des Chemins de Fer Français (French National Railways)),[60] such unequal treatment in relation to pay, working conditions, promotion opportunities, pensions and other social benefits was typically rationalized as legitimate differentiation based on nationality, rather than understood as illegitimate discrimination based on race.[61] Crucially, the exclusion of racialized workers and colonial subjects is not merely an exclusion from the *national* welfare state and labour market institutions, but also from social citizenship *within the EU* – because that social citizenship within the EU is premised on these national institutions. This is because EU social citizenship is mainly marked by a privileging of market citizenship: individuals are rights-holders by virtue of their ability to operate as market participants ('economically active' citizens moving between welfare systems).[62] In limited circumstances, the personal scope of beneficiaries of Member States' coordination duties is extended such that reciprocity and solidarity in welfare benefits applies also to non-economically active citizens moving between welfare systems. However, the development of the notion of 'solidarity', for instance in the EU Charter of Fundamental Rights, has proved insufficient to further extend the development of social citizenship in such a way as to benefit legally resident third-country nationals. Indeed, the extent to which such solidarity is in fact available to all *EU citizens* resident in another Member State is now thrown into doubt. EU citizenship had been deemed to be of 'fundamental status' such that EU citizens lawfully resident in another Member State were entitled to social advantages (including welfare benefits) on the same terms as nationals.[63] However, in

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[60] L. Zevounou, Chapter 5 of this volume.

[61] Ibid. See also European Commission, European network of legal experts in gender equality and non-discrimination, *Country Report, Non-discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78. France.* Reporting period 1 January 2022 – 1 January 2023 (Sophie Latraverse). Available at: www.equalitylaw.eu/downloads/5937-france-country-report-non-discrimination-2023.

[62] M. Everson, 'The Legacy of the Market Citizen' in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* (Oxford: Clarendon Press, 1995), p. 73; N. N. Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597.

[63] Case C-184/99, *Rudy Grzelczyk*, EU:C:2001:458. See also Case C-85/96, *María Martínez Sala*, EU:C:1998:217; Case C-456/02, *Michel Trojani*, EU:C:2004:488; Case C-413/99, *Baumbast*, EU:C:2002:493; Case C-34/09, *Gerardo Ruiz Zambrano*, EU:C:2011:124.

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a line of case law over the past decade, the Court of Justice of the European Union has undertaken what Stefano Giubboni describes as 'a spectacular retreat' from the (admittedly weak) rhetoric of transnational solidarity which its earlier case law had extended to non-economically active EU citizens.[64] Thus, permitting exceptions and qualifications contained in secondary EU legislation (such as the Citizens' Rights Directive 2004/38, OJ 2004 L 158, pp. 77–123) to dilute the 'fundamental' status of citizenship and EU citizens' rights to equal treatment contained in primary EU law,[65] negates any aspiration towards 'social Europe': a social citizenship which excludes non-economically active citizens will also determinedly exclude third-country nationals.

Here is where we have a parallel effect between EU level and Member State level. Racialized workers and colonial subjects, even when no longer in the geographical periphery but having migrated to the global North and present in the geographic core, are excluded from national social citizenship, due to their location in the economic periphery of labour markets. As Karim Fertikh observes, this dual standard and racialized 'hierarchy of belonging', was a common template across many EEC states.[66] So in the same way that these workers are excluded from national institutions of social citizenship, 'third country nationals' as they are referred to in the context of the EU single market, are similarly excluded from 'social Europe'. The hollowing out of 'social Europe' or social citizenship for EU nationals evidenced by the recent case law of the Court of Justice is in line with what Giubboni characterizes as the 'neo-nationalistic and social-chauvinistic moods prevailing in Europe',[67] which no longer accepts the value of 'a certain degree of financial solidarity' between EU Member States.[68] In similar vein, despite the funding of these national and EU redistributive social

[64] S. Giubboni, 'Free Movement of Persons and European Solidarity Revisited (2015) 7 *Perspectives on Federalism* 3–18.

[65] Case C-140/12, *Peter Brey*, EU:C:2013:565; Case C-333/13, *Dano*, EU:C:2014:2358; Case C-67/14, *Alimanovic*, EU:C:2015:597; Case C-299/14, *García-Nieto*, EU:C:2016:114; Case C-308/14, *Commission v. UK*, EU:C:2016:436.

[66] K. Fertikh, Chapter 4 of this volume.

[67] Giubboni, 'Free Movement of Persons'.

[68] *Grzelczyk*, para. 44.

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systems being premised on colonial extraction and the labour power from colonial states, financial or transnational solidarity beyond the territory of the EU is inconceivable.[69]

6.5 SOCIAL REGIONALISM IN THE EU AND THE AU: THE EU AS A NEOCOLONIAL PROJECT

One of the key projects with which labour and social law is concerned relates to constraining private market power, and a concern about the regulatory means by which the market can be governed. Historically, labour law, along with much economic law, has been a domestic project, 'defined on the basis of a geographic territory or a synthetic community'.[70] Labour and social law *scholarship* has traditionally focused on the role of the state and its capacity, or otherwise, to regulate a territorially bounded market to socialize economic risk and uncertainty. But 'labour' is now provided, undertaken or commodified under conditions of trade liberalization; capital and the sphere of economic interaction are increasingly de-territorialized. Such increased cross-border economic activity places major demands on the ability of states to maintain (or instigate) regulatory control of economic activities within their borders. Given increased liberalization of trade and capital, one may ask, with Alain Supiot, whether the social state is still in a position to 'prohibit the use of open borders to escape the duties of solidarity inherent in the recognition of economic and social rights'.[71] We may also need to ask whether, from the perspective of labour and social regulation, economic activity – in particular that which crosses national borders – can any longer be contained within or constrained by state regulation, and instead shift the focus to the attendant role of regulation on the regional or transnational plane.

In that light, and to return to the above discussion of economic sociology and 'embedded liberalism', Björn Hettne's question becomes pertinent: 'Is regionalisation an integral part of globalisation, or is it a

[69] T. de Lange, W. Maas and A. Schrauwen (eds.), *Money Matters in Migration: Policy, Participation and Citizenship* (Cambridge: Cambridge University Press, 2021).

[70] G. Mundlak, 'De-Territorializing Labor Law' (2009) 3 *Law & Ethics of Human Rights* 189.

[71] A. Supiot, 'Grandeur and Misery of the Social State' (2013) 82 *New Left Review* 99.

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political reaction against that process?'[72] In fact, as Hettne also concurs and as we have seen in the case of the EU, it can be both. For industrialized economies of the global North, including those in Europe, much of the protection of society from the market which Polanyi refers to as the countermovement or double movement,[73] occurred through the auspices of the social state. While regionalism and market liberalization do indeed undermine national regulatory autonomy over labour or social welfare law, the embedded liberal compromise, as the European integration project has exemplified, has in fact embedded the internal market within national social policy. Such embedding has been predicated on the ability of these industrialized nations to alleviate any adverse impact of market integration through national systems of employment protection and social welfare, and to fund social policy interventions, but shored up by the development of forms of social citizenship at EU level.[74]

In exploring the scope for regional integration with a social dimension (social regionalism) in the EU and in the AU to re-embed the market or constrain the negative consequences of trade liberalization, one needs to trace the separate trajectories of these two regionalism projects; but also to recognize points of overlap, namely where one regionalism project (the EU) may constrain the policy space available to the other (the AU) to develop its own version of social regionalism. Nancy Fraser's blunt observation that 'the project of social protection can no longer be envisioned in the national frame',[75] along with Supiot's question whether the social state is 'still' able to protect economic and social rights, presupposes prior state capacity albeit now undermined by globalization. Yet developing economies of the global South, former EU colonies, never enjoyed protective capacities equal to those of 'the core' – thanks to 'long histories of colonial subjection,

[72] B. Hettne, 'Beyond the "New" Regionalism' (2005) 10 *New Political Economy* 543–571 at 547.

[73] Polanyi, *The Great Transformation*: 'For a century the dynamics of modern society was governed by a double movement: the market expanded continuously but this movement was met by a countermovement checking the expansion in definite directions', at p. 130.

[74] Ashiagbor, 'Unravelling the Embedded Liberal Bargain'.

[75] N. Fraser, 'A Triple Movement? Parsing the Politics of Crisis after Polanyi' (2013) 81 *New Left Review* 119.

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as well as to the continuation, after independence, of imperialist predation by other means'.[76]

To return to the observation in the introduction, what does it mean to say that EU colonialism continues to shape EU–AU relations, and to determine the conditions of possibility for the evolution of a social dimension for the AU's own market integration project? What does it mean to take Polanyi to both Brussels and Addis Ababa, the homes of the EU Commission and AU Commission respectively? As discussed above, social regionalism in the EU context can be understood to entail a countermovement in the Polanyian sense – a regulatory response to protect vulnerable regions, sectors and workers from the impact of markets and trade liberalization, but writ large, beyond the single nation state. This involves integration which is both solidaristic and redistributive, conceiving of the adjustment costs of trade as more than a matter for domestic policy. But what policy space is there for a similar intervention or social regionalism within sub-Saharan Africa given that according to Nkrumah, the Treaty of Rome and the creation of the EEC represented 'the advent of neocolonialism in Africa'[77] or 'collective colonialism'.[78]

The continent's policy-makers, political elites and institutions (such as the AU Commission), drawing on and complementing the economic analyses of organizations such as the United Nations Economic Commission for Africa (UNECA), have come to a consensus around the need to pursue continent-wide trade liberalization in order to confer on African economies the economic power to engage meaningfully in global trade. But was this acceptance of the existing 'rules of the game' of the global economic order always the case? Was there scope or policy space for the form of regionalism which emerged from the Organisation of African Unity and the common project of decolonization to evolve into a form of African (social) regionalism which could serve as a countervailing force to neo-liberal global trade? The dominant model of

[76] Ibid.

[77] Nkrumah, 'Address to the Ghana National Assembly, 30 May 1961', 229.

[78] K. Nkrumah, 'Step to Freedom' Address to the Nationalist Conference of African Freedom Fighters, 4 June 1962; quoted in S. K. B. Asante, 'Pan-Africanism and Regional Integration' in A. A. Mazrui (ed.), *General History of Africa VIII: Africa since 1935* (Oxford: Heinemann, 1993), p. 740.

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regional integration on the continent today is one aimed at trade liberalization, integrating African states into the world economy and reducing the role of the state in the economy. This is most clearly exemplified through the establishment of the African Continental Free Trade Area (AfCFTA) which came into force in 2021,[79] and has been described as a 'game changer' for stimulating intra-African trade,[80] as well as enhancing integration of the region into the global economy.[81] To what extent is this regionalization process mirroring the market fundamentalism of existing global trade rules, or able to act as a buffer against them? I am interested in contrasting the market orientation acceptance of the neo-liberal paradigm of the *current* continental African regionalization project, with the *earlier* emphasis on the developmental state and state-led industrialization as an alternative economic strategy.

Early conceptions of regionalism on the continent of Africa were, in common with regionalist ideology in Latin America, Asia and among Arab countries, closely founded on aspirations for political unity and a common project of decolonization.[82] In postcolonial Africa, regionalism and integration arose alongside the emancipatory movement against racial (and economic) domination and the desire to integrate as a means to counter neocolonial legacies.[83] However, the radical version of pan-Africanism, as espoused by Nkrumah and other post-independence leaders in the early 1960s urging political integration

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[79] Agreement Establishing the African Continental Free Trade Area, 21 March 2018, available at: https://au-afcfta.org/afcfta-legal-texts/.

[80] UNECA estimates that the AfCFTA will increase the value of intra-African trade by between 15 per cent (50 billion dollars) and 25 per cent (70 billion dollars) by 2040, due to the elimination of 90 per cent of tariffs on goods and the reduction of trade costs – compared to the absence of such a single continental market: UNECA, 'An Empirical Assessment of the African Continental Free Trade Area Modalities on Goods' (November 2018), at 3.

[81] H. Fofack and A. Mold, 'The AfCFTA and African Trade: An Introduction to the Special Issue' (2021) 8 *Journal of African Trade* 1.

[82] D. Bach, 'The Global Politics of Regionalism: Africa' in M. Farrell, B. Hettne and L. Van Langenhove (eds.), *Global Politics of Regionalism: Theory and Practice* (London: Pluto Press, 2005), p. 174; E. T. Aniche, 'Pan-Africanism and Regionalism in Africa: The Journey So Far' in S. O. Oloruntoba (ed.), *Pan Africanism, Regional Integration and Development in Africa* (London: Palgrave Macmillan, 2020), pp. 17–38.

[83] L. G. Dirar, 'Rethinking and Theorizing Regional Integration in Southern Africa' (2014) 28 *Emory International Law Review* 123–165 at 165.

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and supranationalism as a prerequisite for economic integration, gave way to a more moderate version, seeking to strengthen respective states while promoting subregional communities.[84] This choice or tension between different forms of pan-Africanism and models of integration came to the fore in the immediate post-independence period, at the 1963 Addis Ababa summit which led to the formation of the Organisation of African Unity (OAU),[85] and again at the formation of the AU in 2000. As Daniel Bach argues, the OAU, the precursor to the AU, took its inspiration from the Organisation of American States. As such, the emphasis was on providing a multilateral forum. Thus the radical pan-African ideals of sovereignty pooling or supranationalism were sidelined in favour of 'more immediate concerns related to sovereignty enhancement, non-interference in domestic affairs and mutual respect for colonial boundaries',[86] and also in favour of further strengthening *regional* economic communities (RECs) before later *continental* integration.[87]

The Constitutive Act of the African Union, adopted in July 2000, reflects the complexity of combining or balancing these aspirations towards both (national) independence and (regional) integration. Article 3, which articulates the objectives of the new Union, aims to 'defend the sovereignty, territorial integrity and independence of its Member States'; to 'accelerate the political and socio-economic integration of the continent'; and also to 'coordinate and harmonize the policies between the existing and future Regional Economic Communities'.[88] In contrast to the Preamble to the

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[84] A. S. Basiru, M. L. A. Salawu and A. Adepoju, 'Radical Pan-Africanism and Africa's Integration: A Retrospective Exploration and Prospective Prognosis' (2018) 41 *Ufahamu: A Journal of African Studies* 103, esp. 110–112; K. Nkrumah, *Africa Must Unite* (New York: Frederic A. Praeger, Inc., 1963).

[85] Organisation of African Unity (OAU) Charter, Addis Ababa, 25 May 1963. Prior to the foundation of the OAU, states had divided between those which favoured political integration as a prerequisite for economic integration (representatives of Ghana, Guinea, Mali, Morocco, Libya, Egypt, and the Algerian Provisional Government – signatories of the 1961 Casablanca Charter) and the 'Monrovia group' (including representatives of Liberia, Nigeria and Sierra Leone) which favoured a more gradualist approach to integration: Basiru, Salawu, and Adepoju, 'Radical Pan-Africanism'.

[86] Bach, 'The Global Politics of Regionalism', p. 174.

[87] Basiru, Salawu and Adepoju, 'Radical Pan-Africanism'.

[88] Constitutive Act of the African Union; adopted at the Lomé Summit (Togo) 11 July 2000, entered into force 26 May 2001.

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Treaty of Rome, which expresses a determination 'to lay the foundations of an ever closer union among the peoples of Europe' and then envisages that unity primarily in economic terms (referring to improvement of the living and working conditions, abolition of restrictions on international trade and a common commercial policy), the central inspirations underpinning the Preamble to the AU Constitutive Act are the ideals of pan-Africanism – unity, solidarity, but also the 'heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation'. The model of integration ultimately adopted can be understood as a compromise 'between partisans of a federal union (endowed with supranational competences) and those who resisted this ambitious vision and did not want to give up their national sovereignty'.[89]

I now return to the contention that EU colonialism continues to shape EU–AU relations, and to determine the conditions of possibility for the evolution of a social dimension for the AU's own market integration project. Against the backdrop of sometimes unpredictable geopolitical shifts which have affected global trade and politics,[90] AU–EU relations are described in terms of partnership, but not one between equals,[91] given the process of 'unequal exchange' which continues to bedevil postcolonial trade. There are two components to this characterization of colonial economy, developed by historians and economists associated with dependency theory and world-system theory.[92] First, that the wealth of high-income

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[89] G. Laporte and J. Mackie, 'Towards a Strong African Union: What Are the Next Steps and What Role Can the EU Play?' in G. Laporte and J. Mackie (eds.), *Building the African Union: An Assessment of Past Progress and Future Prospects for the African Union's Institutional Architecture*, European Centre for Development Policy Management (ECDPM) Policy and Management Report 18 (Maastricht: ECDPM, October 2010), p. 15.

[90] L. T. Shiferaw and M. Di Ciommo, 'Trouble in Paradise: The EU-Africa Partnership in a Geopolitical Context', ECDPM Briefing Note No. 172, 13 November 2023.

[91] S. Islam, 'Decolonising EU-Africa Relations is a Pre-condition for a True Partnership of Equals', Center for Global Development Blog Post, 15 February 2022.

[92] Rodney, *How Europe Underdeveloped Africa*; R. Prebisch, 'The Economic Development of Latin America and Its Principal Problems' (1950) *United Nations Economic Commission for Latin America*; also published in (1962) 7 *Economic Bulletin for Latin America* 1; I. Wallerstein, *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974); S. Amin, *Unequal Development: An Essay on the Social Formations of Peripheral Capitalism* (New York: Monthly Review Press, 1976).

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nations depends, on a vast scale, on processes of appropriation of natural resources and labour from the rest of the world, in particular from the global South during the colonial period.[93] More specifically, that 'rich countries and monopolistic corporations leverage their geopolitical and commercial dominance in the world economy to depress or cheapen the prices of resources and labour in the global South, both at the level of whole national economies as well as within global commodity chains'.[94] The rules of global trade, and hence the ability to embed the market in the social, are thus weighted against formerly colonized states. Further, in respect of the scope to engage in 'social regionalism', this drain from the global South arguably remains a significant feature of the world economy and sustains high levels of income, redistribution and material consumption in 'advanced economies'.[95]

Second, that contemporary trade law, trade and development policies of international financial institutions and of global North governments have entrenched this unequal exchange. As summarized by Hickel and his co-authors, structural adjustment programmes imposed on the South by the International Monetary Fund and World Bank, bilateral free trade agreements and the rules of a World Trade Organization (WTO) dominated by high-income nations have forced global South governments to remove tariffs, subsidies and other protections for infant industries, to cut public sector wages and employment, while rolling back labour rights and curtailing trade unions.[96]

With regard to the EU–AU nexus, I wish to focus on the second, institutional part of the argument as to unequal exchange. In her 2023 State of the Union Speech, President of the EU Commission Ursula von der Leyen indicated that she and High Representative Josep Borrell would propose a 'new approach' to Africa during the

[93] J. Hickel, D. Sullivan and H. Zoomkawala, 'Plunder in the Post-Colonial Era: Quantifying Drain from the Global South through Unequal Exchange, 1960–2018' (2021) 26 *New Political Economy* 1030–1047 at 1030.

[94] J. Hickel, C. Dorninger, H. Wieland and I. Suwandi, 'Imperialist Appropriation in the World Economy: Drain from the Global South through Unequal Exchange, 1990–2015' (2022) 73 *Global Environmental Change* 1.

[95] Hickel, Sullivan and Zoomkawala, 'Plunder in the Post-Colonial Era', at 1042–1043.

[96] Ibid. at 1032; Hickel, Dorninger, Wieland and Suwandi, 'Imperialist Appropriation in the World Economy', at 9.

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upcoming EU–AU summit.[97] However, the current EU external relations and trade law framework reveals continuities in terms of 'unequal exchange' which are unlikely to be modified by any 'new approach'. The current legal framework governing EU–Africa (i.e. broader than AU) relations is the Samoa Agreement with the Organisation of African, Caribbean and Pacific States (OACPS), signed in November 2023.[98] This 'post-Cotonou' agreement evolved out of the Cotonou Partnership Agreement (CPA), signed in 1990 between the then European Community and African, Caribbean and Pacific (ACP) states, which had itself replaced the earlier Lomé Conventions, while retaining the core principle of non-reciprocal trade preferences first enshrined in the Lomé Convention of 1975.[99] As with the Lomé Conventions, the CPA was granted exemption from the most-favoured-nation obligation in Article I of the General Agreement on Tariffs and Trade, in order to permit preferential treatment of ACP products within the narrow waiver allowed by the WTO.[100] Since the expiry of the WTO waiver in

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[97] 2023 State of the Union Address by President von der Leyen, 13 September 2023, Strasbourg: *Commission work programme 2024: Delivering today and preparing for tomorrow*, Strasbourg, 17 October 2023, COM(2023) 638 final, ANNEXES 1 to 4. A joint communication between the European Commission and EEAS on this 'new approach' was published in late 2024: High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: Building sustainable international partnerships as a Team Europe*, Brussels, 2 October 2024, JOIN(2024) 25 final.

[98] Council Decision 2023/2861 of 20 July 2023 on the signing, on behalf of the European Union, and provisional application of the Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part, OJ 2023 L 2023/2861. For the text of the post-Cotonou partnership Samoa Agreement: Council of the European Union, *Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part*, Brussels, 19 July 2023, (OR. en) 8372/1/23 REV 1.

[99] M. Cremona and V. Dimier in Chapters 2 and 10 of this volume; L. Bartels, 'The Trade and Development Policy of the European Union' (2007) 18 *European Journal of International Law* 715.

[100] General Agreement on Tariffs and Trade (GATT 1947) Article I: General Most-Favoured-Nation Treatment, Article XXXVI Trade and Development: the 'Enabling Clause' allows for a General System of Preferences in favour of developing countries, which otherwise would violate Most Favoured Nation. See also Bartels, 'The Trade and Development Policy'.

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December 2007, trade relations between the ACP countries and the EU have been governed by a variety of legal instruments, including economic partnership agreements (EPAs) and the EU Generalised Scheme of Preferences, 'replacing the more or less unified system of unilateral preferences under the Lomé Agreements with an array of tools', fragmenting the ACP bloc into several subregional pieces for trade purposes.[101] The post-Cotonou partnership will arguably take this fragmentation further. Unlike the Lomé and Cotonou Agreements, which applied equally to all countries in the ACP regions without distinction, the new Samoa Agreement is made up of two parts: a General Part that applies to all OACPS countries (an umbrella agreement) and three region-specific protocols that apply only to the respective regions (regional protocols) – for instance, the Africa Regional Protocol.

While ostensibly committed to supporting intra-African trade, such as to generate tariff incomes of the sort to enable redistribution which could sustain social regionalism, the post-Cotonou partnership in practice operates to undermine African integration and *intra*-African trade. For instance: although the umbrella agreement commits signatory states to 'intensifying regional integration efforts and processes within Africa, the Caribbean, and the Pacific and further encouraging intra-ACP regional trade', and the Africa Regional Protocol commits the parties to 'support regional and continental integration in Africa' (Article 3 of the Africa Regional Protocol), including the AfCFTA, these efforts are undermined by the fact the post-Cotonou partnership also requires that 'trade cooperation shall primarily build on existing preferential trade arrangements and Economic Partnership Agreements (EPAs)'.[102] Prioritizing preferential trade agreements with the EU militates against the ability to deepen RECs and continent-wide integration – and undercuts the potential of the much-lauded AfCFTA

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[101] M. G. Desta, 'The Normative Mess Governing Africa-EU Trade Relation Granted a New Lease of Life: Preliminary Reflections on the Trade-Related Aspects of the Negotiated Agreement between the EU and OACPS', Völkerrechtsblog, 16 November 2021.

[102] Article 16(3) of the Africa Regional Protocol, Council of the European Union, *Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part*, Brussels, 19 July 2023, (OR. en) 8372/1/23 REV 1.

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to increase the value of intra-African trade. As Melaku Geboye Desta shows, EPAs have undermined some of the most promising regional integration projects in Africa, such as the Economic Community of West African States (ECOWAS, one of the regional economic communities on whose foundations the AfCFTA is to be built), given that countries such as Ghana and Côte d'Ivoire have had to conclude *individual* interim EPAs with the EU in order to preserve pre-existing market access – that is duty-free and quota-free access to the EU.[103] The estimates put forward by economists such as those at UNECA, that a single continental market would increase the value of intra-African trade by between 15 per cent (50 billion dollars) and 25 per cent (70 billion dollars) by 2040, due to the elimination of 90 per cent of tariffs on goods and the reduction of trade costs will not be realizable either for the continent-wide AfCFTA or for the RECs.[104] The adoption of bilateral special regimes by states which are members of the AU and also members of one of the AU's RECs, in order to continue preferential trade with the EU, is incompatible with any common external tariff adopted by a REC such as ECOWAS.[105] The ability of EU goods to evade the ECOWAS common external tariff will lead to a loss of customs duties for ECOWAS, and a reduction in revenues for all ECOWAS states,[106] an outcome which is likely to be replicated on the larger, continental, stage of the AU's attempts at market integration. The EU's repeated assertion that EPAs and free trade agreements with the EU 'should be exploited to the greatest extent, as building blocks to the benefit of the African Continental Free Trade Area',[107] can only operate to

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[103] Desta, 'The Normative Mess Governing Africa-EU Trade'.

[104] UNECA, 'An Empirical Assessment'.

[105] ECOWAS Trade Information System, ECOWAS Common External Tariff (CET), https://ecotis.ecowas.int/policy-development/common-external-tariff-cet/.

[106] J. Berthelot, 'The ECOWAS Trade Liberalization Scheme (ETLS) Undermined by the Interim EPAs (iEPAs) of Ivory Coast and Ghana', Bilaterals (27 November 2016); J. MacLeod, J. E. von Uexkull and L. Shui, 'Assessing the Economic Impact of the ECOWAS CET and Economic Partnership Agreement on Ghana', World Bank Group Working Paper, 1 January 2015.

[107] European Commission, *Communication on a new Africa – Europe Alliance for Sustainable Investment and Jobs: Taking our partnership for investment and jobs to the next level*, Brussels, 12 September 2018, COM(2018) 643 final, at Action #8 at 11.

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undermine the AU's goal for AfCFTA to create a single market for goods and services, such a single market being central to the continental market integration agenda but also an essential prerequisite for the continent's development and social agenda.

6.6 CONCLUSION

This chapter has sought to highlight an absence in EU law scholarship, namely an analysis of the role of colonialism, race or racial capitalism in the process of EU integration. Addressing that lacuna requires us to develop an alternative analytical framework with which to understand the law in regionalism and market integration projects: one which recognizes colonialism as central to the historic construction of the welfare state in Europe, and draws attention to the transfers between South and North which made possible the 'embedded liberalism' of the EU social market project.

The value of the region is that in the case of the EU it has been able to serve as a complement and support to the social state weakened by the open borders of trade liberalization. However, the temporal, geographic and economic preconditions which enabled embedded liberalism or social regionalism in the EU to flourish do not apply in the case of the AU. First, the contemporary global trading order is less sympathetic to government intervention: the era of embedded liberalism has given way to one marked by disciplinary neo-liberalism. Second, the individual Member States themselves are less able to provide social stabilizers: developing states, and the regions they create, lack the policy space, institutional or economic capacity to moderate the harmful domestic effects of market exposure. Finally, in keeping with the main theme of this chapter and this collection, one needs to be attentive to the historic and contemporary relationship between the two regionalism projects. To return to Nkrumah's observation on the Treaty of Rome, embedded liberalism in one region has consequences for the policy space available for the development of a social dimension elsewhere. The two regions are not only trading partners, but also share a colonial history which has an ongoing impact, with the embedded liberalism which underpinned the redistributive

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capacities of individual states of the North and the redistributive capacities of the EU integration project in large part predicated on the transfer of value from the global South, and the EU's economic model potentially destabilizing the development of regional integration and redistributive social institutions in its developing-country trading partners.

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CHAPTER 7

Towards Monetary Sovereignty

The Colonial History of the CFA Franc and How to Transition to the Eco

KAKO NUBUKPO

PROOFS

7.1 INTRODUCTION

On 21 December 2019 at a joint press conference in Abidjan in Côte d'Ivoire, France's President Emmanuel Macron and Côte d'Ivoire's President Alassane Ouattara announced the impending end of the CFA franc in the Member States of the West African Economic and Monetary Union (WAEMU), and its replacement by the new eco currency. The effect of this announcement can be likened to a resurfacing of repressed feelings in psychoanalysis.[1] The outspoken discussions about currency in the African franc zone that followed opened the floor to every possible rhetorical excess imaginable, especially from those 'eleventh hour' campaigners who are only now finding out that the CFA franc is not a currency compatible with the emergence of francophone Africa.

However, while we must not stop applying the pressure towards ending the CFA franc, which circulates in fourteen African countries divided into two monetary zones in West and Central Africa,[2] we must

I wish to thank Hanna Eklund.

[1] Members of the WAEMU are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

[2] The African franc zone consists of: the eight Member States of the WAEMU. These countries use the West African CFA franc (XOF); the Economic and Monetary Community of Central Africa (CEMAC), which consists of six Member States: Cameroon, the Central African Republic, Chad, the Congo, Equatorial Guinea, and Gabon. These countries use the Central African CFA franc (XAF); and the Union of the Comoros, which uses the Comorian franc (KMF).

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also provide a realistic outline of what transition to the replacement currency, the eco, would look like for West Africa. The eco's (re)birth was announced on 29 June 2019 in Abuja in Nigeria by the Summit of Heads of States and Governments of the Economic Community of West African States (ECOWAS);[3] thus, a few months prior to the contentious announcement in Abidjan. For France and the European Union (EU), the process which is now unfolding is a test of whether or not they sincerely and definitively want to put the CFA franc to rest.[4]

In this chapter, I briefly outline the colonial economic history of the CFA franc, culminating with the role currently played by the French Treasury and the European Central Bank in the economic life of the African franc zone. I then outline the debate about how to end the CFA franc and the four most plausible options to successfully gather together those fifteen ECOWAS Member States which have been invited to the eco party.[5] Finally, I outline my view of how to successfully end the CFA franc and implement the eco, and how this will benefit the economic lives of the people of West Africa.

7.2 THE COLONIAL HISTORY OF THE CFA FRANC

The franc zone was created by France in 1939 and included fifteen African territories which were part of its colonial empire. Since its inception, the zone has been marked by a monetarist doctrine emphasizing stability and the primacy of the fight against inflation. The franc zone has a currency, created on 26 December 1945, the CFA franc. Originally, CFA stood for *franc des Colonies Françaises d'Afrique* (franc of the French Colonies of Africa), which with independence from colonial rule became the *franc de la Communauté Financière Africaine* (franc of the

[3] Final Communiqué of the 55th ordinary Session of the Authority of ECOWAS Heads of State and Government (Abuja, 29 June 2019). The fifteen members of ECOWAS are Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. ECOWAS was founded by the Treaty of Lagos in 1975. In 1999 ECOWAS agreed to work towards creating a single currency, the eco, short for ECOWAS.

[4] K. Nubukpo, M-Z. Belinga, B. Tinel and D. M. Dembélé, *Sortir l'Afrique de la servitude monétaire: à qui profite le franc CFA ?* (Paris: La Dispute, 2011).

[5] Thus, not including the six Member States of the CEMAC.

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African Financial Community). Imposed on Africans as part of colonization, the monetary situation in francophone Africa follows the contours of the colonial and postcolonial history of the continent.

At the end of the Second World War, after the ratification of the Bretton Woods agreements, the franc zone faced the problem of setting a new parity for the franc at competitive rates in order to help the resumption of exports. For most of the war, the official rates of the franc in relation to the US dollar and the pound sterling remained those adopted in September 1939. However, between 1939 and 1944, prices increased by 150 per cent in France, while they grew by less than 30 per cent in the United States and the United Kingdom. Therefore, a deep devaluation was necessary to restore the balance between French prices and foreign prices.

The CFA franc was thus born at the time of the first devaluation of the metropolitan franc carried out on 26 December 1945. The parity of the CFA franc remained fixed in relation to the metropolitan franc (metro) for forty-six years between the devaluation of 17 October 1948 and the devaluation of 11 January 1994, regardless of economic variations and institutional changes such as the franc zone countries' independence from colonial rule.

In fact, the 50 per cent devaluation of the CFA franc on 11 January 1994 is a crucial, and telling, episode in the history of this currency. This episode brought the inequities of the construction and arrangement of the CFA franc into sharp relief.[6] The devaluation measure was not desired by African governments, who saw major political risks in it, in particular a significant loss of purchasing power of their populations following high post-devaluation inflation. For the French Ministry of Finance, devaluation was, however, foremost a question of preserving the historic characteristics and mechanisms of the governance of the franc zone: the role of the French Treasury Department in its governance, the fixed parity with the franc, and the interests of French companies established in the African franc zone.

[6] The French president François Mitterrand, in the name of privileged relations with certain African heads of state, was hostile to a devaluation, but he finally accepted the idea, after discussions with his prime minister Édouard Balladur.

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Creating as it did a feeling of having been abandoned, the devaluation of the CFA franc in January 1994 marked the beginning of the distancing of the African franc zone countries from the French fold, and the end of the French political and economic monopoly.

Yet, the legal and financial links between the CFA franc and France, and from 1999 France and the EU, have proven resistant to reform.[7] The links between the African franc zone and what has since 1999 been the eurozone have four main characteristics: the fixed parity or fixed exchange rate between the CFA franc and the euro; the total guarantee by the French Treasury of convertibility between the CFA franc and the euro; the freedom of movement of capital between the African franc zone and eurozone;[8] and finally the centralization of foreign exchange reserves, which means that countries whose currency is the CFA franc must deposit 50 per cent of their foreign exchange reserves in the French Treasury, which pays interest for these deposits, a principle called the centralization of reserves.

Despite the successive reforms of 1973, 2010, and 2020 of the institutions and functioning of the WAEMU, created in 1962 as a management body for the CFA franc in West Africa, the intangibility of a fixed parity pegged to the euro has always been maintained and encoded in various conventions concluded between France and the states of the franc zone.[9]

In 2021, seemingly prompted by the currency reform plans in West Africa and transition to the eco, the EU reaffirmed its own involvement and decision-making power regarding the CFA franc's fixed parity to the euro. A Council Decision was issued on 25 January 2021, which amended the original 1998 Council Decision concerning exchange rate matters relating to the CFA Franc.[10] Article 5 of the 2021 Council

[7] For the original EU decision on the transfer from the franc to the euro, see Council Decision of 23 November 1998 concerning exchange rate matters relating to the CFA Franc and the Comorian Franc, OJ 1998 L 320.

[8] The twenty (out of twenty-seven) EU Member States composing the eurozone are: Austria, Belgium, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain.

[9] The same is true of the CFA franc in circulation in Central Africa.

[10] Council Decision of 23 November 1998 concerning exchange rate matters relating to the CFA Franc and the Comorian Franc, OJ 1998 L 320 and Council Decision (EU)

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Decision concerns agreements between France and WAEMU and CEMAC on 'exchange rate matters relating to the CFA franc' and reads: 'Any plans to change the nature or scope of the present agreements, either by amending or by replacing them, shall be submitted by France to the Commission, the European Central Bank and the Economic and Financial Committee. Such plans shall require the approval of the Council on the basis of a recommendation from the Commission and after consultation of the European Central Bank.'

African and French ruling elites have always invoked the virtues of stability to justify the intangibility of fixed parity with the franc and later the euro.[11] However, this intangibility offers these ruling elites advantages in terms of repatriation of capital from the franc zone to the eurozone: African leaders benefit from facilities to deposit their money in eurozone banks and are encouraged to massively import goods and services from the rest of the world, rather than stimulating regional markets. In return, eurozone companies established in the African franc zone can easily repatriate their profits to the eurozone due to the guaranteed convertibility of the CFA franc into euros and the free movement of capital between the two zones.

Economically speaking, four main criticisms have from the outset been addressed to the franc zone and its corollary, the CFA franc. The share of intra-community trade is low (15 per cent compared to 60 per cent in the eurozone). Price competitiveness is hampered by a CFA franc which, pegged to the euro, appears to be a 'strong' currency. However, this 'strength' reflects the eurozone, not the franc zone area. The primacy of the fight against inflation, in line with the economic orthodoxy of the European Central Bank,[12] explains the absence of a growth objective in the missions of Central Banks in the franc zone. As a result, the financing of the economy remains below the needs of the economies in the area.

2021/357 of 25 January 2021 amending Decision 98/683/EC concerning exchange rate matters relating to the CFA franc and the Comorian franc, OJ 2021 L 69.

[11] The same positions have been promoted by public officials of the EU. See M. Hallet, 'The role of the euro in Sub-Saharan Africa and in the CFA franc zone' (2008), Economic Papers 347, European Commission.

[12] Compare the statement in Ibid., p. 17: 'Procedures of macroeconomic surveillance in the CFA franc zone are clearly inspired by those in the EU.'

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From a political and societal point of view, the preservation of the CFA franc is increasingly perceived by African youth and diasporas as a striking illustration of the strong economic and political outsourcing of responsibility and vision that characterizes the African economies and societies of the franc zone. A new generation of West Africans see the states of the franc zone as incapable of deciding on their monetary policy, proof of which is that these states delegate to the former colonial power one of the crucial elements of sovereignty – the power to mint money. CFA notes and coins have since 1945 been made exclusively in Chamalières, in France, by the Bank of France.

The populations living in the franc zone, harassed by authoritarian and corrupt governments, and by indecent living conditions, now aspire to a democratic revival. They rebel against colonial symbols. The fact that CFA notes and coins are made in France symbolically and substantially undermines the idea of sovereignty defended by the African leaders of the franc zone. Furthermore, the two main Central Banks of the franc zone, namely the Central Bank of West African States (BCEAO) and the Bank of Central African States (BEAC) obtained their independence from their respective franc zone states in 2010. However, the BCEAO and the BEAC must go through the French Treasury, that is to say the French Ministry of Finance, as the guarantors of the fixed parity between the CFA franc and the euro.

Considering this history, it is not hard to understand why the establishment of a new eco currency in place of the CFA franc in West Africa is the subject of passionate debate. Just think of Marcel Mauss's characterization of money as 'total social facts'.

PROOFS

7.3 THE OPTIONS

7.3.1 THE ECO-CFA. The idea of the eco as essentially an avatar of the CFA franc – the eco-CFA – places its hopes in a progressive enlargement of the WAEMU to those economies of the ECOWAS with the same export profile of agricultural primary resources, namely coffee, cocoa, and cotton. The eco-CFA schema, which seems to have inspired the Abidjan declarations of December 2019, is founded on the respect of nominal criteria of convergence and on the idea that continuation of the fixed

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exchange regime with the euro is desirable. According to this schema, the centralization of exchange reserves is fundamental and every country would put together its reserves to increase the basket of reserves. This option therefore presumes and depends on a strong political solidarity between the current Member States of the WAEMU.

Importantly, the role of external guarantor, currently played by France within the CFA franc's institutional context, has a strong political dimension: in both theory and practice it has been seen as the foundation of the system's stability. If the eco retains the principle of the centralization of reserves, but shifts their management to a different institutional framework, then the monetary sovereignty passes from France to the WAEMU and gradually to the ECOWAS.

Then there is the question of fixed parity: much work was done a few years ago to propose a system of flexible exchange rates, or even better adjustable rates, as they are based on an index calculated using the most recent basket of currencies. The Abidjan announcement that the exchange rate pegged to the euro would be maintained during the transition period is the real point of contention between those proponents of a flexible currency (the ECOWAS heads of state) and those of an eco-CFA (Côte d'Ivoire and Senegal). Tying the eco to the euro would mean a loss of competitiveness for the eco economies, while leaving the eco flexible would enhance their competitiveness. The idea of continuing to peg the eco to the euro therefore represents a significant weakness of the eco-CFA proposition.

7.3.2 A REAL ECO. A real eco founded on real convergence would mean a currency founded on GDP per capita, and no longer, as in the case of the eco-CFA, a currency founded on the respect of nominal criteria of convergence. In this set-up, the economies of the ECOWAS would be obliged to converge towards the leading trio: Cape Verde, Nigeria, and Ghana. The eco would have a flexible exchange regime governed by an inflation targeting framework and would not be pegged to the euro. The dynamic of convergence would therefore be quite different and the WAEMU Member States would lose their status of being the star pupils of convergence; in other words, their lead roles in the process of setting up the eco would be lost to Nigeria.

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The question is whether Nigeria, a real heavyweight of the ECOWAS (70 per cent of GDP and 52 per cent of the population), is willing to take on the role of being the ecozone's powerhouse? Why would Nigeria now accept the role of the ECOWAS's last resort lender, a role which it did not wish to play during the setting up of the second West African Monetary Zone (WAMZ) in 2002? Perhaps even more crucially, why would it agree to abandon its currency, the naira, in the current context, a context marked by the use of money printing to resolve internal tensions in the Nigerian federation?

7.3.3 THE ECO-NAIRA. In the eco-naira scenario, we would see a return to the initial philosophy behind the WAMZ. On 20 April 2000 in Accra in Ghana, six West African countries (Gambia, Ghana, Guinea, Liberia, Nigeria, Sierra Leone) announced their intention to create a second monetary zone in West Africa with the eco as currency, alongside the CFA franc of the WAEMU. The project planned on subsequently fusing this new WAMZ monetary zone with the WAEMU, to reflect the borders of the ECOWAS. In April 2002, the WAMZ was set up, and each country committed to maintaining its exchange rate within a 15 per cent fluctuation band against the US dollar.

Ever since then, however, anything concerning the set-up of the single currency has been met with palpable inertia. Following the announcement in Abidjan, which declared that the eight French-speaking West African countries of the WAEMU would end the CFA franc and replace it with the eco, the WAMZ Council of Ministers on 16 January 2020, in a sharply formulated communiqué, accused the WAEMU states of violating the spirit of the eco currency as announced in Abuja by the Summit of Heads of States and Governments of the ECOWAS.[13] The statement of Abidjan, it should be noted, did not include the seven ECOWAS countries which are primarily anglophone. Disagreements along these lines could end up creating an 'eco-naira', stewarded by a Nigeria stung by the francophone initiative of the 'eco-CFA'.

[13] Communiqué, Extra-Ordinary Meeting of the Ministers of Finance and the Governors of the Central Banks of the West African Monetary Zone on the Ecowas Single Currency Programme, 16 January 2020.

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Nevertheless, the final communiqué of the 59th ordinary session of the ECOWAS Heads of State and Government, which was held in Accra on 19 June 2021, specifies that the decision was taken 'to adopt the Convergence and Macroeconomic Stability Pact between ECOWAS Member States whose convergence phase covers the period from 2022 to 2026 and the stability phase from January 1 2027', and that it takes note of 'the Roadmap for the launch of the Eco by 2027 and instructs the Ministerial Committee to continue working to resolve all outstanding issues'.[14]

7.3.4 A COMMON (BUT NOT SINGLE) ECO CURRENCY. While a single currency is always a common currency, the opposite is not necessarily true. The history of the European Payments Union (EPU) between 1950 and 1957, which predated the Treaty of Rome's establishment of the European common market, provides an informative example of how an economic agreement that falls short of a single currency can nevertheless strengthen the integration process between countries. In so doing, such a lighter form of monetary cooperation can prepare the conditions for the transition to more intense forms of integration. In 1960, the Senegalese economist Daniel Cabou, who later became the first secretary general of the BCEAO, proposed using the example of the EPU to set up an 'African Payments Union', an idea which was taken up nine years later by the Egyptian economist Samir Amin in a report to Nigerian president Amany Diori.[15]

How can we reinterpret the idea behind the EPU as a roadmap for the eco? By imagining that countries which are not yet able to join the single currency could nevertheless bind themselves to it through exchange rate agreements. Mechanisms for the symmetrical absorption of trade imbalances could, like the same mechanisms set in motion during the EPU, help to recirculate surpluses within the ECOWAS zone, by encouraging

[14] Final Communiqué of the 59th ordinary session of the ECOWAS Heads of State and Government (Accra, 19 June 2021).

[15] See further S. Amin, 'Underdevelopment and Dependence in Black Africa: Origins and Contemporary Forms' (1972) 10 *Journal of Modern African Studies* 503; S. Amin, *Neo-colonialism in West Africa* (New York: Monthly Review Press, 1974); and S. Amin, *Delinking: Towards a Polycentric World* (London: Zed Books, 1990).

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processes of specialization between economies which are the basis for an increase in intra-zone trade, which is in turn one of the major economic and political objectives of the integration process.

7.4 TOWARDS THE ECO AND MONETARY SOVEREIGNTY

In May of 2021 academics, politicians, and other interested parties met for the General Assembly on the Eco (*Les États Généraux de l'Eco*), which was held in Lomé, Togo, to discuss the end of the CFA franc and the introduction of the eco for the whole of the ECOWAS. The General Assembly on the Eco favoured the idea of a common, but not single, currency as a starting point for the eco currency project. In a final declaration of the assembly, a roadmap for the implementation of the eco was formulated around four pillars: the objectives of the currency reform; the formulation of convergence criteria; the system which will be required; and the mode of implementation. The principles of this declaration represent the most compelling structure for the introduction of the eco, and the end of the CFA franc.

7.4.1 THE MAIN OBJECTIVES. Most importantly, the political process towards the adoption of a common eco currency responds to a legitimate demand for the establishment of full monetary sovereignty of the fifteen ECOWAS Member States. This principle has been articulated since the decision of the ECOWAS Heads of State Summit on 29 June 2019 in Abuja.

The adoption of the eco forms part of a larger post-Covid agenda of reconquering fundamental sovereignty in several crucial areas across the West African region: food, health, trade, finance, politics, and security. The eco currency project should be capable of involving all the ECOWAS states, whatever their differences, by guaranteeing the flexibility necessary to absorb the impacts of external shocks, which may diverge between states.

The decision to exit the franc zone, which was announced in Abidjan at the end of 2019 by the eight WAEMU states, notably addressed the question of the repatriation of the exchange reserves from the operations account domiciled in France. This essential delinking of the involvement of the French Treasury is an important part of the eco currency

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reform. Finally, the eco project should aim to maximize the potential for increased and strengthened economic integration in the region.

7.4.2 CONVERGENCE CRITERIA. The eco currency should be constructed so as to take into consideration the criteria of a good exchange rate policy, namely financing essential imports, supporting exports, promoting local credit, protecting 'emerging sectors' with high employment potential, and offsetting the negative impacts of external shocks. In terms of short-term convergence (price, debt, deficit), it is necessary to set minimum macroeconomic criteria for membership, or, in other words, an entry ticket. However, the absorption of differentials (price, debt, deficit) is not a prerequisite, but a medium-term objective, which will be easier to obtain with an adequate economic policy.

In fact, the inflation constraint must be loosened (4–8 per cent) in order not to restrict the potential for structural transformation of the ECOWAS economies. Moderate inflation stimulates credit, because it alleviates the debt for borrowers and thereby rewards risk and innovation. In doing so, structural convergence is fundamental, and sectoral policies in favour of agricultural and industrial value chains with a regional profile must be implemented in a manner which complements the introduction of the eco.[16]

7.4.3 THE FUTURE SYSTEM OF GOVERNANCE. This new monetary system will be built on a new currency, *sui generis*, distinct from existing currencies in the ECOWAS. A Central Bank would be responsible for conducting the monetary and exchange rate policy of the Member States of the ecozone. The pooling of foreign exchange reserves, repatriated from the French Treasury, will be the basis of solidarity between the ECOWAS Member States. In the transition period, solidarity will be strengthened on a political and institutional basis. A cooperation mechanism will be put in place to mitigate differences in opinion in terms of governance and facilitate economic convergence.

[16] For further details on this point see K. Nubukpo, 'The Forgotten Farmer: Redefining Africa's Future through Ecological Transition and Endogenous Solutions' (2023) 6 *Development Cooperation Review* 35.

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Furthermore, the definition of the future eco currency will be based on a basket of currencies representative of the main trade flows in the ecozone, namely the euro, the US dollar, the yuan, and the pound sterling. The exchange rate of the common eco currency will be flexible but administered by the Central Bank. An exchange rate agreement will be concluded between the parties for the anchoring of their existing currency to the eco currency, which will serve as a pivot. Countries which are not yet able to join the eco currency could nevertheless bind themselves to it through exchange rate agreements. The principle of a corridor will be adopted within which existing currencies will be able to float with a fixed fluctuation margin monitored by the ECOWAS monetary authority. Finally, in the long term, the transition from the common currency to the single currency will be considered.

7.4.4 IMPLEMENTATION. In terms of implementation of the eco currency, particular attention will be paid to the prospects for monetary digitalization, which is already central in developed economies but which could prove even more strategic in the African context, characterized by low banking use among populations.

To initiate the transition to the common eco currency, a first pool of states meeting the minimum convergence criteria, which will need to be continuously evaluated, will begin discussions. Subsequently, new memberships in the eco project should be encouraged.

The abandonment of the French Treasury guarantee granted to the WAEMU states will be finalized. In fact, confidence in the eco currency should instead be based on new endogenous safeguard and credibility mechanisms. Furthermore, during the transition and learning phase of exchange rate mechanisms, attention will focus on fiscal and budgetary rapprochement and the stimulation of regional financial markets.

Clearly, behind these questions relating to the choices on how to operate the new eco currency, in particular the future parity and its relation to a basket of eco currencies, on the level of flexibility of the exchange rate, or on the ‘correct’ currency allocation regime that must be adopted, hides another crucial question, namely the necessity to initiate the structural transformation of West African economies.

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To bring about real change, the proposals to support the transition to the eco currency must be technically sound, economically motivated, politically accepted, and based on measures whose impacts and future risks are carefully assessed beforehand.[17] Recognizing the advantages of regional monetary integration and sharing these ideas to generate support from the populations of West Africa is fundamental to the success of the eco currency.

7.5 A TEST OF CREDIBILITY AND A TEST OF SINCERITY

Several options are thus on the table for West African decision makers. The declaration coming out of the General Assembly on the Eco held in Lomé in 2021 provides, in my view, the most compelling option for how to end the CFA franc in West Africa and introduce the eco for the whole of ECOWAS.[18] There is political will in the region. In March 2025 the 11th ECOWAS Convergence Council meeting was held in Abuja, which brought together top financial leaders including ministers of finance and Central Bank governors to further discuss plans for an eco currency launch by 2027.

The creation process of the eco appears to be a true credibility test of West African political vision and governance. For France and the EU, this process might be more a true sincerity test of their readiness to put the CFA franc, and its colonial history, to rest.

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[17] See further, B. Coriat, S. Leyronas and K. Nubukpo (eds.), 'L'Afrique en communs : tensions, mutations et perspectives' (2023) Washington DC: Publication of the French Development Agency/Banque Mondiale and K. Nubukpo, *Une solution pour l'Afrique : du néoprotectionnisme aux biens communs* (Paris: Editions Odile Jacob, 2022).

[18] See further K. Nubukpo (ed.), *Demain la souveraineté monétaire? Du Franc CFA à l'Eco* (Paris: Fondation Jean Jaurès-Editions de l'Aube, 2021).

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CHAPTER 8

Europe's Refugee 'Crises' and the Colonial Legacies in EU Migration and Asylum Law

VERONICA CORCODEL

8.1 INTRODUCTION

In the last decade or so, the question of the legacies of colonialism in contemporary patterns of mobility governance has gained increasing attention in migration and refugee studies across a variety of fields.[1] Building on these works, while complementing them, this chapter contributes to the book's theme by identifying the ways in which colonial hierarchies are woven into contemporary EU migration and asylum law. It tackles this question by exploring in particular the 2015 and 2022 refugee 'crises', the latter in the context of the Russo-Ukrainian war

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[1] E.g. C. Brambilla, 'Shifting Italy/Libya Borderscapes at the Interface of EU/Africa Borderland: A "Genealogical" Outlook from the Colonial Era to Post-Colonial Scenarios' (2015) 13 *ACME: An International Journal for Critical Geographies* 220; C. Kinnvall, 'The Postcolonial Has Moved into Europe: Bordering, Security and Ethno-cultural Belonging' (2016) 54 *JCMS: Journal of Common Market Studies* 152; I. Danewid, 'White Innocence in the Black Mediterranean: Hospitality and the Erasure of History' (2017) 38 *Third World Quarterly* 1674; L. Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum* (London, New York: Rowman & Littlefield, 2017); E. T. Achiume, 'Migration as Decolonization' (2019) 71 *Stanford Law Review* 1509; E. T. Achiume, 'Racial Borders' (2021) 110 *Georgetown Law Journal* 445; Ċ. Mainwaring and D. DeBono, 'Criminalizing Solidarity: Search and Rescue in a Neo-colonial Sea' (2021) 39 *Environment and Planning C: Politics and Space* 1030; F. Mégret, 'The Contingency of International Migration Law: "Freedom of Movement," Race, and Imperial Legacies' in I. Venzke and K. Jon Heller (eds.), *Contingency in International Law: On the Possibility of Different Legal History* (Oxford: Oxford University Press, 2021), p. 179.

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and the former in the context of escalating conflicts in the Middle East and Africa.[2]

Academic scholarship and media have been critical of the discrepancy between the two 'crises'.[3] In 2022, the EU triggered for the first time the Temporary Protection Directive (TPD) to welcome the persons displaced by the Russo-Ukrainian war.[4] By contrast, in 2015, the EU's response largely focused on upscaling a pre-existing regime, by further strengthening the security of its external borders, consolidating its cooperation with 'third' countries to curb migration flows, and supporting the creation and the operation of hotspot centres in frontline Member States. This chapter examines the ways in which this differential treatment has been facilitated by pre-existing colonial legacies in EU migration and asylum law, while carrying them forward.

Using mainly literature from history, political science, and postcolonial studies, it is argued that the colonial legacies in EU migration and asylum law are especially visible in arrangements that reproduce the colonial 'sedentary bias', under which the desirable or normal state of the colonized population was perceived as their remaining in their place of origin, and the related assumptions concerning 'bogus' (less 'real') refugees.[5] It is also shown that the differential scheme emerging from the two 'crises',

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[2] 'Crisis' is used here with quotation marks to emphasize its constructed character. The use of refugee 'crisis' instead of migration 'crisis' seeks to prevent a potential misreading that persons concerned by the 2015 conflicts in the Middle East and Africa do not deserve international protection.

[3] C. Costello and M. Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' (2022) 22 *International Journal of Discrimination and the Law* 244; M. Jackson Sow, 'Ukrainian Refugees, Race, and International Law's Choice between Order and Justice' (2022) 116 *American Journal of International Law* 698; S. Carrera and M. Ineli-Ciger (eds.), *EU Responses to the Large-Scale Refugee Displacement* (San Domenico di Fiesole: European University Institute, 2023); V. Corcodel and D. Fragkou, 'Europe's Refugee "Crises" and the Biopolitics of Risk' (2023) *European Journal of Risk Regulation* 1.

[4] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ 2001 L 212 (Temporary Protection Directive).

[5] O. Bakewell, '"Keeping Them in Their Place": The Ambivalent Relationship between Development and Migration in Africa' in R. Munck (ed.), *Globalisation and Migration. New Issues and New Politics* (London: Routledge, 2013), p. 112; V. Corcodel, 'A Decolonial Agenda for EU Migration and Asylum Law' (2024) 26(4) *European Journal of Migration and Law* 474.

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which has been shaped by the racialized distinction between regular and irregular migration, carries forward these colonial legacies.

The chapter is divided in four sections. Section 8.2 outlines the theoretical framework. Building on existing works on migration and asylum, it contends that a postcolonial approach entails tracing and questioning the continuity of socially constructed ideas that sustained colonial patterns of unequal mobilities and treatment. Within such analyses, particular – though not exclusive – attention should be given to racialized ideas. It is also argued that the role of Europe as a common project, under which imperial states engaged in varieties of colonialism, is somewhat obscure in existing postcolonial works on migration and asylum. Section 8.3 elaborates on the common European colonial project(s) and outlines some of its main legacies in EU migration and asylum law.[6] It argues that colonial patterns of unequal mobility, as well as the racialized sedentary bias upon which they rested, have been to some extent reproduced in EU migration and asylum law, including its visa policies and the resulting distinction between regular and irregular migration. It also outlines how colonialism came to shape the post-war development of international refugee law, upon which contemporary EU asylum law largely builds, and its assumptions on potential 'bogus' refugees. Section 8.4 shows how the differential treatment of the 2015 and 2022 'crises' has been facilitated by a racialized distinction between irregular and regular migration, in continuity with the colonial 'sedentary bias'. It also argues that this operated in conjunction with assumptions that people from the Middle East and Africa are potential 'bogus' refugees. Finally, Section 8.5 offers some concluding remarks.

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8.2 A POSTCOLONIAL APPROACH TO EU MIGRATION AND ASYLUM LAW

In the last decade or so, migration and refugee scholars across a variety of fields, such as political science, sociology, critical geography, and

[6] Throughout the chapter, the expressions 'common colonial project(s)' or 'European colonial project(s)' are used to refer to the idea that European colonial powers have had some important commonalities that coexisted with a variety of forms of colonialism, understood here as including formal, semi-formal, and informal patterns of domination over distant territories and peoples.

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international law, have increasingly integrated postcolonial perspectives.[7] The 'post' does not indicate the end of colonialism, but rather its continuities after post-war processes of formal decolonization.[8] Scholars working from such perspectives are usually interested in the legacies of both formal and informal Western systems of domination over distant territories, in which socially constructed ideas and power relations have been entangled in complex ways.[9] In this sense, they pay particular attention to the ideas that justified colonial and imperialist practices, conceived as socially constructed even if posited as objective or universal. A recently published volume on *Postcoloniality and Forced Migration*, for example, emphasizes the importance of exploring the ways in which ideas about Western civilizational and cultural superiority, racialized hierarchies, religious differences, and gender, persist in contemporary times.[10]

In this vein, Boeyink, Sahraoui, and Tyszler, show, for example, how racialized hierarchies inherited from colonial times shape violent border practices in the Spanish enclaves of Ceuta and Melilla on the North African coast and the French overseas department of Mayotte.[11] Using a similar approach, Mainwaring and DeBono have argued that EU institutions and agencies, as well as EU Member States, have constructed a neocolonial image of the Mediterranean.[12] Oscillating between the idea of a 'European sea and a European responsibility' ('*mare nostrum*') and the image of nobody's sea ('*mare nullius*'), that is, an empty and lawless

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[7] Postcolonialism is often associated with the (retrospectively assigned) canonical works of Frantz Fanon, Gayatri Spivak, Homi Bhabha, and Edward W. Said.

[8] M. Lemberg-Pedersen et al. (eds.), *Postcoloniality and Forced Migration: Mobility, Control, Agency* (Bristol: Bristol University Press, 2022), p. 13.

[9] See e.g. J. T. Gathii, 'Imperialism, Colonialism, and International Law' (2007) 54 *Buffalo Law Review* 1013; V. Corcodel, *Modern Law and Otherness: The Dynamics of Inclusion and Exclusion in Comparative Legal Thought* (Cheltenham, Northampton: Edward Elgar Publishing, 2019), pp. 4–5.

[10] Lemberg-Pedersen et al., *Postcoloniality and Forced Migration*, p. 1.

[11] C. Boeyink, N. Sahraoui, and E. Tyszler, 'Situating the Coloniality of Encampment and Deportation as a Mode of Mobility Governance: Insights from Ceuta and Melilla, Mayotte and Tanzania' in Lemberg-Pedersen et al., *Postcoloniality and Forced Migration*, p. 61.

[12] Ċ. Mainwaring and D. DeBono, 'Criminalizing Solidarity: Search and Rescue in a Neocolonial Sea' (2021) 39 *Environment and Planning C: Politics and Space* 1030.

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space, these actors reproduced racialized colonial tropes while obscuring the historical connections with colonialism, empire, and trade.[13]

Racialized inequalities, understood as race-based differential constructions with material effects, have been an important part of colonial schemes of governance and deserve special attention when examining the question of colonial legacies in EU migration and asylum law. Colonial identity markers other than race, such as gender, sexuality, and religion, were also part of these schemes, but they were often particular instances of 'racialized formations'.[14] This chapter will examine in particular the racialized inequalities produced through the governance of the 2015 and the 2022 refugee 'crises'. In line with postcolonial insights, race is understood here as a social construction of physical features and lineage (Black, White, Brown, or other designation), explicitly or implicitly (re-)produced in a variety of ways, including through legal, political, and economic arrangements.[15]

While legal scholarship has been critical of EU migration and asylum law and its effects, postcolonial perspectives have been only scarcely developed so far.[16] Silga's work, which examines in particular the migration–development nexus in EU policy discourse, stands out as one of the few to have built on postcolonial insights.[17] Indeed, she skilfully shows that migration was inserted in a conception of development

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[13] Ibid.

[14] M. Nye, 'Race and Religion: Postcolonial Formations of Power and Whiteness' (2019) 31 *Method & Theory in the Study of Religion* 210.

[15] E. T. Achiume, 'Race, Refugees and International Law' in C. Costello, M. Foster, and J. McAdam (eds.), *The Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, 2021), p. 43.

[16] Virtually all scholars writing on EU migration and asylum law are, however, critical of the field. For a few examples, see M. Gkliati, 'The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee' (2017) 10 *European Journal of Legal Studies* 81; V. Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24 *Maastricht Journal of European and Comparative Law* 721; D. Ghezelbash et al., 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67 *International & Comparative Law Quarterly* 315; E. Guild, 'Promoting the European Way of Life: Migration and Asylum in the EU' (2020) 26 *European Law Journal* 355.

[17] J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24 *UCLA Journal of International Law and Foreign Affairs* 163. See also J. Silga's chapter in this book (Chapter 9).

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tightly connected to the colonial 'civilizing mission', and that the resulting nexus dissuaded migration to Europe while reproducing a colonial 'sedentary bias'.[18] In a similar vein, though less explicitly informed by postcolonial theories, Spijkerboer has argued that contemporary European case law, of both the European Court of Human Rights and the Court of Justice of the EU, shows troubling tendencies to carry forward unequal regimes that marginalize people from former European colonies.[19] The colonial 'split form of legality', of which the special regime of 'overseas countries and territories' is emblematic, would be reproduced in decisions that exclude the application of EU law to migrants or create lower standards for them.[20] These insights provide a valuable addition to other scholars' concerns over the troubling imprints of colonialism on the EU's Schengen visa regime, as well as its policies of securitizing migration through partnerships with African countries.[21]

The few international and EU legal works on migration and asylum that build on postcolonial theories often draw parallels between contemporary legal arrangements and the unequal regimes of specific European imperial states, such as France, the UK, and Belgium.[22] The role of Europe as a common project remains somewhat obscure in these works. Yet, as Bhambra has argued, European imperial states all engaged

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[18] J. Silga's chapter in this book (Chapter 9). See also Bakewell, 'Keeping Them in Their Place'.

[19] T. P. Spijkerboer, 'Coloniality and Recent European Migration Case Law' in S. Smet and V. Stoyanova (eds.), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge: Cambridge University Press, 2022), p. 117. See also M.-B. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015), pp. 62–96.

[20] Spijkerboer, 'Coloniality and Recent European Migration Case Law', p. 117.

[21] See e.g. E. Guild and D. Bigo, 'Policing at a Distance: Schengen Visa Policies' in D. Bigo (ed.), *Controlling Frontiers – Free Movement into and within Europe* (London: Routledge, 2005), p. 203; L. A. Nessel, 'Externalized Borders and the Invisible Refugee' (2009) 40 *Columbia Human Rights Law Review* 625–699 at 643–662 and 696–697; M. Bosworth, A. Parmar, and Y. Vázquez (eds.), *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging* (Oxford: Oxford University Press, 2018); D. Davitti and A.-E. Ursu, 'Why Securitising the Sahel Will Not Stop Migration' (2018) University of Nottingham, Human Rights Law Centre, FMU Policy Brief No. 02/2018.

[22] See e.g. Mégret, 'The Contingency of International Migration Law', pp. 185–190; Mayblin, *Asylum after Empire*.

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in 'varieties of colonialism' that 'intersected over time to create what may be understood as a European colonial project'.[23]

8.3 EU MIGRATION AND ASYLUM LAW AND THE EUROPEAN COLONIAL PROJECT(S)

Efforts to establish a common direction, though not devoid of tensions and divergences, became especially visible at the 1884–1885 Berlin West Africa Conference, when European powers engaged in a negotiation process to formalize their claims to African territory.[24] In this sense, colonial empires' different forms of regulating the 'natives' and their rights were also part of common European efforts. Moreover, the varieties of colonialism had some important commonalities, one of which was the establishment and maintenance of a framework of unequal mobility that allowed Europeans to settle and consolidate imperial power, open up markets, and suppress resistance in the colonies.[25]

A more explicit framing of *mobility* between Africa and Europe as a common European concern, which continues to reverberate in today's EU migration and asylum policies, became visible in the 1920s. Inter-European debates were then initiated on how to limit the number of Africans in Europe while acknowledging that they were still needed as soldiers.[26] Such debates were partly shaped by German anxieties related to the presence of African soldiers in the occupied Ruhr area, seen as 'uncivilized' people posing dangers to the German population.[27] At the same time, the then project of a Pan-European union advanced ideas that the African continent was an important provider of natural

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[23] G. K. Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism' (2017) 23 *European Law Journal* 395; G. K. Bhambra, 'A Decolonial Project for Europe' (2022) 60 *JCMS: Journal of Common Market Studies* 229–244 at 234.

[24] Bhambra, 'A Decolonial Project for Europe', 234.

[25] Mégret, 'The Contingency of International Migration Law', pp. 185–190.

[26] P. Hansen and S. Jonsson, 'Bringing Africa as a "Dowry to Europe". European Integration and the Eurafrican Project, 1920–1960' (2011) 13 *Interventions* 443–463 at 446 and 450; P. Hansen and S. Jonsson, 'Demographic Colonialism: EU–African Migration Management and the Legacy of Eurafrica' (2011) 8 *Globalizations* 261.

[27] Hansen and Jonsson, 'Bringing Africa as a "Dowry to Europe"', 446.

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resources and a solution for Europe's problem of overpopulation and unemployment.[28]

Situating contemporary EU migration and asylum law in these historical developments allows revisiting exceptionalist narratives on its exclusionary and violent effects, connecting them instead with the European colonial project(s) and patterns of continuity.[29] The post-Second World War EEC framework, with four of the original six Member States then still colonial powers, revived the colonial project(s), with the idea that Africa would be an important provider of raw materials.[30] In this sense, Europe's self-understanding as a post-war cosmopolitan project, bringing together nation states into a transnational entity, conceals the revival of a colonial form of 'transnationalism' and its unequal governance schemes.[31]

Within this 'new' framework, free movement of workers in the EEC was not extended to overseas territories, nor to extra-Community migrants.[32] Hansen has argued that such exclusion crystallized in the 1960s when the Council interpreted the provisions on workers' freedom of movement as restricted to Member States' nationals, shaped by the increasingly negative attitude towards extra-Community migration in a context of decolonization processes.[33] Eklund has showed, however, that a version of such exclusion was already carefully constructed in 1957, through a distinction made in the Treaty of Rome between workers from EEC Member States, regulated by Article 48, and workers from associated 'overseas countries and territories', excluded from the regular regime by Article 135.[34] This was part of a broader project of building an 'ever closer union among the peoples of Europe', which,

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[28] R. Coudenhove-Kalergi, 'Afrika' (1929) 5 *Paneuropa* 1.

[29] Boeyink, Sahraoui, and Tyszler, 'Insights from Ceuta and Melilla, Mayotte and Tanzania', p. 62.

[30] Hansen and Jonsson, 'Bringing Africa as a "Dowry to Europe"'.

[31] Bhambra, 'A Decolonial Project for Europe'.

[32] Hansen and Jonsson, 'Demographic Colonialism'. Treaty establishing the European Economic Community, 1957, art. 227.

[33] P. Hansen, 'A Common Market, a Common "Problem": Migration and European Integration before and after the Launching of the Single Market' (2005) 27 *ThemES* 11.

[34] H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2024) 34 *European Journal of International Law* 831.

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understood in the context of colonial citizenship laws at the time, designated the ethnically and racially European population and excluded people from the territories then colonized by France, Belgium, the Netherlands, and Italy.[35]

After decolonization, the EEC/EC, and later the EU, carried forward this 'split legality',[36] setting up progressively a framework to control and manage its external frontiers to 'compensate' for the creation of a Single Market and the project of EU citizenship. In this sense, while migration and asylum issues started to be explicitly developed in the EU agenda later, with an intergovernmental logic under the Maastricht Treaty and an increasingly supranational logic after the Amsterdam Treaty, the exclusion of persons from the colonies was already foreshadowed in the initial phases of the EEC.[37]

Fertikh has argued that France and Belgium have contributed in important ways to the crystallization of associated countries and territories' exclusion from the freedom of movement of EEC workers.[38] The two Member States were both interested in treating EEC nationals differently from the colonized population in relation to workers' mobility and social security rights. Indeed, granting EEC workers access to their colonies was understood as both a threat to the stability of colonial rule and a risk of growing low-skilled White migration in the colonies.[39] In this sense, such exclusion can be understood as the product of an interplay of relations in the EEC wherein the interests of certain Member States wielded significant influence over the outcome.

The contemporary EU legal regime produces an unequal mobility reminiscent of intra-imperial and EEC schemes, 'a familiar combination of [Europeans'] hyper-mobility within [the EEC or the colonial empire], with significantly reduced South-North mobility'.[40] This is especially visible in the Schengen visa regime, under which the countries whose nationals are subject to visa restrictions, and who become

[35] Ibid.
[36] Spijkerboer, 'Coloniality and Recent European Migration Case Law', p. 119.
[37] Hansen, 'A Common Market, a Common "Problem"'.
[38] See K. Fertikh's chapter in this book (Chapter 4).
[39] Hansen, 'A Common Market, a Common "Problem"'.
[40] Mégret, 'The Contingency of International Migration Law', p. 195.

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'irregular' if not complying with this regime, are mainly in Asia and Africa.[41] The placement of an important part of these countries on the visa 'black list' dates back to the incipient intergovernmental stages of the Schengen project.[42] In this sense, irregularity was a racialized legal and political *choice* of the original five states that signed the Schengen agreement. These states, Belgium, Germany, France, Luxembourg, and the Netherlands, were also among the six founders of the EEC in 1957. Irregularity was actively produced by these states with the effect of making it harder for people from former colonies to reach the EU.[43]

Such regimes carried forward intra-imperial schemes of unequal mobility. These were often tightly connected with citizenship laws, which privileged the ethnically and racially European population by virtue of distinctions that denied full citizenship to 'natives'.[44] Within this framework, the mobility of people from the colonies to the metropole was restricted in ways that aimed at establishing or maintaining sedentary forms of life, with exceptions mainly framed in terms of forced or circumscribed mobility of labour power.[45] At the same time, Europeans could travel to, trade, and settle in, colonial territories. These policies were based on a 'sedentary bias' that the desirable or the normal condition of people from the colonies was to remain in their place of origin.[46] This bias came to be reproduced in EU law in a variety of ways, including through the Schengen visa system and the regime of external borders'

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[41] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) PE/50/2018/REV/1, OJ 2018 L 303.

[42] M. den Heijer, 'Visas and Non-discrimination' (2018) 20 *European Journal of Migration and Law* 470.

[43] They might sometimes successfully apply for visas, but they carry a high burden of proving that they comply with the requirements set by the EU.

[44] E. Saada, 'Citoyens et Sujets de l'Empire Français' (2003) 53 *Genèses* 4 (referring to colonial distinctions such as that between European citizens and colonized peoples' status as nationals); T. Ballantyne, 'Mobility, Empire, Colonisation' (2014) 11 *History Australia* 7.

[45] Access to labour markets was generally regulated in ways that conveyed anxieties about mixed ethnicities, the 'civilized' configuration of the nation state, and economic productivity. L. Dornel, 'Les Usages du Racialisme: Le Cas de la Main d'Oeuvre Coloniale en France Pendant la Première Guerre Mondiale' (1995) 20 *Genèses* 48.

[46] Bakewell, 'Keeping Them in Their Place'. See also D. Thym, 'Migrationsfolgenrecht' (2017) 76 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 169.

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management and control. A version of it has also animated the construction of the EEC project. Historians have argued that indigenous immobilization was crucial for conceiving the metropolis as a 'civilized' nation state and for maintaining the colonial order.[47]

The sedentary bias was visible in different European imperial settings, be it the British Empire, the French colonial order, the Belgian Congo, and the Italian Ethiopia.[48] In 1924, for example, the mobility of Algerians to the French metropole was subject to the requirement of providing a medical certificate and establishing proof of accommodation.[49] This was followed by a more restrictive legislation in 1928, which required the possession of an identity card, a sum of money, and a 'clean' criminal record.[50] Similar restrictions were adopted later in relation to French Western Africa. In Italian Ethiopia, people from the colonies had to obtain a travel document for each trajectory after having deposited a sum of money for potential repatriation costs.[51] In Belgian Congo, 'natives'' mobility within the colony was subject to close surveillance and strict regulation, a 'transfer passport' having been required for leaving one's own constituency for more than thirty days.[52] In the British empire, while the official policy endorsed since 1914 the right of persons from its dominions to enter Britain, patterns of mobility were largely shaped by a racialized functioning of the labour market.[53]

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[47] Ballantyne, 'Mobility, Empire, Colonisation'; Dornel, 'Les Usages du Racialisme'. See also T. Menge, 'Colonial Genealogies of Immigration Controls, Self-Determination, and the Nation-State' (2022) *Critical Review of International Social and Political Philosophy* 1–17 at 6.

[48] Mégret, 'The Contingency of International Migration Law', pp. 185–190.

[49] O. Le Cour Grandmaison, 'Colonisés- Immigrés et "Périls Migratoires": Origines et Permanence du Racisme et d'une Xénophobie d'Etat (1924–2007)' (2008) 69 *Cultures et Conflits* 19.

[50] Ibid.

[51] Ibid. Decree of 22 mars 1930 of the governor of Eritrea, Annuaire de documentation coloniale comparée, 1930, vol. 1, p. 408 (Decree of 22 March 1930 of the governor of Eritrea, Yearbook of Comparative Colonial Documentation, 1930, vol. 1, p. 408).

[52] Decree of 5 décembre 1933, Annuaire de documentation coloniale comparée, 1933, vol. 1, p. 120 (Decree of 5 December 1933, Yearbook of Comparative Colonial Documentation, 1933, vol. 1, p. 120).

[53] S. Constantine, 'Migrants and Settlers' in J. Brown and W. M. Roger Louis (eds.), *The Oxford History of the British Empire: Volume IV: The Twentieth Century* (Oxford: Oxford University Press, 1999), p. 163.

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Unequal regimes of intra-imperial mobility paradoxically coexisted with ideas of freedom of movement as a fundamental right in international law. This right became confined to narrower interpretations, especially after the Second World War, to affirm states' prerogatives over their borders.[54] The paradox of such coexistence is only apparent, however. As Mégret skilfully shows, these were rather two sides of the same coin. International law could endorse the idea of freedom of movement only because patterns of global mobility were shaped by the logics of empire.[55] Indeed, since imperial regulation of mobility was conceived as 'internal', public international law could exclude an important part of humanity, consolidating the colonial sedentary bias, while framing its commitment to mobility in general terms.

Colonialism also came to shape the post-war development of international refugee law, upon which contemporary EU asylum law largely builds. Some of the main drafters and original signatories of the 1951 Refugee Convention were France, Italy, the Netherlands, Belgium, and the United Kingdom, still colonial powers at the time. The initial international refugee regime largely reflected their geopolitical priorities, also shaped by the Cold War anxieties of the time. This regime, which allowed states to limit the geographical scope of its application to events occurring in Europe, favoured anti-communist refugees from Europe.[56] This meant that those displaced by decolonization movements at the time were largely ignored. Hathaway has argued that refugees from former colonies continued to be marginalized even after the 1967 Protocol removed the limitations of the 1951 Convention.[57]

An important way in which such marginalization was carried forward was through the very definition of the refugee, also incorporated in EU asylum law, which limited the grounds of persecution to violations

[54] Mégret, 'The Contingency of International Migration Law', pp. 185–190.

[55] Ibid.

[56] B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 350; J. C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' in H. Lambert (ed.), *International Refugee Law* (London: Routledge, 2017), p. 65.

[57] Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', p. 65. See also B. Bouwman, 'Postwar Displacement, Liberalism, and the Genesis of the International Refugee Regime' (2023) *SCRIPTS Working Paper* No. 25.

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of civil and political rights at the expense of socio-economic rights.[58] More generally, limiting the flight to instances of persecution, at least as understood in Europe, came to exclude many persons from former colonies displaced by 'natural disaster, war, or broadly-based political and economic turmoil'.[59] Not only have such events been associated with colonialism, its history and implications, but their exclusion was in continuity with colonial 'sedentarist' practices and policies. Moreover, in the 1980s, international refugee policy started to favour 'voluntary repatriation' (instead of resettlement) as a solution for those fleeing the Global South,[60] motivated in part by suspicions of 'a thinly disguised movement of economic migrants'.[61] In other words, the impoverished situation in the Global South came to shape a bias of 'bogus' refugees, underpinning policies and practices of regional containment in continuity with the colonial sedentary bias.

EU asylum law reproduced the Refugee Convention's limited understanding of refugees in the Qualification Directive.[62] It also added, however, two forms of international protection: the subsidiary protection status for persons who do not qualify as refugees, and the temporary protection status in case of 'mass influx of displaced persons'. The subsidiary protection status, while covering 'indiscriminate violence in situations of international or internal armed conflict', required an identifiable actor of 'serious harm', thus carrying forward the previous exclusion of environmental and socio-economic factors. The TPD, a promising

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[58] Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', p. 65.

[59] Ibid.

[60] The term 'Global South' is a geopolitical and ideological category and refers in this chapter to the territories and peoples that Europeans colonized mainly between the mid eighteenth and twentieth centuries.

[61] Chimni, 'The Geopolitics of Refugee Studies', 356, 358 (also noting that the 'repatriation turn' in international refugee policy downplayed the contribution of imperialism to forced displacement and overemphasized the responsibility of the country of origin). See also T. Krever, '"Mopping-up": UNHCR, Neutrality and Non-refoulement Since the Cold War' (2011) 10 *Chinese Journal of International Law* 587.

[62] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ 2011 L 337.

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'crisis' tool offering group-based protection without going through the standard individualized applications for international protection, has been activated so far only in the Russo-Ukrainian context. This prompts the question of whether and how the non-activation of the temporary protection regime in 2015 has carried forward colonial biases, a question that this chapter examines in more detail in the following section.

To be sure, the colonial legacies in EU migration and asylum law can also be explored in other ways. One such way would be to examine how the *standard* regime of the Common European Asylum System, and its operation in conjunction with racialized EU visa policies, reproduces biases of 'bogus' asylum seekers with 'sedentarist' racialized effects. The virtual lack of legal paths for people from the Global South to reach the EU for applying for international protection, coupled with the operation of EU-law-based regimes to accelerate these people's asylum procedures, declare their applications inadmissible, or reject, detain and return them, are all promising avenues of enquiry. The discrepancy between the 2015 and 2022 'crises', however, offers an entry point for discussing many of these issues, while presenting a focused case study for more in-depth analysis.

8.4 TWO REFUGEE 'CRISES', ONE RACIALIZED DIFFERENTIAL SCHEME

The discrepancy between the 2015 and the 2022 'refugee crises', the first in the context of conflicts in the Middle East and Africa, especially Syria, and the second in the context of the Russo-Ukrainian war, has been criticized for having produced a racialized differential scheme of treatment. Critical academic and media voices, while welcoming the favourable treatment of those fleeing the Russo-Ukrainian war, have decried Europe's 'double standard' when it comes to White Christian individuals and non-White 'Others'.[63] The following analysis explores how such inequality has been constructed through EU policy and legal arrangements, especially its racialized distinction between irregular and regular migration.

[63] Bakewell, 'Keeping Them in Their Place'.

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The two 'crises' were both understood by the European Commission as concerning a 'mass influx' or 'large numbers' of displaced persons, yet the legal instrument specifically designed for such situations, the TPD, was triggered only for those fleeing the Russo-Ukrainian war. This meant that a scheme of temporary protection was activated for the group of persons displaced by the Russo-Ukrainian war, without going through the standard procedures of individual examination under the Common European Asylum System. By contrast, under the 2015 'crisis' scheme of governance, security concerns and processes of selection of 'true' refugees were privileged, leading to the creation of more dangerous routes, returns, detention, and deaths in the Mediterranean.

While contemporary geopolitical concerns related to the Russo-Ukrainian war have played an important part in the activation of the TPD, it would be reductive to dismiss the legacies of colonialism that have simultaneously subtly operated in the governance of the two 'crises'. The 2015 'crisis' approach of the EU, as it will be shown, was shaped by the perceived threat of irregular migration, a racialized category mainly produced by the EU Schengen visa regime and largely concerning people from former European colonies. The top seven countries of origin of asylum seekers who managed to reach the EU in 2015 and 2016, according to the reports of the then European Asylum Support Office, were Syria, Afghanistan, Iraq, Pakistan, Eritrea, Nigeria, and Iran.[64] Each of them was shaped by tensions at that time, whether through civil war, violence, or escalating conflicts. These countries had all been under the rule of a European State (France, the UK, Italy) in different forms, including as a 'mandate', 'protectorate', a formal colony, or subject to informal rule. In this sense, their inclusion in the Schengen visa 'black list', together with other former European colonies, carries forward colonial schemes of unequal mobility, albeit in an altered manifestation.

[64] European Asylum Support Office (EASO), 'Latest Asylum Trends – 2015 Overview' (2016) and EASO, 'Latest Asylum Trends – 2016 Overview' (2017). The list is meant to provide a few examples of the main countries concerned by the 2015 'crisis' without aiming to be exhaustive. The 'Western Balkans' are not considered here as a single category, even if the then EASO counted the number of arrivals from the 'Western Balkans' as part of a unified category in its report for 2015. Moreover, the list does not include those who did not manage to arrive in the EU, some of whom have drowned in the Mediterranean.

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The 2015 European Agenda on Migration, which laid the foundations for the governance of the 2015 'crisis', explicitly refers to the need to ensure 'a robust fight against irregular migration, traffickers and smugglers and securing Europe's external borders'.[65] To be sure, the idea of offering international protection to those in need is also present, but it is the threat of irregular arrivals that marks a stark difference with the approach under the TPD, making it the main discursive facilitator of the unequal treatment. In this sense, the differential scheme of treatment of the two 'crises' is tightly connected to a pre-existing distinction between regular and irregular migration, a racialized divide that carries forward the colonial sedentary bias and exclusions under the EEC.

Indeed, this distinction can be understood as a ramification of the colonial dualization upon which the EEC was built in continuity with colonial 'sedentarist' policies. Although the regular/irregular differentiation is made within the category of non-EU citizens, its racialization via the EU Schengen visa regime confirms the European project of building an 'ever closer union' among the ethnically and racially European population.[66] In other words, if the EEC project is understood in ethnic and racial terms with the effect of excluding people from the colonies, the continuing exclusion of these people (and others) after formal decolonization reproduces a racialized scheme of unequal mobilities. It is a ramification of the original EEC project, itself a continuation of previous European colonial projects: EU law carries forward a hyper-mobility regime for EU citizens, and a regime of '*non-entrée*' for people from the Global South. Somewhere in between these two poles, a regime of visa-exempted mobility, albeit with less benefits than EU citizens, is offered to a predominantly White population from 'third' States. Some of these neighbouring States, like Ukraine, have been granted 'EU candidate status' with the prospect of expanding the 'ever closer union among the peoples of Europe'.

Prior to Ukraine acquiring the EU candidate status in 2022, a regime of visa-free travel for short stays was granted to Ukrainian nationals in

[65] EU Commission, 'A European Agenda on Migration', COM(2015) 240, 13 May 2015.
[66] Eklund, 'Peoples, Inhabitants and Workers'.

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2017.[67] In this sense, regularity was created for them.[68] While the TPD does not distinguish between regular and irregular arrivals, the 2022 Council Implementing Decision did emphasize that Ukrainian nationals were exempt from visa restrictions when Russia invaded Ukraine in 2022.[69] The decision, however, obscures that this was the product of a legal and political choice to facilitate Ukrainians' access to the EU in the first place. This choice was made by the EU after Poland had issued work and residence permits as a response to the 2014 annexation of Crimea by Russia.[70] This can be partly seen as the product of EU–Poland relations and the EU's own geopolitical agenda, but it would be incomplete to halt at this point. If the racialized category of 'irregularity', which carries forward the colonial sedentary bias, facilitated a radically different response in 2015, the overall differential scheme cannot be meaningfully separated from its colonial roots.

Moreover, conflating the 2015 'crisis' with the threat of irregular migration, produces the racialized figure of the potential 'bogus' asylum seeker, in continuity with the ways in which colonialism and Cold War anxieties have shaped international refugee law. In this sense, the differential scheme created by the governance of the 2015 and 2022 'crises' rests on the assumption that White individuals are more 'genuine' refugees than non-White Others. Although the term 'refugee' is not used in the 2022 Council Implementing Decision, the refugee status being distinguished from the temporary protection status under the Common European Asylum System, the overall response of the EU in 2022 has focused ostensibly on the need to offer protection. The emphasis on

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[67] The visa-free travel was granted for a maximum period of 90 days within any 180-day period. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders OJ 2016 L 77, art. 6(1).

[68] On the constructed character of regularity and irregularity, see M. Samers, 'An Emerging Geopolitics of Illegal Immigration in the European Union' (2004) 6 *European Journal of Migration & Law* 27.

[69] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection OJ 2022 L 71.

[70] E. Guild, 'Seeking Coherence among Member States: The Common European Asylum System' (2019) 23 *Spanish Yearbook of International Law* 183–192 at 184.

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protection in a situation of 'mass influx' comparable to 2015 does convey the idea that this group of displaced persons is perceived as more worthy and credible than the other.

Skordas has argued that the two 'crises' have been justifiably treated in different ways, precisely because the 2015 context concerned 'irregular mass migration', while the 2022 context concerned 'mass influx of displaced persons'.[71] Nationals from Middle Eastern and African countries, or so the argument goes, could have benefitted from protection elsewhere if *indeed* needed, and this allegedly casts doubt over their qualification as 'displaced persons' within the meaning of the TPD. The argument conceals the constructed character of irregularity, as well as its racialized dimension and colonial legacies, with the effect of portraying people mostly from former colonies as less 'real' refugees. At the same time, such ideas reproduce the colonial tropes of immobilizing the 'natives', including within regional confines, and undermine their rights through an unequal scheme of governance.

To be sure, the 2015 Agenda on Migration did refer explicitly to international protection needs, but they were considered in conjunction with the dangers associated with the threat of irregular migration. This led to an approach that privileged processes of selection between 'real' and 'bogus' refugees, notably through hotspots created in Italy and Greece. The distinction between regular and irregular migrants was presented in a way that concealed the role of the EU in producing it through a racialized Schengen visa regime. It also masked the fact that very few legal paths exist for those who flee conflicts in the Global South. Indeed, in addition to the shortcomings of the 2015 European Resettlement scheme, mainly because of its voluntary nature,[72] EU law does not require Member States to grant a humanitarian visa for those seeking to reach the EU to apply for asylum.[73] In this sense, the 2015 approach, under which the figure of the asylum seeker from the Global

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[71] A. Skordas, 'Temporary Protection and European Racism' (2022) Forum on the EU Temporary Protection Responses to the Ukraine War.

[72] A. Niemann and N. Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56 *JCMS: Journal of Common Market Studies* 3.

[73] Case C-638/16 PPU *X and X v. Etat Belge*, ECLI:EU:C:2017:173.

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South is overshadowed by that of the irregular migrant, carried forward a pre-existing racialized '*non-entrée*' regime.

The emphasis on the threat of irregular migration, to be read as a risk of arrival of persons mainly from former colonies, went further than that: it laid the ground for more restrictive policies and practices, some of them with a global reach. Indeed, it laid the foundation for increasing detentions and returns, Frontex-led joint operations, Common Security and Defence Policy (CSDP) missions, and further (formal or informal) agreements with countries from the Global South to control migration to the EU.[74] Two important technologies were used with the effect of exacerbating the pre-existing unequal regime of mobility: an increased association of people from the Global South with security concerns, and the 'externalization' of this racialized migration–security nexus, oftentimes in conjunction with development policies in the Global South.

These technologies shaped the Commission's recommendations in 2015 to strengthen Frontex's role and capacity to secure the EU's external borders, organize returns, to incorporate migration in the then ongoing CSDP missions in Mali and Niger, as well as to deploy CSDP more generally to 'systematically identify, capture and destroy vessels used by smugglers'.[75] Saving lives at sea was also considered as part of a reinforced mandate of Frontex, but rather in an incidental manner that prioritized border security operations.[76] Within the security rationale, Global South migrants came to be portrayed as victims to be saved from exploiting smuggling networks, a rhetoric that concealed the role of restrictive EU policies in creating the racialized need to resort to irregular means in the first place.[77] At the same time, the 'fight against criminal networks of smugglers and traffickers' has been understood as a means of dissuading irregular migration, and thus of 'immobilizing' migrants

[74] Ghezelbash et al., 'Securitization of Search and Rescue at Sea'; M. Gkliati, 'The Application of the EU-Turkey Agreement'.

[75] EU Commission, 'A European Agenda on Migration' (referring to the European Union Capacity Building Mission Sahel Mali and Sahel Niger operations).

[76] Ghezelbash et al., 'Securitization of Search and Rescue at Sea'.

[77] On securitized humanitarianism, see P. Pallister-Wilkins, *Humanitarian Borders: Unequal Mobility and Saving Lives* (Brooklyn: Verso Books, 2022).

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from Global South countries, reinforcing the colonial 'sedentary bias' and carrying forward the image of potential 'bogus' asylum seekers.

Similar ideas appear in relation to partnerships with 'third countries', understood as required for addressing the 'root causes' of irregular migration to the EU. Security considerations have occupied a predominant place in such agreements with 'third countries', whose pre-existing role as Europe's 'border guards' has been further consolidated in the context of the 2015 'crisis'. It is in this sense that the 2015 Agenda emphasizes that:

> The journey is often far more dangerous than expected, often at the mercy of criminal networks who put profit before human life. Those who fail the test of asylum face the prospect of return. […] It is in the interests of all to address the root causes which cause people to seek a life elsewhere, to crack down on smugglers and traffickers, and to provide clarity and predictability in return policies. […] Partnership with countries of origin and transit is crucial.[78]

While arrangements with 'third countries' can be traced back to the 1990s, their development intensified in 2015 and 2016 with the infamous EU–Turkey Statement and the Valletta Summit on Migration centred on cooperation with African states.[79] The resulting 'externalization' of EU securitized borders to countries like Libya, Turkey, Sudan, Niger, Mauritania, and Mali, has been subject to severe criticism.[80] From providing border equipment and training to border guards to consolidating and establishing surveillance systems and funding detention centres, the measures established by these arrangements produced more dangerous routes for those from African and Middle Eastern countries while

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[78] EU Commission, 'A European Agenda on Migration', p. 7.

[79] EU Commission, 'The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy', COM(2006) 735, 30 November 2006; European Council, Press Release, EU–Turkey Statement, 18 March 2016.

[80] E.g. L. Bialasiewicz, 'Off-Shoring and Out-Sourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean' (2012) 17 *Geopolitics* 843; L. Pradella and S. Taghdisi Rad, 'Libya and Europe: Imperialism, Crisis and Migration' (2017) 38 *Third World Quarterly* 2411; A. Casaglia and A. Pacciardi, 'A Close Look at the EU–Turkey Deal: The Language of Border Externalisation' (2022) 40 *Environment and Planning C: Politics and Space* 1659.

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creating more possibilities of returning them, either to their countries of origin or countries of transit. Many of these agreements also provided for development aid in exchange for third countries’ cooperation with the EU in securing ‘their’ borders. Development, however, often sought to curb migration flows, in continuity with the colonial sedentary bias.[81]

The effects of the 2015 approach have been dramatic, with almost 10,000 deaths in the Mediterranean registered in two years, according to the International Organization for Migration.[82] Similar effects had been already experienced under intra-imperial schemes of regulating mobility during the twentieth century. An example in this vein is the series of attempts to reach the French metropole by means of unsafe boats after movements from Algerian departments were restricted.[83] In 1926, the ‘Sidi Ferruch’ incident revealed the suffocation of more than twenty ‘natives’ hidden in enclosed spaces of a boat to avoid police checks.[84] This led to even more restrictive policies in 1928 requiring conditions such as the possession of an identity card, a sum of money, and a ‘clean’ criminal record. While today restrictions are based on a different set of measures, the Sidi Ferruch example is reminiscent of the self-perpetuating ‘sedentarist’ cycle of irregularity: restrictions produce more unsafe routes and defying them leads to more restrictions and more dangerous routes.

In contrast to the 2015 approach, the activation of the TPD in the context of the Russo-Ukrainian war led to a more welcoming regime, under which most of those fleeing the war were entitled to enter the EU and to obtain residence permits in the host Member States for the entire period of the temporary protection.[85] The unequal treatment of the 2015 and 2022 ‘crises’ has had implications not only for mobility towards the EU, but also within the EU. In the 2015 context, if people from Middle Eastern and African countries managed to reach the EU and apply for asylum, they became transferable and detainable if they travelled to a

[81] Silga, ‘The Ambiguity of the Migration and Development Nexus Policy Discourse’.

[82] ‘Missing Migrants Project’ (International Organization for Migration, 2022), see https://missingmigrants.iom.int.

[83] Le Cour Grandmaison, ‘Colonisés-Immigrés et “Périls Migratoires”’.

[84] Ibid.

[85] The period of temporary protection can last up to three years. Temporary Protection Directive, art. 4.

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Member State not seen as responsible for their asylum application under the Dublin III rules.[86] In this sense, their potential country of refuge had to be decided according to the Dublin III Regulation. By contrast, under the Schengen visa-free regime, Ukrainian nationals could move freely within the Schengen Area as they fled the Russo-Ukrainian war.

The EU's approach to the 2015 'crisis' continues to shape contemporary regimes and practices that concern people from the Global South. Initially conceived as an emergency scheme and a 'blueprint for the EU's reaction to future crises',[87] many of its aspects, such as partnerships with African countries and hotspots in Italy and Greece, remain in place to this day. Moreover, many of them have been integrated in the standard regime of the reform proposals under the 2020 New Pact on Migration and Asylum.[88] In this sense, the 2015 'crisis' approach seems to have become the 'blueprint' for the EU's general approach to migrants from the Global South, applicable even in 'non-crisis' times, marking a more restrictive turn in continuity with colonial 'sedentarist' policies.

To be sure, media and civil society actors reported racialized practices even in the context of the Russo-Ukrainian war. Indeed, they emphasized that people from Africa were hindered from fleeing by Ukrainian authorities, while Romas faced discriminatory practices in relation to rights associated with temporary protection such as housing.[89] These

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[86] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ 2013 L 180.

[87] EU Commission, 'A European Agenda on Migration'.

[88] G. Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" for Migration Management' in S. Carrera and A. Geddes (eds.), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees* (San Domenico di Fiesole: European University Institute, 2021).

[89] M. Pronczuk and R. Maclean, 'Africans Say Ukrainian Authorities Hindered Them from Fleeing', *New York Times*, 1 March 2022; A.-F. Rotman, 'They Called Ukraine Home. But They Faced Violence and Racism When They Tried to Flee', *Time*, 1 March 2022; W. Nattrass, 'Roma Refugees from Ukraine Face Czech Xenophobia', *EU Observer*, 17 May 2022. See also Committee on the Elimination of Racial Discrimination, 'Racial Discrimination against Persons Fleeing from the Armed Conflict in Ukraine', Statement 1 (17 March 2022).

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practices are in tension with the Council Implementing Decision 2022, which recognizes the need to protect permanent residents in Ukraine and allows short-term residents to enter the EU for preparing their returns to their countries of origin.[90] However, these practices also confirm that at least some authorities perceived the reception of persons fleeing the Russo-Ukrainian war as mainly confined to Ukrainian citizens or White ‘quasi-Europeans’.

To complicate further the overall scheme of unequal treatment of the two ‘crises’, its racialization is largely made invisible under the EU’s Race Equality Directive.[91] Indeed, racial discrimination under EU law does not cover ‘difference based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals’.[92] In other words, EU anti-discrimination law carries forward and obfuscates the racialization of the distinction between regular and irregular migrants, upon which the unequal scheme of managing the two ‘crises’ rests. The postcolonial analysis provided here sought to go beyond this legal understanding of racial discrimination, by looking at race as a social construction that can be reproduced in implicit or (more rarely) explicit ways. Race has also been approached as tightly connected to colonial ‘sedentarist’ policies, which continued to cast a shadow over the EEC project, international refugee law, and EU migration and asylum law.

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8.5 CONCLUSION

The postcolonial lens used in this chapter has provided a framework to explore some of the main colonial legacies in EU migration and asylum law, including how these have shaped the differential treatment of the 2015 and 2022 refugee ‘crises’. The chapter has argued that the colonial racialized sedentary bias, a version of which was already inscribed in the EEC project, is woven into EU migration and asylum law. It has also emphasized the ways in which international refugee law, upon which

[90] Council Implementing Decision, recital 13.

[91] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000 L 180.

[92] Ibid.

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contemporary EU asylum law largely rests, was shaped by colonialism, in addition to Cold War anxieties. The definition of the refugee, identical under the Refugee Convention and the Qualification Directive, excluded many displaced persons from the Global South even after the 1967 Protocol removed the limitations of the Convention. These people also came to be increasingly associated with potential 'bogus' refugees, in continuity with the colonial racialized sedentary bias.

The differential governance of the 2015 and 2022 refugee 'crises' has carried forward these ideas through measures that built on a racialized distinction between regular and irregular migration. This distinction is largely produced by EU Schengen visa policies: the category of the 'irregular migrant' emerges from visa restrictions, which concern mainly people from former colonies. It is the threat of these people's arrival in the EU, constructed as 'irregular', that has shaped the 2015 approach, under which the TPD was put aside in favour of a set of measures that upscaled a pre-existing securitized and racialized regime. This meant creating more obstacles for people from the Global South to reach the EU, including by further strengthening the security of external borders, creating hotspots in frontline Member States to identify the 'real' refugees, and consolidating the cooperation with 'third' countries to curb migration flows.

This analysis allows revisiting exceptionalist narratives on the two 'crises', situating them instead within patterns of continuity of the European colonial project(s). This is not to say that there were no emergency measures in the governance of each 'crisis', but rather that the discrepancy between these measures carries forward a more stable and structural colonial pattern of racialized unequal mobility. This is further confirmed by the enduring 2015 approach, currently on its way to becoming – at least partly – an integral component of the standard regime under the 2020 New Pact on Migration and Asylum.

To be sure, the chapter does not suggest that the enduring legacies of colonialism in EU migration and asylum law necessarily determine a single outcome, that of a continuous exclusion of people from former colonies. After all, nothing in the TPD confines its activation to 'regular' (as opposed to irregular) arrivals. Neither is it suggested that colonial legacies are mere manifestations of neocolonial policies that instrumentalize

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existing legal arrangements for such purposes. EU migration and asylum law is rather situated somewhere in between these two poles: with a structure that carries forward colonial legacies but with some degree of flexibility as to the ways in which such structure can be used. The aim of the chapter, therefore, was not to show that EU migration and asylum law must be altogether dismissed. The aim was rather to expose the colonial legacies of EU migration and asylum law for greater awareness of how such legacies might be carried forward, while inviting further research on possible 'decolonizing' counter-mobilizations.

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CHAPTER 9

From Political to Migration-Based Conditionality in EU Development Policy

'Plus ça change, plus c'est la même chose'

JANINE SILGA

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9.1 INTRODUCTION

The notion of conditionality transcends the European Union (EU) context as it is inherent in development aid. Before conditionality emerged as 'political conditionality' in the EU, this concept was rooted in macro-financial assistance and the structural adjustment of developing countries' economic policies. What can be labelled as 'policy conditionality' emerged in the so-called 'Bretton Woods Institutions' (World Bank and International Monetary Fund) imposing structural adjustment on debt-ridden developing countries in the early 1980s.[1] Structural adjustment aimed at reducing public spending drastically by privatizing several public sectors and even some public services. It is now clear that this policy, which was then redirected towards the eradication of poverty, did not lead to the expected prosperity. On the contrary, it left several 'developing' countries worse off than before, especially in Africa.[2]

Political conditionality emerged from policy conditionality, with a refocus on the promotion of democracy, human rights and the rule of

In the course of its elaboration, this chapter has benefitted from the generous feedback of many people. Among them, I would like to thank especially: Veronica Corcodel, Gráinne de Búrca, Hanna Eklund, Nicola Hargreaves, Ivana Isailović, Jan Orbie and Eva Połońska-Kimunguyi. All remaining errors or omissions are mine alone.

[1] T. Killick, 'Principals, Agents and the Failings of Conditionality' (1997) 9 *Journal of International Development* 483–495 at 483 and 487.

[2] With respect to African countries, see: W. Brown, *The European Union and Africa: The Restructuring of North-South Relations* (London: I. B. Tauris & Co Ltd, 2002), p. 79.

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law and preventing attacks on these values. This initiated the rights-based approach to development which was later confirmed by the adoption of the Maastricht Treaty in 1992.[3]

In the context of migration, the notion of conditionality can be broadly defined as the EU's leverage of different instruments, whether political, economic or financial, to lead third countries to comply with certain norms on migration management. In the context of migration, these norms are mostly related to the readmission of nationals (or non-nationals), assistance with returned nationals, the prevention of irregular migration or the respect of international protection. While migration-based conditionality might appear as a deviation from what would be a more 'righteous' and legitimate form of (political) conditionality, this chapter argues that this is incorrect. On the contrary, this chapter contends that migration-based conditionality stems from political conditionality and the asymmetric power relations on which it relies. While this chapter focuses on the use of conditionality in the relations between the EU and 'developing' countries, especially ACP (African, Caribbean and Pacific) countries, it is important to note that conditionality is also used in the context of the accession process to the EU or more recently with respect to compliance with the rule of law.[4]

In this sense and beyond its specific application, conditionality can be broadly described as a 'methodology' used in the context of international relations by one more powerful party to influence and constrain the choices and actions of another less powerful party.[5] Adopting a 'methodological' understanding of conditionality allows one to better understand its shift across time.

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[3] See former Article 130U(2) of the Treaty establishing the European Community.

[4] V. Viţă, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 *Cambridge Yearbook of European Legal Studies* 116–143.

[5] In the context of this chapter, the understanding that ACP countries are 'less powerful' than the EU is to be understood in relation to their level of 'aid dependency' on the latter. This echoes the observation by Brecht Lein whereby '[b]ecause aid conditionality uses international financial assistance as a lever for progress or reform, it assumes a relationship of dependency between donor and beneficiary'. B. Lein, 'Human Rights in EU Development Cooperation' in J. Wouters, M. Nowak, A.-L. Chané and N. Hachez (eds.), *The European Union and Human Rights: Law and Policy* (Oxford: Oxford University Press, 2020), p. 397.

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This chapter will start by providing the background to this study by briefly highlighting how EU development policy emerged within a European colonial and postcolonial context that was inevitably imbued by racism. While this often fails to be clearly addressed, racism is key to understanding how EU development policy has been structured and has been functioning to this day, reflecting asymmetric power relations between former colonies and former (European) colonial empires. Racism also appears as the 'missing' (or 'implicit') link that connects the colonial legacies in EU development policy and the introduction of mechanisms such as migration-based conditionality to curtail migration from the 'darker' parts of the world.[6] Keeping this background in mind, this chapter will critically examine political conditionality. Finally, it will review the different steps in the emergence of migration-based conditionality in the context of the external dimension of EU migration policy, before focusing on the way in which it has found its latest expression in the last iteration of the cooperation framework between the EU and ACP countries.

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9.2 THE COLONIAL ROOTS OF EU DEVELOPMENT POLICY: UNEARTHING RACISM

The colonial origins of EU development policy are beyond doubt. However, the racism that lies at the root of the colonial project has yet to be clearly highlighted in the relevant scholarship. This criticism can be generalized to the whole field of development studies as mentioned by authors such as Uma Kothari who, echoing Sarah White,[7] questioned the 'invisibility' or 'silence' around race in development.[8]

[6] E. Tendayi Achiume explains how the Schengen visa regime 'mainly excludes the predominantly nonwhite world from [it] […] while including the predominantly white world'. E. T. Achiume, 'Racial Borders' (2022) 110 *The Georgetown Law Journal* 445–508 at 470. For a more extensive analysis, read: 468–476.

[7] S. White, 'Thinking Race, Thinking Development' (2002) 23 *Third World Quarterly* 407. This author mentions how '[t]alking about race in development is like breaking a taboo' and how '[t]he virtual absence of discussion of race in development makes "breaking the silence" a daunting prospect'. Respectively, at 407 and 408.

[8] U. Kothari, 'Critiquing "race" and Racism in Development Discourse and Practice' (2006) 6 *Progress in Development Studies* 1.

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In an article written in 2006, Kothari wondered whether this silence or invisibility might be explained by the fact that 'within a discourse framed around humanitarianism, cooperation, and aid, raising "race" is too distracting, disrupting and demanding?'[9] 'Or [she went on to ask] does the silence of "race" conceal the complicity of development with racialized projects?'[10] To this question, she replied that: 'Significantly, this concealment is founded upon the assumption that development takes place in non-racialized spaces and outside of racialized histories. Furthermore, the silence about "race", the concealment of its effects and the complicity of development with racialized projects are intimately connected.'[11]

The colonial origins of EU development policy have been consistently emphasized and increasingly reaffirmed by scholars.[12] In 1993 Enzo Grilli observed that '[i]t was the weight of colonial inheritance that forced the European nations, engaged in the late 1950s in the creation of the European Community (EC), to deal in a common fashion with the diverse "countries and territories" still under their national jurisdiction'.[13] Marjorie Lister also showed how '[t]he legacies of colonialism, particularly French colonialism, were crucial in shaping the relationship between the European Economic Community [...] and the ACP states'.[14] To be more precise, what became the 'association' of European colonies to the European Economic Community (EEC) originated from the French insistence on duplicating its own internal constitutional structure established after the Second World War to renew its relationship with its colonies.[15] The reference to the French post-war endeavour

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9 Ibid., at 2.

10 Ibid.

11 U. Kothari, 'An Agenda for Thinking about "Race" in Development' (2006) 6 *Progress in Development Studies* 9.

12 Among others, see: Brown, *The European Union and Africa*, pp. 39–43; V. Dimier, *The Invention of a European Development Aid Bureaucracy – Recycling Empire* (New York: Palgrave Macmillan, 2014); E. R. Grilli, *The European Community and the Developing Countries* (Cambridge: Cambridge University Press, 1993), pp. 1–14 and M. Lister, *The European Community and the Developing World* (Aldershot: Avebury, 1988), pp. 1–18.

13 Grilli, *The European Community and the Developing Countries*, p. 1.

14 Lister, *The European Community and the Developing World*, p. 12.

15 Quoting Gerard and Victoria Curzon, Marjorie Lister has described how the association stemming from the Treaty of Rome was imposed on former colonies 'in a fashion

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is also important in connection to the 'concealment' of racism as part of colonialism and therefore development. In this respect, Emily Marker has scrutinized how after the Second World War metropolitan French policy makers framed '"colonialist racism" as fundamentally un-French' in an effort to 'obscur[e] the way [in which] race actually worked in post-war Greater France by encouraging the perception that race lived in individual hearts and minds rather than in institutions, everyday practice and social relations'.[16]

Rather than an 'act of friendship and cooperation',[17] the 'association' also has to be located in the context of the so-called 'Eurafrica' materializing a form of common management of European possessions in Africa.[18] Guy Martin summarized this ideology as: 'a body of thought, originating in the colonial period, according to which the fate of Europe and Africa is seen as being naturally and inextricably linked at the political, economic, social, and cultural levels'.[19] Underpinned by the supposed 'interdependence' and 'complementarity' between the European and African continents,[20] resort to this ideology has justified and allowed asymmetric relationships stemming from colonialism to exist beyond the acquisition of formal independence. The acclaimed work by Peo Hansen and Stefan Jonsson has also shown how this ideology was a crucial (albeit neglected) dimension of European integration.[21] In this respect, Véronique Dimier has also highlighted

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which could not have been more colonial in spirit'. Lister, *The European Community and the Developing World*, p. 14. On the asymmetry of 'association', read also: H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *The European Journal of International Law* 831–854 at 837–840. For a more precise account of this process, see especially: Dimier, *The Invention of a European Development Aid Bureaucracy*, pp. 10–21 and p. 53; and Brown, *The European Union and Africa*, pp. 39–40.

[16] E. Marker, 'Obscuring Race: Franco-African Conversations about Colonial Reform and Racism after World War II and the Making of Colorblind France, 1945–1950' (2015) 33 *French Politics, Culture & Society* 1–23 at 16.

[17] Dimier, *The Invention of a European Development Aid Bureaucracy*, pp. 53–54.

[18] See especially: G. Martin, 'Africa and the Ideology of Eurafrica: Neo-colonialism or Pan-Africanism?' (1982) 20 *The Journal of Modern African Studies* 221.

[19] Ibid., at 222.

[20] Ibid.

[21] P. Hansen and S. Jonsson, *Eurafrica – The Untold History of European Integration and Colonialism* (London, New York: Bloomsbury Academic, 2014).

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how the creation of EU development policy consisted of a 'survival' strategy not only for colonial rule but perhaps most importantly for the colonial administration itself.[22]

More recently, we can mention works by Rahel Weldeab Sebhatu or Olivia Umurerwa Rutazibwa and their pressing calls for an epistemic post- and anti-colonial deconstruction of the notion of development going beyond theoretical investigations to have a tangible effect on institutions.[23]

In spite of the long acknowledgement of the colonial origins of EU development policy and – one might argue – its ongoing postcolonial existence, the relevant scholarship does not usually feature racism in a straightforward way, although there are some exceptions.[24] This may be because for some racism is an intrinsic part of European colonialism and therefore always an implicit component thereof. Or it may also simply be because of a reluctance to address it head-on.

When looking at EU migration policy and EU development policy simultaneously, racism becomes an evident part of the equation. What can be at best implicit when examining EU development policy, becomes obvious in EU migration policy. Criticisms about how racism exists in migration policies

[22] Dimier, *The Invention of a European Development Aid Bureaucracy*.

[23] R. W. Sebhatu, 'Applying Postcolonial Approaches to Studies of Africa-EU Relations' in T. Haastrup, L. Mah and N. Duggan (eds.), *The Routledge Handbook of EU-Africa Relations* (Abingdon, New York: Routledge, 2021), pp. 38–50; and O. U. Rutazibwa, 'On Babies and Bathwater – Decolonizing International Development Studies' in S. de Jong, R. Icaza and O. U. Rutazibwa (eds.), *Decolonization and Feminisms in Global Teaching and Learning* (London: Routledge, 2018), pp. 158–180.

[24] Apart from Uma Kothari and Sarah White mentioned earlier, Kalpana Wilson is a notable exception: K. Wilson, *Race, Racism and Development – Interrogating History, Discourse and Practice* (London, New York: Zed Books, 2012). For direct references to racism as part of EU development policy and/or its colonial origins, read the analyses by Hanna Eklund about the ubiquity of racial considerations when it comes to the status and treatment of colonial subjects as part of the 'association': Eklund, 'Peoples, Inhabitants and Workers', 843–846. More broadly in relation to development studies, see: S. J. Ndlovu-Gatsheni, 'Coloniality of Power in Development Studies and the Impact of Global Imperial Designs on Africa' (2012) 33 *Australasian Review of African Studies* 48 (and the inaugural lecture of the same title delivered at the University of South Africa, Senate Hall on 16 October 2012). For a critical analysis of the 'normative power' of the EU as reflected in political conditionality in relation to colonialism and its racist ramifications, see also: U. Staeger, 'Africa-EU Relations and Normative Power Europe: A Decolonial Pan-African Critique?' (2016) 54 *Journal of Common Market Studies* 981.

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in general and in EU migration policy in particular have been increasingly voiced by scholars.[25] These more recent analyses echo John Torpey's early observations whereby '[o]ne of the most important consequences of regional integration in Europe has been a heightened attentiveness to racial distinctions, at least on the part of the guardians of the borders'.[26]

Before looking at how racism operates in EU development policy through an analysis of 'migration-based conditionality', it may be useful to provide some terminological precision about the concept of 'racism'.[27] Racism is a debated notion as it relies on the unscientific but socially constructed (and therefore socially alive) notion of 'race'. This chapter focuses on one aspect of racism, which consists in the way in which racism always postulates a human hierarchy. In other words, while it is true that racism means that some humans are considered to be inferior to others, it is unclear whether this inferiority is a permanent state or where exactly on the human hierarchy one may be. This dimension of hierarchy that is at the heart of racism is particularly clear in the way in which EU migration policy has been evolving over time as a way of ordering humans' access to mobility and rights.[28] In development, this hierarchy exists between countries that are defined according to their supposed level of 'development', which mirrors the

[25] See especially: Achiume, 'Racial Borders'; M.-B. Dembour, 'Still Silencing the Racism Suffered by Migrants… The Limits of Current Developments under Article 14 ECHR' (2009) 11 *European Journal of Migration and Law* 221; N. El-Enany, *(B)ordering Britain – Law, Race and Empire* (Manchester: Manchester University Press, 2020); T. Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452. See also V. Corcodel in Chapter 8 of this volume.

[26] J. Torpey, *The Invention of the Passport – Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000), p. 154.

[27] Both notions of 'race' and 'racism' have been closely and extensively analysed by a wide range of scholars across many disciplines. For the purpose of clarity, this chapter relies especially on the following analyses of both concepts: E. Bonilla-Silva, 'Rethinking Racism: Towards a Structural Interpretation' (1996) 62 *American Sociological Review* 465; D. T. Goldberg, *The Threat of Racism – Reflections on Racial Neoliberalism* (Malden, Oxford, Carlton: Blackwell, 2009); and Wilson, *Race, Racism and Development.*

[28] For a more detailed analysis of the extension of the colonial order into EU migration policy, read especially: El-Enany, *(B)ordering Britain*, pp. 175–218. In the context of the EU asylum regime, see also: C. Costello and M. Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' (2022) 22 *International Journal of Discrimination and the Law* 244.

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notion of 'civilization' that was used as a justification for the colonial project.[29] In light of this, it is not surprising that most of the 'Least Developed Countries' (LDCs) are African countries that used to be European colonies.[30]

Understood thus as the establishment of a hierarchy of humans (both individually and collectively), racism entails an asymmetry which is reflected not only in the allocation of individual rights, such as free movement across international borders, but also in power relations between states. The following section will examine how political conditionality especially reflects the latter.

9.3 POLITICAL CONDITIONALITY AND ITS DISCONTENTS

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As already mentioned, political conditionality can be perceived as the continuity of policy conditionality.[31] In other words, political conditionality can be considered as the political extension of liberalism beyond the economic realm. As William Brown puts it, '[p]olitical conditionalities, at their most extensive, entail donors placing a model of a liberal democratic capitalist state alongside the orthodox economic policies of adjustment'.[32] This continuity from policy to political conditionality has been most palpable in the cooperation between the EU and ACP countries.[33] While several geopolitical and economic factors have certainly contributed to this shift and as a consequence a strengthening of conditionality, the fundamental reason for its existence consists in the original asymmetric power structure

[29] Among others, see: El-Enany, *(B)ordering Britain*, pp. 183–189; and J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24 *UCLA Journal of International Law and Foreign Affairs* 163–200 at 185–191. More generally, see: Wilson, *Race, Racism and Development*.

[30] For a list, see: www.un.org/ohrlls/content/list-ldcs.

[31] For a detailed analysis of the shift from support to structural adjustment to the introduction of political conditionality in the EU–ACP cooperation framework, see especially: W. Brown, 'From Uniqueness to Uniformity? An Assessment of EU Development Aid Policies' in K. Arts and A. Dickson (eds.), *EU Development Cooperation – From Model to Symbol* (Manchester: Manchester University Press, 2004), pp. 17–41. For further details on this process, read also: Brown, *The European Union and Africa*, pp. 115–137.

[32] Brown, *The European Union and Africa*, p. 124.

[33] Ibid., pp. 94–113.

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between EU and ACP countries and the persistence of this structure over time.[34]

As a variation of the conditionality 'methodology', political conditionality may be described as a way for the EU to enforce specific political norms and values in non-EU states and to fashion their political values and institutions. These political norms usually relate to human rights, democracy and good governance. In the specific context of EU development policy, Brecht Lein defines conditionality as 'the allocation and use of financial resources to sanction or reward recipients in order to promote democratic governance and human rights'.[35]

Political conditionality has been said to rely on a 'carrot-and-stick' approach,[36] in that it can be defined in both 'positive' and 'negative' terms. On the one hand, 'positive' conditionality aims to promote compliance from third countries, mainly by providing financial and technical assistance.[37] On the other hand, 'negative' conditionality aims to 'punish' violations of political norms by imposing economic sanctions or suspending specific economic or financial benefits. The EU has developed different tools to enforce political conditionality.

The first (and best known) tool consists of the insertion of so-called 'human rights' clauses in international agreements. This practice stems from the 1969 Vienna Convention on the Law of Treaties and in particular its Article 60. Human rights clauses were first introduced by the EU in the early to mid nineties. These clauses have subsequently been fleshed out from being more lenient to explicitly making respect for human rights an essential element of the agreements concerned.

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[34] Read especially: O. Engström, 'Lomé and Post-Lomé: Asymmetric Negotiations and the Impact of Norms' (2000) 5 *European Foreign Affairs Review* 175; and J. Mackie, *Lomé to Cotonou and Beyond: What Happened to the 'Spirit of Lomé' in EU Development Cooperation*, EU Diplomacy Papers 7/21 (Bruges, Natolin: College of Europe, 2021).

[35] Lein, 'Human Rights in EU Development Cooperation', p. 389. This definition is borrowed from N. Molenaers, N. Dellepiane and J. Faust, 'Political Conditionality and Foreign Aid' (2015) 75 *World Development* 2–12 at 2.

[36] L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005), p. 1.

[37] For a more detailed analysis, see: B. Simma, J. B. Aschenbrenner and C. Schulte, 'Human Rights Considerations in the Development Co-operation Activities of the EEC' in P. Alston with M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), pp. 571–626.

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In the EU context, the first 'human rights clause' was introduced in Article 5 of the Fourth Lomé Convention on the partnership between the EU and the 'African, Caribbean and Pacific' countries.[38] This clause was then strengthened by the adoption of the so-called Lomé IV bis Agreement,[39] which clearly established that: 'Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention […] shall constitute an essential element of this Convention.'

In addition to inserting an essential elements clause as part of human rights conditionality, international agreements may also contain a 'non-execution clause', which formalizes the condition that each party must take 'appropriate measures' in relation to a breach of the human rights clause by the other party and after consulting that party. These measures could include the suspension of any benefits granted under the agreement. The first one of its kind was also the outcome of the mid-term of the Lomé IV Convention, as part of the Lomé IV bis Agreement (former Article 366a). This clause was further developed in Article 96 of the 2000 Cotonou ACP–EU Partnership Agreement.[40]

Human rights clauses have been subject to intense criticism ranging from vagueness and lack of effectiveness to inconsistency and double standards.[41] In this latter respect, it is notable that most aid

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[38] Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ 1989 L 229/3.

[39] Agreement amending the fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995, OJ 1995 L 156/3.

[40] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317/3.

[41] Among others, see Lein, 'Human Rights in EU Development Cooperation', pp. 395–397; G. Crawford and S. Kacarska, 'Aid Sanctions and Political Conditionality: Continuity and Change' (2019) 22 *Journal of International Relations and Development* 184; K. Del Biondo, 'EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanction Practice' (2011) 7 *Journal of Contemporary European Research* 380; P. Leino, 'European Universalism? – The EU and Human Rights Conditionality' (2005) 24 *Yearbook of European Law* 329; E. Shaver Duquette, 'Human Rights in the European Union: Internal Versus External Objectives' (2001) 34 *Cornell International Law Journal* 363; K. E. Smith, 'The EU, Human Rights and Relations with Third Countries: "Foreign Policy" with an Ethical Dimension?' in K. E. Smith and M. Light (eds.), *Ethics and Foreign*

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suspensions have kept 'target[ing] low income, aid-dependent countries in Sub-Saharan Africa'.[42] Admittedly, economic sanctions (including individual sanctions) often based on United Nations (UN) resolutions may be regarded as a complementary and perhaps a more efficient way to enforce political norms but this does not explain why the essential elements clause should be implemented more towards African countries than elsewhere.[43]

In addition to human rights clauses, conditionality may also be used in direct connection with trade preferences. This is the case in the EU Generalised System of Preferences (GSP) programme and in particular the so-called 'GSP+' scheme.[44] The latter aims at granting additional trade preferences to the World Trade Organization most favoured nation rate to 'developing' countries which comply with human rights, social and environmental norms. Three types of trade benefits currently exist under the EU GSP programme: the standard GSP or 'General Arrangement', which provides for reduction or suspension of tariff duties on a number of products for all beneficiary countries and territories; the GSP+ or 'Special Incentive Arrangement for Sustainable Development and Good Governance' provides for additional benefits for 'vulnerable' beneficiaries of the General Arrangement which have ratified and effectively implemented twenty-seven international conventions on human rights and sustainable development; last, the special arrangement for the LDCs also known as the 'Everything But Arms' initiative provides for duty-free and quota-free access for all products except arms and armaments to the EU market. In practice, as virtually no LDC produces arms or

Policy (Cambridge: Cambridge University Press, 2001), pp. 185–203 (on the inconsistency of EU political conditionality, see especially pp. 193–202).

[42] Lein, 'Human Rights in EU Development Cooperation', p. 395. This is clearly echoed by Gordon Crawford and Simonida Kacarska who find that '[s]ub-Saharan Africa stands out as the region with the highest frequency of aid sanctions, implemented both by the EU and the US'. Crawford and Kacarska, 'Aid Sanctions and Political Conditionality', 190.

[43] Crawford and Kacarska, 'Aid Sanctions and Political Conditionality', 205–206.

[44] Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008, OJ 2012 L 303/1.

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armaments, this title is symbolic. As a vehicle for political conditionality, the GSP programme has faced roughly the same criticisms as human rights clauses.[45]

As briefly examined, there is a 'symbiotic' relation between the notion of 'conditionality' and political norms and values in the EU. In this sense, political conditionality appears to be tightly connected to the protection and promotion of human rights worldwide. While these political norms and values generally appear to be intrinsically desirable, their use as part of a conditional development 'cooperation' has been contested as instruments of power and domination. When it comes to development cooperation with ACP countries, the very existence of aid conditionality appears to contradict the idea of a 'partnership' of equals.[46] As abundantly shown, the roots of this asymmetric relationship are to be found to a large extent in the colonial origins of EU development policy itself built on asymmetric power relations between the EU and its 'partners'.[47] While the development of colonized overseas territories was mentioned in the 1950 Schuman Declaration, its finality was unclear at the time. This was especially so, in light of its entanglement with the notion of 'Eurafrica' and its very hierarchical understanding of 'development', as reflected in the 'association' between the EEC and its colonies.[48]

It is only with the independence of former colonies, the emergence of the 'Third World' and its demands for a fairer New International Economic Order that the initial colonial conception of EU cooperation

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[45] For a general review of the EU GSP with respect to political conditionality, read: N. Hachez and A. Marx, 'EU Trade Policy and Human Rights' in J. Wouters, M. Nowak, A.-L. Chané and N. Hachez (eds.), *The European Union and Human Rights: Law and Policy* (Oxford: Oxford University Press, 2020), pp. 378–384.

[46] S. R. Hurt, 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' (2003) 24 *Third World Quarterly* 161–176 at 171–172.

[47] Among others, see: W. Brown, 'Restructuring North-South Relations: ACP-EU Development Co-operation in a Liberal International Order' (2000) 85 *Review of African Political Economy* 267; and M. van Reisen, 'The Enlarged European Union and the Developing World: What Future?' in A. Mold (ed.), *EU Development Policy in a Changing World – Challenges for the 21st Century* (Amsterdam: Amsterdam University Press, 2007), pp. 29–65. For further developments, see also Section 9.2 of this chapter.

[48] Eklund, 'Peoples, Inhabitants and Workers', 836.

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for development has started to yield. This was best reflected in the first Lomé Convention marked by non-reciprocity and non-conditionality.[49] However, this moment was isolated and rather exceptional as it quickly paved the way for another 'development' narrative building on conditionality.[50]

Although they do not seem to fulfil the same objectives, the asymmetry that underpins the EU development cooperation as reflected in political conditionality is equally (if not more) visible in migration-based conditionality. The EU has developed an external dimension to its migration policy since the early 1990s. So far, this external dimension has covered several policy concepts, such as the 'migration–development nexus', the 'Global Approach to Migration and Mobility', 'mobility partnerships' and more recently the 'New Migration Partnership Framework'. Since the inception of EU migration policy, international migration has been consistently perceived as a potential threat to European security and the 'fight against irregular immigration' has remained a central element of its external dimension.[51]

This is clear when looking at the recent evolution in the use of EU financial instruments within the context of migration management.[52] In this sense, the way in which 'conditionality' is being used in the external dimension of EU migration policy deserves close attention.[53] The next section highlights the main steps in the process of how access to development funding has been increasingly made conditional upon the compliance by third-country partners with EU norms on migration management and especially readmission.

PROOFS

[49] See also M. Cremona's Chapter 2 in this volume on the predecessor Yaoundé Convention.

[50] Generally, see: Brown, *The European Union and Africa*; and Dimier, *The Invention of a European Development Aid Bureaucracy*, pp. 160–174.

[51] For a recent example, see: Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions *on a New Pact on Migration and Asylum*, COM(2020) 609 final, 23.09.2020.

[52] See Section 9.5 of this chapter.

[53] On the issue of conditionality in the field of international migration management generally, read: N. El Qadim, 'Lutte contre l'immigration irrégulière et conditionnalité de l'aide au développement' (2018) 171 *Migrations Société* 109.

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9.4 THE EVOLUTION OF CONDITIONALITY IN THE EXTERNAL DIMENSION OF EU MIGRATION POLICY

9.4.1 FROM A SUBTLE TO AN OPEN USE OF CONDITIONALITY. The initial phase of the use of conditionality in the context of EU migration policy evolution was marked by more subtle and scarce references to conditionality that did not follow a consistent approach. This was explained by a strong institutional resistance to the use of conditionality (in particular, negative conditionality) in the cooperation with third countries on migration. Initially, the European Commission rejected the attempt of the European Council to 'retaliate' against third countries unwilling to comply with specific migration management norms and in particular readmission.

In the early 2000s, security concerns started to take over the external cooperation of the EU on migration. The European Council meeting in Laeken on 14 and 15 December 2001 adopted a more control-oriented tone as to what could be demanded of third-country partners in terms of migration management.[54] While clearly supporting the integration of migration into the EU foreign policy, the European Council insisted that readmission agreements *had* to be concluded with third countries. The 2002 conclusions of the European Council meeting at Seville were even more explicit as regards controlling immigration and they clearly mentioned negative conditionality by advocating sanctioning the lack of willingness of third countries to cooperate with the EU on border management.[55] This proposition was not followed by the Commission, which firmly rejected the use of conditionality (at least in its negative formulation) in the EU cooperation with third countries as regards migration.[56]

The Global Approach to Migration, which in 2011 became the Global Approach to Migration and Mobility (GAMM), was launched in 2005 against the background of the dramatic situation in the Mediterranean Sea and especially in the aftermath of the tragic events in Ceuta and

[54] See paragraph 35 of Presidency conclusions, European Council meeting in Laeken, 14 and 15 December 2001, SN 300/1/01/REV.

[55] Conclusions of the Seville European Council 21 and 22 June 2002, Bull. EU 6-2002, point. I.1 onwards.

[56] Communication from the Commission to the Council and the European Parliament, *Integrating migration issues in the European Union's relations with third countries*, COM(2002) 703 final, 03.12.2002, p. 4.

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Melilla in September 2005.[57] The GAMM was envisioned as the new policy framework of the external dimension to the European migration policy. As part of it, the notion of conditionality was initially incentive-based reflecting a rather 'positive' (understood as 'promotional') version of this concept in the 'more-for-more' principle, mostly applied towards southern Mediterranean countries, especially in the aftermath of the 'Arab Spring'.[58] It is therefore not surprising that in its 2012 conclusions on the GAMM, the Council evoked the 'more-for-more' principle in the context of the EU cooperation with third countries on migration. In this sense, it insisted that 'visa facilitation agreements should only be considered in parallel with EU readmission agreements'.[59] While not mentioning conditionality explicitly, the 'more-for-more' principle indirectly meant the intention to only offer 'closer' cooperation (often taking the shape of financial incentives) to partners willing to cooperate on readmission.

9.4.2 THE 'MIGRATION CRISIS' AND ITS AFTERMATH: AN OPEN USE OF CONDITIONALITY. The 'more-for-more' principle initiated the use of a subtle form of conditionality by the EU in its cooperation with third countries on migration management. This was formulated as a tool for 'promoting' EU norms on migration management and for rewarding their endorsement by third countries, rather than as a way to 'punish' those that would not abide by them.

However, the situation shifted after the European Agenda on Migration was adopted in the aftermath of the so-called 'migration crisis' starting in 2015.[60] Launched on 13 May 2015, the European Agenda on Migration includes four pillars to 'better manage migration'. The first one aims at

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[57] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, 18.11.2011. For further details on the situation in Ceuta and Melilla, read: E. Blanchard and A.-S. Wender (eds.), *Guerre aux migrants. Le livre noir de Ceuta et Melilla* (Paris: Syllepse, 2007).

[58] COM(2011) 743 final, *The Global Approach to Migration and Mobility*, p. 2.

[59] Council conclusions on the Global Approach to Migration and Mobility, 3 May 2012, 9417/12, point 42.

[60] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, COM(2015) 240 final, 13.05.2015.

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reducing the 'incentives for irregular migration' in 'partnership' with third countries.[61] In this respect, the Agenda referred to the need to address 'the root causes of irregular migration and forced displacement in third countries' highlighting the key role of development aid.[62] The second pillar of the European Agenda on Migration consisted of 'saving lives and securing external borders' through strengthening border management.[63] Its third pillar reaffirmed Europe's duty to protect those in need of asylum through a 'strong common policy on asylum',[64] while its last pillar sketched out the EU's 'new policy on legal migration'.[65]

Throughout this communication, the Commission referred to cooperation with third countries as being crucial to reaching these objectives. However, it did not provide many details about the level of commitment expected from 'partners'. The Commission was more explicit about the concrete implications of this cooperation in the subsequent New Partnership Framework (NPF). While being a dimension of the European Agenda on Migration, the NPF is a follow-up both to the EU–Africa Summit on Migration in Valletta that took place on 11 and 12 November 2015, and which led to the creation of the EU Emergency Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa (EUTR for Africa), and to the adoption of the EU–Turkey Statement on 18 March 2016.[66] In its communication 'establishing a New Partnership Framework with third countries under the European Agenda on Migration',[67] the Commission

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[61] Ibid., pp. 7–10.

[62] As the Commission clearly states: 'With a budget allocation of EUR 96.8 billion for the 2014–2020 period, EU external cooperation assistance, and in particular development cooperation, plays an important role in tackling global issues like poverty, insecurity, inequality and unemployment which are among the main root causes of irregular and forced migration. This includes support in regions of Africa, Asia and Eastern Europe where most of the migrants reaching Europe originate from.' Ibid. at p. 8.

[63] Ibid., pp. 10–12.

[64] Ibid., pp. 12–14.

[65] Ibid., pp. 14–17.

[66] www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[67] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank *on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM(2016) 385 final, 07.06.2016.

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mentioned the NPF as a 'new comprehensive cooperation with third countries on migration'.[68] In terms of conditionality, the NPF explicitly stated that under this new policy framework, the EU stood 'ready to provide greater support to those partner countries which make the greatest efforts […], *without shying away from negative incentives*'.[69]

In using these terms, the Commission went beyond the 'promotional' approach of the 'more-for-more' principle to potentially include negative conditionality as part of its policy strategy. Endorsing the position of the Commission, the tone of the European Council also started to change after the NPF came into existence. In particular, in its conclusions of June 2021, the European Council clearly mentioned the intensification of 'mutually beneficial partnerships and cooperation with countries of origin and transit […] as an integral part of the European Union's external action'.[70] The 'pragmatic, flexible and tailor-made' approach should make use 'of all available EU and Member States' instruments and incentives'.[71]

To reach its objectives, the NPF foresaw the creation of 'migration compacts' targeting especially African countries along the Central Mediterranean route and in particular the following five priority countries: Niger, Nigeria, Senegal, Mali and Ethiopia.[72] Critical of this notion, the non-governmental organization CONCORD rather defined migration compacts as partnership frameworks 'introducing […] conditionalities regarding cooperation with third countries in the field of migration and strengthening the externalisation of EU migration policy'.[73]

PROOFS

[68] Ibid., p. 5.

[69] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank *on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, p. 2 (emphasis added).

[70] *European Council meeting (24 and 25 June 2021) – Conclusions*, EUCO 7/21, 25.06.2021, point 12.

[71] Ibid.

[72] On the prioritization of the Central Mediterranean route see: *Malta Declaration by the Members of the European Council on the external aspects of migration: Addressing the Central Mediterranean route*, 3 February 2017 and more recently, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *on the Report on Migration and Asylum*, COM(2021) 590 final, 29.09.2021, p. 2.

[73] CONCORD, *Partnerships or Conditionality? – Monitoring the Migration Compacts and the EU Trust Fund for Africa* (Brussels: CONCORD-Europe, 2018), p. 6.

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9.5 MIGRATION-BASED CONDITIONALITY AND POSTCOLONIAL REMINISCENCE

The anchoring of conditionality in the external dimension of EU migration policy was first formalized through the creation of financial instruments aiming at giving incentives to non-EU 'partners' to adopt EU norms on migration management. So far this 'promotional' version of migration-based conditionality remains dominant. This promotion relies on financial 'assistance' to third countries. This was especially the case of the EUTF for Africa. However, resort to 'negative' conditionality has significantly increased. It first formally appeared in the 2019 reform of the Community Code on Visas (Visa Code). This approach was then confirmed both in the New Pact on Migration and Asylum and in the 'Post-Cotonou' Agreement of 15 November 2023. As further developed in this section, the inclusion of migration-based conditionality in the cooperation framework between the EU and the ACP countries, in which political conditionality also originates, confirms the enduring postcolonial asymmetry of the EU development 'cooperation'.

PROOFS

9.5.1 THE EU EMERGENCY TRUST FUND FOR AFRICA: THE 'POSITIVE' SIDE OF MIGRATION-BASED CONDITIONALITY?. In its 2016 communication on the NPF, the Commission mentioned three financial instruments especially relevant in the field of cooperation on migration: the EU Regional Trust Fund in Response to the Syrian Crisis (the so-called 'Madad Fund'), the EU Facility for Refugees in Turkey and the EUTF for Africa.[74] Of these three financial mechanisms, two are trust funds. A trust fund consists of 'a development tool that pools resources from different donors in order to enable a quick, flexible, complementary, transparent and collective response by the EU to the different dimensions of an emergency situation'.[75] This section will focus

[74] For a critical overview of these instruments from an institutional perspective, see: R. Crowe, 'The European Budgetary Galaxy' (2017) 13 *European Constitutional Law Review* 428–452 at 442–444.

[75] European Parliament resolution of 13 September 2016 *on the EU Trust Fund for Africa: the implications for development and humanitarian aid* (2015/2341(INI)), OJ 2018 C 204/68, point D.

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on the last instrument, namely the EUTF for Africa, to highlight its main (controversial) characteristics.

The EUTF for Africa was adopted in the context of the 2015 'migration crisis', at the EU–Africa Valletta Summit on Migration taking place on 11 and 12 November 2015. In their political declaration and 'guided by the principles of solidarity, partnership and shared responsibility', the participants expressed their commitment to 'allocate appropriate resources to the implementation of […] concrete actions using all existing instruments, along with the newly set up EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa'.[76] Like other trust funds, the EUTF for Africa is legally based on a Commission Decision and on its Constitutive Agreement between the EU Commission and the donors signed in Valletta on 12 November 2015.[77] This trust fund has gathered over 4.5 billion euros, with over 89 per cent coming from the EU and around 11 per cent from EU Member States and other donors.[78] The EUTF for Africa focused on twenty-six African countries,[79] corresponding to three 'windows of investment': The Sahel region and Lake Chad area (Window A), the Horn of Africa (Window B) and the North of Africa (Window C).[80] The Constitutive Agreement of the EUTF for Africa provides that this instrument should '[s]upport all aspects of stability and contributes to better migration management as well as addressing the root causes of destabilisation, forced displacement and irregular migration, in particular by promoting resilience, economic and equal opportunities, security and development and addressing human rights abuses'.[81]

[76] Valletta Summit, Political Declaration, 11–12 November 2015.

[77] Commission Decision of 20.10.2015 *on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa*, C(2015) 7293 final, 20.10.2015. Initially, the EUTF for Africa was to last until 31 December 2020. However, this duration was extended until 31 December 2021.

[78] EUTF for Africa – North of Africa Window, *Improving Migration Management in the North of Africa Region*.

[79] These countries cover the whole African continent. The following countries are concerned in Northern Africa: Morocco, Algeria, Tunisia, Libya and Egypt; in the Sahel and Lake Chad area: Burkina Faso, Cameroon, Chad, Côte d'Ivoire, the Gambia, Ghana, Guinea, Mali, Mauritania, Niger, Nigeria and Senegal; and lastly in the Horn of Africa: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan, Tanzania and Uganda.

[80] Article 3(2)(2)(d) of the Constitutive Agreement.

[81] Article 2(1) of the Constitutive Agreement.

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In the 2018 *Annual Report on the EU Trust Fund for Africa*, the Commission noted that as of 31 December 2018, the resources allocated to this EUTF amounted to approximately 4,200 million euros.[82] Two years later this figure had risen to 5,058.2 million euros.[83] This included 3,385.6 million euros from the former European Development Fund (EDF), 1,052 million euros from the EU budget including EU financial cooperation instruments and 619.7 million euros from EU Member States and other donors (United Kingdom, Switzerland and Norway).[84] These figures show that the most overwhelming contribution comes from the EDF, which was until its integration into the EU budget the main financial instrument for cooperation between the EU and ACP countries. This has raised important concerns and criticisms on the lack of partnership and ownership of the EUTF for Africa as the extent to which the use of the EDF in this context followed the principles of partnership and ownership of the EU–ACP cooperation framework remains unclear.[85]

Migration management constitutes the strategic priority receiving most funding from the EUTF for Africa (31 per cent), followed – in declining order – by strengthening community resilience (27.1 per cent), the development of economic opportunities (18.9 per cent), governance and conflict prevention (21.4 per cent) and other/cross-cutting issues (1.5 per cent).[86] This latter category may include the funding of 'cross-window' actions such as the promotion of academic exchanges,[87] which could have deserved more attention from a development perspective.

The EUTF for Africa has been widely criticized.[88] The European Parliament warned 'against the serious risk of misuse of EU development

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[82] EUTF for Africa, '2018 Annual Report' (March 2019), at 15.
[83] EUTF for Africa, '2020 Annual Report' (March 2021), at 13.
[84] Ibid.
[85] V. Hauch, A. Knoll and A. Herrero Cangas, *EU Trust Funds – Shaping More Comprehensive External Action?* (Maastricht: European Centre for Development Policy Management (ECDPM)), Briefing Note no. 81, November 2015, pp. 10–11.
[86] EUTF for Africa, '2020 Annual Report' (March 2021), at 15.
[87] EUTF for Africa, '2018 Annual Report' (March 2019), at 21.
[88] For institutional criticisms, read among others: S. Carrera, L. Den Hertog, J. Núñez Ferrer, R. Musmeci, L. Vosyliūtė and M. Pilati, 'Oversight and Management of the EU Trust Funds – Democratic Accountability Challenges and Promising Practices' (2018) Study for the Policy Department for Budgetary Affairs of the European Parliament; H. Temprano Arroyo, *Using Aid to Address the Root Causes of Migration and Refugee*

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aid, in particular in conflict-affected countries where security, migration and development issues are closely interconnected' and it has emphasized that 'the projects covered by the EUTF, which have been created using sources mainly devoted in principle to development purposes, must have development objectives'.[89] In spite of its 'promotional' coating, the EUTF for Africa announced a looming negative conditionality towards 'non-cooperative' non-EU states. As Clare Castillejo clearly expressed, 'once conditionalities are introduced, this can be a slippery slope'.[90] This is especially true in light of the adoption of the new Article 25a of the EU Visa Code in 2019.

9.5.2 THE REFORM OF THE VISA CODE AND THE EMERGENCE OF NEGATIVE CONDITIONALITY IN THE SAMOA ('POST-COTONOU') AGREEMENT. Although initially unclear that it would be used towards a third country, negative conditionality made its appearance after the revision of the Visa Code and the adoption of a new Article 25a.[91] Under this new provision, some provisions of the Visa Code which are favourable to visa applicants will not apply to nationals of a third country that is deemed not to cooperate sufficiently '[d]epending on the level of cooperation with Member States on the readmission of irregular migrants assessed on the basis of relevant and objective data'.[92]

The relevant provisions of the Visa Code are the following: Article 14(6), which waives the requirement to provide a number of documents in support of a visa application; Article 16(1) providing for the payment of a visa fee of 80 euros rather than 120 or 140 euros; Article 16(5)b waiving the visa fee for holders of diplomatic and service passports; Article

Flows (Fiesole: European University Institute, 2019), pp. 29–30; Special Report of the European Court of Auditors, 'European Union Emergency Trust Fund for Africa: Flexible but Lacking Focus' (2018), at 8–9.

[89] European Parliament resolution of 13 September 2016 on the EU Trust Fund for Africa: the implications for development and humanitarian aid, point 18.

[90] C. Castillejo, *The European Union Trust Fund for Africa: A Glimpse of the Future for EU Development Cooperation* (Bonn: Deutsches Institut für Entwicklungspolitik/German Development Institute, 2016) Discussion Paper, p. 27.

[91] Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), OJ 2019 L 188/25.

[92] Article 25a(1) of the Visa Code.

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23(1) setting out the time limit of fifteen days for making a decision on an admissible visa application; and last, Article 24(2) and (2)c on the possibility to be granted multiple-entry visas.

The Commission is in charge of assessing the level of third countries' cooperation on readmission at least once a year.[93] In doing so, it has to take into account the following indicators: the number of return decisions issued to nationals of the third country concerned; the number of actual forced returns; the number of readmission requests per Member State accepted by the third country as a percentage of the number of such requests submitted to it; and the level of practical cooperation with regard to return.[94] Practical cooperation is illustrated by the following: providing assistance in identifying persons staying irregularly in the EU and the 'timely' issuance of travel documents; the acceptance of the European travel document for the return of irregularly staying third-country nationals or *laissez-passer*; accepting the readmission of the legally returned persons and as a consequence, accepting the return flights and operations.[95] When the Commission establishes that a third country is not sufficiently 'cooperative', it may submit a proposal to the Council to adopt an implementing decision leading to the suspension of the application of certain provisions of the Visa Code with respect to this country.[96]

As part of the New Pact on Migration and Asylum launched in 2020, the Commission has confirmed its intention *not to shy away* from imposing sanctions (or 'negative incentives'). It clearly stated that: 'Action by Member States in the field of returns needs to go hand in hand with a new drive to improve cooperation on readmission with third countries, complemented by cooperation on reintegration to ensure the sustainability of returns.'[97] While this has to primarily rely on 'the full and effective implementation of the twenty-four EU agreements and arrangements on readmission with third countries' as well as the completion or launch of new negotiations

[93] Article 25a(2) of the Visa Code.
[94] Article 25a(2) points (a), (b) (c) and (d) of the Visa Code.
[95] Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, on repealing the Council Recommendation of 30 November 1994, OJ 2016 L 331/13.
[96] Article 25a(5) of the Visa Code.
[97] *New Pact on Migration and Asylum*, p. 21.

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to enter into new such agreements – or arrangements – the Commission added that: 'These discussions should be seen in the context of the full range of EU's and Member States' policies, tools and instruments, which can be pulled together in a strategic way.'[98] In this sense, the Commission mentions that a 'first step was made by introducing a link between cooperation on readmission and visa issuance in the Visa Code'.[99]

This approach was further confirmed in Article 7 of the proposal for a regulation on asylum and migration management as part of the New Pact on Migration and Asylum.[100] While this provision has disappeared in the final instrument,[101] (probably under the influence of the European Parliament),[102] the negative dimension of migration conditionality has proved to 'have teeth' as it was first implemented towards the Gambia in 2021. Following a proposal from the Commission of July 2021,[103] the Council quickly adopted the decision in October of the same year to suspend all the provisions mentioned in Article 25a of the Visa Code, except Article 16(1).[104] The Gambia has now been followed by Ethiopia.[105] While it is important to mention that proposals for a similar suspension

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[98] Ibid.

[99] Ibid.

[100] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23.09.2020.

[101] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No. 604/2013, OJ 2024 L 2024/1351.

[102] Draft European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] in (COM(2020)0610 – C9-0309/2020 – 2020/0279(COD)), 11.10.2021, 38–39.

[103] Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect of The Gambia, COM(2020) 413 final, 15.07.2021.

[104] Council Implementing Decision (EU) 2021/1781 of 7 October 2021 on the suspension of certain provisions of Regulation (EC) No. 810/2009 of the European Parliament and of the Council with respect to The Gambia, OJ 2021 L 360/124.

[105] Council Implementing Decision (EU) 2024/1341 of 29 April 2024 on the suspension of certain provisions of Regulation (EC) No. 810/2009 of the European Parliament and of the Council in respect of Ethiopia, OJ 2024 L 2024/1341.

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were also put forward towards Bangladesh[106] and Iraq in 2021,[107] and Senegal in 2022,[108] so far negative conditionality has been concretely implemented only towards two African countries, in a way that is very similar to what has been happening in relation to political conditionality.

The visa conditionality mechanism has been criticized by scholars as 'unlikely to contribute to good international relations'.[109] Or as adding to the already discriminatory EU visa regime by reflecting 'a paradigm shift from a "more for more" to a "less for less" approach resulting in a more restrictive and discriminatory system'.[110] The least that can be said is that this 'new turn of the screw to *cooperation* on readmission' does not bode well for the EU to establish mutually satisfying partnership on migration in the future.[111]

In spite of its relatively low level of application so far, negative migration-based conditionality seems to have entered into the 'Post-Cotonou' Agreement (or the 'Samoa Agreement') and especially its rather cryptic Article 74(4),[112] and Annex I,[113] which provide for the possibility for one party to take some 'proportionate measures' when the other party is considered not to have respected its obligations for the readmission of its nationals. It is important to note that Article 74 of the

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[106] Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Bangladesh, COM(2021) 412 final, 15.07.2021.

[107] Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Iraq, COM(2021) 414 final, 15.07.2021.

[108] Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Senegal, COM(2022) 631 final, 09.11.2022.

[109] E. Guild, 'Negotiating with Third Countries under the New Pact: Carrots and Sticks?', EU Migration Blog, 27 November 2020.

[110] F. S. Nicolosi, 'Refashioning the EU Visa Policy – A New Turn of the Screw to Cooperation on Readmission and Discrimination?' (2020) 22 *European Journal of Migration and Law* 467–491 at 483.

[111] Ibid. (emphasis added).

[112] As this provision reads '[I]f a Party considers that another Party has failed to respect the time limit referred to in Annex I in line with Standard 5.26 of Chapter 5 of Annex 9 to the Convention on International Civil Aviation, it shall notify the other Party accordingly. If that other Party continues to fail to comply with those obligations, the notifying Party may take proportionate measures starting as from 30 days of the notification.'

[113] Annex I 'Return and Readmission Processes'.

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Samoa Agreement that is explicitly on 'return and readmission' opens with a first paragraph in which both parties 'reaffirm their right to return illegally staying migrants and reaffirm [their] legal obligation [...] to readmit their own nationals illegally present on the[ir] territories [...], without conditionality and without further formalities'. The insistence on an obligation to readmit nationals 'without conditionality' sounds slightly ironic considering the extensive use of conditionalities (including migration-based) towards ACP countries within and outside the framework of this agreement.

9.6 CONCLUSION

In relation to Article 74(1) and the obligation to readmit nationals 'without conditionality', Maurizio Carbone has noted that: 'The choice of the term "conditionality" in th[e] context [of the Samoa Agreement] may be misleading as this generally refers to conditions that donors attach to aid disbursement.'[114] A central contention of this chapter is that there is nothing misleading in the choice of this term as it reflects – albeit somewhat ironically – the long existence of conditionality in the context of EU development policy.

As readmission and return of third-country nationals staying irregularly in the EU has become a priority (if not *the* priority) of the external dimension of EU migration policy, migration-based conditionality has emerged as a way of inciting and coercing non-EU countries into following the same logic.

This chapter has investigated how migration-based conditionality can be located within the broader context of European postcolonialism. It argues that migration-based conditionality constitutes a legacy of the hierarchical human order stemming from colonial racism. Relying on the same asymmetric power relations at the heart of the EU development cooperation, migration-based conditionality appears as an extension of political conditionality. This analysis is further supported by the

[114] M. Carbone, 'Double Two-Level Games and International Negotiations: Making Sense of Migration Governance in EU-Africa Relations' (2022) 30 *Journal of Contemporary European Studies* 750–762 at 760.

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pervasiveness of migration-based conditionality in EU external relations, as illustrated by the Proposal of the Commission to reform the GSP system,[115] which could extend it to the GSP system and potentially more aspects of the EU external relations. Paying more attention to the EU's colonial past might be the only way to prevent this 'slippery slope' from taking us into a place of irretrievable disgrace.

[115] Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No. 978/2012 of the European Parliament and of the Council, COM(2021) 579 final, 22.09.2021. See especially p. 3 and pp. 19–20. For a critical analysis of the GSP through the lens of post-development, read especially: J. Orbie, A. Salvador, M. Alcazar III and T. Sioen, 'A Post-Development Perspective on the EU's Generalized Scheme of Preferences' (2022) 10 *Politics and Governance* 68–78.

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PART II

ACTORS

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CHAPTER 10

'We Must Pretend to Follow the Laws'

The Colonial Artists of EEC Development Policy

VÉRONIQUE DIMIER

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10.1 INTRODUCTION

> We [colonial officials] must pretend to follow the laws. If we really would follow them, we would do nothing at all.[1]

> Its existence [the existence of the *contrôleur-délégué* of the European Development Fund] had only been possible through a double irregularity, financial and legal. Its creation had been decided without being accepted by the Council of Ministers. Its financing, based on EDF credits, had not been submitted to the EDF Committee [representing the Member States].[2]

These statements come from two different contexts and two different times in history. The first one, from Robert Delavignette, a former colonial official in French Sudan and the director of the French colonial school from 1936 to 1946, echoes the sentiment prevalent among French colonial bureaucrats. The second one, which originates from an unnamed civil servant at the French Ministry of the Economy and Finance, highlights irregularities surrounding the establishment of the

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[1] R. Delavignette, *Toum* (Paris: l'Harmattan, 2012), pp. 256–257. Originally published in 1926 under the pseudonym Louis Faivre.

[2] Archives of the French Ministry of the Economy and Finance (Centre des archives économiques et financières, Bercy), B 0017727/1, CEE/FED, 1962-1974, Note of the service dealing with international affairs, to Mr Deguen, 18.05.1967.

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supervisory structure of the European Development Fund (EDF) by the Directorate General 8 (DG8), the European Commission service responsible for European development aid. These reflections find a common thread through Jacques Ferrandi, a former colonial official trained at the colonial school in the 1940s, who became the director of the EDF from 1962 to 1975 and was responsible for setting up the *contrôleur-délégué* of the fund.

The EDF was conceived in 1957 under the association regime with overseas countries and territories, which was regulated in Part IV of the Treaty of Rome and which primarily targeted French and Belgian colonies in sub-Saharan Africa. The EDF was continuously deployed as countries transitioned from colonial to independent governance in the early 1960s in the framework of the Yaoundé Convention with the Associated African and Malagasy States (AAMS). With a mandate to foster the economic, social, and cultural development of the associated countries and territories (Article 131 of the Treaty of Rome), the EDF received funding from European Economic Community (EEC) Member States, predominantly France and Germany. The fund amounted to 581.25 million ECU (EEC units of account) over a period of five years (1958–1962) and was run by the European Commission, the supranational body of the EEC.

The Implementing Convention attached to the Treaty of Rome established that it was the responsibility of the associated countries' and territories' authorities (later on to be metamorphosed from colonial into African governments) to put forward economic and social projects for EEC financing. It was also their task to implement them, that is to launch the calls for tender and prepare the technical specifications of the projects, the so-called *cahier des charges*. The role of the European Commission was to assess development projects proposed by the associated countries and territories (with the power to accept or reject projects), then to make financing proposals to be forwarded to the Council of Ministers for approval. A subsequent EDF Committee (representing the Member States) had the role of deciding by qualified majority which projects to finance. As far as the implementation of the projects was concerned, the Commission's task was to monitor the projects implemented by the local authorities and supervise the calls for tender. As guardian of the treaties, it also became guardian of an

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equal share of tenders and contracts among companies from both the Member States and the associated countries, as specified by Article 132 of the Treaty of Rome.[3]

Ferrandi's creation of the *contrôleur-délégué* of the EDF aimed to aid newly independent AAMS in project development and oversight, circumventing Member States' objections, notably France's opposition to Commission control mechanisms. To address this resistance, Ferrandi leveraged a legal precedent,[4] by instituting in 1965 the *contrôleur-délégué* role via a Commission regulation, sidestepping Council approval.[5]

Leveraging legal precedent mirrored the colonial bureaucracy's practice of bending rules, emblematic of the institutional ethos of the colonial school, a public institution set up in 1887 to train colonial officials for sub-Saharan African and Asian territories.[6] This chapter contends that colonial-era rules permeated EEC development cooperation. But more importantly, it shows that with personnel transitions from colonial to European administrations, a colonial attitude towards legal compliance was transferred within the European Commission.

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10.2 NAVIGATING THROUGH LEGAL AMBIGUITY: GOVERNING TECHNIQUES IN A COLONIAL CONTEXT

As representatives of French state authority at the grassroots level, colonial officials held a diverse array of responsibilities during the 1940s, encompassing tax collection, judicial proceedings, and the initiation of development endeavours. However, in adherence to the principles espoused by the colonial school, they were mandated to transcend mere bureaucratic enforcement and 'adapt' general colonial regulations to the nuances of African realities. Such principles may appear unconventional for a state institution, particularly the first of its kind in France before

[3] On the functioning of the EDF, see: F. Baron and G. Vernier, *Le fonds européen de développement* (Paris: Presses Universitaire de France, 1981).

[4] V. Dimier, *The Invention of a European Development Aid Bureaucracy: Recycling Empire* (London: Palgrave, 2014), p. 76.

[5] Règlement n° 62/65/CEE Fonds européen de développement, OJ 1965 81.

[6] V. Dimier, *Le gouvernement des colonies: regards croisés franco-britanniques* (Brussels: University of Brussels, 2004). On the colonial school, see also: W. Cohen, *Rulers of Empire: The French Colonial Service in Africa* (Stanford: Hoover Institute Press, 1971).

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the establishment of the École Nationale d'Administration (National School of Administration) in 1945. Typically, bureaucratic officials are expected to enforce laws and penalize transgressors, a cornerstone of their legitimacy and authority. In the colonial context, these laws were essentially regulations enacted by the colonial ministry in Paris or the governor-general in African capitals.[7] Consequently, they diverged from the French legal system applicable in the metropolis and strayed from the overarching principles outlined in Article 6 of the 1789 Declaration of Human and Civic Rights: 'The law should be the same for all whether it protects or punishes.'[8]

As Olivier Le Cour Grandmaison observed, 'the colonial legal system was inherently discriminatory and derogatory'.[9] Derogatory because laws passed by the French parliament did not apply in colonial territories, except in extraordinary circumstances as dictated by competent authorities. Discriminatory because a dichotomy was established between French citizens, who retained the privileges of French laws even in colonial territories, and French 'subjects' (the native population), who were denied the same privileges. Consequently, within the same territories, two legal systems coexisted, tailored for two distinct populations and delineated along racial lines. 'Unity was supplanted by radical legal diversity, equality was supplanted by hierarchy, and liberty was supplanted by the strict subjugation of natives and the perceived superiority of French citizens from the metropolis.'[10] The rationale behind this distinctive legal framework, where 'exception became the norm', rested on the premise that native peoples remained 'backward' or, as posited by social anthropologists of the 1930s, culturally distinct.[11]

During the 1930s, Henri Labouret, a former colonial official in West Africa and anthropologist, asserted that 'nothing is more detrimental in

[7] The governor had power to adopt regulations applicable on the whole territory on which they had authority.

[8] On the specificity of the colonial legal system, see: O. Le Cour Grandmaison, 'L'exception et la règle : sur le droit colonial français' (2005) 212 *Diogène* 42–64. The system was called the 'régime des décrets'. Those regulations were not submitted to the control of the French parliament.

[9] Ibid., 50.

[10] Ibid., 54.

[11] Ibid., 50.

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colonial matters than preconceived formulas and imported principles, which, being often extracted from our European ideas, cannot be applied to other regions or eras'.[12] Such rhetoric served to justify the native policy and colonial development discourse of the 1930s–1940s, emphasizing evolution while respecting tradition, pragmatism, and adaptation to African cultures and realities.[13] It also validated the significant variability and flexibility of colonial regulations and the role of colonial officials, whether governors or their subordinates, the district officers (*the commandants de cercle)*, as intermediaries between the local elite, their demands, their customary laws, and regulations emanating from the metropolis. To address unforeseen circumstances unaccounted for by legislators in Paris or local capitals, and to establish legitimacy and authority, colonial officials were encouraged to negotiate the application of laws, seek compromises, and engage in negotiations with native legitimate chiefs. Negotiations and compromises were central to the system of indirect rule advocated by the colonial school.

The implementation of the system of indirect rule within the French empire remains a topic of debate.[14] Hubert Lyautey notably institutionalized this system during his tenure as *Résident Général* (governor) in Morocco, from 1912 to 1925. Often cited as an exemplar by instructors at the colonial school, Lyautey extolled the 'illegal but efficient practices' of his superior Joseph Gallieni[15] during his time as an army officer in Indochina. Gallieni was known to operate 'contrary to the rules',[16] even going so far as to 'use official papers as handkerchiefs after formally acknowledging their receipt'.[17] As noted by Maurice Delafosse, a former colonial official in West Africa and anthropologist at the colonial school (1909–1926), the vast distances between the metropolis and local administrations meant that such practices often went unnoticed, for better or for worse.

PROOFS

[12] H. Labouret, *A la recherche d'une politique indigène dans l'Ouest africain* (Paris: Edition du Comité de l'Afrique Française, 1931), p. 31.

[13] Dimier, *Le gouvernement des colonies*, chapter 3.

[14] Dimier, *Le gouvernement des colonies*.

[15] Gallieni was colonel in the Indochina colonial war (1892–1895), then governor of Madagascar (1896–1905).

[16] Lettre du 20 juillet 1895 (letter of 20 July 1895), H. Lyautey, *Lettres du Tonkin et de Madagascar, 1894–1899* (Paris: Colin, 1920), p. 225.

[17] Lettre du 23 juin 1895 (letter of 23 June 1895), Ibid., p. 213.

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> The orders canceling previous orders, the *circulaires* modifying the application of the orders, as well as countless decrees coming from Paris, unexpectedly, and contravening both the orders and the *circulaires*. All these texts contradict each other, visibly originating from different offices, though separated by partitions, which are too tight. The texts are long enough to make a Benedictine turn pale and often more confusing than a Chinese puzzle, and they follow one another in an avalanche so impetuous that I have not even finished running my blotter over a correction before I have to cross it out and replace it with a new modification [...]. And now in despair I wonder if I will ever know which one is the fortunate paragraph which, among the hundreds of articles of the old decrees, might resist the debacle of being erased by one of the five *décrets annulateurs*. I fall asleep blissfully on the growing pile of official journals and explanatory *circulaires*, leaving it to chance to guide me in a maze darker than the darkness, dear to Stanley of the equatorial forest. I administer all of this haphazardly. Sometimes it turns out that by a happy coincidence, I have made the decision that needed to be made. Very often I have taken a decision, which no text, recent or old, could have justified. In these cases my error generally goes unnoticed or, which happens much more rarely, I receive a letter from the higher authority a few months later stating, without cordiality or surprise, that I have contravened Article 77 of the Decree of October 5, 1913, modified in its sixth and ninth paragraphs by Article 122, paragraph D, of the Decree of October 6 of the same year. I acknowledge receipt of the letter by stating the disapproval of my own error, and I do as my *noirs administrés* do, I continue.[18]

This quotation serves as a caricature depicting the functioning of colonial bureaucracy, while also shedding light on a primary characteristic of the ideal colonial administrator championed by the colonial school: muddling through and occasionally circumventing rules constituted a method of governance. Following decolonization, this approach persisted among many African leaders, some of whom had previously collaborated closely with the colonial administration. Indeed, numerous postcolonial African states inherited features of colonial governance,

[18] M. Delafosse, *Broussard ou les états d'âme d'un colonial* (Paris: L'Harmattan, 2012), pp. 136–137.

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particularly the 'decentralized despotism' characteristic of indirect rule.[19] These states evolved into neo-patrimonial systems, wherein the authority and legitimacy of leaders were grounded in patron–client relationships, the discretionary powers of select individuals, continual exceptions to established norms, and a lack of transparency, especially in financial management.[20] This system primarily relied on the ability of political leaders to cultivate client networks through the distribution of positions and funds obtained from external aid and other sources. As demonstrated elsewhere, these traits continued to influence colonial officials such as Ferrandi who pursued careers in Brussels.[21]

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10.3 TRANSITIONING FROM THE FIDES TO THE EDF: THE METHODOLOGY OF JACQUES FERRANDI

Having served as an assistant to the district officer in Casamance (Senegal) from 1941 to 1943 during his tenure as a colonial official, Ferrandi's post-war career trajectory was marked by significant roles within the Ministry of Overseas France in Paris. He began as the head of the ministry's International Affairs Division in 1947, then assumed the position of French delegate to the Overseas Territories Committee at the Organisation Européenne de Coopération Économique (Organisation for European Economic Cooperation) in 1949, becoming a technical adviser to the Minister of Overseas France in 1951. His career took him to Dakar in 1953, where he was appointed Director General of the Economic Services of the French West African Federation. In this capacity, he oversaw the Fonds d'Investissement Economique et Social (The Investment Fund for Economic and Social Development (FIDES)), established in 1946 by the French metropolis to allocate funds for the initial colonial development plans.

[19] M. Mamdani, *Citizens and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996).

[20] On indirect rule and its legacy on the postcolonial states in Africa, see also: J. F. Bayart, *The State in Africa: The Politics of the Belly* (Hoboken: Wiley, 2009); J. Herbst, *State and Power in Africa. Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000).

[21] Dimier, *The Invention of a European Development Aid Bureaucracy.*

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During this period, France embarked on reforming its empire in sub-Saharan Africa, rebranding it as the Union Française (French Union) in 1946 and subsequently as the Communauté Française (French Community) in 1958. Supported by the African currency CFA franc and the commercial system of colonial preferences, the Union Française formed a substantial trade and monetary zone shielded from external competition. Trade barriers erected around France and its empire in 1928 facilitated French enterprises' access to overseas markets and privileged the entry of products from these territories into the French market.[22] To sustain this protected zone and colonial reliance, social and economic development plans were implemented, accompanied by a revised discourse on development emphasizing the welfare of overseas inhabitants. Departing from the principle of colonial financial autonomy, FIDES was established to ensure this welfare through development plans. Local colonial authorities proposed funding projects with the assistance of public or private consultancy firms. These projects underwent assessment in Paris, were approved by a committee chaired by the minister of overseas France, and executed by local colonial authorities, awarding contracts to French firms.[23]

As noted by Denis Cogneau, French imperial businesses still derived significant benefits from colonial ventures in the 1950s.[24] However, the economic strain caused by the Second World War, coupled with the increasing demands of African elites for parity in social benefits, alongside

PROOFS

[22] On the economic situation at the end of colonization, see: D. Cogneau, *Un empire bon marché. Histoire et économie politique de la colonisation française, 19-20ème siècle* (Paris: Seuil, 2023); J. Marseille, *Empire colonial et capitalisme français. Histoire d'un divorce* (Paris: Albin Michel, 2005).

[23] Official Journal, Lois et Décrets de la République Française, 4 June 1949, p. 5482. The projects were proposed by the authorities of the territories (colonial administrations), then assessed by the French central administration in Paris before being accepted by a specific council (Comité directeur), composed of the colonial minister and representatives from the minister of the economy, minister of finance, the commissioner general for planification, the director of the Caisse Centrale de la France d'Outre-mer, directors responsible for the planification and the economy within the colonial ministry, and four MPs nominated by the Parliament Committee for overseas territories. The authorities of the territories would then implement the projects accepted with the help of French firms locally established.

[24] Cogneau, *Un empire bon marché*, pp. 395–400.

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conflicts in Indochina and Algeria, rendered France financially incapable of sustaining this developmental model single-handedly. Consequently, the idea emerged to share this responsibility with future European partners. During the negotiations for the Treaty of Rome in 1956–1957, France proposed and obtained the association of its overseas territories in sub-Saharan Africa with the future EEC, thereby opening its African market to other Member States' goods and enterprises in exchange for their participation in an EDF.[25] The association in Part IV of the Treaty of Rome encompassed trade agreements, including the extension of French colonial preferences to the EEC. As mentioned above, it introduced a financial aid mechanism known as the EDF for overseas territories, with its legal framework outlined in a specific Implementing Convention attached to the treaty.

As highlighted by Hanna Eklund, a clear distinction was drawn from the outset between the future European legal framework for citizens of European Member States and that for native inhabitants of associated overseas territories.[26] In my own work, I stress the ambiguity of France's position during the negotiations on the Treaty of Rome.[27] The French government argued that excluding overseas territories from the EEC would be unconstitutional due to the recognition of the Union Française in the 1946 French Constitution: overseas territories were part of the Republic. However, their full integration into the EEC was not envisioned either, as these 'underdeveloped' territories were deemed too different economically, institutionally, and politically from European Member States. To some extent, underdevelopment, as a new means of categorizing peoples in the world through their level of economic growth,[28] was used to justify the perpetuation of exceptions as norms within the new European legal order and the absence of any provision for overseas territories' representation in future EEC institutions. This was a source of

[25] Numerous articles and books exist on these negotiations. See: Dimier, *The Invention of a European Development Aid Bureaucracy*, chapter 1.

[26] H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of European Law* 831.

[27] Dimier, *The Invention of a European Development Aid Bureaucracy*, p. 11; see also on this question Eklund, 'Peoples, Inhabitants and Workers', 836.

[28] On this idea, see: V. Halsmayer and D. Speich Chassé, 'Economic Growth and the Object of Development' in C. Unger, I. Borowi and C. A. Pernet (eds.), *The Routledge Handbook on the History of Development* (Oxfordshire: Routledge, 2022), pp. 25–26.

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significant disappointment for African deputies like Léopold Senghor, the representative of Senegal in the French National Assembly.[29] The 1946 French Constitution had granted all subjects of the empire citizenship in the Union Française: certain categories of former colonial subjects had voting rights and representation in the French National Assembly in Paris, albeit with a different electoral system to French citizens. In 1956, French overseas territories in sub-Saharan Africa were granted increased political autonomy through the Defferre laws.[30] The fact that these territories were considered different from the French metropolis by the EEC, the very fact that the association was decided unilaterally without consulting the emerging political elite of the territories concerned,[31] was viewed as 'the most questionable form of colonialism' by contemporary observers.[32]

Another source of criticism for Senghor was the functioning of the EDF: its mechanisms were adapted from the French FIDES, with procedures designed to be under the control of French colonial authorities. The Implementing Convention attached to the Treaty of Rome stipulated that these authorities would propose economic and social projects for EEC financing in collaboration with local authorities or popular representatives. However, negotiations for the future EEC suggest that France aimed to maintain significant control over the decision-making process of the fund and restrict not only the intervention and oversight of local representatives but also that of other EEC Member States in territories still under its sovereignty.[33]

PROOFS

[29] Official Journal (OJ) of the Assemblée Nationale de la République Française, debates, 4 July 1957, p. 3264, quoted by Dimier, *The Invention of a European Development Aid Bureaucracy*, p. 15.

[30] Finalized by the French Parliament in June 1956, one month after the Venice Intergovernmental Conference discussion on the future common market, this law granted the overseas territorial assemblies, constituted by the 1946 constitution (assemblies in which representatives of the native population had a majority of seats), more budgetary power, most notably in the field of social and economic development. It also established government councils accountable to the territorial assemblies and introduced universal suffrage for the elections of the territorial assemblies and the National Assembly.

[31] M. Lister, *The European Community and the Developing World* (Aldershot: Avebury, 1988), p. 14.

[32] Moreux, Marchés coloniaux du monde, 1953a, p. 2882, quoted by Dimier, *The Invention of a European Development Aid Bureaucracy*, p. 14.

[33] Ibid., pp. 68–69.

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Hence, from its inception, the EDF grappled with dual constraints: France's design for it to serve its own colonial interests, both political and economic, and other Member States' desire to exert control over it and ensure equitable treatment for their companies in the allocation of contracts. Under the first constraint, France ensured that the first commissioner responsible for the association was French: Robert Lemaignen, a prominent figure in the French *patronat* in Africa. Under the second constraint, Germany ensured that the director-general of the service overseeing the association within the European Commission (DG8) was German, represented by Helmuth Allardt.

As previously discussed, in 1958 Lemaignen appointed Ferrandi as his head of cabinet to assist in constructing the new multinational administration of DG8.[34] Given Ferrandi's extensive personal network among the African elite and his expertise in FIDES procedures, he was well suited to aid the new commissioner in interpreting and executing the EDF. Ferrandi brought with him a small team of colonial officials who transposed to DG8 their methods rooted in indirect rule, as well as their connections with the local African elite. Subsequently, upon his promotion to Director of the EDF in 1962, Ferrandi established a system founded on personal relationships, mutual trust, and loyalty with African heads of state, characterized by opacity in fund allocation, a general disdain for transparency in project evaluation, and a disregard for rules.

Drawing from the philosophy of the colonial school, Ferrandi justified this system by emphasizing the necessity of adapting to African realities and cultures: 'fighting against underdevelopment is not a technique. It does not consist of applying a solution pre-fabricated in a laboratory to a pre-determined situation.'[35] Addressing the European Committee of Engineers in Brussels, he argued:

> What we expect from you, technicians, is to refuse any perfectionism, that is to say, to refuse to apply solutions that may have worked in Europe, but cannot be used in Africa […]. I will add that, in the same way there is no

[34] Dimier, *The Invention of a Development Aid Bureaucracy*, chapter 2.

[35] J. Ferrandi, 'La communauté Européenne et l'assistance technique' (1964) *International Development Review* 9. Quoted by Dimier, *The Invention of a Development Aid Bureaucracy*, p. 33.

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> sickness but only sick patients, there is no underdevelopment but only underdeveloped countries, with their own characteristics, their particular needs, their possibilities and their specific solutions [underlined in the text].[36]

Mirroring the colonial schools' ethos, Ferrandi believed that Africa had to develop in its own way, which necessitated a commitment to compromise with African collaborators:

> competence, modesty, courage, realism [underlined in the text] [...]. All these qualities can flourish only in a context of loyal cooperation with the legitimate government and administrations of those countries. As was already said, and it is now a kind of *cliché*: the way we give is much more important than what we give. This essentially means that everything must be based on the style or in other words, human relations.[37]

Ferrandi's approach also involved interpreting EEC law in a manner conducive to his objectives, as evident in the creation of the *contrôleur-délégué* of the EDF and in addressing the 'discrimination issue' concerning EDF contracts awarded to EEC companies.

PROOFS

10.4 SKIRTING REGULATIONS AND ESTABLISHING LEGAL PRECEDENTS

Upon achieving independence, many African states lacked the capacity to develop the expected projects outlined by DG8 or to execute them. Consequently, they required technical assistance, for example to devise development projects or prepare the calls for tender and associated technical specifications, referred to as *cahiers des charges*. Aligned with the practices of the FIDES and the intentions of the French government, this technical support was primarily provided by French consultancy firms, sometimes in collaboration with firms from other Member States. Despite the appearance of independence, these firms remained closely tied to French companies established in former colonies and influenced

[36] J. Ferrandi, 1974, *Marchés tropicaux*, pp. 1055–1056. Quoted by Dimier, *The Invention of a Development Aid Bureaucracy*, p. 34.
[37] Ibid.

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by local legal frameworks based on former French colonial regulations. This influence extended to the technical specifications of projects attached to calls for tender, which, written in French and reflecting French technical terminology and legal requirements, tended to favour French companies over those from other Member States. German companies, in particular, frequently voiced complaints regarding this imbalance as they struggled to secure contracts from the EDF.[38]

Another point of contention arose from the right of establishment and availability of information: while France, under pressure from other Member States, compelled its former African colonies to adopt a legal framework allowing the establishment of all EEC companies on their territories, it did not facilitate access to information regarding EDF tenders or establish a common legal framework for technical specifications easily understandable to non-French companies. Consequently, during the first years of the EDF, the latter secured 40 per cent of EDF contracts compared to only 3.28 per cent for German companies. When factoring in that 35.74 per cent of contracts were awarded to firms from associated states, which were essentially French entities in disguise, French companies monopolized the majority of EDF contracts, revealing a covert form of discrimination.[39]

To challenge this discrimination and bolster his authority within DG8, Ferrandi devised a strategy to enlist German support and secure greater autonomy for the EDF from the French government. In 1960, immediately after several associated countries and territories had gained independence, he proposed the appointment of independent EDF *contrôleurs* recruited by the European Commission to oversee technical assistance and project control in associated states. These agents would assist in project development, ensure technical specifications allowed for fair competition, supervise local administration-led tenders, and monitor expenditure – tasks originally assigned to French consultancy firms per the French government's plans. When France rejected these proposals, Ferrandi, employing

[38] V. Dimier, 'The European Development Fund, a Dowry for French Companies?' in V. Dimier and S. Stockwell (eds.), *The Business of Development in Post-Colonial Africa* (London: Palgrave, 2021), p. 250.

[39] V. Dimier 'The European Development Fund, a Dowry for French Companies?', p. 250; see also: V. Dimier and S. Stockwell, 'Development Inc.? The EEC, Britain, Post-Colonial Overseas Development Aid, and Business' (2023) 97(3) *Business History Review* 513–546.

PROOFS

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his characteristic approach, established the *contrôleur-délégué* of the EDF without the consent of Member States. Recruitment occurred through the Association Européenne de Coopération (Association for European Cooperation), a Belgian-based non-profit organization, with *contrôleurs* contracted privately and funded through the EDF budget.

Furthermore, Ferrandi endeavoured to enhance transparency in adjudication procedures and increase access to information. Calls for tender were publicized in various specialist journals across Member States and in multiple languages, in addition to the *Official Journal* of the EEC and associated countries. The Commission disseminated project records, including technical and financial details, to Permanent Representations in Brussels and EEC information offices in Member States. In response to recurrent German criticisms and as negotiations for Yaoundé II approached in 1968, DG8 developed a common legal framework for technical specifications for all EDF-funded contracts (*cahier des charges général*), translated into the four languages of the Community.[40] This document represented an initial effort to modernize and standardize local technical specifications documents and depart from inherited colonial rules.

However, the reforms implemented were insufficient in addressing the discriminatory practices among Member States concerning EDF contracts. It became evident that the issue transcended legal boundaries. French companies, due to their close ties with local elites, were adept at employing practices such as bribery, thereby securing contracts. Consequently, Ferrandi's team of *contrôleurs* found themselves compelled to adapt to this reality, compromising the very principles of competition they were mandated to uphold. To allow German companies (like Strabag) to have access to EDF tenders, they resorted to the same tactics as French and local companies, intervening on the ground and attempting to sway local administrations' handling of tender processes. In 1962, following Strabag's unsuccessful bid for an EDF road project in Somalia, the European Commission engaged the Somalian government to initiate a fresh tender process, excluding the Italian firm that had secured the contract.[41]

[40] Archives of the EEC: 25/1980/1041, draft project of a common contract law and specification for public work financed by the EDF, 1970.

[41] Dimier, 'The European Development Fund, a Dowry for French Companies?', pp. 261–262.

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These adaptations did not go unnoticed by firms, particularly French ones, which began losing contracts to German and other EEC Member State companies.[42] Certain Member States, notably the German government, endorsed Ferrandi's actions where these were in their own interests. Conversely, the German government sometimes criticized Ferrandi for setting precedents by flouting regulations, as exemplified by the Trans-Gabon railway project.

The railway project, proposed by President Omar Bongo of Gabon in 1968 and revisited in 1973, aimed to facilitate forest exploitation and potentially exploit iron ore mines.[43] Despite objections from various agencies, such as the World Bank, and reservations from most EDF Committee members regarding its profitability, the project proceeded. Notably, concerns were raised within the EDF Committee about Ferrandi's preselection of firms before official approval of the project by the EDF Committee and before the publication of a formal call for tender in the EEC *Official Journal*. Such action prompted questions about legality and potential lawsuits against the Commission. In particular, the Dutch and German representatives persistently asked that the procedures be respected. Despite objections, the project secured majority approval within the Committee. The fact that Ferrandi made sure, through his consortium of firms, to give a fair share of the project to companies of several Member States, probably helped towards this outcome.[44]

10.5 CONCLUSION

This chapter highlights the perpetuation of a colonial mindset towards legal governance, which accompanied the arrival of Ferrandi and other colonial officials in DG8. Moreover, it underscores how this mindset was largely fuelled by the enduring competition among Member States to maximize benefits from the EDF for their respective enterprises.

[42] Ibid.

[43] On the Trans-Gabon railway, see: B. Peyrot, 'Le transgabonais, vecteur économique stratégique du développement du Gabon' in J. L. Chaléart, C. Chanson-Jabeur and C. Béranger (eds.), *Le chemin de fer en Afrique* (Paris: Karthala, 2006), pp. 307–321.

[44] V. Dimier, 'The Business of Eurafrica: The European Development Fund between the European Commission, the Member States and European Firms' (2018) 24 *Journal of European Integration History* 187.

PROOFS

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Consequently, the EEC legal framework underwent continual adjustments not only to accommodate African elites, but also to serve the interests of Member States.

More recently, in 2006, Louis Michel, the commissioner for development, urged the head of the Commission's delegation in Eritrea to exercise 'flexibility and constructiveness' regarding President Isaias Afwerki's decision to market the food aid given by the EU, an act which was not envisaged by the financial convention signed between the EU and the Eritrean administration under a programme named 'Food for Free'.[45] Given the country's strategic significance, few Member States opposed this decision or envisaged imposing sanctions despite facing one of the most authoritarian regimes on earth.

Flexibility and adaptation of law remained the guiding principles for successive generations of *contrôleurs*, renamed 'delegates' after 1975, then heads of delegation of the Commission.[46] In a European Commission publication dedicated to the delegations' role and historical trajectory from 2004, the experience of René Calais, one of the first colonial officials to be recruited by Ferrandi to assume the role of *contrôleur-délégué* in Chad, was highlighted, precisely for his capacity to adapt, the same capacity which prompted those who were critical of Ferrandi's style to label DG8's civil servants and *contrôleurs-délégués* 'colonial artists'.[47]

PROOFS

[45] V. Dimier and C. Breton, 'Le Fonds Européen en action: du réseau Ferrandi à l'Erythrée' (2014) 384–385 *Outre-Mer* 103.

[46] V. Dimier and M. Mcgeever, 'Diplomats without a Flag: The Institutionalization of the Delegations of the European Commission in ACP Countries' (2006) 44 *Journal of Common Market Studies* 483.

[47] European Commission, *Taking Europe to the World, 50 Years of the European Commission's External Service* (Luxembourg: Office for Official Publications of the European Communities, 2004).

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CHAPTER 11

Colonial-Era Mixed Courts, Early Euro-Lawyers, and EU Law as Constitutional Law

MICHEL ERPELDING

11.1 INTRODUCTION

The supranational character of both EU and European Convention on Human Rights (ECHR) law (collectively designated as 'European law') is closely associated with the rise of the Court of Justice of the European Union (CJEU) in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg, both of which have acted as constitutional judges in allowing individuals to invoke treaty provisions against national legislation, whether directly or through preliminary referrals by national courts.[1] Since the 2000s, a growing number of publications have analysed the often controversial powers of these courts from a historical and sociological perspective.[2] With regard to the creation of EEC

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[1] Whereas the CJEU adopted this position as early as the 1960s, in its Case 26–62 *Van Gend en Loos*, ECLI:EU:C:1963:1 and Case 6–64 *Costa v. ENEL*, ECLI:EU:C:1964:66 decisions, the ECtHR waited until its judgment in the *Loizidou v. Turkey* case, Appl. No. 1531/89, judgment of 23 March 1995 to proclaim the ECHR as 'a constitutional instrument of European public order'.

[2] For the CJEU, see, e.g.: K. Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001); A. Stone, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); A. Boerger-De Smedt, 'La Cour de justice dans les négociations du traité de Paris instituant la CECA' (2008) 14 *Journal of European Integration History* 7; P. L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010); A. Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) 21 *Contemporary European History* 339; M. Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' (2012) 21 *Contemporary European History* 375; J. Bailleux, *Penser l'Europe par le droit: L'invention du droit communautaire en France* (Paris: Dalloz, 2014); M. Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend & Loos* Judgment' (2014) 12

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(now EU) law and its promotion as supranational law, a certain number of publications have notably highlighted the decisive role played by a small number of highly qualified jurists, for whom Antoine Vauchez has coined the term 'Euro-lawyers'.[3] I shall apply this term here as well to lawyers participating in the creation and promotion of either EEC/EU or ECtHR law as supranational law.

When identifying the precedents on which early Euro-lawyers could build, many publications have noted the influence of individual domestic legal cultures.[4] In addition, several authors have identified continuities between interwar-period international lawyers and post-Second World War Euro-lawyers.[5] However, two aspects of this crucial period remain understudied.

First, with the notable exception of A. W. Brian Simpson, most authors seem to assume that interwar international adjudication remained

International Journal of Constitutional Law 136; A. Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge: Cambridge University Press, 2015); V. Fritz, *Juges et avocats généraux de la Cour de justice de l'Union européenne (1952–1972): Une approche biographique de l'histoire d'une révolution juridique* (Frankfurt a. M.: Vittorio Klostermann, 2018); A. Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of *Costa v. Enel*' (2019) 30 *European Journal of International Law* 1017. For the ECtHR, see, in particular: A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001); M. R. Madsen, '"La Cour qui venait du froid." Les droits de l'homme dans la genèse de l'Europe d'après guerre' (2005) 26 *Critique internationale* 133; E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010); M. R. Madsen, *La genèse de l'Europe des droits de l'homme: Enjeux juridiques et stratégies d'État (France, Grande-Bretagne et pays scandinaves, 1945–1970)* (Strasbourg: Presses Universitaires de Strasbourg, 2010); J. Christoffersen and M. R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011); M. Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford: Oxford University Press, 2017).

[3] Vauchez, *Brokering Europe*, p. 5.

[4] Since the 1950s, many authors have for instance underlined the influence of individual French or US legal institutions on EU law. For a recent publication participating in this tradition, see, e.g.: W. Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt' (2017) 28 *European Journal of International Law* 935.

[5] M. R. Madsen and A. Vauchez, 'European Constitutionalism at the Cradle: Law and Lawyers in the Construction of a European Political Order (1920–1960)' in A. Jettinghoff and H. Schepel (eds.), *Lawyers' Circles: Lawyers and European Legal Integration* (The Hague: Reed Business Information, 2004), pp. 15–34; G. Sacriste and A. Vauchez, 'Les "bons offices" du droit international : la constitution d'une autorité non politique dans le concert diplomatique des années 1920' (2005) 26 *Critique internationale* 101.

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confined to interstate disputes.[6] However, well before the 1950s, internationally composed courts examined treaty-based claims by individuals against sovereign states, notably in the wake of the post-First World War peace treaties. As I have shown elsewhere, the creators of both the Luxembourg and the Strasbourg courts acknowledged these institutions as important precedents.[7]

Second, while certain of the above-mentioned publications recognize the importance of decolonization on the development of post-Second World War European law, they do not look at possible legal and personal continuities between international institutions established within a colonial context and the CJEU and the ECtHR. It might perhaps seem counter-intuitive to look at continuities between institutions whose main objective was to maintain inherently unequal forms of domination and institutions aiming to create forms of mutual dependency and solidarity among equals. A glance at international organizations law might dispel this assumption, as recent publications have shown that post-Second World War international organizations in general,[8] and the UN in particular,[9] relied heavily on legal principles and legal expertise developed within the often partly internationalized legal pluralism of certain colonial settings.[10]

As this chapter will show, the CJEU and the ECtHR were no exceptions to this, as the sources of inspiration their creators could draw on were not limited to individual Western legal cultures or post-First World War European international courts but extended to precedents from colonial contexts. One of these precedents was the use of

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[6] Brian Simpson, *Human Rights and the End of Empire*, pp. 91–156.

[7] M. Erpelding, 'International Law and the European Court of Justice: The Politics of Avoiding History' (2020) 22 *Journal of the History of International Law* 446.

[8] J. Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25 *European Journal of International Law* 645.

[9] M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton and Oxford: Princeton University Press, 2009), pp. 28–65.

[10] I am referring here to relations between Western and non-Western polities that were formally governed by international law, but in fact entrusted the former with all or some government functions of the latter. This was the case in protectorates such as Morocco or Tunisia, Class A mandates such as Syria or Palestine, or states and other independent polities placed under international financial supervision, such as the late Ottoman Empire and Khedivial Egypt (which would become a de facto protectorate after 1882).

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internationally composed 'mixed courts' to guarantee the individual rights of Westerners, which I will refer to here as 'colonial-era mixed courts'. This chapter will therefore first introduce readers to the origins and characteristics of these courts, which operated between the middle of the nineteenth and the middle of the twentieth centuries, highlighting the cases of the Mixed Courts of Egypt and the Mixed Court of Tangier. It will then show some of the personal continuities that existed between these courts and post-Second World War European law, both within the European Communities and the Council of Europe (CoE). Finally, to further illustrate this point, the chapter will zoom in on one particular case before the Mixed Court of Tangier that not only raised the question of treaty law as constitutional law, but also elicited a cautious, but ultimately positive, assessment by Nicola Catalano, who would shortly afterwards become one of the most influential early 'Euro-lawyers'.

11.2 COLONIAL-ERA MIXED COURTS: UPHOLDING TREATY LAW AS CONSTITUTIONAL LAW

Mixed courts of the colonial era were a form of domestic court with international participation established between the first half of the nineteenth century and the first half of the twentieth century in non-Western polities (including fully sovereign states, but also protectorates, mandates, and condominiums). Serving as an alternative to consular jurisdiction in countries where Western states were unwilling to accept the jurisdiction of ordinary local courts over their nationals or their nationals' interests (a system also known as capitulations, especially in the context of the Ottoman Empire), they blended domestic and international features.[11] These features were not limited to their composition and included other variables such as the legal norms that created them, the substantial and procedural laws they applied, their jurisdiction, and the languages they used. This blend of domestic and international features led contemporary authors to describe them as 'mixed' in a way that largely corresponds to today's characterization of certain courts

[11] C. Bell, 'Capitulations' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009).

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as 'hybrid'. The first of these institutions were the Ottoman Mixed Commercial Courts (ca.1848–1914/23), which provided the blueprint for all others. Over time, the jurisdiction of mixed courts outgrew the initial focus on civil and commercial cases, with some later courts handling suits against the host government not unlike present-day investor–state dispute arbitration. However, due to the growing rejection of the discriminatory foundations of this system and to the progress of decolonization, most mixed courts created during the nineteenth and early twentieth century were eventually replaced by national courts before the 1960s.[12] That said, based on their broad powers as guarantors of treaty-based economic freedoms of foreign individuals and companies and their own understanding of themselves as 'constitutional courts', two mixed courts seem especially relevant as precedents for both the CJEU and the ECtHR, namely the Mixed Courts of Egypt and the Mixed Court of Tangier.

Created pursuant to a 1875 convention between Egypt and more than a dozen Western powers, the Mixed Courts of Egypt were only dissolved in 1949, pursuant to the 1937 Montreux Convention. During their existence, the Mixed Courts of Egypt included between thirty-two and seventy judges (two-thirds of whom were foreigners, one-third Egyptians), many of whom had served as high-ranking magistrates in their home countries. Handing down their decisions, which were usually written in French, in the name of the Egyptian sovereign and in the interest of free international trade, they applied treaty-based laws that they could complement by invoking 'the principles of natural law and equity', or, at least until 1937, even modify them by convening as a 'Legislative Assembly'. Even more importantly from the perspective of individual rights, the Mixed Courts of Egypt had the power to award damages to private persons for the violation of their treaty-based rights by Egyptian authorities.

[12] For a typology of these courts, see: M. Erpelding, 'Mixed Courts of the Colonial Era' in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press, 2021). For a different typology and a comparison with present-day international commercial courts, see: W. Theus, 'International Commercial Courts: A New Frontier in International Commercial Dispute Resolution?' in J. Bäumler et al. (eds.), *European Yearbook of International Economic Law 2021* (Berlin and Heidelberg: Springer, 2022), pp. 1–34.

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In this regard, the Mixed Courts had a broad understanding of their mandate. As early as 1876, in a decision that would eventually contribute to the destitution of ruler of Egypt Khedive Ismaʿīl, they accorded to themselves the right to ignore any law that they deemed in violation of rights granted to foreigners by way of treaty.[13] According to one of the last presidents of the Alexandria-based Mixed Court of Appeals, these rights were understood by the members of the Mixed Courts of Egypt as similar to constitutional rights.[14]

The Mixed Courts of Egypt later served as a model for the creation of a similar institution within the International Zone of Tangier (1924–1956), which was distinct from the French and Spanish Protectorates over Morocco. Adopted in 1923 as a multilateral treaty, the Tangier Zone Statute formally placed the Moroccan port city and its surroundings under the sovereignty of the Moroccan Sharīf, while delegating vast components of that sovereignty to several Western powers. These powers jointly administered most of the Zone using a series of international institutions, which included an administrator, a (non-elected) Legislative Assembly, a Committee of Control (composed of the professional consuls of the Western powers parties to the 1906 Act of Algeciras and endowed with the power to veto legislation), and a Mixed Court. The French international lawyer Paul Reuter (1911–1990), one of the drafters of the Treaty establishing the European Coal and Steel Community (ECSC), once described this scheme as a type of unequal federal integration between Morocco and the Western parties to the Statute.[15] In at least one respect, the quasi-federal character of the Tangier regime was even more conspicuous than that of the ECSC Treaty: as opposed to the latter, it included a supremacy clause. Under Article 11 of a Moroccan '*Dahir*'

[13] *Cesare Carpi v. Daira Sania* (Mixed Court of Appeals, 3 May 1876). Reprinted in: US Department of State, *Arbitration Series No. 4 (4)* (Washington: Government Printing Office, 1932), p. 245.

[14] J. Y. Brinton, *The Mixed Courts of Egypt*, revised ed. (New Haven: Yale University Press, 1968), p. 131. For general representations of the Mixed Courts of Egypt, see also: M. S. W. Hoyle, *Mixed Courts of Egypt* (London: Graham & Trotman, 1991); M. Erpelding, 'Mixed Courts of Egypt' in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press, 2021).

[15] P. Reuter, *Institutions internationales* (Paris: Presses Universitaires de France, 1955), p. 250.

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(decree) annexed to the Tangier Zone Statute, '[t]he Administration of the Zone shall respect the Treaties at present in force between Us [the Sultan of Morocco] and the Powers. … In case of any divergence between the provisions of these Treaties and the laws and regulations passed by the International Legislative Assembly, the provisions of the Treaties shall prevail'.[16]

The relative sophistication of the Tangier Zone Statute did not, however, lead to the creation of a judiciary as renowned as the Mixed Courts of Egypt. Generally speaking, the Mixed Court of Tangier was much smaller than its Egyptian model. Until 1953, it included only five titular judges, none of whom was a Moroccan. Deemed much less prestigious than the Mixed Courts of Egypt, it did not attract the same kind of high-profile magistrates. This changed somewhat between 1953 and 1956 when, following a major overhaul, the bench of the Mixed Court of Tangier was expanded to thirteen foreign judges and one Moroccan judge.[17] Nevertheless, despite these shortcomings, the Mixed Court of Tangier had similarly broad powers and proved just as activist as those in Egypt.

Just like their Egyptian counterparts, the Tangier judges used their jurisdiction over suits by foreigners against the government to set aside laws that they deemed contrary to the economic freedoms of foreigners, asserting that these freedoms were guaranteed by the 'constitutional treaties' of the Zone. This could be considered a form of judicial activism. Granted, the prevalence of these treaties over local legislation was firmly enshrined within the above-mentioned supremacy clause. Nevertheless, the 'duty … to ensure the observance of the regime of economic equality and the provisions of the statute of Tangier' had been entrusted by Article

[16] 'Draft Shereefian Dahir Organising the Administration of the Tangier Zone', annexed to the Convention regarding the Organization of the Statute of the Tangier Zone (signed 18 December 1923, entered into force 14 May 1924) 28 LNTS 541.

[17] See M. O. Hudson, 'The International Mixed Court of Tangier' (1927) 21 *American Journal of International Law* 231; R. Nefussy, *Le Tribunal Mixte de Tanger* (Lyon: Éditions de l'A.G.E.L., 1949). For more recent publications, see: F. Tamburini, 'Il "tribunale misto" di Tangeri (1925–1952): Balance of power, diritto e mentalità coloniale' (2007) 4 *Jura Gentium* 55; L. Ceballos López, *Historia de Tánger: Memoria de la ciudad internacional*, 2nd edn (Córdoba: Almuzara, 2013), pp. 115–122; M. Erpelding and F. Rherrousse, 'Mixed Court of Tangier' in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press, 2020).

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30 of the Tangier Zone Statute to the above-mentioned Committee of Control. By asserting their own power to enforce the supremacy of treaties over Zone legislation, the members of the Tangier Mixed Court showed that they were not afraid of encroaching on what Western consuls in Tangier would have considered their *domaine réservé*.[18] They did so for the first time in the 1938–1939 *Radio-Tanger* case. After the Tangier Legislative Assembly had adopted a law prohibiting all private radio broadcasting in the Zone on grounds of Moroccan 'imperial' security, local authorities had started criminal proceedings against the director and the manager of the privately owned *Radio-Tanger* station. However, the station's owners, the Belgian industrialist Louis de Wolf and his Romanian associate Charles Michelson, were clearly aware of the potential offered by the unique legal framework of the Tangier Zone and its judicial guarantees.[19] Their strategy of commissioning and disseminating opinions from some of Europe's most prominent international lawyers, all of whom asserted the legality of their undertaking, proved successful with the local judges.[20] Echoing the arguments used by the defendants, both the Mixed Court's Section of First Instance,[21] and its Appeals Section,[22] deemed the law contrary to the principle of 'economic freedom without inequality', which was granted to all foreigners in Morocco by the 1906 Act of Algeciras, and acquitted the accused. In its lengthy decision, written by its Spanish president Manuel Díaz Merry, the Mixed Tribunal even explicitly compared itself to the US Supreme Court.[23]

PROOFS

[18] Nefussy, *Le Tribunal Mixte de Tanger*, pp. 207–208.

[19] Memorandum by Louis de Wolf, June 1939, Belgian Diplomatic Archives (ADB), APCI 5.402.

[20] The file conserved on *Radio-Tanger* at the ADB includes opinions by the well-known international lawyers Nicolas Politis, Jules Basdevant, Sir James Leslie Brierly, and Sir John Fisher Williams. It furthermore mentions opinions by the international arbitration specialist Gilbert Gidel, as well as by two lesser-known lawyers, Fakhri and Limburg: ADB, APCI 5.402.

[21] *Ministère Public v. Joseph Aerts et Albert Azerraf* (Mixed Court of Tangier, Section of First Instance, 28 December 1938 (decision) and 4 January 1939 (reasoning)). See: Janssens to Spaak, 4 January 1939, ADB, APCI 5.402.

[22] *Ministerio Público v. Joseph Aerts and Alberto Azerraf* (Mixed Court of Tangier, Appeals Section, 10 March 1939), in M. Díaz Merry (ed.), *Tánger: Tratados, Códigos, Leyes y Jurisprudencia de la Zona Internacional* (Tangier: Distribuciones Iberica, 1950), pp. 2380–2391.

[23] Ibid.

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Considering their international composition and legal basis, their broad powers as guarantors of treaty-based individual rights, their activism, and their full integration within their respective host polities, the Mixed Courts of Egypt and Tangier presented several features that would have been useful to the creators and promoters of the two post-Second World War European supranational courts. As a matter of fact, several leading early Euro-lawyers had some form of experience of the Mixed Courts of Egypt and Tangier.

11.3 PERSONAL CONTINUITIES: THE COLONIAL EXPERIENCES OF EARLY EURO-LAWYERS

Several lawyers who played an important role in creating and/or promoting the Luxembourg and Strasbourg courts as supranational courts had previous experience of colonial-era mixed courts.

The fact that the Council of Europe was established in 1949, which was the same year that the Mixed Courts of Egypt were dissolved, likely contributed to some striking personal continuities between these institutions. While the Swede Torsten Salén (1889–1964), who had been a judge at the Mixed Courts of Egypt between 1926 and 1949 before serving as a member of the Committee of Experts that elaborated the draft ECHR between February and March in 1950, did not display any leanings in favour of supranational adjudication in that context (a move his country would have opposed in any case), two of his former colleagues were actually instrumental in setting up the ECtHR as a supranational court.[24]

The first of these colleagues was the Dutch Arnold Struycken (1900–1955). After defending a doctoral dissertation in international law and serving as a legal secretary to several Mixed Arbitral Tribunals based in the Netherlands (some of which dealt with politically highly sensitive expropriation cases), between 1936 and 1949 Struycken had served as a judge of the Mixed Courts of Egypt – a period that coincided with increased Egyptian opposition to the wide-ranging powers of these courts, and after 1937 that saw a transitional period in which their absorption by the local court system was prepared and

[24] Madsen, *La genèse de l'Europe*, pp. 236–239.

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lively discussions took place about the future protection of foreigners' rights within that system. In 1949, following the dissolution of the Mixed Courts, Struycken was appointed Political Director within the Secretariat of the Council of Europe, and entrusted with coordinating the relations between the organization and its member states. This included coordinating the meetings of, and serving as rapporteur for, the Committee of Experts that drafted most of the ECHR.[25] During that process, Struycken's administration presented the Committee of Senior Officials with a precedent involving the Mixed Courts of Egypt while describing them as complying with international standards regarding access to justice.[26] Although he undoubtedly participated in paving the way for it, Struycken himself did not witness the rise of the ECtHR as a supranational court. After having been appointed Clerk of the Assembly and Adjunct-Secretary-General of the organization in 1954, he suddenly died from a heart attack at his office desk in 1955.[27]

By contrast, Struycken's colleague Polys Modinos (1899–1988) had the opportunity to actively shape the functioning of the ECtHR until the end of the 1960s. Born into a Greek family in Alexandria, Modinos studied in Paris before joining the bar of the Mixed Courts of Egypt in 1922. After fifteen years of practice as a lawyer, he joined the bench of the Mixed Courts in 1937 and remained there until its dissolution. As opposed to Struycken, Modinos was a relatively prolific author, publishing some forty articles between 1923 and 1968, many of which related to individual rights.[28] During the final years of the Mixed Courts, he did not hesitate to provide foreign embassies with memoranda critical of Egyptian laws that he considered discriminatory towards foreigners and the end of the international guarantee of their rights by the Mixed Courts.[29] After the dissolution of the Mixed Courts, Modinos joined Struycken's department in 1951. In 1954, he was appointed

[25] Brian Simpson, *Human Rights and the End of Empire*, pp. 691 and 711.

[26] CoE, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, vol. 3 (The Hague: Martinus Nijhoff, 1976), pp. 101–119.

[27] CoE, Directorate of Information, 'Death of the Clerk of the European Assembly' (30 September 1955) doc. IP/883, PL/HB/M-TN.

[28] 'Bibliographie' in *Problèmes des droits de l'homme et de l'unification européenne : Mélanges offerts à Polys Modinos* (Paris: A. Pedone, 1968), pp. XIX–XXI.

[29] French Diplomatic Archives (AMAE), 213QO/71.

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to the strategic position of Head of the Council of Europe's Human Rights Department. In that capacity, he served as the first secretary of the European Commission of Human Rights. In 1959, he became the ECtHR's first Registrar, before being appointed Deputy-Secretary-General of the organization in 1962.[30] Modinos was not only a staunch advocate of supranationalism, hailing the CJEU's seminal 1963–1964 decisions as models for the ECtHR, which he considered a constitutional court,[31] but actively modelled procedures before the Strasbourg organs on those before the Mixed Courts of Egypt, as the then president of the ECtHR, the French law professor René Cassin (1887–1976), would acknowledge in 1968.[32]

As for the CJEU, three of its early members and promoters had been in contact with the Mixed Court of Tangier.[33] Its first president, Massimo Pilotti (1879–1962), had participated in the 1928 revision of the Statute of the Mixed Court of Tangier, although it is hard to tell whether this experience influenced him in any way.[34] Perhaps more importantly, Michel Gaudet (1915–2003), who had established the Legal Service of the ECSC's High Authority in the early 1950s and laid the groundwork for the *Van Gend & Loos* and *Costa v. ENEL* decisions as Head of the European Commission's Legal Service in the early 1960s, did not hesitate to establish parallels between the legal techniques used in the context of European integration and those he had himself used as a legal counsel to the French Protectorate in Morocco in 1945–1948.[35] Although not based in Tangier, he had nevertheless acquired first-hand knowledge

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[30] CoE, Information Department, 'Décès de l'Ambassadeur Polys Modinos, ancien Secrétaire général adjoint du Conseil de l'Europe' (1 June 1988) doc. F (88) 33.

[31] P. Modinos, 'Conclusions et perspectives d'avenir' in *Les droits de l'homme en droit interne et en droit international : Actes du 2e colloque international sur la Convention européenne des droits de l'homme (Vienne, 18–20 octobre 1965)* (Brussels: Presses Universitaires de Bruxelles, 1968), p. 549.

[32] R. Cassin, 'Polys Modinos, Grand Commis de l'Europe' in *Problèmes des droits de l'homme et de l'unification européenne : Mélanges offerts à Polys Modinos* (Paris: A. Pedone, 1968), p. XXIV.

[33] There seem to have been no major continuities with the Mixed Courts of Egypt, although the Italian Rino Rossi (1889–1974) had been a judge at the Italian Capitulatory Tribunal in Cairo in 1936–1940: Fritz, *Juges et avocats généraux*, p. 300.

[34] Ibid.

[35] Erpelding, 'The Politics of Avoiding', 462.

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of the Mixed Court's *Radio-Tanger* case.[36] By contrast, one of Gaudet's subordinates at the High Authority's Legal Service in 1953–1956 Nicola Catalano (1910–1984) had actually lived in the International Zone. Another major Euro-lawyer, Catalano is often credited as the inventor of the CJEU's preliminary reference procedure.[37] He also wrote the first textbook on EEC law, published in 1962, in which he expressly presented the CJEU, on whose bench he had sat between 1958 and 1961, as a constitutional court.[38] Before beginning his career as a Euro-lawyer by joining Gaudet in Luxembourg, Catalano had been the legal counsel to the International Zone of Tangier in 1951–1953. During this time, he did not only witness the modernization of the local Mixed Court into the 'International Jurisdiction of Tangier'.[39] As we shall see in the next section, he also wrote an opinion on the powers of the Mixed Court of Tangier that anticipated some of the later debates at the Luxembourg court.

11.4 NICOLA CATALANO AND THE *NORDLUND* CASE: IN DEFENCE OF PRIMACY

The peculiar circumstances of the Mixed Court of Tangier's *Radio-Tanger* decision, which had been adopted by a majority of Fascist and Francoist judges within the context of the Spanish Civil War and had led to an outcry by French officials and commentators, could have turned it into an isolated precedent.[40] However, the court actually reaffirmed it after the Second World War. In 1948, a Danish dentist named Aksel Nordlund, who

[36] The file on the *Radio-Tanger* case from the French Protectorate's Legal Service preserved at the French Diplomatic Archives in Nantes includes files signed by Gaudet. AMAE (Nantes), 1MA/20/243bis.

[37] P. Pescatore, 'Les travaux du 'groupe juridique' dans la négociation des Traités de Rome' (1981) 24 *Studia diplomatica* 173.

[38] Fritz, *Juges et avocats généraux*., pp. 200–202 and N. Catalano, *Manuel de droit des Communautés européennes* (Paris: Dalloz, 1962).

[39] Tamburini, 'Il "tribunale misto" di Tangeri', 67.

[40] French archives include many memoranda mentioning the Fascist or Francoist leanings of Italian and Spanish judges as a major problem of the Mixed Court. See, e.g.: AMAE (Nantes), 675PO/D18. The president of the Mixed Court's Appeals Section Díaz Merry was actually a member of an organised Francoist group in Tangier. Ceballos, *Historia de Tánger*, p. 76, and see e.g.: A. Ménard, *La Radio-diffusion à Tanger* (Paris: Sirey, 1939).

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had previously practised for more than fifteen years within the French Protectorate, was denied by the administrative authorities of Tangier the right to set up his practice within the Tangier Zone. To deny Nordlund's request, they invoked a 1939 law reserving this right to nationals of the signatories of the 1906 Algeciras Act, to which Denmark was not a party. When Nordlund ignored this decision, the authorities initiated criminal proceedings against him. Before the Mixed Court, Nordlund argued that the 1939 law was unconstitutional. The judges agreed, based on three considerations. First, they held that neither the Act of Algeciras nor earlier economic treaties concluded between Morocco and Western states discriminated between different Western nationalities, and that Denmark benefitted from the advantages granted to other Western states pursuant to the most-favoured-nation clause under Article 17 of the Madrid Convention of 3 July 1880.[41] Second, they recalled that pursuant to both Article 7 of the Tangier Zone Statute and the supremacy clause included in the above-mentioned Moroccan decree annexed to it, the Zone's authorities had the obligation to comply with the treaties applicable to the Zone. Third, invoking Article 1 of the Zone's Code of the Civil Status of Foreigners which, like all other Codes of Tangier was treaty based and could not be altered by ordinary legislation, they stressed that the principle of economic equality between foreigners, as a 'fundamental law of Morocco', not only applied within the realm of commercial activities, but extended to all private rights of foreigners. As a result, they declared the 1939 law 'formally irregular and contrary to [the Zone's constitutional texts, applicable treaties and Codes]', and acquitted Nordlund.[42]

The Mixed Court's decision in the *Nordlund* case did not cause a controversy similar to that sparked by the *Radio-Tanger* precedent – it

[41] A most-favoured-nation clause can be defined as 'a treaty provision whereby one State (the granting State) undertakes the obligation to accord to another State (the beneficiary State), in a designated sphere of economic or other relations, treatment not less favourable than the treatment it extends in the same sphere to any other third State'. Very common objects of most-favoured-nation clauses are economic rights granted to nationals of certain countries by the granting state. A. Rasulov, R. Geiß and M. Hilf, 'Most-Favoured-Nation Clause' in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2021), para. 1.

[42] *Ministère public v. Nordlund* (Mixed Court of Tangier, Section of First Instance, 20 December 1948) in *Journal de Tanger* (Tangier, 25 December 1948).

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was never appealed. Nevertheless, the head of the local executive, the administrator, seemed clearly ill at ease with it, requesting two opinions on the matter from the Zone's legal counsel.

The first of these opinions, issued only a few months after the decision, was written by the Spanish lawyer Pedro Cortina. From a purely substantive point of view, Cortina showed himself to be in total agreement with the Mixed Court. As he had made clear in another opinion issued only a few months earlier, he was himself convinced that the treaty-based principle of economic freedom without inequality enjoyed a 'fundamental' character within the Tangier Zone and therefore limited the powers of the Legislative Assembly.[43] In his opinion on the *Nordlund* decision, he emphatically described the Tangier Zone Statute as '*une véritable "constitution conventionnelle"*' ('a truly "conventional constitution"'). From this premise, he concluded that the Mixed Tribunal did not only have the power, but the obligation, to set aside all laws it deemed contrary to the Zone's 'treaty-based constitution'. Nevertheless, he still concluded that the Mixed Tribunal had overstepped its mandate, which did not include making generally binding pronunciations on the validity of laws, but only applying them in individual cases or, as Cortina noted, just like the US Supreme Court, refusing to apply them in such cases. Decisions exceeding this remit could possibly be annulled by the Zone's Committee of Control.[44]

The second opinion on the *Nordlund* case was issued in 1951 by Nicola Catalano, who by then had succeeded Cortina as the Zone's legal counsel. His style was clearly different. Avoiding potentially divisive references to the US Supreme Court, Catalano seemed intent on appearing nuanced, discussing possible arguments and counterarguments before modestly submitting his own conclusion. His determinations were, however, not fundamentally different from those of his predecessor. If anything, they were more likely to cement the Tangier Mixed Court's power to set aside laws than Cortina's position. Just like his predecessor, Catalano denied the court's claim to act as a

[43] P. Cortina, 'L'article 7 du Statut et le principe de la liberté économique' (memorandum, 4 August 1948) AMAE, 29POI/1/119.

[44] P. Cortina, 'Organe compétent pour déclarer l'inconstitutionnalité des lois' (memorandum, 4 February 1949) AMAE, 29POI/1/119.

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constitutional court while acknowledging its power to set aside unconstitutional laws, which he considered as supplementing the Committee of Control's power to veto unconstitutional legislation before it was enacted. However, in contrast to Cortina, Catalano stressed that the court should only do so 'in very rare cases and only if the contradiction between the treaty and the law appears self-evident' ('*dans des cas très rares et seulement quand la contradiction entre le traité et la loi apparaît evident[e]*, ictu oculi'). This call for judicial restraint, mainly aimed at dissuading the Tangier judges from using all too vague treaty provisions, hardly left the court's powers diminished. If anything, it accentuated them – all the more so as Catalano, as opposed to Cortina, asserted that Mixed Court decisions, whether right or wrong, were final and could not be challenged before any other institution. Moreover, just like Cortina, Catalano left no doubt about the fact that, once the court had identified a contradiction between a law and a treaty provision, it had the obligation to apply the latter rather than the former, based on what Catalano described as a 'criterion of primacy' ('*critérium de primauté*').[45] Although the existence of a formal supremacy clause was a major difference between the Tangier Zone Statute and the ECSC and EEC Treaties, Catalano's cautious approval of the Tangier Mixed Court's activism might perhaps help explain his later attitude vis-à-vis EEC law primacy, which was fundamentally positive but ultimately dependent on judicial initiative. Despite being an ardent European federalist, coming up with the preliminary referral procedure, and brainstorming the creation of the Fédération Internationale pour le Droit Européen (International Federation for European Law) with Michel Gaudet, the head of the Commission's Legal Service, Catalano asserted until 1963 the precedence of subsequent national laws over treaties.[46] It was only after the 1964 *Costa v. ENEL* decision that he fully embraced EEC law primacy, becoming one of its most vocal proponents.[47]

[45] N. Catalano, 'Limites de la compétence du Tribunal Mixte de la Zone de Tanger' (memorandum, 13 February 1951) AMAE, 29POI/1/119.

[46] T. Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge: Cambridge University Press, 2022), pp. 145 and 147.

[47] A. Arena, 'Nicola Catalano (1910–1984): Concepteur du renvoi préjudiciel' in N. Catalano (ed.), *Manuel de droit des Communautés européennes* (new ed., Brussels: Bruylant, 2023), pp. XXX–XXXVII.

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11.5 CONCLUSION

Today, it is still hard to establish the exact degree of influence semi-colonial legal institutions wielded on the creation of European law as constitutional law. Nevertheless, accounts such as the one by Michel Gaudet on his time in Morocco and René Cassin's observation on Polys Modinos using the experience he had acquired in Egypt to shape human rights procedures in Strasbourg should not be regarded as mere anecdotes. Put together, they show that European law did not draw its origins from individual Western legal traditions and institutions alone, but that international – or, indeed, quasi-federal – legal institutions and practices developed on Europe's colonial 'peripheries' did indeed contribute in some way to post-Second World War European 'integration-through-law'.[48]

The fact that these contributions were rarely acknowledged as such should not come as a surprise. Granted, the establishment of a new post-Second World War international order did not result in an immediate disqualification of colonialism, but was rather informed by it – so much so that one of its designers, the South African prime minister Jan Smuts, could still hope in 1945 that the UN might help to preserve colonialism and white supremacy.[49] While American States (including the US) and the Soviet Union displayed some hostility towards colonialism from the outset of the UN's existence, the decisive impetus that tilted the UN in favour of anti-colonialism came from the recently decolonized states,[50] whose practice challenged and partly succeeded in changing established rules.[51] It would take until the 1960s, the decade during which most of the formal decolonization processes were achieved, for this trend to crystallize into a set of firmly established rules that put

[48] I am borrowing this term from Antony Anghie, who, while underlining the centrality of colonialism to understand present-day 'universal' international law, also notes that in traditional international law scholarship, 'the colonial world is relegated to both the geographical and theoretical peripheries of the discipline'. A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2012), p. 34.

[49] Mazower, *No Enchanted Palace*, p. 165.

[50] Ibid., pp. 149–189.

[51] G. F. Sinclair, 'Towards a Postcolonial Genealogy of International Organizations Law' (2018) *Leiden Journal of International Law* 841–869 at 854–858.

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Western states and lawyers on the defensive.[52] That said, even in France, where during the 1950s the overwhelming majority of political parties were advocating colonial reform rather than decolonization, colonialism was not always positively connoted. On the one hand, France's colonial domination over parts of Africa could be mobilized as a geopolitical argument in favour of European integration.[53] On the other hand, invoking colonial institutions as models for European supranational institutions, which had already been made fragile by the rejection of the European Defense Community in 1955, would hardly have increased their legitimacy in the eyes of the general public.

As opposed to their Western domestic sources of inspiration, such as the Supreme Court of the United States and the French Conseil d'État (Council of State), the colonial origins of post-Second World War European integration-through-law are much less conspicuous and only visible to the trained eye. In that regard, they remind one of *spolia*, or individual stones extracted from dismantled structures and reused in more recent buildings, sometimes serving a slightly different purpose. Identifying these *spolia*, and thereby the continuities and discontinuities between past and present legal practices, might prove a useful contribution to present-day debates about European supranational institutions, their potentialities, and their limitations.

PROOFS

[52] S. Moyn, 'The High Tide of Anticolonial Legalism' (2021) 23 *Journal of the History of International Law* 5–31 at 11–16.

[53] P. Hansen and S. Jonsson, *Eurafrique: Aux origines coloniales de l'Union européenne* (Paris: La Découverte, 2022), pp. 119–311.

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PART III

EXITS

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CHAPTER 12

Algeria and the European Union

From Exit to Challenges of Continuity

AMEL BENREJDAL BOUDJEMAA

12.1 INTRODUCTION

In order to understand Algeria's position in relation to what is now the European Union (EU), we must consider several factors, especially historical factors.[1] Algeria became part of 'France' in the mid nineteenth century due to colonization. Consequently, a French administrative structure based on an absence of equality was established, reinforced by the presence of European settlers in the Maghreb.

Following the losses in the Indo-Chinese territories in 1954 and the Maghreb (Morocco and Tunisia) in 1956, coupled with the escalation of the Algerian War of Independence in 1954, French officials became increasingly convinced that creating a distinct legal status for Algerians was the only way to justify France's objection to Algeria's independence.

Intense European efforts to realize a unifying project in the mid 1950s resulted in the establishment of the European Economic Community (EEC). Initially comprising six founding members – France, Italy, West Germany, Belgium, the Netherlands, and Luxembourg – there was no intention to extend this new institution to the colonies. However, the Algerian cause, raised in international forums and notably at the United Nations, altered the course of negotiations. Algeria became the focal point of French–European struggles to ensure the expansion of this new European institution throughout the entire Mediterranean, with the possibility of directing European funds to Algeria.

[1] The EU was known as the European Economic Community (EEC) between 1957 and 1967, the European Communities (EC) between 1967 and 1993, and finally the European Union (EU) from 1993 to this day.

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Another aspect supporting France's view of Algeria's legal position was its adherence to the colonial concept of Eurafrica. Despite its gradual loss of relevance after the independence of former colonies, this concept continued in the form of a vision of the establishment of a complementary relationship between Europe and Africa. France supported this notion by legally asserting its keen defence of Algeria's inclusion in the new European bloc under Article 60 of the 1946 French Constitution, which states that the French Union includes continental France, overseas departments, and territories.

The controversial idea of Eurafrica had widespread acceptance in 1957, the year the Treaty of Rome was signed.[2] Although European intentions to integrate Africa, including Algeria, were evident under the Treaty of Rome, several decades later it had become clear that a united Europe could not sustain that integration. Instead, and as this chapter will show, the inclusion of Algeria was replaced with various tools that reflected the EU's institutional system and internal and external policies. Europe has yet to find what it appears to be seeking, namely a 'special relationship for sustainable rapprochement'.[3]

PROOFS

[2] P. Dramé and S. Saul, 'Le projet d'Eurafrique en France (1946–1960): quête de puissance ou atavisme colonial?' (2004) 4 *Guerres mondiales et conflits contemporains* 95.

[3] D. Avit, 'La question de l'Eurafrique dans la construction de l'Europe de 1950 à 1957' (2005) *Matériaux pour l'histoire de notre temps, numéro thématique : Europe et Afrique au tournant des indépendances* 17. See the following documents: Lettre du gouvernement algérien du 18 décembre 1963 demandant l'ouverture de conversations sur les relations futures entre la CEE et l'Algérie et réponse du Conseil; ACE, BAC 7/1973 N18/1, relations entre la CEE et l'Algérie, rapport au sujet des conversations exploratoires engagées avec l'Algérie (communication de M. Rey) [juin ou juillet 1964]; ACE, BAC 7/1973 N18/2, rapport au sujet des conversations exploratoires engagées avec l'Algérie, le 25 août 1964 : « la délégation française expose les relations entre la France et l'Algérie, à la demande de la Commission, le 24 juin 1964 », p. 42. Comp. ACE, BAC 144/1922 948, travail du Groupe Algérie-Maroc-Tunisie » et ses délibérations concernant certains produits : fruits, légumes, vins, pommes de terre, figues, le 16 février 1966.; See the following documents; ACM, CM2 1963 899, demande d'ouverture de conversations exploratoires avec la CEE présentée par le Maroc, 14 décembre1963. ACM, CM2 1963 900, demande du gouvernement tunisien, du 8 octobre 1963, d'ouverture des conversations exploratrices avec la CEE. ACM, CM2 1964 1347; ACE, CEAB 5 – 1544/4, relation de la CEE avec les pays du Maghreb (1963–1966); conversations exploratoires au sujet des possibilités de conclusion d'un accord entre la CEE et les pays du Maghreb et leurs incidences éventuel, le 14 décembre 1966; ACE, BAC 144 1992- 259, mandat en vue de l'ouverture des négociations avec la Tunisie et le Maroc, régime pour les produits agricoles, le 16 avril 1965, et; BAC

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Against this background, this chapter will raise the following questions. What were the legal foundations that shaped the Euro–Algerian relationship? Did Europe depend on Algeria even after their separation? How has Algeria's exit from the EEC impacted on the EU of today? Given its relationship with Algeria, has the EU ever truly succeeded in delineating a well-defined regional border law?

12.2 THE LAW OF EXTENDING EUROPEAN BORDERS: EUROPEAN INTEGRATION AND ALGERIA

Algeria, through its European status imposed by France, de facto formulated the border law of the EEC. In other words, belonging and integration were not only a result of the geographical contiguity of regions, but rather could be achieved based on extra-regional extension through colonialism.

In the first decades of the EU, during the post-Second World War era, European leaders insisted on flexible borders. At a time when Europe and Africa did not have common interests, these leaders considered 'integration' as a tool to preserve imperialistic interests. France, in particular, promoted integration between the two continents, on the condition that European superiority was maintained within the integrational structure. The French also argued for preferential tariffs under the guise of development aid. This 'integration' was finally achieved mainly because four countries of the EEC group had colonies or administered territories under international trusteeship.

The inclusion of Algeria in the EEC was achieved specifically through extensive French efforts led by French minister of the overseas Gaston Defferre. The French insisted that its partners regulate Algeria in Article 227 of the Treaty of Rome.[4] Article 227 states that some provisions of the EEC are to be applied to Algeria, which means that Algeria was considered as a part of the EEC even though it was not an official Member State like the six founding countries. Megan Brown, in her book *The Seventh Member State* (in other words, Algeria) points out that although Article 227

25/1980 400, association de la Tunisie aux Communautés européennes : texte et signature de l'accord d'association à Tunis, 28 mars 1969 avec les annexes et l'acte final.

[4] Algeria was excluded from the framework of the 1951 Treaty Establishing the European Coal and Steel Community.

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mentioned Algeria, the latter's status was not clearly defined at the time, making the Euro–Algerian relationship complex and ambiguous.

In sum, the Treaty of Rome was intentionally formulated to maintain Algeria's administrative status within France.[5] The rights of Algerians were not, however, clearly defined within the EEC. Brown reached an important conclusion in this regard, namely that the 'seventh Member State', Algeria, challenged the concept of Europe's natural borders by highlighting the extra-continental nature of the EEC at the time of its creation. In other words, she says, the integration process was never spatially restricted.[6]

The ambiguity inherent in the Euro–Algerian relationship concerns Algeria's status and the fact that the local population never benefitted from the same rights as Europeans. Moreover, requests made to the EEC to provide technical and professional assistance for Algerian workers were rejected.

After Algerian independence, the relationship mutated into cooperation agreements between the EEC and Algeria and several other Mediterranean countries. These agreements governed economic exchanges and technical and financial aid. Algeria was the first to express its desire to cooperate with the Community on an international scale in a letter of 24 December 1962, followed by a request to start exploratory conversations on 27 June 1963. Tunisia and Morocco expressed the same desire on 8 October and 14 December 1963 respectively.[7] The aim of

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[5] The departmentalization of Algeria is the result of a political decision by the French government during the Second Republic, aiming to divide French Algeria into French departments. This former administrative division extended from 1848 to 1962. Until 1955, Algeria was divided into three departments: Algiers, Oran, and Constantine, while the Saharan region, known as the Southern Territories, was under military administration.

[6] M. Brown, *The Seventh Member State: Algeria, France, and the European Community* (Cambridge: Harvard University Press, 2022), p. 6. For this reason, it should be said that the contemporary arguments to not include Turkey in the EU on the basis that it is not located within the geographical borders of Eastern Europe are not consistent with the concept of the Union throughout its history, which reveals a double standard.

[7] G. Valay, 'La Communauté Economique Européenne et les pays du Maghreb (suite et fin)' (1967) 3 *Revue des mondes musulmans et de la Méditerranée* 167; H. Ben Hamouda. 'Le rôle de la France envers le Maghreb au sein de la Communauté européenne (1963–1969)' (2010) 3 *Matériaux pour l'histoire de notre temps* 90; S. Papastamkou, 'La France et la Méditerranée : ambition de puissance, perceptions, interactions' (2010) 3 *Matériaux pour l'histoire de notre temps* 1.

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the cooperation agreements was to facilitate trade and the movement of workers between Algeria and the countries of the EU. However, the preferential privileges granted under the agreements were limited, because these provisions were incompatible with the economic policy of a country that had until very recently been under colonial rule.[8] Algeria's exhaustion from having been a colony for so long made it falter and stumble in its attempts to improve its economy. The Algerian authorities therefore accepted support and assistance agreements, but encountered technical, political, and material difficulties. As a newly decolonized state, Algeria was unable to perceive its relationship with the Europeans as anything other than a different form of colonialism, especially in the realm of workers' rights. It must be remembered that under colonial rule, Algerian workers did not enjoy genuine equal rights alongside the Europeans.

Maintaining ties with the former colony was nevertheless still considered in the mainstream French discourse to be the most rational solution; consequently, the nature of the relationship between Algeria and the EU acquired a sense of inevitability.

Today the border problem continues to be an important topic in European politics, but it has changed shape. The centrality of borders in the relationship between Algeria (albeit not only) and the EU is illustrated in the ongoing debate concerning migration. Under the pretext of protecting their borders from the arrival of 'unnecessary' immigrant populations who do not 'deserve' to belong to their countries, or who are even considered a threat to their nations and to Europe as a whole, some politicians have sought to tighten these borders by various means including the creation of detention centres.[9]

It will not then be difficult to understand the impact of Brexit in 2020. This was not just Britain's exit from the EU and the contraction of the latter's borders, but also an affirmation of the European illusion of establishing a system of borders between European and non-European regions. European countries were, and de facto are still, in need of what is non-European.

[8] I. Bensidoun and A. Chevalier, *Europe-Méditerranée: le pari de l'ouverture* (Paris: Economica, 1996).

[9] See also V. Corcodel in Chapter 8 of this volume.

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The vulnerability of European borders can be seen internally too. During the Covid-19 pandemic all Member States of the EU became isolated, which deepened the crisis in the legal system of integration established by the Treaty of Rome of 1957.

If we acknowledge that before the contemporary vulnerability and movement of European borders, the European integration of Algeria was in fact the first example of such a movement of the European border, many questions arise.[10] Most importantly, how was it possible for Algeria, a Muslim country in the southern Mediterranean, to join the EEC under the Treaty of Rome and remain a 'member' until 1976, when its withdrawal was formalized, even though it had gained independence in 1962? The answer to this question is best understood as a matter related to European needs and interests, especially those of the French.

Recalling Algeria's role in European integration and the way in which Algeria moved the European border, the subsequent part of this study will highlight how the EU Member States, including France, have constructed multiple concepts of Euro–Algerian relations. First, a relatively brief period of 'cooperation'. Second, and spanning several decades, 'partnership'. Most recently, grafted onto the concept of partnership, 'Neighbourhood Policy' and 'Union for the Mediterranean'.

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12.3 EXPANSION OF EUROPEAN INFLUENCE: THE EURO–MEDITERRANEAN COOPERATIVE PROPOSAL

After the declaration of Algerian independence, some European countries did not want to continue granting a specific preference to certain African countries and advocated that preferential treatment should rather be kept within the EEC institutional framework. This prompted the opening of negotiations between Algeria and the EEC. However, the legal basis for interaction between Algeria and Europe had changed. Instead of coming under Article 227, which recognized the inclusion of

[10] This idea is a complement to the notion of 'a virtual border system' discussed earlier, and we said that there was a dynamicity during Algeria's accession to and exit from the European Community, which means that there is flexibility on the part of the latter to accept the entry and exit of Algeria.

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Algeria into the EEC, Algeria's relationship with the EEC now came under Article 238 of the Treaty of Rome, which states in part: 'The Community may conclude with a third State, a union of States or an international organization, agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.'

Article 238 uses an equitable formula to describe the relationship between the EEC and others by establishing agreements that guarantee equal rights and obligations to all states; creating joint initiatives and actions; and providing for special procedures. Cooperation implies interaction based on equality without discrimination or distinction between the states. Algeria, through its new position, formulated a proposal that differed from everything that had preceded it, by ensuring the expansion of the EEC's intervention in spheres of influence in exchange for support and assistance. This can be understood as an attempt at replacing integration through colonization with integration through cooperation.

The EEC-Algerian Cooperation Agreement was signed in April 1976. This agreement defined a new relationship between the EC and Algeria in addition to the existing trade relationship. Moreover, the agreement was comprehensive and without any specific condition attached (this, as we will see, has since changed), opening the door to further bilateral agreements.[11]

While the cooperation agreements were soon replaced with new forms of policy documents and agreements, as we will see later, the idea of cooperation has remained in the area of migration. Through an intersection of common interests between what is now the EU and Algeria, the management of borders and human mobility has historically been and still is entrenched in the EU–Algerian relationship. The 'migration problem' and its associated security challenges has remained a topic of cooperative policy. The issue of migration, connected to security and social challenges beyond borders, has always been the subject of complex and challenging negotiations between Algeria and European countries. On this issue there exist what could be described as genuine and continuous diplomatic efforts of cooperation.

[11] B. Khader, *Le partenariat euro-méditerranéen après la conférence de Barcelone* (Paris: l'Harmattan, 1997), pp. 6–8; G. Benhayoun, B. Planque and N. Gaussier, *Économie des régions méditerranéennes et oppement durable* (Paris: l'Harmattan, 1999), pp. 182 and 183.

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12.4 PARTNERSHIP WITH ALGERIA

12.4.1 THE NEW EURO–MEDITERRANEAN POLICY OF THE 1990S. The European approval of a new Euro–Mediterranean policy was influenced by a combination of regional and international factors, which cooperation agreements alone could not accommodate.[12]

The first tangible sign of this transformation within the EU was the signing of the Maastricht Treaty, which aimed to enhance the democratic legitimacy of European institutions and improve their efficiency. More importantly, the Treaty linked economic unity to the progress of the common foreign policy, as well as the common security policy, complemented by a common defence policy. The Maastricht Treaty turned the EU towards a 'partnership framework'.[13] The European Commission proposed the idea of the Euro–Mediterranean partnership (Algeria, Morocco, and Tunisia), extending the financial protocol with these countries and reviving the project of a 'free exchange' area. It became clear that the European conviction and view was that a Euro–Mediterranean relationship was the best basis for regional stability.[14] For Algeria, Morocco, and Tunisia, the opportunity presented in the context of this 'partnership framework' was to rely on European assistance and paternalistic policies.

The Algerian crisis, which began in 1992, together with the political climate prevailing then in France, led the latter to reconsider once again the relations between the two countries. In this context, the paternalistic nature of what the European countries were trying to practise and impose became clear. For instance, we may recall the remarks of the French minister of foreign affairs Allain Jupé, according to which 'France must help the Algerian government in the fight against terrorism'. In the same vein, the former president François Mitterrand proposed holding a European conference on Algeria; in other words, Europe determining the fate of Algeria from the outside as was done during the colonial period.[15]

[12] J. François Daguzan and G. Raoul, *Méditerranée nouveaux défis, nouveaux risque* (Paris: Publisud, 1995), pp. 62–63.

[13] Z. Hassan, *Le partenariat euro-méditerranéen, contribution au développement du Maghreb* (Paris: l'Harmattan, 2010), p. 48.

[14] Conclusion of the European Summit in Lisbon, 1992.

[15] P. M. de La Gorce, 'L'Algérie et les granes puissances' (1996) 43–44 *Recherches Internationales* 21.

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Europe's shift towards diversifying partnership policies served as an alternative to cooperation. The EU directed its foreign policy towards new forms and areas. One example is the French proposal presented by former president François Mitterrand to establish a Council for Security and Cooperation in the Western Mediterranean, consisting of Algeria, Morocco, Tunisia, Italy, Spain, and France. However, the Maghreb countries, including Algeria, opposed the exclusion of some countries (such as Malta, Yugoslavia, and Libya); they also insisted that the conflict in the Middle East should not be ignored. The initiative was revived in 1990, resulting in the formation of the 5+5 Group. During a second meeting of the group in 1991 the 'Algiers Declaration' was issued. However, the group was short-lived, due to several security and political circumstances, most notably the Lockerbie crisis.

12.4.2 FROM THE BARCELONA PROCESS TO THE ASSOCIATION AGREEMENT: SHAPING A EUROPEAN FOREIGN POLICY. Partnership has become the cornerstone of the EU's common foreign policy.[16] In this context, the relationship with Algeria has shifted from revolving around commerce and trade to become a 'strategic' one with a greater focus on security challenges. Partnership is also the umbrella term used to delineate the legal framework for European migration.

The Barcelona Process, initiated in 1995 and involving the EU and twelve southern and eastern Mediterranean countries, addressed the 'urgent need' to connect the countries south of the Mediterranean Sea with the EU. However, the Barcelona Process had vulnerabilities and shortcomings. It excluded, for example, two key issues – agriculture and population flows – and established what many have described as an 'unequal reciprocal relationship'. With its flexibility and limited commitment, it did not prove to be very effective. It is noteworthy that the Barcelona Declaration, while not legally binding or of contractual nature, is nevertheless considered a condition for joining the partnership between Europe and the Mediterranean countries.

[16] M. F. Labouz, *Le partenariat de l'union Européenne avec les pays tiers, conflits et convergences* (Brussels: Bruyant, 2000), p. 48; and Hassan, *Le partenariat euro-méditerranéen*, p. 17.

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In the year 2000, when France chaired the follow-up meeting of the Barcelona Process at the fourth Euro–Mediterranean Conference in Marseille, the goal was to continue the official discussion on the project 'Charter of Stability in the Mediterranean'. This project revolved around peaceful resolutions to end conflicts, respect for human rights and democracy, and combating the root causes of terrorism. Due to the ongoing conflicts in the Middle East, however, the drafting of an agreement was abandoned. The outcome of this conference highlighted concerns about European attempts to revive colonial efforts and to ensure the longevity of projects related to European interests and thus European influence. The Marseille conference in fact revealed that the Barcelona Process had not achieved its intended goal of creating a region of prosperity, stability, and security.[17]

A key component of the partnership as conceptualized by the Barcelona Process was the signing of an Association Agreement between the EU and Algeria on 22 April 2002, which came into effect on 1 September 2005. The following question arises: what has changed and what is new?

The agreement was signed by the EU and Algeria to strengthen historical and cultural ties, considering their 'proximity and interdependence [with] historic links and common values'.[18] The Association Agreement commits both parties to a more substantial liberalization of bilateral trade and is meant to ensure that Algerian companies and consumers benefit from the development of international trade and investment. The agreement includes a gradual elimination of customs duties on European industrial products over a twelve-year period (Algeria already enjoys tariff-free access and a share in the European market for its industrial exports). The EU has chosen a policy of immediate liberalization (without duties or quotas) for a large number of Algerian agricultural products since the agreement became valid, except for a limited list of sensitive categories where quotas are established. Algeria must respond with significant tariff reductions on agricultural exports from the EU.

[17] Conclusions of the Euro–Mediterranean Conference, 2005.

[18] Preamble of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, OJ L 265, 10.10.2005, pp. 2–228.

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Substantial tariff reductions have been agreed upon by both parties for manufactured agricultural products and fish products.

Algeria has benefitted from the customs exemption agreements, but these benefits have remained very limited due to several long-term obstacles of a political and legal nature. The Association Agreement lays a significant foundation for economic liberalization in Algeria. It obliges Algeria to enact what in Algerian legal scholarship could be termed modern legislation regarding competition and intellectual property protection to make it compatible with European standards.[19] The internationalization and the diffusion of exchanges under pressure from the European and international community have also led to the unification of the rules of international trade, whether in the form of general conditions, model contracts, or international agreements, and the adoption of alternative dispute resolution methods, such as international trade arbitration to resolve international trade disputes.

The Association Agreement covers more than just trade and the economy. It establishes new institutional structures to intensify 'political dialogue' across a wide range of areas, from education and culture to combating crime, money laundering, drugs, and terrorism. Both states are committed to upholding human rights and democratic principles. This initiative coincides with the development of an ambitious new programme for economic cooperation between Algeria and the EU with the view to help the Algerian economy adapt to the global market. Assistance will be provided to implement the Association Agreement in areas such as updating customs and tax administrations, supporting standards and technical regulation bodies, and enhancing the statistical system.

From a legal perspective, association agreements represent a regulatory and methodological shift compared to previous models, because their reach depends on the economic development of Mediterranean countries and the depth or intensity of the political, social, and economic relationships they share with the EU, which explains the commitment to negotiate between the 'Partnership Council' and the government of the concerned state within the framework of an annual meeting.

[19] A. Benrejdal and A. Baadji, 'A Reading of the Modern Trends in Law' (2023) 60 *Revue Algérienne des Sciences Juridiques et Politiques* 1.

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It must be emphasized that the EU is adopting an 'assistance approach'. Through this approach, it seeks to ensure the sustainability of contractual relations and enhance them in local affairs across various sectors, thereby reinforcing the European presence and influence in Maghreb countries, including Algeria.

The Association Agreement employs the principle of political conditionality, similar to what is found in international institutions such as the World Bank and the International Monetary Fund, and relies on the preparation of structural reform programmes.[20] For instance, the absence of good governance was noted to have an impact on poverty, developmental setbacks, and social conditions.[21] Consequently, the agreement made the provision of loans and aid conditional on the establishment of the principles of good governance. Further, as reflected in Article 2 of the Association Agreement, the EU's approach to external relations with African countries is characterized by yet another form of conditionality, whereby it purports to condition all of its provisions on the respect for human rights and democracy, under the threat of suspending or terminating the partnership or ending support.

12.4.3 THE EUROPEAN NEIGHBOURHOOD POLICY. Both Algeria and Libya approached the European Neighbourhood Policy with considerable hesitation. From Libya's perspective, the ongoing problems of its 'political dialogue' with European countries have dominated bilateral relations for years, primarily due to its exclusion from the Barcelona Process of 1995. Unlike agreements reached in the past with other Mediterranean Arab countries (Tunisia, Morocco, Egypt, and Algeria), Libya has secured concessions from the Europeans with a lower political conditionality threshold. The EU turned a blind eye to the demand for political reforms in Libya, including commitments to ensure pluralism, freedom of the press, and judicial independence.

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[20] See J. Silga's Chapter 9 in this book.

[21] E. Iconzi, G. Belem and C. Gendron, « *Conditionnalité, gouvernance démocratique et développement, (dilemme de l'œuf et de la poule) ou problème de définition ?* », Actes du colloque Développement durable : leçons et perspectives, Ouagadougou (2004).

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Moreover, France's rush to strengthen ties with what the former president, Nicolas Sarkozy, termed the 'Gateway to Africa', and its preparation for building a nuclear reactor in Libya at that time, led to Libyan scepticism about the true European objectives regarding Libya and Algeria. The uncertainties surrounding European goals created an imbalance among Mediterranean counterparts.[22]

When the EU Commission first introduced its 'Neighbourhood Policy', it was presented as a fresh framework for relations with countries not involved in integration into the EU. Although it stemmed from the Barcelona Process, this 'new' policy was sold as 'Building Peace in the Neighbourhood'. For the countries of the southern Mediterranean, the partnership was described as being based on a mutual commitment to common values (democracy, human rights, rule of law, good governance, principles of the market economy, and sustainable development). Hence, the European Neighbourhood Policy went beyond existing relations to provide a deeper political relationship and economic integration.

The European Neighbourhood Policy is considered one of the most problematic policies, especially as it is based on a specific form of bilateral relations, namely 'the European Union – partner country'. It is distant from regionalism or localism and keeps the door firmly closed on any possibility of accession to the EU. It favours the interests of the European countries over those of their partners and promotes some partner countries over others.[23]

What first catches the attention is the diversity of forms of legal and non-legal instruments associated with the Neighbourhood Policy. There are initiatives such as 'Expanded Europe' and the 'Geographical Neighbourhood Policy', which were adopted in 2003. This was followed by the issuance of the Europe and Neighbourhood Policy document in May 2004, along with the strategic paper that determined this policy. It was then reinforced with action plans in December of 2004, culminating

[22] L. Martinez, 'Algérie et Libye à l'épreuve de la politique européenne de voisinage' in L. Martinez (ed.), *Violence de la rente pétrolière* (Paris: Presses de Sciences Po, 2010), pp. 175–209.

[23] D. Vitaliy, 'Politique de voisinage de l'Union Européenne : ou elle transformations sur le régime commercial régional en Europe' (2005) 485 *Revue du marché commun de l'union européenne* 104.

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in the European Neighbourhood and Partnership Instruments,[24] a financial instrument considered a simplified political tool compared to the preceding MEDA or TACIS instruments.[25]

12.4.4 THE UNION FOR THE MEDITERRANEAN: FROM A FRENCH INITIATIVE TO A EUROPEAN PROJECT. The development of the Mediterranean Project for Contemporary Partnership is the crystallization of a French strategy that has existed since the seventies. It materialized as a political agreement with economic, social, cultural, and security content, laying the groundwork for the establishment of a new regional organizational structure. It began with a partnership, evolved into a Neighbourhood Policy, and ultimately took its final form as the Union for the Mediterranean in 2008.

In 2007, the then French presidential candidate Nicolas Sarkozy announced that the French recognized the importance of the common heritage between Europe and the Mediterranean region. He expressed regret that France and Europe had turned their backs on the Mediterranean. The idea was to build institutions with various missions and powers in order to reorganize selective migration, meet environmental challenges, develop education, as well as invest in renewable and nuclear energy. Gradually, in response to the EU's call, the emphasis moved from an initiative based solely on French interests to a broader European proposal.

However, making this idea European rather than French is neither simple nor superficial, as the project was built on a very solid French foundation. One of its most important pillars was the *Avicenne Report* from 2007, which formulated French interests in the form of projects for developmental, security, and political reforms. This approach was

[24] Regulation (EC) No. 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ L 310, 09.11.2006, pp. 1–14.

[25] Council Regulation (EC) No. 1488/96 of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, OJ L 189, 30.7.1996, pp. 1–9; Council Regulation (EC, Euratom) No. 99/2000 of 29 December 1999 concerning the provision of assistance to the partner states in Eastern Europe and Central Asia, OJ L 12, 18.1.2000, pp. 1–9.

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meant to guarantee the effective implementation of policy, which differed from what was considered the disappointment of the Barcelona path. Additionally, a report from the French National Assembly laid the groundwork for how to build on existing institutions and how to involve the EU in the Mediterranean Union.[26] This report emphasized respecting the gains of Barcelona, while confirming that belonging to the Mediterranean Union is not a substitute for joining the EU. In December 2007, this stance was supported by the 'Call from Rome for the Mediterranean', a French, Italian, and Spanish political initiative.

The proposal was not presented to Algeria, perhaps with the aim of excluding any link between the interests of the French project and its former colony. Instead, Algeria demonstrated its position by joining what at that point was named the 'Union for the Mediterranean', in order to avoid being marginalized in the region.[27]

All of this is aimed at elevating the political level of relations with Europe. The noticeable expansion of partnership areas characterized the new direction, now including political and security dialogue, urban development, water, energy, tourism, justice and law, women's issues, civil society cooperation, migration, health, intercultural dialogue, industry, statistics, and more. However, over the first two years, amid many internal problems for countries (financial crises) and security setbacks in the Middle East, among other issues, the achievements were limited. These achievements focused on specific sectors, such as funds dedicated to alternative energy projects, civil protection, higher education and scientific research, and justice.[28]

In this project, Algeria has proven to be an indispensable partner. There are, however, several challenges, such as the absence of clear positive indicators regarding the achievements and future goals of the partnership. In an era where China is emerging as a global power challenging

[26] R. Muselier and J. C. Guibal, Rapport d'Information N° 449, *« Comment construire l'Union méditerranéenne ? »*, Assemblée Nationale, Commission des affaires étrangères, Enregistré à la Présidence de l'Assemblée nationale Française (2007) en conclusion des travaux d'une mission d'information constituée le 31 juillet 2007.

[27] K. Mohsen-Finan, 'l'Union pour la Méditerranée : une ambition française de reconsidérer le Sud' (2008) 3 *Institut Français des Relations Internationales* 2 at 13.

[28] P. Verluise, 'L'Union pour la Méditerranée deux ans après le Sommet de Paris', *Revue Géopolitique*, 16 June 2010.

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the West it appears crucial that Europe reconsider its relations with former colonies. Pursuing independence and isolation poses a risk to the global influence of the EU.

For a long time, the EU has relied on specific policies tailored to the nature of its relationships with colonies in various regions worldwide.[29] However, these policies are primarily built upon a common factor: trade and aid connections. Nevertheless, in the face of new global transformations and the emergence of new international actors, the unified European entity that is the EU has struggled to maintain its position. The challenge for the Union is no longer merely that of sustaining existing relationships with former colonies but rather taking a leadership role and asserting global influence.

12.4.5 EVALUATING THE PARTNERSHIP. The slow pace of reforms and protectionist policies on both sides are the main factors hindering the partnership. The Mediterranean perspective, often non-European, considers development and reforms as projects, and projects require a significant amount of time. Regarding customs duties, Algeria is among the first group of South Mediterranean countries experiencing a very high rate, ranging between 18 per cent and 30 per cent. While the customs dismantling process varies by country, the region as a whole relies on reducing customs tariffs on imports and maintaining them for consumer goods. This protectionist policy, considered an advantage for developing countries, is not necessarily favoured by the EU. The EU, in turn, sought self-protection through other means such as data protection laws, designation of sensitive sectors, standardization, anti-dumping laws, and so forth.

On the other hand, regional integration failures and a lack of investment attraction contributed to undermining the role that the EU was expected to play in the region. For instance, the EU's share as the primary source of foreign investment had already fallen to less than 50 per cent in 2002. Instead, the EU became not just an economic actor and partner but a player addressing security, stability, and prosperity challenges.

[29] See also D. Caruso's Chapter 3 in this volume.

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The Joint Assessment Document of the Partnership Agreement for the year 2017 stated that the trade budget's imbalance and the significant deficit have imposed a new commitment on the EU to build an effective 'win-win' partnership. That was following the failure of many precedent joint meetings, in addition to the report of the French Senate (2016–2017), which described this kind of agreement as simply a means to secure short-term political and diplomatic interests.[30]

The evaluation also revealed obstacles that hindered the partnership from progressing as envisioned by its founders. The most significant impediments included the absence of any role for non-governmental organizations and the high indebtedness of South Mediterranean countries due to the policies pursued by donor countries through international financial institutions such as the World Trade Organization (WTO). The donor countries seemed to be using the economic situations of the South Mediterranean countries as collateral. Pressure from the WTO resulted in the EU's practice of using political conditionality with a focus on security. There was also a tightening of selective migration programmes due to insufficient management mechanisms, amidst the disparity between a series of joint agreements and treaties and the increasing contradictions in migration legislation. Moreover, the demographic decline in EU countries, and the resulting encouragement of skilled migration, further complicated the situation. All these factors hindered the securing of a sustainable partnership.

The problems of terrorism and cross-border crime, the growing tide of illegal migration, and the crisis of refugees and minorities on both shores of the Mediterranean are among the most important factors shaping European 'partnerships'. For example, in the field of migration and border entry regulation, we see a difference between the 1960s when Mediterranean governments encouraged the migration of their citizens to Europe, and the 1970s and 1980s when they shifted towards discouraging migration and reclaiming skilled workers. Finally, in the 2000s, we witnessed an increase in the number of laws aimed at regulating

[30] M. Simon Suitour, n.d., pp. 16–24; Bob Khaled, n.d. M. Simon Suitour (n.d.), SENAT, session extraordinaire de (2016–2017), rapport au nom de la commission des affaires européennes le cas de l'Algérie méditerranéen de la politique de voisinage.

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migration from within, by, to give one example, rejecting or accepting dual nationality. The Algerian government, for example, initially rejected dual nationality but later recognized it through an amendment to the nationality law. Other issues include the matter of family reunification, or the right of foreigners to benefit from social security and social grants for students, all of which result from the varying views of European countries (such as France, Germany, and Spain) on the Mediterranean migrants. Some see them as a factor to ensure the vitality of the European economy, while others do not.

12.5 CONCLUSION

The Rome Treaty of 1957 was a pivotal moment in the establishment of the EU. Despite its primary goal being the creation of a common market, its historical connection to former colonies influenced the structure, approach, and system of the Union itself. During the post-Second World War decolonization period, the treaty impacted relations between European countries and their former colonies. Once the economic integration was completed, and once former colonies had gained independence, Europe shifted towards enforcing cooperation, leading to ongoing economic and political interactions in the development of a highly dynamic regional system. It cannot be denied that the EU has indissoluble historical ties, interests, and political considerations that bind it to Algeria.

It would appear that the EU's overall approach to Algeria does not change whether Algeria is part of the EEC, by an extension of the integration project outside the continent, or whether the EU is assuming the role of influencer in Euro–Maghreb, Euro–Mediterranean, and Euro–Arab relations, or whether the EU acts strategically to secure its interests in the framework of projects like the Barcelona Process, the European Neighbourhood Policy, and the Association Agreement.

Different generations of agreements have embodied the Europeans' perspective towards non-Europeans. The transition of purely economic agreements to agreements with a variety of social, political, security, and cultural aspects means that internal and external dynamics have played a significant role in shaping and redirecting the EU's policy towards

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Algeria and its neighbours. These transformations indicate the level of adaptation of the relationship between the EU and Algeria.

The early phase of Algeria's independence provided an opportunity to acknowledge the dynamic expansive movement of European borders. The Member States of the EU, however, needed to instil confidence in regional integration. Once achieved, the sole guiding principles from within towards those outside its borders became those that impact and shape not only the internal structure of the Union but also its common foreign policy centred on security, defence, migration, and development. Algeria did not completely detach from interacting in these policy areas as they remain fundamental for its own internal affairs. And since independence ended the colonial era, Euro–Algerian relations have shifted to a new form of partnership, which is not best described as cooperation. This new paradigm of partnership replaced the initial integration that characterized Algeria's relationship with Europe.

It is true that France initially compelled Europe to accept Algeria within the framework of regional integration. France also sought, in one way or another, to ensure the continued importance and permanence of Algeria's role within the EU for many years solely to achieve its own political and economic objectives. Nevertheless, one should not deny the European will to engage with Algeria in a mutually beneficial manner, based on common interests. Issues such as migration, border control, security, and the project of the Union for the Mediterranean are components of such a connection with Algeria.

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CHAPTER 13

‘Eurarctic’

Colonialism and EU–Greenland Relations

ULLA NEERGAARD

13.1 INTRODUCTION

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The relationship and colonial ties between Greenland and the European Union (EU) Member State Denmark contain elements that are hardly ever told. The history of this relationship has led to a rather volatile set-up with possible implications for the EU’s contemporary interests in the Arctic. Therefore, it is of importance to bring to the fore the long-standing histories that connect the Arctic and Europe, as those histories may help us understand the challenges of today, not least because of the EU’s new Arctic policies. Severe – yet often overlooked – democratic flaws, connected to three significant events in the past century, will be highlighted and analysed in this chapter. The first of these events is related to the decisions made in 1952 leading to the formal decolonization of Greenland through its integration into the Kingdom of Denmark; the second is related to Denmark’s accession in 1973 to the European Community (EC); and the third is related to Greenland’s withdrawal therefrom in 1986.

The aim of this chapter is to shed further light on what will be referred to as Eurarctic, while being primarily limited to a focus on the colonial history of Greenland as well as present EU–Greenland relations. The overall approach is fundamentally legal in spirit, although it is combined with an interdisciplinary touch to enhance appropriate contextual understandings. Also of significance is the fact that the history of the Nordic/Arctic countries to which the history of Greenland is anchored, is long, complex, and at times controversial. For this reason, the intention of this chapter is to rather modestly take a bird’s-eye view and focus on some of the most significant moments.

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The chapter will firstly introduce the EU's Arctic policy, as it has recently been stated, as well as the term Eurarctic and the importance of Greenland in that context (Section 13.2). It will then analyse the colonial history of Greenland (Section 13.3), which is then followed by an analysis of the links between the EU and Greenland with a specific focus on how Greenland went from being a Member State through Denmark to becoming an associated overseas country and territory (OCT) and the implications thereof (Section 13.4). The final section draws some overall conclusions about the key issues examined in the chapter (Section 13.5).

13.2 EURARCTIC

In 2021, with the following few, yet rather noteworthy, words, the EU introduced its new Arctic policy:

> The European Union (EU) is in the Arctic. As a geopolitical power, the EU has strategic and day-to-day interests, both in the European Arctic and the broader Arctic region. The EU also has a fundamental interest in supporting multilateral cooperation in the Arctic and in working to ensure that it remains safe, stable, sustainable, peaceful and prosperous. Being a major economic player, it shares the responsibility for global sustainable development, including in the Arctic regions, and for the livelihood of inhabitants, including Indigenous Peoples. The EU exerts a significant impact on the Arctic through its environmental footprint and demand for resources and products originating there.[1]

PROOFS

[1] High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A stronger EU engagement for a peaceful, sustainable and prosperous Arctic', Brussels, 13.10.2021, JOIN(2021) 27 final, p. 1. For an analysis of the Joint Communication, see e.g. A. Stępień and A. Raspotnik, *Continuity with Great Confidence* (Washington, DC: The Arctic Institute, 2021). Also see Danish Institute for International Studies, 'Nye sikkerhedspolitiske dynamikker i Arktis. Muligheder og udfordringer for Kongeriget Danmark' (2020). Regarding the definition of Europe's indigenous peoples, as referred to in the quotation, see explanation by S. Amiel, *Who Are Europe's Indigenous Peoples and What Are Their Struggles?* (Euronews, 9 August 2019). More generally, see R. L. Johnstone, 'Colonisation at the Poles, Incomplete Decolonisation and the Creation of Indigenous People' in Y. Tanaka, R. L. Johnstone and V. Ulfbeck (eds.), *The Routledge Handbook of Polar Law* (Oxfordshire:

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At the same time, the EU committed itself to 'increased engagement in and around the Arctic region, in response to the geopolitical, environmental, economic, security and social challenges they face, and to working with others to manage new opportunities there'.[2] Most recently, the president of the European Commission Ursula von der Leyen visited both the Faroe Islands and Greenland, in the latter case to inaugurate the EU Office in Nuuk with the aim of ensuring Europe's physical presence in Greenland and in the wider Arctic region.[3] At the same time, President von der Leyen has signed agreements (together with Greenlandic prime minister, Múte Bourup Egede, and Danish prime minister, Mette Frederiksen) in relation to the EU–Greenland partnership totalling almost 94 million euros under the EU Global Gateway investment plan: 71.25 million euros for education and skills and 22.5 million euros for green growth, including renewable energy, critical raw materials, and biodiversity conservation.[4]

The EU's recently intensified engagement in Arctic matters could suggest associations with another project, namely Eurafrica. The relationship between Eurafrica and European integration has been analysed in detail in a remarkably insightful book by Hansen and Jonsson.[5] Eurafrica, as Hansen and Jonsson set out, was a particular intellectual and political project, conceived and articulated in the interwar period.[6] It saw Europe's very survival as dependent upon its

PROOFS

Routledge Handbooks, 2024), p. 386 onwards; and Y. Tanaka, R. L. Johnstone and V. Ulfbeck, 'Polar Legal System' in Y. Tanaka, R. L. Johnstone and V. Ulfbeck (eds.), *The Routledge Handbook of Polar Law* (Oxfordshire: Routledge Handbooks, 2024), p. 29.

[2] 'Joint Communication: A stronger EU engagement for a peaceful, sustainable and prosperous Arctic', p. 16.

[3] See e.g. European Commission, *President von der Leyen inaugurates the EU Office in Nuuk and signs cooperation agreements to strengthen the EU–Greenland Partnership*, Press Release, 15 March 2024.

[4] Ibid. and European Commission, 'EU–Greenland Partnership', Factsheet, 15 March 2024.

[5] P. Hansen and S. Jonsson, *Eurafrica. The Untold History of European Integration and Colonialism* (London: Bloomsbury, 2014).

[6] G. K. Bhambra, 'Series Editor's Foreword' in Hansen and Jonsson, *Eurafrica*, p. xii. See further U. Neergaard, 'Shadows of Europe's Colonial Past as Interwoven in EU Law' in C. Barnard, D. Sarmiento and A. Łazowski (eds.), *The Pursuit of Legal Harmony in a Turbulent Europe: Essays in Honour of Eleanor Sharpston* (Oxford: Hart Publishing, 2024), pp. 91–102.

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ability to appropriate land and extract labour and resources from the African continent.[7]

Inspired by Hansen and Jonsson, the term Eurarctic is used here rather than the term European Arctic, which is used in the Joint Communication. This is done to embrace the possible colonial undertones connected with the EU's engagements in the Arctic area. These may be seen as in themselves constituting a new wave of neocolonialism or neo-imperial ambition in the sense of exportation of a large part of the EU's norms, values, and standards to the rest of the world – as demonstrated above so clearly including the Arctic area – and under all circumstances as being shaped by older, more traditional versions of colonialism. Indeed, the Arctic area, in parallel with Africa, has had a history heavily influenced by colonialism. In contrast to Africa, the Arctic area has only fairly recently truly become the centre of attention of strong and conflicting political forces.

Beyond any doubt, the Arctic area, although previously largely ignored by the big political players, has become extremely important for multiple reasons, including in particular climate change and support for sustainable development, security interests, and possible access to natural resources. Thus, it is both understandable and reasonable that the EU wishes to boost its presence. One may wonder, however, how the EU can justify its 'claim' to its presence and commitments. In that regard, it is on the one hand explained in the Joint Communication that the eight Arctic States – namely Canada, the Kingdom of Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States – themselves have the primary responsibility for tackling challenges and opportunities within their territories. On the other hand, it is stated that many challenges extend beyond national borders and the region's boundaries and therefore can be more effectively addressed through regional or multilateral cooperation.[8] Thus, the communication states that the EU sees its own role as legislator for part of Eurarctic as something that needs to be taken into account.[9]

[7] Bhambra, 'Series Editor's Foreword', p. xii.

[8] 'Joint Communication: A stronger EU engagement for a peaceful, sustainable and prosperous Arctic', p. 1.

[9] Ibid., p. 1.

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Among the eight Arctic States, which are listed in the before-mentioned Joint Communication, only three are Member States of the EU; namely the Kingdom of Denmark, Finland, and Sweden.[10] Although Sweden, in principle, is also a kingdom, only Denmark is designated as such in the Joint Communication. The reasoning behind this choice is likely that the Kingdom of Denmark includes three entities, namely Denmark, the Faroe Islands, and Greenland. In the Joint Communication, this is touched upon to some degree in the following manner:

> The EU has important ties with Greenland and the Faroe Islands. Both are part of the Kingdom of Denmark, and both are seeking closer relations with the EU. In order to further consolidate and enhance the longstanding cooperation between the European Commission and Greenland, the European Commission will establish an office to be located in Nuuk. This office will manage EU support to Greenland as well as facilitating further strengthening and deepening of the partnership between the European Commission and the Government of Greenland, including through cooperation and dialogue in areas of common interest, in close cooperation with the Special Envoy for Arctic Matters.

Evidently, the EU's 'claim' to and interest in the Eurarctic is mainly directed towards Greenland. The Swedish and Finnish importance in the Arctic area currently appears to be considered as rather vague in comparison with Greenland.[11] Similarly, the Faroe Islands are often not considered, and it is at times contested whether these are truly situated in the Arctic area.

In this context, it is highly intriguing that Denmark has the status of a Member State of the EU, while the two autonomous entities of the realm of Denmark, namely Greenland and the Faroe Islands, have the status of an OCT and a third country, respectively. Unlike the Faroe Islands, Greenland has consistently and formally been considered a former colony of Denmark and has had relations with the EU since 1973. With that background, the EU's 'claim' to the Arctic, albeit limited to Greenland for the reasons indicated above, will be analysed.

[10] Ibid., p. 1. Norway and Iceland are European Free Trade Association Member States.

[11] According to J. Stavridis, *Sweden and Finland Give NATO an Arctic Opportunity* (The Washington Post, 13 July 2023), about '15 percent of Sweden and a third of Finland are within the Arctic Circle: the region known as Lapland'.

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13.3 THE COLONIAL HISTORY OF GREENLAND AND DENMARK

Geographically, Greenland is considered part of North America.[12] Yet, in most other respects its closest relations are with Denmark and therefore Europe. In what follows, the manner in which this relationship with Denmark originally came about is explained chronologically and by focusing mainly on aspects of colonization.[13] In that regard, it should be kept in mind that words like 'colonies' and 'colonization' today are viewed as unambiguously negatively charged words.[14] At the same time, historical events may be interpreted differently. Here, the classifications launched by the Greenlandic Constitutional Commission in a report from 2023, in which a Constitution for Greenland is proposed, are taken as the point of departure for the analysis, even though others might have viewed and presented the evolution differently.[15] On this basis, the following six different phases of development are presented: (1) 'initial colonization' (1721–1782); (2) 'parasitic colonialism' (1782–1830s) and 'classic colonialism' (1830s–1908); (3) 'intensive colonialism' (1908–1953); (4) 'hidden colonialism' (1953–1979); (5) 'early decolonization' (1979–2009); and (6) 'matured decolonization' (2009–).

13.3.1 'INITIAL COLONIZATION' (1721–1782). It is generally considered that the first Inuits came to Greenland about 4,500 years ago, but eventually vanished. Later on, sometime between the twelfth and fourteenth century, another group of people – the Thule people – arrived,

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[12] See e.g. G. Alfredsson, 'Greenland and the Law of Political Decolonization' (1982) 25 *German Yearbook of International Law* 290. Greenland is separated from Canada by only thirty kilometres.

[13] R. L. Johnstone, 'Colonisation at the Poles', p. 385 defines colonization as the 'claim of a People to legitimised control over a territory which is not their homeland'.

[14] See in this respect N. Brimnes, H. C. Gulløv, E. Gøbel, P. O. Hernæs, P. E. Olsen and M. V. Pedersen, 'En ny dansk kolonihistorie' in N. Brimnes, H. C. Gulløv, E. Gøbel, P. O. Hernæs, P. E. Olsen and M. V. Pedersen (eds.), *Grønland. Den arktiske koloni* (Copenhagen: Gads Forlag, 2017), p. 4.

[15] Forfatningskommissionens Betænkning, Grønlandsudvalget 2022–2023 (2. samling) (Report from the Greenlandic Constitutional Commission). Also see e.g. Brimnes, Gulløv, Gøbel, Hernæs, Olsen and Pedersen, 'En ny dansk kolonihistorie', p. 6.

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replacing the very first group of Inuits. The Inuits of today are considered as descending from this later group.

The Norse, as the first non-Inuits, are believed to have first arrived in the tenth century, constituting the first time in history that Europeans had settled in Greenland. More exactly, approximately 450 years of Norse presence started with Erik the Red's 'landnam' in 985.[16] The settlement was at first organized as a free state based on a similar Icelandic model.[17] In 1261, the Norse farmers chose to join Norway, which in the following century became part of Denmark-Norway with the confirmation of the Kalmar Union in 1397.[18] From these Norse inhabitants, however, no news or signs of life had been received since 1408.[19] Thus, in principle, only Inuits inhabited Greenland as such. However, in the sixteenth and seventeenth centuries, Europeans returned, although not on a permanent basis. These would, for example, include the English, the Dutch, and even the Basques due to whaling and trade interests.[20]

With the increased level of international and economic interests in Greenland, it eventually – and apparently without regard to the presence of indigenous peoples – became an international issue whether Greenland was Danish-Norwegian or 'no man's land'.[21] In Danish literature, Greenland has been seen as belonging to the Danish Crown originally under the Kalmar Union since the fourteenth century. However, it was considered first 'properly' colonized by Denmark in 1721, when the Danish-Norwegian priest Egede arrived.[22] Egede is thereby widely narrated as having turned Greenland into a Danish colony. At the same time, he has been considered to have proselytized Christianity

PROOFS

[16] H. C. Gulløv (on behalf of the eds.), 'Forord' in Brimnes, Gulløv, Gøbel, Hernæs, Olsen and Pedersen (eds.), *Grønland. Den arktiske koloni*, p. 8.

[17] Ibid., p. 8.

[18] Ibid., p. 8.

[19] H. C. Gulløv and P. A. Toft, 'Den førkoloniale tid' in Brimnes, Gulløv, Gøbel, Hernæs, Olsen and Pedersen (eds.), *Grønland. Den arktiske koloni*, p. 24.

[20] Ibid., pp. 17–18.

[21] Gulløv (on behalf of the eds.), 'Forord', p. 8.

[22] F. Harhoff, 'Greenland's Withdrawal from the European Communities' (1983) 20 *CML Review* 13, at 14; and S. Thuesen, H. C. Gulløv, I. Seiding and P. A. Toft, 'Hans Egedes rejse til Grønland' in Brimnes, Gulløv, Gøbel, Hernæs, Olsen and Pedersen (eds.), *Grønland. Den arktiske koloni*, p. 49.

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among the indigenous Greenlandic population.[23] Thus, in the abovementioned report from the Greenlandic Constitutional Commission, which distinguishes between six different constitutional phases, this first constitutional phase is called 'initial colonization', and is seen as beginning in 1721 and lasting until 1782.[24]

This phase was influenced by uncertainties, experiments, and improvisations.[25] An essential element of the colonization took place with the help of trading companies that were granted state monopolies.[26] Land was controlled through the establishment of colonies, that is small colonial towns, as the seat of the institutions of colonization.[27] These colonies functioned as local centres under the leadership of merchants and missionaries responsible to the trading company and the missionary college respectively, but without a Greenlandic central government.[28] Consequently, this was not colonization by European settlers, but rather a colonization managed by posted Europeans in fixed-term employment and financed by the Greenlandic population as producers of the goods.[29]

13.3.2 'PARASITIC COLONIALISM' (1782–1830S) AND 'CLASSIC COLONIALISM' (1830S–1908). The second constitutional phase – among those presented by the Greenlandic Constitutional Commission – is seen as consisting of two periods. The first period is characterized by the Greenlandic Constitutional Commission as 'parasitic colonialism'.[30] The period is seen as beginning on 19 April 1782 with the signing of so-called instructions (in Danish '*Instrux*') in Copenhagen, which bear a title that may be translated as: *Instructions according to which the merchants or those who*

PROOFS

[23] Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus 1945–54. En historisk udredning* (2007), at 10. Also see e.g. E. Porsild, 'Greenland at the Crossroads' (1948) 1(1) *Arctic* 53; or F. A. J. Nielsen, 'Den ældste grønlandske Bibel – et sprogligt og kulturelt møde' in O. Høiris et al. (eds.), *Fra vild til verdensborger* (Århus: Universitetsforlag, 2011), p. 147.
[24] 'Grønlandsudvalget 2022–2023', p. 10.
[25] Thuesen, Gulløv, Seiding and Toft, 'Hans Egedes rejse til Grønland', p. 105.
[26] Ibid., p. 106.
[27] Ibid., p. 106.
[28] Ibid., p. 106.
[29] Ibid., p. 107.
[30] 'Grønlandsudvalget 2022–2023', p. 11.

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either manage the trade or manage the whaling facilities in Greenland in particular, as well as all those who are at the bottom of the trade in general.[31] The instructions prescribe a form of minimal interaction and a formal separation between the Europeans and the local Inuits. Although not explained, by naming the period 'parasitic colonialism', it may be assumed that the Commission considers it as characterized by a parasitic relationship of mainly economic exploitation.[32] These principles of separation between the population groups were in practice valid for around fifty years.[33]

At the end of the first period of this second constitutional phase, the Peace Treaty of Kiel was signed (in 1814), and Greenland, together with Iceland and the Faroe Islands, became purely a Danish area of responsibility.[34] Until then, Greenland, Iceland, and the Faroe Islands had been a Danish-Norwegian joint matter.[35] With the treaty, the Danish-Norwegian Union, which had existed since 1380, was dissolved, and mainland Norway went to Sweden, in principle as compensation for Finland, which Russia had taken in 1809.[36]

In the report of the Greenlandic Constitutional Commission the second period of this second constitutional phase is referred to as 'classic colonialism' and is considered as beginning in the 1830s and ending in 1908.[37] It is explained that at the beginning of the 1830s, some major changes occurred in the Danish understanding of its presence in Greenland.[38] This led to the colonial government moving away from the principle of separation.[39] Among other things, it included involvement of the local Inuit population to a greater extent than before as well

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[31] Ibid., p. 11. In original: '*Instrux, hvorefter kiøbmændene eller de som enten bestyrer handlen eller forestaae hvalfanger-anlæggene i Grønland i særdeleshed, saavel som og alle de der staae i handlens tieneste i almindelighed, sig for fremtiden have at rette og forholde.*'

[32] Ibid., p. 11.

[33] Ibid., p. 11.

[34] T. Kjærgaard, 'Freden i Kiel, Grønland og Nordatlanten 1814–2014' in *Digitalt særtryk af fund og forskning i det Kongelige Biblioteks Samlinger*, Bind 54 (Copenhagen: The Royal Library, 2015), p. 379.

[35] Ibid., p. 379.

[36] Ibid., p. 379.

[37] 'Grønlandsudvalget 2022–2023', p. 11.

[38] Ibid., p. 11.

[39] Ibid., p. 11.

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as initiating a more targeted assimilation strategy.[40] Furthermore, the school system was expanded.[41]

When the first Danish Constitution (in Danish '*Grundloven*') was adopted in 1849, Greenland kept its status as a colony, and was therefore not explicitly a separate part of the constitution.[42] The Faroe Islands (and Iceland), in contrast, had explicitly been part of the constitution and had never formally had the status of a colony.[43] Previously, in 1816, the Faroe Islands had been given the status of a region/county (in Danish an '*amt*').[44]

To these developments it may be added that from 1782 until the end of the 1850s, the only formal state organization consisted of two inspectorates (in Danish '*inspektorater*'), one for South Greenland and one for North Greenland.[45] Moreover, in the years 1857–1861, small steps towards establishing democratic political institutions were taken as local boards of trustees were established at the individual colonies.[46] However, only self-supporting local whalers (in Danish '*fangere*') had the right to vote.[47]

13.3.3 'INTENSIVE COLONIALISM' (1908–1953). The third constitutional phase is referred to as 'intensive colonialism' and is considered to have lasted from 1908 to 1953.[48] Since the 'instructions' of 1782, it was not until 1908 that a new basic legal framework was adopted in Denmark for how the Danish state should act in

PROOFS

[40] Ibid., p. 11.
[41] Ibid., p. 11.
[42] F. Harhoff, '§ 1' in H. Zahle (ed.), *Danmarks Riges Grundlov med kommentarer* (Copenhagen: DJØF Forlag, 1999), p. 29, p. 30.
[43] Ibid., p. 29.
[44] J. Hartmann, 'The Faroe Islands: Possible Lessons for Scotland in a Post-Brexit Devolution Settlement' (2019) 44(1) *EL Review* 111, at 113. Importantly, although not formally having had the status of a colony, as pointed out by A. Kočí and V. Baar, 'Greenland and the Faroe Islands: Denmark's Autonomous Territories from Postcolonial Perspectives' (2021) 75(4) *Norwegian Journal of Geography* 189, at 198, the differences between Greenland and the Faroe Islands may in actual fact only lie in terminology.
[45] 'Grønlandsudvalget 2022–2023', p. 11.
[46] Ibid., p. 11.
[47] Ibid., p. 11.
[48] Ibid., p. 12.

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Greenland.[49] This was entitled: 'Act on the Administration of the Colonies in Greenland etc.'.[50]

In 1911, the above-mentioned local boards of trustees were replaced by two regional councils, namely South Greenland's Council (in Danish '*Sydgrønlands Landsråd*') and North Greenland's Council (in Danish '*Nordgrønlands Landsråd*'), which were located in Nuuk (formerly in Danish '*Godthaab*') and Qeqertarsuaq (formerly in Danish '*Godhavn*') respectively.[51] On the economic level, the colonial administration initiated an economic transformation by intensifying fishing and initiating an industrial fishing industry.[52]

In 1905, Norway increasingly claimed parts of Greenland, and in 1931 it occupied Eastern Greenland.[53] This violation of Danish sovereignty was brought by Denmark before the Permanent Court of International Justice in The Hague, which in 1933 confirmed Denmark's sovereignty over all of Greenland.[54] During the German occupation of Denmark in 1940, Greenland remained under Danish rule despite many challenges.[55] In contrast, in 1944, in the middle of the Second World War, Iceland declared its independence from Denmark and proclaimed the Republic of Iceland.[56]

13.3.4 'HIDDEN COLONIALISM' (1953–1979). Soon after the Second World War came to an end, for colonial powers the world

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[49] Ibid., p. 12.

[50] Author's translation. Ibid., p. 12. The Danish title is here said to be: '*Lov om Styrelsen af Kolonierne i Grønland m.m. (Lov nr. 139-1908)*'.

[51] Ibid., p. 12.

[52] Ibid., p. 12.

[53] K. Berlin, *Danmarks ret til Grønland. En udredning af Grønlands, Islands og Færøernes stilling til Norge og Danmark før og nu* (Copenhagen: Nyt Nordisk Forlag, 1932), p. 9 onwards.

[54] G. Alfredsson, 'Greenland and the Right to Self-Determination' (1982) 51 *Nordisk Tidsskrift for International Ret* 39, points out in this regard that the decision of the Permanent Court in the Danish-Norwegian dispute over portions of East Greenland related only to rival claims of two states, with the conclusion that Denmark's rights were superior to those of Norway. The Court neither received nor considered arguments of the native population.

[55] See in particular B. Lidegaard, *Uden mandat. En biografi om Henrik Kauffmann* (Copenhagen: Gyldendal, 2020); and J. Heinrich, 'Krig og afkolonisering 1939–53' in Brimnes, Gulløv, Gøbel, Hernæs, Olsen and Pedersen (eds.), *Grønland. Den arktiske koloni*, pp. 280–317.

[56] Kjærgaard, 'Freden i Kiel', pp. 386–387.

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entirely changed. During that period, and after the United Nations (UN) was established in 1945, it became clear that new winds were blowing with regard to the European countries' colonial arrangements, which were seen as more and more unacceptable.[57] For obvious reasons, these developments, among others, also had an impact on Denmark–Greenland relations.

On the basis of decisions made in 1952, Greenland was formally decolonized in 1953 by integration into the Kingdom of Denmark.[58] In contrast to most other decolonizations, an integration with the metropole – rather than independence therefrom – took place.[59] The chosen 'solution' was thus only one among several possible solutions, and the road thereto was not without obstacles.[60] Most importantly, a constitutional right for Greenlandic self-determination, although suggested at some stage in the process, was not inserted.[61]

Greenland's status then became, along with the Faroe Islands, what in Danish constitutional theory is commonly viewed as part of '*Rigsfællesskabet*', which might be translated as the 'community of the

PROOFS

[57] 'Grønlandsudvalget 2022–2023', p. 12; and generally Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*.

[58] O. Spiermann, *Danmarks Rige i forfatningsretlig belysning* (Copenhagen: DJØF Forlag, 2007), p. 62. Also see more generally Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*, in particular chapter 9.

[59] Alfredsson, 'Greenland and the Right to Self-Determination', 40 points out in this regard that: 'The choice available to the Greenlanders was only between *status quo* or integration. There was no mentioning of independence and there were no negotiations between the parties about other forms of ties linking Greenland to Denmark.'

[60] Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*, chapter 9.

[61] These events are further described in Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*, chapter 9. In particular, (from p. 201 onwards) two prominent Danish law professors, Poul Andersen and Alf Ross, had been associated with the Constitutional Commission as consultants and in that capacity had been asked to elaborate a joint legal opinion regarding constitutional issues concerning the potential integration of Greenland. They did submit such a joint legal opinion, but also individual legal opinions. In that regard, the one submitted by Ross turned out to be controversial, and it was decided not to publish it at the time because it gave rise to concerns (it is now published e.g. at p. 314 onwards). Importantly, Ross expressed that he was in favour of the insertion of an individual provision in the future Constitution designating that Greenland constitutes a self-governing people's society within the kingdom, the details of which were to be determined by law. This thinking, however, did not become part of the political debate.

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realm' or 'the commonwealth of the Danish State'.[62] Against that background, Paragraph 1 of the Danish Constitution was (with effect from 1953) amended to read: 'This Constitutional Act shall apply to all parts of the Kingdom of Denmark.' None of the previous constitutional acts had contained any equivalent provision regarding the geographical extent of the constitution.[63] The provision is commonly understood as implying that the constitutional Act applies to all three 'members' or 'entities' of the realm, in other words Denmark, the Faroe Islands, and Greenland. Formally, Greenland and the Greenlandic population were now an equal part of the Kingdom of Denmark.[64] Importantly, in 1953 Greenland was allocated two members in the Danish Parliament. Moreover, Denmark intensified its financial investments in Greenland.[65]

In the Greenlandic Constitutional Commission's report, this fourth constitutional phase is described as a phase of 'hidden colonialism', as large parts of the colonial structure and logic are seen to have continued unaltered.[66] The commission also highlights that the real decision-making authority for the overall framework for the control of Greenland remained with the Danish authorities in Copenhagen, and that examples of discrimination, at times severe, between Danes and Greenlanders could still be found.[67]

PROOFS

[62] J. H. Danielsen, 'Self-Government and the Constitution: Greenland within the Danish State' (2013) 19(4) *European Public Law* 619; and U. P. Gad, *National Identity Politics and Postcolonial Sovereignty Games – Greenland, Denmark, and the European Union* (Copenhagen: Museum Tusculanum Forlag, 2017), p. 11.

[63] Harhoff, '§ 1', p. 29. Until the amendment only a minor part of the Constitution has been considered as applicable to Greenland, see Grønlandskommissionen (Greenlandic Constitutional Commission), 'Betænkning 2. Politiske og Administrative Forhold i Retsplejen', Copenhagen (1950), at 8. Also see e.g. F. Harhoff, *Rigsfællesskabet* (Århus: Klim, 1993), p. 205.

[64] 'Grønlandsudvalget 2022–2023', p. 12.

[65] Ibid., p. 13.

[66] Ibid., p. 13.

[67] Ibid., p. 13. Currently, most disputed is the so-called intrauterine device (IUD) case, see e.g. Indenrigs- og Sundhedsministeriet (Ministry of Health and the Interior), *Danmark og Grønland sætter uvildig udredning af spiralsagen i gang*, Pressemeddelelse maj 2023 (Press release, May 2023), according to which a team of researchers is now starting to uncover what happened when Greenlandic girls and women in the 1960s were fitted with IUDs to prevent pregnancy. The researchers will investigate the extent of the case, the decision-making process behind it, and uncover the experiences of the women involved. In addition, 143 Greenlandic women are suing the Danish state for violation of human rights and demanding a total of 42.9 million Danish krone in compensation.

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Significantly, it is highlighted in the report that the Greenlandic population did not have the right to vote in the referendum on the new Danish Constitution, and that the incorporation process generally was characterized by major democratic shortcomings.[68] In that regard, Alfredsson explains that:

> The concrete proposals for integration were worked out by a special Constitutional Commission in the summer of 1952, submitted to the Greenlandic Provincial Council in August and decided upon by this Council in September of that same year, i.e. within a month of receiving the proposed text. The Constitutional Commission was composed of Danes only, the expertise was Danish and, to the best of my knowledge, Greenlandic authorities had no expert advice on the implications, f. ex. the finality, of the enactment of the proposals. It also appears that the initiative for integration was Danish. In an essay (*Grønlandssagen i FN 1946–54*, Odense Universitetsforlag 1975) by historian Finn Petersen, who had access to public and private archives concerning the case, it was disclosed that suggestions to this effect were made by Danish officials as early as the late forties for the very purpose of avoiding unfortunate UN influence.[69]

The Danish author Lidegaard explains in his book about Greenland's history that delegates in the UN queried why the Greenlandic people had not been asked through a referendum.[70] According to Lidegaard, the Danish delegates could not come up with an explanation.[71] He further states that he cannot explain it himself either, because the result thereof would in his opinion undoubtedly have been in the positive, not preventing the decision-makers from going in that direction.[72] He then suggests

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[68] 'Grønlandsudvalget 2022–2023', p. 12. Also see Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*; Spiermann, *Danmarks Rige i forfatningsretlig belysning*, p. 64 onwards; and Alfredsson, 'Greenland and the Right to Self-Determination', 39 onwards.

[69] Alfredsson, 'Greenland and the Right to Self-Determination', 40. Similarly, see Alfredsson, 'Greenland and the Law of Political Decolonization', 290–308.

[70] M. Lidegaard, *Grønlands Historie* (Denmark: Nyt Nordisk Forlag Arnold Busck, 1991), p. 199.

[71] Ibid., p. 199.

[72] Ibid., p. 199. Alfredsson, 'Greenland and the Right to Self-Determination', 40–41, however, emphasizes that: 'No referendum was held in Greenland about integration. Elections were, however, held in Denmark in connection with the constitutional

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that one explanation may be that a referendum seemed superfluous, as it all appeared straightforward, supported by the fact that the Greenlandic council ('landsråd') – as the above-mentioned two councils were merged into one around 1950 – had been involved in the process leading up to the referendum in Denmark itself.[73] However, other explanations may also be considered, for example perceived hindrances due to interpretations of the Danish Constitution; that Greenlandic representatives to some degree had been involved in the process beforehand;[74] or a lack of sincere respect for the importance of taking into consideration the opinions of Greenlanders.

The lack of a referendum in Greenland was in fact not only questioned, but also criticized during the negotiations in the UN, but at the end of the day the criticism had no effect.[75] Thus, the UN ended up acknowledging the requested change of status by adopting a resolution on 9 September 1954 in which Denmark was removed from the list of colonial powers.[76]

amendment according to the rules of the 1915 Constitution which prior to integration was not valid in Greenland. I have heard Danes maintain that if a referendum had been held in Greenland it would have come out in favour of integration. This may be true, but then again Danish authorities had neither lived up to the requirements of the UN Charter for developing free political institutions in this non-self-governing territory nor had they provided sufficient information about other options available under international law.' Similarly, see Alfredsson, 'Greenland and the Law of Political Decolonization', 290–308.

[73] See about the landsråds' limited democratic legitimacy and competences, Grønlandsk-dansk selvstyrekommission (Greenlandic-Danish Self-Government Commission), 'Betænkning om selvstyre i Grønland' (2008), at 7–8; and further Lidegaard, *Grønlands Historie*, p. 199.

[74] See for a criticism of this point Alfredsson, 'Greenland and the Right to Self-Determination', 40: 'Art. 73e of the UN Charter states that it is the obligation of administering powers "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their political institutions …" Was the Provincial Council, which unanimously approved of integration, such a free political institution? My reply is in the negative. […] It is therefore almost paradoxical when this Council, to which the Danish authorities had delegated only minor functions, was given the immense task of deciding permanently on the constitutional future of Greenland.' Similarly, see Alfredsson, 'Greenland and the Law of Political Decolonization', 290–308. Also see Forfatningskommission (Constitutional Commission), 'Betænkning afgivet af Forfatningskommissionen af 1946' (Copenhagen, 1953), in particular 89–100.

[75] Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*, 253.

[76] 'Grønlandsudvalget 2022–2023', p. 12. Also see Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*, chapters 10 and 11.

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13.3.5 'EARLY DECOLONIZATION' (1979–2009). Despite the above steps, it is not until the fifth constitutional phase that the Greenlandic Constitutional Commission refers in its report to 'early decolonization' as such, as a 'home rule' (in Danish '*hjemmestyre*') construction for Greenland became a reality in 1979.[77] Beforehand, there had been a referendum in Greenland, where a majority voted in favour of the introduction of home rule.[78] In Danish, the term 'home rule' is applied as an equivalent to 'self-governance' (to some degree).[79]

On 1 January 1980 Greenland's home rule began to take over administrative tasks from the Danish state.[80] The arrangement may originally have been considered as conferring a limited autonomy in certain administrative matters within the realm, and as drawing its inspiration from the arrangement already established for the Faroe Islands.[81] More precisely, as summed up by Weiss, home rule established limited decentralization by the transfer of certain legislative and executive powers and concomitant financial responsibility in a number of specifically listed areas to Greenlandic authorities. However, matters such as foreign relations, the constitution, defence, and the court system remained the responsibility of the Danish government.[82] The home rule administration was essentially responsible for the development of Greenland's society and had legislative powers concerning areas such as fishing, hunting, labour market affairs, social affairs, education and culture, health services, environmental protection, and municipal structures.[83] In April 1979, the new '*Landsting*', which is the

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[77] 'Grønlandsudvalget 2022–2023', p. 13. Also see Lov om Grønlands hjemmestyre – nr. 577 af 29. november 1978 (Law on Home Rule in Greenland).

[78] 'Grønlandsudvalget 2022–2023', p. 13. Also see e.g. Gad, *National Identity Politics*, p. 9.

[79] I. Foighel, 'A Framework for Local Autonomy: The Greenland Case' (1979) *Israel Yearbook of Human Rights* 82–105; I. Foighel, 'Home Rule in Greenland: A Framework for Local Autonomy' (1980) *Common Market Law Review* 91–108; I. Foighel, 'Grønlands hjemmestyre', U1979B.99; and F. Harhoff, 'Det grønlandske Hjemmestyres grund og grænser', U1982B.101.

[80] 'Grønlandsudvalget 2022–2023', p. 14.

[81] F. Weiss, 'Greenland's Withdrawal from the European Communities' (1985) *European Law Review* 175.

[82] Weiss, 'Greenland's Withdrawal', 175.

[83] P. Walsøe, 'The Judicial System in Greenland' in B. Dahl et al. (eds.), *Danish Law in a European Perspective* (Copenhagen: Forlaget Thomson, 2002), p. 493.

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Danish name for Greenland's regional Parliament, was elected on the basis of these new rules.[84]

13.3.6 'MATURED DECOLONIZATION' (2009–). The final constitutional phase, so far, is termed 'matured decolonization' in the report by the Greenlandic Constitutional Commission.[85] This phase is seen as beginning on 21 June 2009, where instead of the home rule arrangement, a new arrangement, now termed 'self-rule', entered into force.[86] In a prior referendum, a 75 per cent majority of the population had confirmed acceptance of this model in a vote on an enhanced version of home rule.[87] The background to the Danish Parliament's passing of the Act on Greenland's Self-Governance is stated in its preamble to be a recognition that the people of Greenland are a people pursuant to international law with the right of self-determination, where the Act is based on a wish to foster equality and mutual respect in the partnership between Denmark and Greenland.

Pursuant to Paragraph 1 of the Act on Greenland's Self-Governance, the Greenlandic self-government authorities shall exercise legislative and executive power in the fields of responsibility taken over. In addition, the Act includes provisions regarding, for example, the economic relations between the Greenlandic self-government and the Danish government, provisions as to foreign relations, and cooperation between the Greenlandic self-government authorities and the Danish authorities of the realm regarding statutes and administrative orders. Although foreign affairs are formally still the responsibility of Denmark, in practice Greenland's involvement has gradually increased in that

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[84] Weiss, 'Greenland's Withdrawal', 175. Greenland's regional government is called '*Landsstyre*' in Danish.

[85] 'Grønlandsudvalget 2022–2023', p. 13.

[86] Lov om Grønlands Selvstyre (Act on Greenland's Self-Governance), Lov nr 473 af 12/06/2009. See for an analysis of its constitutional dimensions, e.g. J. H. Danielsen, 'Grønlands Selvstyre og Danmarks Riges Grundlov' (2011) *Juristen* 9–18; and J. H. Danielsen, 'Self-Government and the Constitution: Greenland within the Danish State' (2013) 19 *European Public Law* 619–642. Also see Grønlandsk-dansk selvstyrekommission (Greenlandic-Danish Self-Government Commission), 'Betænkning om selvstyre i Grønland' (2008).

[87] Gad, *National Identity Politics*, p. 10.

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regard.[88] Also, Greenland's self-government took over responsibility for Greenland's underground on 1 January 2010.[89] Ultimately, it is generally acknowledged that there are limits as to which areas can be transferred to Greenland.[90] Seemingly, the interpretation of self-government is dynamic.

Importantly, the Act on Greenland's Self-Governance also stipulates how a decision regarding Greenland's independence can be taken by the people of Greenland. However, there is a condition requiring the consent of the Danish Parliament.[91] Some forces, including the Greenlandic Constitutional Commission as demonstrated, envision full independence from Denmark. Thereby a final phase possibly designated as 'final decolonization' or 'full sovereignty' may be envisaged.[92]

All in all, the colonial history of Greenland and Denmark is long and, from the perspective of today, widely considered not acceptable. Yet, many different narratives exist side-by-side.[93]

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13.4 EU–GREENLAND RELATIONS

As it has been explained above, the Greenlandic population was not invited to vote in the referendum on the new Danish Constitution of

[88] S. Blockmans, 'Between the Devil and the Deep Blue Sea? Conflicts in External Action Pursued by OCTs and the EU' in D. Kochenov (ed.), *EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (The Netherlands: Kluwer, 2011), p. 313.

[89] 'Grønlandsudvalget 2022–2023', p. 14.

[90] Danielsen, 'Grønlands Selvstyre', 9–18; and Danielsen, 'Self-Government and the Constitution', 619–642. Also see Betænkning 1497/2008, Selvstyre i Grønland (2008), pp. 24–27.

[91] Spiermann, *Danmarks Rige i forfatningsretlig belysning*, p. 90, who points out that it is generally assumed that this would not require a change of the Danish Constitution.

[92] 'Grønlandsudvalget 2022–2023', p. 14.

[93] See e.g. J. Heinrich, 'Statusændringen i 1953. Grønlændernes forhold til Danmark i perioden 1945–1954' in Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus*, 352. Heinrich is a historian, with an upbringing and life in both Greenland and Denmark. From his assessments, it becomes evident that the Danish–Greenlandic relationship is in contrast to most other colonial relationships. Relatedly, it is of some interest that Greenland since 1736 until the middle of the twentieth century was largely closed so that neither Danes nor other nationalities could get access without permission; see Grønlandskommissionen (Greenlandic Constitutional Commission), 'Betænkning 2. Politiske og Administrative Forhold i Retsplejen', Copenhagen (1950), at 8.

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1953, according to which Greenland was formally decolonized by integration with the Kingdom of Denmark. It was also mentioned that the incorporation process has been characterized by other democratic shortcomings.[94] In relation to EU–Greenland relations, certain democratic shortcomings may similarly be claimed to have been present. In that light, two central events will be examined in what follows: firstly, the original Danish accession to the EC in 1973 with particular focus on Greenland; and, secondly, Greenland's withdrawal from the EC in 1986.

13.4.1 THE ACCESSION IN 1973. In the 1972 Danish referendum on Danish membership of the EC, Greenland was not given the opportunity to have a separate referendum, although this was desired.[95] Certain initiatives to inform the Greenlandic population about the EC were undertaken.[96] Resistance in Greenland to EC accession appears

[94] 'Grønlandsudvalget 2022–2023', p. 12. Also see Danish Institute for International Studies, *Afvikling af Grønlands kolonistatus.*

[95] According to E. L. Jensen, 'Nyordning og modernisering 1950–79' in Brimnes, Gulløv, Gøbel, Hernæs, Olsen and Pedersen (eds.), *Grønland. Den arktiske koloni*, p. 361, this had actually been sought, but without any luck. Jensen furthermore explains that in the Danish Parliament there was an inquiry about a separate vote for Greenland, as well as during the spring session of the Greenlandic National Council in 1972. It was further proposed that the National Council should demand a postponement of the referendum, i.e. in effect a demand for a separate vote for Greenland. The answer to both initiatives was, however, that it would require changes in the state legal relations between Denmark and Greenland, and the time had passed for that.

[96] Jensen, 'Nyordning og modernisering 1950–79', p. 361, explains (author's translation): 'Up to the referendum, an information campaign was organized to give the Greenlandic population a greater knowledge of the EC and thus give the voters a real opportunity to take a stand. The campaign was very short, and the material was only sent out to the recipients very late. There was also a short and relatively intensive debate about the advantages and disadvantages of EC membership. The supporters were primarily of the conviction that future development should take place in close association with Denmark, and then membership of the EC had to be included in the bargain. Opponents of EC membership questioned whether the way forward led to the formation of larger entities such as the EC, and highlighted Greenland's desire to be able to decide on its own affairs. Why should one sign up for centralized European cooperation, when one advocated a decentralization of the decision-making process? Or as the South Greenland newspaper *Kujatâmio* put it in an editorial: "Our National Council's influence on things will probably resemble that of a class council at a children's school." And a few days before the referendum, the editorial writer in *Atuagagdliutit Grønlandsposten* very clearly summarized what the opponents saw as

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to have been substantial as a majority of Greenlanders voted against accession. The votes for Denmark in isolation were 1,954,053 ('Yes') and 1,126,097 ('No').[97] The votes for Greenland in isolation were: 4,062 ('Yes') and 9,594 ('No').[98] Nevertheless, unlike the Faroe Islands, in 1973, Greenland – which at the time did not have a home rule arrangement – had to accede as an integral part of Denmark due to an interpretation made by the Danish government.[99] This has been 'used as a basis for Greenlandic complaints that the island had been forced into the European Community by a majority of Danes'.[100] The referendum may thus have to be understood in light of having taken place during the so-called fourth constitutional phase, which in the Greenlandic Constitutional Commission report is described as a phase of 'hidden colonialism', as large parts of the colonial structure and logic were seen to continue in unaltered terms.[101]

The referendum result has been seen as a catalyst for important subsequent political efforts. Greenlandic politicians and commentators had concluded that the fact that Greenland was subjected to an unwanted foreign policy situation could not simply be ignored and had to have

the central issue. Greenland was in every respect so different from Denmark and thus also from the EC that it was a utopia to want to link the two countries together in an unbreakable unit. Thus, the EC issue was also clearly linked to the demand for a more Greenlandic Greenland. The sceptical attitude was strengthened by the fact that the chairmen of both Greenland's Workers' Association and the fishermen's and trappers' organization KNAPK spoke against membership.'

[97] Danmarks Statistik (Denmark Statistics), *Statistiske efterretninger – Folkeafstemningen den 2. oktober 1972 om Danmarks tiltrædelse af De europæiske Fællesskaber* (1972).

[98] Danmarks Statistik (Denmark Statistics), *Statistiske efterretninger*.

[99] See Commission of the European Communities, 'Greenland's referendum on the European Community (Note from Mr Dalsager)', SEC (81) 1818 Brussels, 18 November 1981, 1 (available in the Historical Archives of the Commission at the European University Institute), where it is stated: 'When voting on Danish membership of the European Community in October 1972, there was a considerable majority in Greenland for Greenland to remain outside. However, the Danish Government's interpretation of the results of the vote throughout Denmark (including Greenland) was that Denmark as a whole had agreed to becoming a member of the European Community and this covered Greenland as well. It should be noted that the proportion of people voting in Greenland was relatively low compared with the rest of Denmark.'

[100] H. Krämer, 'Greenland's European Community (EC)-Referendum, Background and Consequences' (1982) 25 *German Yearbook of International Law* 273.

[101] 'Grønlandsudvalget 2022–2023', p. 13.

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consequences of a political nature.[102] Accordingly, attention first turned towards the future relationship between Greenland and Denmark as a necessary precondition for steps eventually being taken with regard to the relationship with the EC.[103]

13.4.2 THE WITHDRAWAL IN 1986 AND INCLUSION AS OCT.

Only a few years after the establishment of the home rule arrangement in 1979 a consultative and non-binding referendum was held in Greenland on 23 February 1982 on whether the EC Treaties should continue to apply in Greenland. The referendum was not concerned with the possibility of a transformation into an OCT status, but simply with the question: 'Do you want Greenland to remain a part of the European Communities?'[104] Also, the title of the Greenlandic Act on the referendum itself indicates that it was all about the continued application of the Treaties on the European Communities in Greenland.[105] It should be noted that an

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[102] See 'Greenland's referendum on the European Community (Note from Mr Dalsager)', where it is more precisely stated: 'Since Greenland's entry to the European Community there has been considerable political pressure for reviewing its membership. This view has been put forward in particular by the Siumut party (socialist), backed by the Greenland trade union movement and some small parties […] At the Greenland parliamentary elections of 1979, the Siumut party obtained 12 of the 20 seats. The opposition Atassut party (liberal-conservative), which wants Greenland to remain in the European Community, obtained 8 seats. One of the main reasons for Siumut's election victory was its election promise to take Greenland out of the European Community as soon as possible.'

[103] According to Jensen, 'Nyordning og modernisering 1950–79', p. 365 (author's translation): 'The voting result served as a catalyst for subsequent political efforts. […] Where until then the question had revolved around a Greenlandic for or against membership of the EC, the focus was now turned towards the future relationship between Greenland and Denmark.'

[104] See 'Landstingslov nr. 2 af 3. april 1981 om afholdelse af en folkeafstemning om fortsat anvendelse af traktaterne om De Europæiske Fællesskaber i Grønland' (Act No. 2 of 3 April 1981 on a referendum on the continued application of the Treaties of the European Communities in Greenland), Section 2(1) and 2(2). Author's translation: 'If a majority of the voters participating in the referendum answer no to this question, the national government is authorized to enter into negotiations with the national authorities on the timing and conditions for Greenland's withdrawal.' According to Section 6 it is understood that the question was to be phrased both in Danish and Greenlandic. Also see Harhoff, 'Greenland's Withdrawal from the European Communities', 13.

[105] 'Landstingslov nr. 2 af 3. april 1981 om afholdelse af en folkeafstemning om fortsat anvendelse af traktaterne om De Europæiske Fællesskaber i Grønland'.

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OCT status would signify that at least some elements of the treaties would still be in force in Greenland.

In the referendum 32,391 persons were entitled to vote among whom 12,615 voters (52 per cent of the total poll) voted 'No' and 11,180 (46.1 per cent of the poll) voted 'Yes' to the referendum's question.[106] In other words, a fairly small anti-EC majority emerged. Although the Danish government was in support of Greenland remaining in the EC, it had announced prior to the referendum that it would respect the result.[107] Following the outcome, the '*Landsstyre*' requested the Danish government, in which this competence was vested, to initiate the negotiations with the EC.[108] In other words, Greenland was not entitled to carry through the negotiations on its own. On 19 May 1982, the Danish government, with reference to Article 96 of the European Coal and Steel Community Treaty, Article 236 of the EEC Treaty, and Article 204 of the Euratom Treaty, then submitted its proposal in that regard.[109]

Against this background, the Council of Foreign Ministers of the EU decided at its meeting on 29 November 1983 to negotiate expediently on the terms and conditions for the withdrawal and the transformation to a future association.[110] The Council reached agreement in February 1984, which was signed in Brussels in March of the same year.[111] There was a minor delay caused by the fact that the necessary ratification had not been completed in all the Member States before the deadline of 1 January 1985.[112] Greenland's exit from the EC eventually took effect on 1 February 1985.

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[106] Harhoff, 'Greenland's Withdrawal from the European Communities', 13.

[107] S. Skovmand, 'Grønland gik imod strømmen', *Notat* (30 March 2007); and T. Høyem, 'Minister for Greenlandic Affairs Addressing the Conference at the Opening' in H. Rasmussen (ed.), *Greenland in the Process of Leaving the European Communities* (Copenhagen: Forlaget Europa, 1983), pp. 9–10.

[108] Harhoff, '§ 1', p. 28 and Jensen, 'Nyordning og modernisering 1950–79', pp. 393–394.

[109] 'Danish Government memorandum of 19 May 1982/Danish Government proposal for the amendment of the Treaties establishing the European Communities with a view to Greenland's withdrawal from the Communities and the application to Greenland of the special association arrangements in Part Four of the EEC Treaty' in Commission, *Status of Greenland, Commission opinion*, Commission communication presented to the Council on 2 February 1983, Bulletin of the European Communities, Supplement 1/83, p. 6.

[110] Weiss, 'Greenland's Withdrawal', 173.

[111] Ibid., 173.

[112] Ibid., 173.

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As mentioned above, the foregoing referendum in Greenland was concerned with whether Greenland should remain a part of the EC.[113] It was not asked whether Greenland should have the status of an OCT.[114] This may give rise to some surprise, because the possibility of OCT status was on the table beforehand. For instance, in a *Statement Issued by the Greenland Government on Greenland's Future Relationship with the European Community*, directed to the EC and dated 2 October 1981, the following was said:

> The Government is aware that many people will consider a third-country arrangement like that enjoyed by the Faroes as the most obvious course, but it wishes to confirm its interest in continued links with the European Communities if the referendum turns out in favour of Greenland's withdrawal. As a result, the Government would like Greenland to be associated with the European Community as an overseas country or territory on the same basis as the EEC's other overseas countries and territories. The Government would like to point out that many of these overseas countries and territories have an average per capita income similar to Greenland and that these areas' historical and constitutional ties to a Member State of the European Community are the same as Greenland's. The Government therefore finds it natural for Greenland to be associated with the European Community on the same conditions as the other overseas countries and territories and hopes that the Governments of the other Member States display the same sympathetic understanding as the Danish Government.[115]

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[113] Harhoff, 'Greenland's Withdrawal from the European Communities', 13.

[114] For an account of the reasons behind that choice, see e.g. M. Olsen, 'Minister for Social Affairs in Greenland's Home Rule. Perspectives beyond Greenland Secession from the EEC' in H. Rasmussen (ed.), *Greenland in the Process of Leaving the European Communities* (Copenhagen: Forlaget Europa, 1983), p. 26. It may be understood from the commentary on the Act in question, i.e. Landstingslov nr. 2 af 3. april 1981 (Act No. 2 of 3 April 1981), that the theme of the referendum was considered as well thought through. Thus, it is about the crucial Section 2 stating (author's translation): 'The theme is set out in the legal text deliberately clearly and unambiguously as an indicative vote on the question in order to avoid later interpretational doubts about results, which is an imminent risk when setting up several alternative questions. The positive wording of the question is partly due to the desire to avoid linguistic misunderstandings and partly due to consideration of the already existing slogans; "NO to EC" and "YES to EC".'

[115] Attached to 'Greenland's referendum on the European Community (Note from Mr Dalsager)'. Also see the discussion by F. Harhoff in Grønlands Hjemmestyre, *Redegørelse for forholdet mellem Grønland og EF* (September 1981), p. 13 onwards.

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It may give rise to concern that the choice ultimately made was not necessarily in conformity with the theme of the referendum. On the surface, the term OCT refers to territories that are situated outside the EU but that, for historical, social, cultural, and/or political reasons, have a relationship to a Member State of the EU. In fact, the term constitutes an example of coded language for colonialism.[116] Thus, OCTs are in reality former colonies. OCTs of today are referred to in Annex II to the Treaty on the Functioning of the European Union (TFEU).[117] They are not sovereign states with an international legal personality and can be viewed as situated in a grey area, as neither Member States nor third countries.[118]

The fact that Greenland was given such status was a product of negotiations.[119] Thereby, Greenland actually did to some degree remain related to the EC and subject to the applicability of some EC law (including some treaty provisions).[120] At the same time, a likely implication is that Greenlanders are to be considered Union citizens.[121] In some contrast, it should be noted that the psychological factor, understood as the Greenlanders not wanting Brussels to take over Copenhagen's previous

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116 H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) *European Journal of International Law* 836.

117 As a result of Brexit, those OCTs that had special relations with the United Kingdom are no longer associated with the EU, and the number of OCTs has been reduced from twenty-five to thirteen.

118 P. H. Madsen et al., 'Højt oppe mod Nord – der hvor EU-retten ikke (helt) gælder' (2016) 9 *Advokaten* 28–31.

119 It may be understood from 'Greenland's referendum on the European Community (Note from Mr Dalsager)', that: 'As an alternative to EEC membership, the Greenland Government (the Siumut party) has expressed its wish for an association agreement with the Community similar to that which the Community has with the overseas countries and territories. In his speech to the Parliament, Mr Dalsager stated that the question of Greenland gaining OCT status could not be settled at present and when considering this, it must be borne in mind that Greenland has a relatively high gross national product per inhabitant compared with most of the present OCT areas. Another decisive factor was Greenland's considerable exports of fish products to the Community.'

120 See e.g. U. Neergaard, 'Free Movement of Persons and the Autonomous Territories in the Danish Kingdom: Greenland and the Faroe Islands' in K. Hyltén-Cavallius and J. Paju (eds.), *Free Movement of Persons in the Nordic States: EU Law, EEA Law, and Regional Cooperation* (Oxford: Hart Publishing, 2023), pp. 225–246.

121 As this has been analysed in e.g. U. Neergaard, 'Shadows of Europe's Colonial Past', pp. 91–102.

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'psychological' role after having achieved home rule in 1979, has been taken as among the reasons for Greenland's leaving.[122] In combination, this points to an exceptionally paradoxical situation for Greenlanders.

The legal contours of the OCT formula were at the time reshaped to fit the future re-association of Greenland.[123] Thus, when Greenland in principle withdrew from the EC, a provision was inserted in what is now Article 204 TFEU. Here, it is stated that the provisions regarding the OCTs are applicable in Greenland. Article 198 TFEU highlights the basic purpose of association as being to promote the economic and social development of the countries and territories, and to establish close economic relations between them and the Union as a whole, as well as to serve primarily to further the interests and prosperity of the inhabitants of these countries and territories to lead them to the economic, social, and cultural development to which they aspire. Attention should also be given to Article 200 TFEU, which stipulates that customs duties on imports into the Member States of goods originating in the OCTs shall be prohibited in conformity with the prohibition of customs duties between Member States, and that customs duties on imports into each OCT from Member States or from the other OCTs shall be prohibited in accordance with the provisions of Article 30 TFEU.

Council Decision on the Overseas Association, including Greenland, is also of significance.[124] The essence of the interrelationship is stipulated in its preamble in the following manner:

> The TFEU and the secondary legislation adopted on the basis of it do not automatically apply to the OCTs, with the exception of a number of

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[122] See 'Greenland's referendum on the European Community (Note from Mr Dalsager)', pp. 1–2.

[123] K. Mason, 'European Communities Commission – Greenland – EC Commission Draft Approves Withdrawal of Greenland from European Community and Proposes Terms for Economic Reassociation' (1983) 13 *Georgia Journal of International and Comparative Law* 865.

[124] Council Decision 2021/1764 of 5 October 2021 on the association of the Overseas Countries and Territories with the European Union including relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other, OJ 2021 355/6. The Decision establishes the rules and the procedure for the association of the Union with the OCTs, including Greenland, and replaces Council Decision 2013/755/EU and Council Decision 2014/137/EU.

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> provisions which explicitly provide for their application. Although not third countries, the OCTs do not form part of the single market and must nevertheless comply with the obligations imposed on third countries in respect of trade, particularly rules of origin, health and plant health standards and safeguard measures.

This means that with respect to trade, OCTs must meet, for example, the obligations laid down in relations with third countries, in particular with regard to rules of origin, unless provision is made to the contrary. The decision contains several provisions that have the consequence that Greenland (and other OCTs), in many respects, is in a more privileged position than third countries and in several areas even equates to Member States.[125] Accordingly, pursuant to Article 44 of the decision, products originating in Greenland (and other OCTs) shall be imported into the Union free of import duty, and the Member States shall, according to Article 45 of the Decision, not apply to imports of products originating in Greenland any quantitative restrictions or measures having equivalent effect. Also, pursuant to Article 47 of the Decision, the Union shall not discriminate between OCTs and the OCTs shall not discriminate between Member States. As an OCT, Greenland therefore has direct access to the internal market without import restrictions; and, at the same time, the OCTs are not prevented from maintaining or introducing customs or quantitative restrictions on imports of products originating in the Union within the meaning of Article 45 of the Decision.[126]

In the above-mentioned new Arctic policy of the EU, there is a fairly brief reference to the OCT status of Greenland.[127] In particular, it is explained that under the Overseas Association Decision, Greenland has a wide-ranging political and policy dialogue with the EU, preferential trade arrangements to access the EU market, and is one of the largest OCT recipients of EU support per capita (225 million euros foreseen between 2021 and 2027).[128]

[125] Ibid.
[126] Ibid.
[127] 'Joint Communication: A stronger EU engagement for a peaceful, sustainable and prosperous Arctic', pp. 4–5.
[128] Ibid.

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13.5 CONCLUSIONS

This chapter has been concerned with showing how the present increase of the EU's interest in the Arctic area is to some degree justified due to its ties with Greenland through the Member State Denmark. The ties between Denmark and Greenland, however, are built on a heavy heritage of colonialism. Thereby, Danish colonialism is at the core of the EU's 'passage' to the Arctic. The ties in question may thus be considered as rather volatile, and the entire set-up may thereby harbour a looming backlash.

As to the heritage of colonialism, Greenland's relationship with Denmark has by now been very long, although this relationship has at times also been challenged by other countries. It has, however, in the most recent decades been one moving towards greater independence, and as a clear manifestation thereof a home rule arrangement was established in Greenland in 1979. Replacing this home rule arrangement, a self-rule arrangement entered into force in 2009. There are now strong forces working to achieve full sovereignty, most recently culminating with the launch of the proposal for a Greenlandic Constitution.[129]

Related thereto, the existence of democratic shortcomings in connection with significant referenda (or omission thereof) in the past century should be highlighted. Some of these democratic shortcomings in relation to Greenland are connected to the EU. As explained earlier, besides the flaws related to the decolonization of Greenland in 1953, there are flaws related to the EU accession in 1973 and subsequently to the withdrawal in 1985. Most significantly, the Greenlandic population did not have a separate vote and thus had to accede in 1973. In the same vein,

[129] 'Grønlandsudvalget 2022–2023'. In the same vein, also see the recently launched Greenlandic Arctic strategy, namely Naalakkersuisut/Departementet for Selvstændighed og Udenrigsanliggender (Government of Greenland/Department for Independence and Foreign Affairs), 'Grønland i verden. Intet om os, uden os. Grønlands udenrigs-, sikkerheds- og forsvarspolititiske strategi for 2024–2033 – en Arktisk Strategi' (February 2024); and the launching of a grand investigation of the history of the relationship between Greenland and Denmark, namely Naalakkersuisut (Government of Greenland) and Uddannelses- og Forskningsministeriet (Ministry of Education and Research), 'Kommissorium. Historisk udredning af forholdet mellem Grønland og Danmark' (June 2023).

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the Greenlandic population had not been asked explicitly at the referendum concerning the withdrawal, whether it wanted to get an OCT status, as the question asked may rather be understood as a third-country status – like the Faroe Islands – being at stake. Moreover, it was not the Greenlandic '*Landsstyre*', but rather the Danish government, in which this competence to carry through the negotiations of withdrawal was vested. Thus, Greenland's ties – through Denmark – to the EU are first and foremost based on its OCT status, used in relation to former colonies. Greenland entered into this status without being a party as such to the negotiations that followed its voting to withdraw from the EC.

If Greenland were to end up completely leaving the Danish realm, which is constantly up for discussion not least due to the colonial history as explained earlier, to become a sovereign state no longer subject to the Danish Constitution, such a step would evidently also affect Greenland's relationship with the EU. In that case this relationship would have to be redefined and renegotiated, since it at present is mainly defined through Greenland's connection with Denmark as an EU Member State. The consequences might in fact be quite significant, as Greenland would then as a likely point of departure assume the status of a third country unless it could and would wish to become a Member State in its own right or some other construction could be designed.

All in all, the findings of this chapter cannot and should not be ignored in relation to the EU's new, crucial Arctic policy, according to which the EU wishes to increase its engagement in and around the Arctic region, in response in particular to climate change and in support of sustainable development, security interests, and possible access to natural resources. All parties, the EU, Denmark, and Greenland, will soon have to face the complicated colonial history through improved dialogue and, even more importantly, through increased orientation towards finding solutions for a more stable, constitutional and/or international interrelationship. The interrelational platform, although currently volatile as the simmering conflicts in the Arctic are manifold, also contains positive elements, which however can only be realized through increased self-reflexivity.

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CHAPTER 14

The Land of Many Laws

Brexit and the Legacy of Colonialism in Northern Ireland

STEPHEN COUTTS

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14.1 INTRODUCTION

Brexit was in many respects a great revealer. Aside from the fractures it brought to the surface in the United Kingdom's constitutional and political systems,[1] Brexit also taught us a lot about European Union law. *Wightman* provides a definitive and sophisticated statement of the constitutional nature of the Union.[2] More comprehensively, Brexit revealed the elements of European Union law that really mattered, namely economic integration and the laws and institutional structures which facilitate this process. What came to be at stake in the Brexit negotiations was the internal market and the customs union and the paraphernalia of laws and institutions which facilitate both.[3] Furthermore, it was not only the individual bodies of substantive law but the manner in which these all worked together to create an environment for economic integration and the creation of a single economic space. The UK's attempts to 'cherry-pick' and the Union's resistance to this, underlined the systemic nature of internal market law and its institutional framework – including legal procedures, legal effects and institutions. The metaphor of the 'ecosystem' of Union law is apt and useful.

[1] D. Wincott, G. Davies and A. Wager, 'Crisis, What Crisis? Conceptualizing Crisis, UK Pluri-constitutionalism and Brexit Politics' (2021) 55 *Regional Studies* 1528.

[2] Case C-621/18 *Andy Wightman and Others v. Secretary of State for Exiting the European Union* EU:C:2018:999.

[3] The fact that the UK had opt outs from other significant areas of EU law, such as Economic and Monetary Union, Schengen and parts of the Area of Freedom, Security and Justice certainly influenced this. Withdrawal of a more fully integrated Member State would no doubt generate different considerations.

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Brexit also revealed another, more limited but nonetheless important and hitherto underappreciated characteristic or side effect of Union law. This was its role in facilitating the resolution of a postcolonial conflict with cross-border dimensions, which had persisted until the end of the last century in the north-west of Europe, namely what were known euphemistically as 'the Troubles' in Northern Ireland. This is the European Union as a peace project but perhaps differently than how that phrase is commonly understood. It was joint European Union membership of the United Kingdom and the Republic of Ireland that permitted conflicting political and constitutional aspirations of two communities – the legacy of a settler-type colony – to be accommodated. Intriguingly, and with some echoes of the Monnet method and the early hopes of neo-functionalism,[4] this operated not so much at the level of high constitutional principle: the so-called constitutional question and its link to post-sovereigntist tendencies in EU membership.[5] Instead, it was the day-to-day and quite technical operation of Union law and the common economic and social space it constructed between the two otherwise separate jurisdictions of Ireland and the United Kingdom which allowed the border to diminish as a marker of identity and separation, and for the aspirations of the nationalist community in Northern Ireland (i.e. that section of the population which typically identifies as Irish and would aspire for Northern Ireland to be unified with the Republic of Ireland) to be partially fulfilled.[6] The *functional* dimension of European Union law rather than (or in addition to) broader constitutional transformations played a key role in the facilitation of the peace process in Northern Ireland. Brexit entailed the removal of this largely unnoticed but crucial scaffold

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[4] Neo-functionalism and the Monnet method refers to an approach to European integration which stresses economic and legal integration in key sectors at a technical level, leading to 'spillovers' requiring integration and Europeanization in other areas over time. See P. Craig, 'Integration, Democracy and Legitimacy' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), pp. 13–40; and G. de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 12 *JEPP* 310.

[5] The 'constitutional question' refers to the central disagreement between the nationalist and unionist communities, namely whether Northern Ireland should be part of the United Kingdom or the Republic of Ireland.

[6] By contrast the unionist community typically identifies as British and seeks to maintain the current constitutional arrangements under which Northern Ireland is a constituent part of the United Kingdom.

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to the peace process in Northern Ireland and the resulting Belfast/Good Friday Agreement and, as a consequence, posed problems to the settlement embodied in that agreement, forcing constitutional choices which could be avoided in the context of joint EU membership.[7]

The resulting Ireland/Northern Ireland Protocol (hereinafter referred to as the Protocol) is designed to compensate for the absence of joint EU membership caused by Brexit.[8] It is however an imperfect substitute. It is an attempt to keep Northern Ireland in the EU single market for goods and yet minimize any undermining of the constitutional position of Northern Ireland within the UK. As such, it has created a hybrid and truly liminal legal system,[9] especially when combined with the operation of devolved government in Northern Ireland. It combines legal sources from regional, national and transnational legal orders in a unique and complex way and crystallizes Northern Ireland's position as lying between two unions.[10] It is a complex and far from ideal situation of legal pluralism or perhaps more accurately legal entanglement.[11] It is also a case study in the manner in which postcolonial conflict situations with cross-border dimensions can be facilitated by transnational law and legal systems and by a certain acceptance of legal pluralism.

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[7] The document is officially known as 'The Agreement Reached at the Multi-Party Talks on Northern Ireland' and is known variously as the Belfast Agreement and Good Friday Agreement. It consists of an agreement between the parties in Northern Ireland, as well as the UK and Irish governments. It resulted in a Treaty between Ireland and the United Kingdom as well as constitutional change in Ireland and legislation in the United Kingdom.

[8] Protocol on Ireland/Northern Ireland OJ 2019 C 384 I/92. Perhaps with a view to managing public relations in the UK, by decision of the Joint Committee, the EU and UK have agreed to refer to the Protocol as the 'Windsor Framework'. See Joint Declaration 1/2023 of the Union and the United Kingdom in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Committee OJ 2023 L 103/87. For convenience, the Ireland/Northern Ireland Protocol will be referred to by its original name (and still formal title) here.

[9] From the political perspective see J. Brennan, 'Stuck between the EU "Rock" and the UK "Hard Place"? Northern Ireland as a Liminal Space after Brexit' (2023) 27 *Space and Polity* 133.

[10] See S. de Mars and C. Murray, *Bordering Two Unions: Northern Ireland and Brexit* (Bristol: Policy Press, 2018).

[11] N. Krisch, 'Entangled Legalities in the Postnational Space' (2022) 20 *iCon* 476.

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After briefly providing some background on the colonial history of Ireland, this chapter will outline the crucial role played by Union law as a mostly invisible scaffold in the settlement embodied in the Belfast/Good Friday Agreement before reflecting on the necessary difficulties posed by Brexit and the resulting 'solution' in the form of the Protocol. A conclusion will reflect on the complex legal landscape which has emerged as a consequence of Brexit and also the role of legal pluralism or entanglement in the management of a cross-border postcolonial situation.

14.2 NORTHERN/IRELAND AS COLONY

There is by now a well-established tradition of postcolonial studies in Irish literature, cultural studies and historiography.[12] This is despite some resistance to attempts to place Ireland in the postcolonial world arising from its location in Western Europe and its constitutional integration with the United Kingdom in the nineteenth century.[13] Certainly, neither Ireland's necessary exposure to and experience in processes of Western European modernization and capitalist development nor the role of Ireland and Irish people in processes of British (and other) imperial projects should be overlooked.[14] However, it remains the case that Ireland's position for much of its history was as a colony in a position of economic and political subjugation to England and later within the United Kingdom, an experience which profoundly marked the economic, social and cultural development of the state up to the present day.[15]

As put by Engels 'Ireland may be regarded as the first English colony'.[16] It formed part of the first wave of North Atlantic colonization

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[12] See J. Cleary, 'Irish Postcolonial Studies, 1980–2021' (2022) 2022 *Radical History Review* 15.

[13] J. Cleary, 'Irish Studies, Colonial Questions: Locating Ireland in the Colonial World' in J. Cleary (ed.), *Outrageous Fortune: Capital and Culture in Modern Ireland* (Dublin: Field Day, 2007), pp. 59–60. For a discussion, and rejection, of this 'revisionist' account see B. O'Leary, *A Treatise on Northern Ireland – Volume I: Colonialism* (Oxford: Oxford University Press, 2019), chapter 1.2.

[14] For a well-rounded account of Ireland's and Irish people's experiences in the English Empire see J. Ohlmeyer, *Making Empire: Ireland, Imperialism and the Early Modern World* (Oxford: Oxford University Press, 2023).

[15] Cleary, 'Irish Studies, Colonial Questions', p. 59.

[16] Cited Ibid., p. 42.

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undertaken by Spain and England and other European states in the early modern period.[17] Early Norman invasion in the twelfth century led to a sporadic and only partially successful conquest of the island. Norman lords coexisted with local Gaelic lords and partially assimilated to the local culture; control by the English crown was limited. This group of 'Old English', remaining Catholic and involved in a number of rebellions against the English crown, was eventually displaced by the New English after the English Reformation and subsequent wars.[18] A more comprehensive conquest and assertion of control over the island took place in the seventeenth century during a number of wars, key amongst them the Cromwellian war.[19] A colonial project of settlement ('plantations') led to displacement and anglicization. The most successful of these plantation projects took place in the northern province of Ulster with large-scale migration of Protestants from England and Scotland.[20] A substantial community formed along distinct cultural, religious and linguistic lines, separate from the majority Gaelic community, which remained Catholic and Irish speaking until the mid-nineteenth century. In line with its position as a colony, the economy of Ireland tended to develop to complement and service rather than compete with the metropole.[21] Its economy remained largely agricultural with the exception of the Protestant-dominated north-east of the island, which participated in the industrial revolution of the nineteenth century, developing strong links with the industrial cities of northern England and Scotland. This divergence in economic trajectories also contributed to the economic and social distinctiveness of the north-eastern part of the island, with resulting effects on the distinctive identity of the region.[22]

[17] Ibid.

[18] The assimilation of the Old English to the Gaelic population and their shared Catholic religion (in contrast with post-Reformation English) led to divisions in Ireland taking on more a sectarian than ethnic hue.

[19] See O'Leary, *A Treatise on Northern Ireland – Volume I: Colonialism*, chapter 1.3.

[20] For a general history see Ibid. Within that Protestant population there were divisions between Presbyterian and Anglican communities, the former tending to occupy a lower social and economic position.

[21] See Cleary, 'Irish Studies, Colonial Questions', p. 32 ff. on the socio-economic relationship between Ireland and Britain.

[22] O'Leary, *A Treatise on Northern Ireland – Volume I: Colonialism.*

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The result was the creation of a mixed settler colony in most of the island,[23] with assimilation and anglicization of the local population. The Catholic Gaelic population remained a significant and disenfranchised majority. Rapid introduction of Ireland into the North Atlantic capitalist world in the seventeenth and eighteenth centuries and the elimination or incorporation of the local elite, created a particular socio-economic structure, with a small, Protestant minority owning large estates, worked by impoverished peasant tenants.[24] In the north-eastern part of the island the situation was different. While a substantial population of indigenous people remained, this coexisted alongside a large and rooted community of Protestants with an English and Scottish background. This community had a distinct identity, a central part of which included an affiliation with the metropole, expressed in loyalism to the British state and a desire to maintain the union with the United Kingdom.[25] As a consequence, when Ireland secured its independence following a rebellion and War of Independence in the 1920s, part of the settlement provided that six counties in the north-east of the island could exercise an option to separate from this new state and remain part of the United Kingdom, an option they exercised in 1922, leading to the creation of two political entities on the island: the Irish Free State, later to become the Republic of Ireland, and Northern Ireland, a self-governing unit within the United Kingdom.[26] Partition of the island, along with other compromises, was deeply controversial within the Irish independence movement and contributed to a short but bitter civil war.

Northern Ireland was created with the goal of securing as large a territorial and economic unit as possible in order to ensure its viability while at the same time ensuring that this unit would retain a Protestant majority.[27] The Catholic minority found itself in an economically, socially and politically disadvantaged situation and experienced

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[23] Cleary, drawing on the work of Fieldhouse and Fredrickson outlines a typology of four types of colony: administrative, plantation, mixed settlement and pure settlement. See Cleary, 'Irish Studies, Colonial Questions', p. 30.

[24] Ibid. p. 33.

[25] O'Leary, *A Treatise on Northern Ireland – Volume I: Colonialism*, chapter 1.7.

[26] J. Casey, *Constitutional Law in Ireland* (Dublin: Roundhall, 2000), pp. 7–9.

[27] B. O'Leary, *A Treatise on Northern Ireland – Volume II: Control* (Oxford: Oxford University Press, 2019), chapter 2.2.

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significant forms of discrimination.[28] Inspired by civil rights movements in the US, Irish Catholics organized politically in the 1960s to demand equal treatment and the reform of political processes.[29] Violent suppression of these social movements combined with inter-communal tensions and more militant tendencies in the Irish nationalist movement gave rise to a thirty-year period of terrorism and violent social unrest in Northern Ireland, a period known as 'the Troubles'.[30] After a number of failed attempts at political settlement, a peace process was successfully launched in the 1990s and culminated in the signing of the Belfast/Good Friday Agreement in 1998.[31] The agreement has been amended a number of times and the peace process remains ongoing. Nonetheless, it remains the basis for the constitutional settlement of Northern Ireland and to date there has not been a widespread recurrence of political violence.

14.3 THE BELFAST/GOOD FRIDAY AGREEMENT AND THE ROLE OF THE EUROPEAN UNION

14.3.1 THE BELFAST/GOOD FRIDAY AGREEMENT. The Belfast/Good Friday Agreement consists of three strands, in an attempt to manage internal divisions in Northern Ireland, secure the rights of both communities as well as address the broader 'constitutional question' and Northern Ireland's relationship with the Republic of Ireland and the rest of the United Kingdom.[32] The first strand deals with issues internal to Northern Ireland. This established a devolved assembly and government with a power-sharing arrangement based on the d'Hondt model, in effect a consociational system of government ensuring that both communities are represented in the Northern Ireland Executive (the

[28] Ibid.

[29] Ibid., chapter 2.5.

[30] O'Leary, *A Treatise on Northern Ireland – Volume II: Control*, chapters 2.5–2.6 and B. O'Leary, *A Treatise on Northern Ireland Volume III: Consociation and Confederation* (Oxford: Oxford University Press, 2019), chapters 3.2–3.4.

[31] O'Leary, *A Treatise on Northern Ireland Volume III: Consociation and Confederation*, chapter 3.5.

[32] See Brennan, 'Stuck between the EU "Rock" and the UK "Hard Place"?', 133.

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regional, 'devolved' government).[33] Provisions were also included relating to policing reform and rights guarantees to address the concerns of the minority nationalist community.[34]

The second strand deals with the 'North–South' relationship that is between Northern Ireland and the Republic of Ireland.[35] This established a number of bodies, foremost of which is the North–South Ministerial Council, bringing together ministers from both jurisdictions. Also included in the North–South dimension of the agreement are a set of implementation bodies managing implementation of joint action in a number of areas where cross-border cooperation would be useful, such as energy or tourism.[36] The North–South strand therefore has a political/symbolic and also functional dimension, giving some expression to the need to promote all-Ireland cooperation and indeed some embryonic form of a thicker political relationship between Northern Ireland and the Republic of Ireland while also having more practical, functional elements in specific policy fields.

Partially to address unionist sensibilities in the face of these North–South bodies, the Belfast/Good Friday Agreement also contained an East–West strand, managing the relationship between Ireland as a whole and the United Kingdom, including devolved governments as well as other political entities in the archipelago.[37] It consists of two bodies: a British–Irish Council and a British–Irish Intergovernmental Conference. The British–Irish Council is composed of parliamentary representatives

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[33] The d'Hondt model creates a power-sharing arrangement whereby a government must be formed from parties representing the different communities and indicating the proportion of ministers each party has in government. See J. McEvoy, 'The Institutional Design of Executive Formation in Northern Ireland' (2006) 16 *Regional and Federal Studies* 447.

[34] For an overview of the Belfast/Good Friday Agreement see D. O'Sullivan, 'The Good Friday Agreements: A New Constitutional Settlement for Northern Ireland' (2000) 22 *Dublin University Law Journal* 112.

[35] For an overview see J. Coakley, 'The North-South Relationship: Implementing the Agreement' in J. Coakley, B. Laffan and J. Todd (eds.), *Renovation or Revolution? New Territorial Politics in Ireland and the United Kingdom* (Dublin: University College Dublin Press, 2005), pp. 110–131.

[36] Ibid.

[37] For an overview see R. Fanning, 'The British-Irish Relationship: From Antagonism to Alliance' in Coakley, Laffan and Todd (eds.), *Renovation or Revolution? New Territorial Politics in Ireland and the United Kingdom*, pp. 132–146.

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from the various political entities in the British–Irish archipelago, namely the Irish and UK governments, the devolved governments of Wales, Scotland and Northern Ireland and representatives from the UK's dependencies in the area, in particular the Isle of Man and the Channel Islands. The British–Irish Intergovernmental Conference consists of representatives at ministerial or prime ministerial level. While both the British–Irish Council and the British–Irish Intergovernmental Conference met infrequently and fell into abeyance for some time, their value has been recognized in the post-Brexit context where representatives of the British and Irish governments and officials will no longer meet at EU fora.

A compromise on the constitutional question resulted in the enshrinement of the so-called principle of consent. Northern Ireland's constitutional status would only change with the wishes of a majority of its population as determined by a referendum.[38] The acceptance of this principle constituted an important concession for both the nationalist community and the Irish state, accepting as it does the legitimacy of Northern Ireland as a political unit and the partition of the island.[39] At the same time, it committed the United Kingdom under an international treaty to change the constitutional status of Northern Ireland in appropriate circumstances. This, alongside the institutionalization of opportunities for the Irish government to have input into governance questions relating to Northern Ireland in the British–Irish Intergovernmental Conference and its role as shared guarantor (alongside the UK government) of the Belfast/Good Friday Agreement, led to a nuancing of the question of sovereignty over Northern Ireland, away from an absolutist conception towards something more ambiguous. Related to these broader questions and further crystallizing Northern Ireland's liminal constitutional status, was a commitment that individuals born in Northern Ireland would be entitled to identify as British, Irish or both and acquire the citizenship of either or both states.[40]

[38] The Belfast/Good Friday Agreement, Article 1(i) and (ii) in particular.

[39] It also required amendment of Articles 2 and 3 of Bunreacht na hÉireann (the Irish Constitution). See O. Doyle and T. Hickey, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus, 2019), pp. 2–14.

[40] See O'Sullivan, 'The Good Friday Agreements'; and on the question of nationality law in Northern Ireland more generally B. Ryan, 'The Ian Paisley Question: Irish Citizenship and Northern Ireland' (2003) 25 *Dublin University Law Journal* 145.

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14.3.2 THE ROLE OF THE EUROPEAN UNION. The European Union and European Union law did not feature strongly in the text of the agreement, being mentioned only in relation to some aspects of North–South cooperation where fields governed by EU law were implicated.[41] The European Union provided some assistance, particularly on the question of financial aid for peace-building initiatives, in particular through the PEACE initiative, but was neither a party to the negotiations (unlike the key role played by the United States government in brokering the agreement) nor a guarantor of the agreement alongside the British and Irish governments.[42] Nonetheless, the role of joint EU membership of both the UK and Ireland was crucial, if underappreciated, to the successful development of the peace process in a number of ways.

Firstly, joint EU membership provided a key context for the maturing of the relationship between the UK and Ireland from asymmetrical dependence into one of equal and close partners.[43] European Union membership developed Ireland economically, providing the opportunity to diversify its economy away from the dependence on the UK market. Ireland's economy had historically developed in order to service rather than compete with the metropole. The result was an economy based on agricultural exports, the main market for which was overwhelmingly the United Kingdom. European Union membership allowed Ireland to develop its industrial sector and diversify its trade. This is particularly the case after the 1990s when large multinational companies developed thriving technology and pharmaceutical industries, attracted in part by Ireland's English-speaking workforce and access to the European market.

Meeting regularly as sovereign equals within the context of joint membership also underlined the formally equal nature of the two states, maturing a relationship which had been distinctly asymmetrical in the decades immediately after Irish independence.[44] Ireland was both a former colony

[41] See B. Laffan, 'The European Context: A New Political Dimension in Ireland, North and South' in Coakley, Laffan and Todd (eds.), *Renovation or Revolution? New Territorial Politics in Ireland and the United Kingdom*, pp. 166–184.

[42] Ibid.

[43] Fanning, 'The British-Irish Relationship', p. 133.

[44] Ibid.

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and the much smaller and weaker state, economically and politically. As noted above, it was also heavily dependent on the UK as its main export market, a dependence which was not mutual. On a more practical level,

> [j]oint membership of the European Union provided British and Irish ministers and officials with a forum for continuing contact across a whole range of public policy issues. EU meetings, particularly at the European Council, provided British and Irish prime ministers with an informal arena to discuss Northern Ireland at the margins of EU deliberations. Such bilateral meetings … provided an important opportunity for relationship building between the heads of government. Opportunities for informal contact meant that even when Anglo-Irish relations were at a low ebb, there was not a complete breakdown in communications.[45]

The broader nature of the European Union as a post-sovereign entity, framing relationships between sovereign states in new ways and facilitating cross-border cooperation and interaction also provided an important context and model for the peace process. The 'messianic' mission of the European Union as a peace project and its attempt to bring together previously antagonistic states, indeed mortal enemies, did not escape some participants in the peace process.[46] That it did so by both attenuating the sharp edges of sovereignty and by encouraging transnational economic and social connections was also noted.[47]

More concretely, the embedding of both Ireland and the United Kingdom (including Northern Ireland) within the broader economic structures of the European Union, especially after the completion of the single market and the abolition of customs checks, facilitated a process by which the border between the two legal jurisdictions, while continuing to exist as a matter of international law, was significantly diminished in importance socially and symbolically.[48] Customs and security checks

[45] Laffan, 'The European Context', p. 171.

[46] See J. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825.

[47] Laffan, 'The European Context', p. 173.

[48] See M. Murphy and J. Evershed, 'Contesting Sovereignty and Borders: Northern Ireland, Devolution and the Union' (2022) 10 *Territory, Politics, Governance* 661.

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had long existed between the two jurisdictions before the implementation of the Belfast/Good Friday Agreement. Security posts at the borders represented a visible and imposing symbol of British presence in Northern Ireland and the distinction between the two jurisdictions. They, alongside more prosaic border checks, were frequently the target of terrorist attacks. Removal of border checks was seen as a key component in the normalization of Northern Ireland's security situation, the development of communities in the border region and the facilitation of greater cross-border cooperation.[49]

There was also an important symbolic dimension to the removal of the border which could be understood as an integral part of the North–South strand of the Belfast/Good Friday Agreement. Different legal frameworks combined not just to remove the border but to allow the island of Ireland to be considered a single economic and social space, thereby facilitating the expression of the identity of the nationalist community and indeed the ability of members of that community to plan their lives on an all-Ireland basis.[50] The Common Travel Area (CTA), an informal arrangement between Ireland and the UK, abolishes border controls on persons between the two jurisdictions and extends rights of residence and equal treatment to United Kingdom and Irish nationals respectively.[51] The customs union and single market allow the same thing with respect to goods and economic life. Customs and regulatory checks with respect to goods are no longer necessary and hence the need for a physical border for goods disappears. The operation of the single market in all its regulatory and institutional complexity, allows economic actors to operate across borders with a great degree of freedom, developing supply chains and penetrating markets but also receiving services (including health and education) and engaging in

[49] See J. Doyle and E. Connolly, 'Brexit and the Northern Ireland Question' in F. Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford: Oxford University Press, 2017), pp. 139–160.

[50] See Murphy and Evershed, 'Contesting Sovereignty and Borders'.

[51] For an overview see B. Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *Modern Law Review* 855; and more recently G. Barrett and G. Butler, 'Europe's "Other" Open-Border Zone: The Common Travel Area under the Shadow of Brexit' (2018) 20 *Cambridge Yearbook of European Legal Studies* 252; and I. Maher, *The Common Travel Area: More than Just Travel* (Royal Irish Academy – British Academy Brexit Policy Discussion Paper, 2017).

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employment. In short, the absence of a physical border and the opportunities for cross-border life facilitated by the internal market and the customs union (amongst other elements of EU law), combined with the CTA, created the conditions for Northern Ireland and Ireland to be treated as a single economic and social space and thus gave expression to the nationalist community's aspiration to identify with the rest of Ireland in a concrete and meaningful way.

It is worth pausing to note the mixture of both the 'high constitutional politics' and the more mundane functionalist operation of a single market and customs union in the contribution of the EU to the peace process in Northern Ireland. The maturing of the relationship between Ireland and the United Kingdom within the context of the European Union and its predecessors was certainly key, as was the opportunity afforded by frequent meetings and the development of ongoing relations between politicians and senior officials. Likewise, the 'post-sovereigntist' hue to constitutional politics within the European Union certainly provided an alternative to the otherwise binary, mutually incompatible constitutional aspirations of the two communities. However, peace processes are not built on high constitutional and political rhetoric alone but demand the transformation of concrete, tangible conditions on the ground. The effective elimination of the border by the operation of mundane, functional single market legislation and the completion of the customs union had important symbolic effects and normalized the situation between the two jurisdictions. It also diminished the significance of the border for the purposes of daily life and for politics more generally. In some ways it harks back to the original Monnet method: functionalism and the facilitation of cross-border economic and social activities in the service of peace.

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14.4 CHALLENGES POSED BY BREXIT

Brexit posed a significant challenge for the peace settlement in Northern Ireland, particularly when the United Kingdom opted for a so-called 'hard Brexit', withdrawing from the customs union and the internal market. Withdrawal from the customs union and the internal market would necessarily mean the introduction of customs and regulatory checks

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between the United Kingdom and the European Union. Installing these on the border between Ireland and Northern Ireland would pose a number of practical, security and broader political risks. On a practical level, the nature of the border would make it extremely difficult to police. It would also pose difficulties for individuals and communities in the border area, many of whom engage in multiple border crossings in a single day, living in one jurisdiction and working or attending school in another.[52] This would be particularly the case if (in light of the large number of border crossings), the number of official border crossings was reduced and minor crossings closed. A number of commentators raised the possibility of new border installations being a target for remaining dissident republican terrorist organizations, a process which risked escalation with increasing securitization and even militarization of border crossings in response to security threats.[53] It is difficult to overstate the symbolic importance and potential for political destabilization of large-scale military installations in a post-conflict society such as Northern Ireland. Finally, the reinstatement of a physical border would undermine the North–South dimension of the Belfast/Good Friday Agreement, which depended on the diminishment of the border as a practical and hence political reality resulting from the joint embedding of Ireland and Northern Ireland in the European Union's single market and customs union.

Ensuring the absence of a physical border was quickly identified as a priority for the Irish government within its broader response to Brexit, alongside securing as close a relationship as possible between the UK and the European Union in order to diminish the economic impact of Brexit on Ireland.[54] A deliberate choice was made by Ireland to align itself closely with the European Union, underlining its position as a Member State rather than as an 'intermediary' between the UK and the EU. Ireland launched an impressive diplomatic effort, engaging intensely both with the Union institutions and national capitals in order to press upon European decision-makers and fellow Member

[52] See Doyle and Connolly, 'Brexit and the Northern Ireland Question', pp. 139–160.
[53] Ibid.
[54] See B. Laffan, 'Brexit: Re-opening Ireland's "English Question"' (2018) 89 *Political Quarterly* 568.

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States the importance of the border issue to the peace process and to ensure that it would form part of the Union's objectives in the first stage of the Brexit negotiations, that is in the context of the Withdrawal Agreement rather than the future relationship. This last point was key in ensuring that the border question was dealt with at the stage where the European Union had most leverage and also to ensure that the border would not be the subject of wider trade-offs in the context of negotiating the future relationship. In its diplomatic efforts to frame the issue for European partners and ensure that it was treated within the first phase of the negotiations, Ireland was entirely successful. This was achieved by the impressive efforts made by the Irish foreign service and its 'first mover advantage', facilitated by its preparation in advance of Brexit and the absence of similar preparation on the part of the United Kingdom.[55]

The Brexit negotiations were long and tortuous, involving two British prime ministers, a number of extensions to the Article 50 Treaty on the Functioning of the European Union (TFEU) timeline and two agreements, one failed and one ultimately successful.[56] It resulted in the Protocol as an integral part of the Withdrawal Agreement concluded between the EU and the UK at the end of January 2020.[57] The necessity for the Protocol arose from the choices made by the United Kingdom during the Brexit negotiations. It became increasingly clear that Prime Minister Theresa May's originally vacuous phrase 'Brexit means Brexit' in fact meant withdrawal from the customs union and internal market. This was a logical consequence of the UK's goal to enjoy independent trade and regulatory policies following withdrawal and its refusal to be subject to the jurisdiction of the Court of Justice of the European Union (CJEU or Court of Justice).

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[55] Ibid.

[56] Article 50 TFEU regulates the withdrawal of a Member State from the European Union. Article 50(3) TFEU stipulates that withdrawal shall take place either on a date specified in the Withdrawal Agreement between the Union and the Member State in question or, failing that, within two years. The two-year period could be extended by a decision of the European Council. This occurred twice before eventual withdrawal took place on 31 January 2020. See M. Dougan, *The UK's Withdrawal from the EU: A Legal Analysis* (Oxford: Oxford University Press, 2020), chapter 5.

[57] For a detailed overview of the legal dimensions of the Brexit process see Ibid.

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With respect to the UK's only land border with the EU, Theresa May made three promises which were impossible to keep at the same time. Firstly, she promised Eurosceptics in her own political party – the Conservative Party – to withdraw from the internal market and customs union. Secondly, she promised the Irish government and the European Union that there would be no hard border between Ireland and Northern Ireland. Indeed this promise was elevated to a somewhat formal status in a Joint Report published by the European Commission and the UK in December 2017, confirming the broad outline of agreements on the Withdrawal Agreement and allowing the opening of discussions on the future relationship.[58] Finally, Theresa May promised the unionist community in Northern Ireland and in particular its largest party, the Democratic Unionist Party (DUP), that there would be no 'new borders' between Northern Ireland and Great Britain and that Northern Ireland's constitutional position within the United Kingdom would be maintained and that the entire United Kingdom – including Northern Ireland – would leave both the internal market and customs union.[59] This created what became known as the Brexit Trilemma. May had made three promises. She could keep any two of these but not all three. The UK as a whole could withdraw from the customs union and single market with no new border between Northern Ireland and Great Britain but this would entail a border between Northern Ireland and Ireland. It could also withdraw from the customs union and single market but keep Northern Ireland within the customs union and single market. This would have the benefit of ensuring that there would be no hard border between Northern Ireland and Ireland but would necessitate border checks between Northern Ireland and Great Britain. Finally, the UK could ensure no new borders between Northern Ireland and Ireland and between Northern Ireland and Great Britain but only by remaining as a whole within the customs union and single market. At least one promise would have to be broken.

May's response was a compromise. The preferred solution would be for the border issue to be dealt with in the future relationship. If,

[58] Ibid. p. 96.

[59] T. May, 'Prime Minister's Commitments to Northern Ireland' (2017). Available at www.gov.uk/government/publications/prime-ministers-commitments-to-northern-ireland.

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however, the future relationship did not result in a situation where there was no need for a border between Ireland and Northern Ireland, a 'backstop' solution would kick in. In such a situation some internal market rules would continue to apply in Northern Ireland alongside appropriate jurisdiction for the Court of Justice while the United Kingdom as a whole would effectively remain within the customs union. This arrangement would remain in place until alternative arrangements (presumably based on technological innovations) would allow withdrawal from the customs union. This solution would eliminate the need for customs checks between Northern Ireland and Great Britain leaving minimal regulatory checks and would also ensure the absence of a hard border between Ireland and Northern Ireland. While the UK would leave the single market, it would not do so as a single unit and would (in the event the backstop was triggered) remain within the customs union. Unfortunately, May's compromise was too much of a compromise. It was unacceptable to the DUP and, taking their lead from the DUP, the Eurosceptic wing of the Conservative Party. Given May's weak political position, defeat was inevitable. Her version of the Withdrawal Agreement was defeated three times in Parliament and she resigned to be replaced by Boris Johnson.[60]

14.5 THE 'SOLUTION': THE IRELAND/NORTHERN IRELAND PROTOCOL

In an effort to break the political deadlock Boris Johnson renegotiated the Protocol changing the 'backstop' to a 'frontstop', applicable regardless of the outcome of the future relationship. Significant parts of internal market legislation, particularly as it applies to goods, would apply to Northern Ireland along with jurisdiction for the Court of Justice. Northern Ireland would remain within the customs territory of the United Kingdom, but goods at risk of onward movement to Ireland and hence the EU's internal market, would be subject to the customs code of the European Union. The result was effectively the breaking of the promise made by Theresa May to the DUP: a border in the Irish sea would be necessary in order to ensure regulatory checks and some

[60] Dougan, *The UK's Withdrawal from the EU*, chapter 5.

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customs checks. After a number of failed attempts to gain approval for his renegotiated Withdrawal Agreement, Boris Johnson dissolved Parliament, calling a general election in which he won a considerable majority.[61] No longer reliant on the votes of the DUP, Johnson ratified the Withdrawal Agreement and legislated for Brexit generally and for the Protocol in particular with the adoption of the Withdrawal Agreement Act 2020.[62]

This however was not the end of the story. The Protocol should have come into effect on 31 December 2020 with the end of the transition period.[63] However, problems with implementation combined with resistance from the unionist community resulted in the UK unilaterally deciding not to apply key provisions throughout 2022 and seeking to renegotiate the Protocol.[64] While unwilling to reopen the text of the Protocol as such, the EU did negotiate with the UK on its implementation, resulting in the adoption of the 'Windsor Framework'.[65] The Windsor Framework is not a radical overhaul of the Protocol and is mainly concerned with the implementation of the provisions on the movement of goods. There is one change to the text of the Protocol, introducing a new 'Stormont Brake' (discussed further below). Nonetheless, the Windsor Framework does 'provide for a significant reworking of the Protocol' with *de minimis* rules for its application and the disapplication

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[61] Ibid.

[62] Ibid.

[63] The Withdrawal Agreement between the EU and UK provided for a 'transition period' between the exit of the UK from the EU (which took place on 31 January 2020) and the adoption of a framework for a new relationship (governed by the Trade and Cooperation Agreement). During this transition period the UK, broadly speaking, remained subject to Union law.

[64] See Editorial Comments, 'Unfinished Brexit Business: The Windsor Framework on the Northern Ireland Protocol' (2023) 60 *Common Market Law Review* 1217, at 1220–1221. Unionist resistance included a legal challenge: a number of unionist politicians challenged the Protocol in the UK courts, arguing that it breached the Acts of Union 1800 (incorporating Ireland into the UK) and the Northern Ireland Act 1998 (implementing the Belfast/Good Friday Agreement in UK law). The UK Supreme Court ultimately rejected the challenge relying on the principle of parliamentary sovereignty. See *Allister and Peeples v. Secretary of State for Northern Ireland* [2023] UKSC 5. There was also social unrest within the unionist community resulting in heightened tensions.

[65] See C. R. G. Murray and N. Robb, 'From the Protocol to the Windsor Framework' (2023) 74 *Northern Ireland Legal Quarterly* 395.

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of some substantive rules (particularly on sanitary and phytosanitary requirements).[66]

The main body of the Protocol is a relatively short document, with a total of eight Articles. Its short nature is deceptive. Various provisions of the Protocol refer to annexes, which themselves contain references to hundreds of pieces of Union legislation to be applied to Northern Ireland. To simplify a very complex legal arrangement, the Protocol ensures that Northern Ireland remains in the single market for goods and de facto within the customs union. While quite technical in places, some provisions of the Protocol and especially its recitals do emphasize its broader role in trying to maintain the conditions for the continued operation of the Belfast/Good Friday Agreement and the wider set of relations between Ireland, Northern Ireland and the rest of the UK.[67]

14.5.1 EU LAW APPLICABLE IN NORTHERN IRELAND. While most focus has understandably been on the operation of the provisions of the Protocol relevant to the movement of goods and customs, the Protocol also protects another element of the peace process underpinned by European Union law. The Belfast/Good Friday Agreement contains a number of provisions on the protection of rights in Northern Ireland, committing the UK to be a party to and to implement the European Convention on Human Rights (ECHR) into domestic law with respect to Northern Ireland, establish a number of rights-protecting institutions and more broadly to ensure the non-diminution of rights in Northern Ireland.[68] A number of these rights derive from European Union law, in particular equality legislation. Article 2 of the Protocol guarantees those rights and institutions. Unlike the provisions on the movement of goods and customs, the commitment of the UK under Article 2 of the Protocol is

[66] Ibid., 396.

[67] The recitals note ‘the commitment of the United Kingdom to protect North-South Cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls’ and ‘that the Union and the United Kingdom have carried out a mapping exercise which shows that North-South cooperation relies to a significant extent on a common Union legal and policy framework’.

[68] C. McCrudden, *The Good Friday Agreement, Brexit and Rights* (Royal Irish Academy – British Academy Brexit Policy Discussion Paper, 2017).

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merely to ensure the non-diminution of rights contained in EU legislation within Annex 1 to the Protocol.[69] It may replace those provisions with domestic law but in doing so must ensure a comparable level of protection. The CTA is also protected by the Protocol, recalling the essential role the CTA plays – both in its abolition of border controls and in providing for reciprocal free movement and equal treatment rights for UK and Irish nationals – in ensuring the absence of a border and the creation of a broader all-Ireland social and economic space. Article 3 of the Protocol permits the continuation of the CTA between the UK and Ireland and provides that it shall continue 'without affecting the obligations of Ireland under Union law', particularly with regard to free movement.[70]

The main body of the Protocol is taken up with arrangements for the free movement of goods in an effort to ensure the absence of a hard border between Ireland and Northern Ireland. To simplify somewhat, this is achieved by ensuring that Northern Ireland remains in the single market for goods and that the EU's customs code is applicable to Northern Ireland. Complexity is added by the desire of the UK government, with sensitivity to unionist concerns, to ease movement of goods between the rest of the UK and Northern Ireland. The result is that a large body of EU law relating to the single market, referenced in Annex 2 to the Protocol, will apply to Northern Ireland producers. Goods entering Northern Ireland from the rest of the UK or a third state will not have to comply with these regulations which may nonetheless (especially in particular areas such as agriculture and food) entail substantial certification and other regulatory requirements, unless they are at risk of onward movement to the single market or will be processed. Similarly, the customs code will apply to Northern Ireland with respect for goods which are deemed to be at risk of onward movement to the single market.[71]

[69] C. McCrudden, 'Human Rights and Equality' in C. McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge: Cambridge University Press, 2022), pp. 143–158.

[70] Protocol on Ireland/Northern Ireland, Article 3. The most obvious situation in which this would be relevant is if the UK sought to impose additional visa requirements on EU citizens and their family members and attempted to oblige Ireland to mirror those requirements as part of broader visa policy coordination in the context of a CTA.

[71] Ibid., Article 5(1) and (2).

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Criteria for determining which goods are at risk of onward movement are to be drawn up by the EU–UK Joint Committee which manages the implementation of the Withdrawal Agreement. Articles 30 and 110 TFEU shall also be applicable to Northern Ireland and quantitative restrictions prohibited between Northern Ireland and the Union.[72] Articles 7 to 11 make applicable other areas of EU law, including VAT and excise (Article 8), electricity (Article 9) and state aid (Article 10). Article 7 deals with registrations, assessments, certificates and so on of relevance to the free movement of goods.

14.5.2 LEGAL NATURE OF THE PROTOCOL. If the substance of the Protocol, applying significant swathes of EU law to Northern Ireland and containing a cumbersome procedure for differentiating between goods destined for the local market and goods at risk of onward movement, is eye-catching and already complicates Northern Ireland's legal situation, the governance arrangements and the nature of the law made applicable by the Protocol are also worthy of note. The Protocol is an integral part of the Withdrawal Agreement, which in turn enjoys primacy in UK law by virtue of Article 4 of the Withdrawal Agreement and section 7A of the UK's Withdrawal Act 2018 (as amended by the UK Withdrawal Agreement Act 2020).[73] Section 7A replicates the language of the earlier European Communities Act 1972 which provided for direct effect and primacy of EU law within the UK domestic legal system.[74] All EU law made applicable by the Protocol, including relevant future law (applicable by virtue of 'dynamic alignment' i.e. the application of future, relevant EU law in Northern Ireland), thus enjoys direct effect and primacy over UK law. The Charter of Fundamental Rights of the EU will also apply.[75] It is important

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[72] Ibid., Article 5(5).

[73] European Union (Withdrawal) Act 2018 (as amended by the Withdrawal Agreement Act 2020), s. 7A.

[74] C. Barnard, 'The Status of the Withdrawal Agreement in UK Law' in McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol*, pp. 107–117.

[75] The application of the Charter may have particular relevance with reference to Article 2 of the Protocol i.e. the non-diminution of rights. See for example its application in a recent judgment striking down the UK government's legislation providing for an amnesty in relation to Troubles-era crime in *Dillon et al. v. Secretary of State for Northern Ireland* [2024] NIKB 11, paras. 518 ff.

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to distinguish this from what is known as 'retained EU law' in the UK legal system. In order to avoid the creation of large gaps in its legal system on its withdrawal from the EU, the UK effectively replicated the vast majority of EU law in UK domestic law. As a result, there is now a category of 'retained EU law' in UK law.[76] This is UK domestic law rather than EU law, even if the substance remains the same. Its application and interaction with other parts of UK law is subject to various rules of interpretation (including with respect to the case law of the Court of Justice, differentiating between cases decided pre- and post-withdrawal).[77] Not all EU law was incorporated in this manner, for example the Charter of Fundamental Rights was excluded.[78] Retained EU law applies in Northern Ireland with respect to those matters which do not fall within the scope of the Protocol. However, the Protocol also ensures that a body of law, also derived from EU law but with a different nature, and enjoying direct effect, primacy and dynamic alignment and bringing into play the Charter of Fundamental Rights, applies in Northern Ireland. Note should also be taken of the application of law derived from the Withdrawal Agreement proper, in particular provisions relating to citizens' rights, which have their own institutional arrangements.[79]

14.5.3 IMPLEMENTATION, ENFORCEMENT AND GOVERNANCE OF THE PROTOCOL. The single market does not just consist of a set of rules but operates as part of a wider legal 'ecosystem' including institutions and processes for monitoring and enforcement which in turn underpin the operation of mutual trust so central to the operation of EU law. While the practical operation of the Protocol will be implemented by UK officials, there are provisions relating to data sharing with the Commission and the possibility of on-site inspections by the Commission.[80] The Protocol also extends the jurisdiction of EU

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[76] European Union (Withdrawal) Act 2018, s. 7.
[77] European Union (Withdrawal) Act 2018 (as amended by the Withdrawal Agreement Act 2020), s. 6.
[78] See B. McCloskey, 'The Charter of Fundamental Rights' in McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol*, pp. 159–170.
[79] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community OJ 2019 C 384 I/1, pt 2 – Citizens' Rights.
[80] Protocol on Ireland/Northern Ireland (n 8).

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institutions to supervise and enforce the application of relevant EU law in Northern Ireland, including infringement proceedings. The judgment of the Court of Justice in *Commission v. United Kingdom*, fining the UK for failures in relation to fuel marking, is an indication that these provisions will bite.[81] Importantly, the Court of Justice found that, with respect to Northern Ireland, the infringement continued after the transition period (when EU law ceased to apply to the rest of the UK) by virtue of the operation of the Protocol and that moreover the fine for this element of the infringement should be calculated with reference not to the GDP of Northern Ireland but by reference to the GDP of the UK as a whole, in order to ensure adequate deterrence.[82]

Article 12 of the Protocol also provides that the courts of the United Kingdom shall have the ability and in some cases the obligation to make a preliminary reference to the Court of Justice. In practice this will principally mean the courts of Northern Ireland. However, Article 12 of the Protocol is not limited to the courts of Northern Ireland and given that the UK Supreme Court will in certain circumstances be a court of final instance for matters falling within the scope of the Protocol, the obligation to make a preliminary reference under the third paragraph of Article 267 TFEU may fall on that court.[83] That this may have some impact is illustrated by the judgment of the Court of Justice in *Commission v. UK*, finding an infringement on the part of the UK as a consequence of the failure of the UK Supreme Court to refer an issue of European Union law on arbitration to the Court of Justice under Article 267 TFEU.[84]

Governance of the Protocol falls to a set of committees established under the Withdrawal Agreement and the Protocol. The general Joint

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[81] Case C-692/20 *Commission v. United Kingdom* EU:C:2023:707. This was not contested by the parties. The UK only contested the calculation of the fine with respect to Northern Ireland, arguing that it should be calculated by reference to the GDP of Northern Ireland rather than the UK as a whole. See Ibid., para. 91.

[82] Ibid., paras. 118 and 119. See also the analysis in Case C-692/20 *Commission v. United Kingdom* (Opinion of AG Collins) EU:C:2022:972, paras. 71–73.

[83] It is worth pointing out that Article 12 of the Protocol specifically references the third paragraph of Article 267 TFEU.

[84] Case C-516/22 *Commission v. United Kingdom* EU:C:2024:231 with the Court of Justice finding that by its failure to refer the case via Article 267 TFEU or stay the matter the Supreme Court of the UK 'seriously compromised the EU legal order' (para. 87).

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Committee, established under the Withdrawal Agreement, is the ultimate decision-making authority for the Protocol and is also the forum where sensitive matters such as ongoing alignment and possible safeguarding measures are discussed.[85] This is assisted by a Specialised Committee, concerned with the implementation of the Protocol and a Joint Consultative Working Group for gathering and exchanging information and assisting the Specialised Committee.[86] There is a safeguard clause contained in Article 16 of the Protocol, the use of which was already threatened by the UK during the initial period of the Protocol's application.[87] Finally, there are important but complex democratic safeguards. New EU legislation in the context of dynamic alignment is to be incorporated in the Protocol by a decision of the Joint Committee. This requires the agreement of the UK government. If agreement is not forthcoming, then remedial measures may be taken by the EU. This procedure, contained in Article 13 of the Protocol, was supplemented by a new provision, with a view to increasing the democratic credentials of the Protocol as part of the Windsor Framework.[88] The new Article 13(3)(a) allows a group of members of Northern Ireland's devolved legislative assembly (the 'Stormont Assembly') to request that the UK government trigger what is now known as the 'Stormont Brake', not applying new EU law to Northern Ireland in the event that the measure will have '"significant impact" for everyday life in Northern Ireland'.[89] As with the original procedure under Article 13(4) of the Protocol, in the event that the new measure is not applied to Northern Ireland, the Union may adopt remedial measures. Both the use of the 'brake' and any remedial measures shall be subject to

[85] Protocol on Ireland/Northern Ireland, Article 13. See K. Hayward, 'The Committees of the Protocol' in McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol*, pp. 44–54.

[86] Protocol on Ireland/Northern Ireland, Articles 14 and 15.

[87] For an analysis of the briefly famous Article 16 see R. Howse, '"This Is Not an Exit": Article 16 in the Ireland/Northern Ireland Protocol' in F. Fabbrini (ed.), *The Law and Politics of Brexit: The Protocol on Ireland/Northern Ireland* (Oxford: Oxford University Press, 2022), pp. 252–270.

[88] This was effected by a decision of the Joint Committee adopted pursuant to Article 164 of the Withdrawal Agreement, allowing amendment of the Withdrawal Agreement (including its protocols) during the first four years after the end of the transition period.

[89] Murray and Robb, 'From the Protocol to the Windsor Framework', 405.

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the dispute resolution mechanisms under the Withdrawal Agreement, including arbitration.[90]

14.6 CONCLUSION: CONSTITUTIONAL ENTANGLEMENTS IN A POSTCOLONIAL SPACE

To say that the Protocol is a complex piece of legal engineering is an understatement. Placed alongside the already considerable particularities of Northern Ireland's legal system it gives rise to not simply legal entanglement but arguably constitutional entanglement. This perhaps is inevitable to some extent and reflects the underlying historical position of Northern Ireland as a postcolonial entity and the social, political and identarian legacies of that position, in particular with two communities, with different political traditions and identifying with different bordering states. It is in the words of Brennan a quintessential 'liminal space'.[91] The effects of this 'liminality' or in-betweenness was diminished in the context of joint membership of the European Union and especially its single market. This chapter has sought to trace how, in combination with the operation of the CTA, the importance of the border between Northern Ireland and Ireland was minimized both symbolically and practically. Largely unacknowledged, transnational legal frameworks, allowing for social and economic interactions, were key in facilitating a peace process in a postcolonial society of different political communities where one community identified with a neighbouring state. The Protocol is necessarily an imperfect substitute for joint membership of the EU. It has also complicated even further the 'entangled nature' of Northern Ireland's law and arguably the entangled nature of its constitutional position.

Legal entanglement, defined by Krisch as a 'situation in which law is constituted by the ways in which norms from different origins are linked with one another without being integrated into a common order', is related to legal pluralism but emphasizes the absence of any

[90] For an overview of the dispute resolution mechanisms see J. Wouters, 'Dispute Settlement' in McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol*, pp. 55–66.

[91] Brennan, 'Stuck between the EU "Rock" and the UK "Hard Place"?'.

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systemic quality.[92] This chapter reveals that Northern Ireland now certainly experiences a situation where ‘norms from different origins’ apply ‘without being integrated into a common order’. After the withdrawal of the UK from the EU and the entry into force of the Protocol we now find applicable in Northern Ireland: ordinary UK law; retained EU law (not subject to ongoing legislative or interpretative alignment, and enjoying modified primacy); EU law derived from the Protocol (subject to ongoing legislative and interpretative alignment and enjoying direct effect and primacy); the shadow of the (soft-law) CTA governing reciprocal treatment of Irish and UK nationals; law from the devolved Stormont Assembly; rules flowing from the Belfast/Good Friday Agreement; and finally, the ECHR, in turn enjoying a particular status by virtue of the Belfast/Good Friday Agreement. All of these are simply the sources of *public* law in Northern Ireland’s unique constitutional position; presumably we must add to these other forms of international and transnational law, including private sources of norms and regulations.[93]

But the entanglement of Northern Ireland law is not limited to varied sources of law, or rather a focus on the multiplicity of the different bodies of law alone does not capture the full picture. For it is arguable that Northern Ireland also experiences, particularly post-Brexit, considerable *constitutional* entanglement in the sense that there are multiple sites of legal authority operating in Northern Ireland, not always operating within the confines of a single system, nor perhaps particularly well integrated. Northern Ireland is of course first and foremost subject to the sovereign authority of the Westminster Parliament. And yet, while the basic fact of Northern Ireland’s constitutional position in the United Kingdom is unchanged and is in fact confirmed (and provides the basis for) the Belfast/Good Friday Agreement, it has also been pointed out that the Belfast/Good Friday Agreement is to some extent a constitutional charter for Northern Ireland and the Northern Ireland Act 1998 a quasi-constitutional statute, thereby limiting to some extent the core constitutional principle of the UK, namely the sovereignty of

[92] Krisch, ‘Entangled Legalities in the Postnational Space’, 487.
[93] Ibid.

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the king in Parliament.[94] As part of this, Northern Ireland now enjoys a legislative assembly and executive (albeit increasingly suspended amid political dysfunction) as part of an asymmetric quasi-federation. The ECHR and moreover its implementation in domestic law is also mandated by the same agreement which adds the authority of the European Court of Human Rights to the constitutional landscape of Northern Ireland. To this must be added the North–South and East–West institutions of the Belfast/Good Friday Agreement, albeit acknowledging their limited impact in practice and mostly symbolic and diplomatic function (particularly the East–West institutions). The Protocol, in contrast to the rest of the UK, also now involves EU bodies, including the Court of Justice and the Commission, in both the enforcement and application of a body of law in Northern Ireland. The EU also has a legislative function with respect to Northern Ireland in those areas of law covered by the Protocol. The interaction of the developing EU law with Northern Ireland law is then managed by an 'interface' institution, created under the Withdrawal Agreement, namely the Joint Committee. Multiple institutions, nested and overlapping, from different constitutional sites, now claim some form of legal authority over Northern Ireland.

It is important to specify exactly what form of legal pluralism this represents. Tamanaha, along with other authors, has identified the use of the language of legal pluralism in three contexts.[95] It was originally used by legal anthropologists in colonial and postcolonial settings. The language was then exported to the field of legal sociology and was used to reflect a multiplicity of state and non-state normative systems. Finally, it has most recently been used to describe the legal situation arising from increased international and transnational law, including private regulatory systems. The use of legal pluralism here to describe the situation in Northern Ireland falls within the third category. Legal pluralism with respect to (post)colonial situations was characterized by different forms of law.

[94] C. Harvey, 'The 1998 Agreement: Context and Status' in McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol*, pp. 44–54; and see F. Ahmed and A. Perry, 'Constitutional Statutes' (2017) 37 *Oxford Journal of Legal Studies* 461.

[95] See B. Tamanaha, 'A Reconstruction of Legal Pluralism and Law's Foundations' in N. Krisch (ed.), *Entangled Legalities beyond the State* (Cambridge: Cambridge University Press, 2021), pp. 449–477.

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'European' law emanating from the metropole was highly institutionalized and often applied exclusively to particular groups of the population ('Europeans'). This existed alongside customary and other more socially embedded forms of law with local bodies which were formally institutionalized to a greater or lesser extent.[96] This pluralism frequently persisted after independence with formal, state law existing alongside more local forms of customary law. The coexistence and interaction between these different systems and forms of law gave rise to instances of legal pluralism.

The multiplicity of law in Northern Ireland today does not represent an instance of postcolonial legal pluralism as it is normally understood. Unlike postcolonial legal pluralism, it is not marked by 'the stark contrasts and sheer diversity between coexisting bodies of formal and informal law derived from different traditions involving fundamentally different world views'. Rather the laws analysed here 'are virtually all Western derived and … involve formal written regulatory regimes and tribunals operating in standard ways familiar to jurists'.[97] The legal pluralism arising in Northern Ireland as a result of Brexit is not a legal pluralism contrasting a formal, state-based system of law with local, customary or less formalized or institutionalized systems of law as is common in postcolonial situations. Rather, it is the application of a somewhat bewildering array of nonetheless formal legal provisions with different institutional origins (UK, Northern Ireland, EU) and with different legal effects and rules of interaction (so-called 'interface rules'). Unlike legal pluralism in the context of (post)colonial societies, which is characterized by *diversity*, the legal pluralism of global/transnational law and hence that of Northern Ireland is characterized by *multiplicity*.[98]

Thus, in *form* and *nature*, the legal situation in Northern Ireland is a species of global/transnational legal pluralism familiar to students of European Union law. However, its *origins* are postcolonial in the sense that it responds to needs arising from a conflict with its origins in a colonial situation. This colonial situation has a distinct cross-border dimension arising from the fact that one of the main communities in

[96] See S. Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 829; and L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2001).

[97] Tamanaha, 'A Reconstruction of Legal Pluralism and Law's Foundations', p. 452.

[98] Ibid. at p. 453.

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Northern Ireland identifies strongly with a neighbouring state as a result of a partition of the island of Ireland during a process of decolonization. Transnational legal pluralism can play a role in facilitating postcolonial conflict resolution, in particular by diminishing the practical and symbolic importance of borders, facilitating the aspirations of different national communities and allowing constitutional questions to recede into the background. European Union law was, unbeknownst to most observers, ideally suited to such a role.

The European Union and EU law engages with colonial concerns in many and varied respects, as analysed in this volume. The foundation of the EU in an era of imperialism and its development in an era characterized by decolonization is clear. It was at least partially a response to this retrenchment on the part of some Member States. The foreign policy and in particular trade policy of the Union was largely shaped by North–South and colonial legacies in the first decades of the Union's existence.[99] The wider legacy of some Member States as empires and indeed as colonies also has an impact on some areas of EU law, for example citizenship.[100] That EU law played a role in managing a postcolonial situation that existed between two Member States is perhaps less acknowledged and was indeed 'hidden'. Nonetheless, it was a remarkable effect of EU law that it provided a scaffold for a peace process by facilitating cross-border social and economic interactions and softening an otherwise contentious border. But this regional integration requires a certain pluralism of legal sources: an acceptance of common rules, particular effects of those rules and an institutional apparatus to enforce them. The UK has attempted to extract itself from this legal framework without jeopardizing the peace process in Northern Ireland. The result, with the application of law from multiple sources and interacting in a complex manner, is a particularly 'entangled' legal reality and yet one which, while intellectually unsatisfying, may nonetheless serve its function of providing a framework for the ongoing peace process.

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99 See G. Garavini, *After Empires: European Integration, Decolonisation, and the Challenge from the Global South* (Oxford: Oxford University Press, 2012).

100 See for example the judgment in Case C-192/99 *The Queen and Secretary of State for the Home Department, ex parte: Manjit Kaur* EU:C:2001:106.

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CHAPTER 15

The Missing View from the Cathedral

European Law during and after Colonies and Empires

ANTOINE VAUCHEZ

15.1 INTRODUCTION

While a growing literature has emerged over the past few years on the entanglements between European law and (post)colonialism, this field of research is still in its early stages.[1] Stable bibliographies have not yet been constituted, there are still no 'usual suspects' and the research agenda and possible legal and archival materials remain in large part to be identified, particularly those from non-European sources.[2] Strikingly, European law scholars are latecomers to the study of postcolonialism. While some scholars have attempted to identify European Union (EU) law's 'darker legacies', in particular in connection to the fascist and Nazi past of some of its founders,[3] very few so far have worked on the *colonial* heritage in European law

Many thanks to Hanna Eklund for her thoughtful comments on the text.

[1] There has recently been a variety of initiatives including panels at the 2023 European Union Studies Association congress and an important conference promoted by Philipp Dann and Signe Larsen at the Humboldt Law School on *European Public Law after Empires* (3–5 May 2023) from whose discussions this paper has also benefited.

[2] Just to give one example: Megan Brown's excellent book on the relationship between Algeria and the European Communities before and after independence relies almost exclusively on European sources: M. Brown, *The Seventh Member State. Algeria, France and the European Community* (Cambridge: Harvard University Press, 2022).

[3] See C. Joerges and N. Singh Galleigh (eds.), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism in Europe* (London: Bloomsbury, 2003); and a recent revisitation of the project twenty years after, C. Joerges, *"Darker Legacies of Law in Europe": The Florence Project Revisited. Accomplishments, Failings, Lessons* (European University Institute, Law Working Paper, 2023). Most recently, see M. Mangenot (ed.), 'Un légiste de Vichy à la Communauté européenne. Maurice Lagrange, une biographie professionnelle' (2023) 1 *Civitas Europa* 9.

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whether in the field of European human rights,[4] or in the field of European economic law.[5] While historians of European integration projects have long insisted on the importance of colonial issues,[6] particularly in the negotiations and implementation of the founding European treaties,[7] the research agenda is only now emerging in the field of European law. It is hard to account for this 'almost complete absence of a reckoning with the legacy of empire and imperialism',[8] particularly when compared with the field of international law in which these colonial and postcolonial perspectives have long been explored.[9] One reason for this 'colonial amnesia' probably has to do with the general narrative of European integration that has long dominated EU historiography, that which saw European integration as a post-imperial project. In this account, it was not until Europe lost its position as the centre of gravity of international relations in the immediate aftermath of the Second World War, and under the effect of the collapse of empires, that a specifically *European* project, detached from European international law, became thinkable and desirable. As such, the European legal projects appear as an essential part of the decolonization process, thereby leading postcolonial

[4] W. Hommes, *Co-creating European Human Rights. How the Netherlands Received and Shaped the European Convention on Human Rights (1945–2022)*, PhD thesis, University of Amsterdam (2023).

[5] D. Caruso and J. Geneve, '*Melki* in Context. Algeria and European Legal Integration' in B. Davies and F. Nicola (eds.), *EU Law Stories* (Cambridge: Cambridge University Press, 2017), pp. 506–527; H. Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 831.

[6] For an early interest in the 'collective colonialism' of the European Communities, see C. Cosgrove, 'The Common Market and Its Colonial Heritage' (1969) 4 *Journal of Contemporary History* 73; and, more recently, P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London: Bloomsbury, 2014).

[7] See however B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001); P. Bonino, *La France face à la Convention européenne des droits de l'homme*, PhD thesis, Cy Cergy Paris University (2016); Brown, *The Seventh Member State*.

[8] See S. Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 6.

[9] See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001). For a general assessment of the acquis and some limits of TWAIL (Third World Approaches to International Law) scholarship, see A. Anghie, 'Rethinking International Law. A Twail Perspective' (2023) 1 *European Journal of International Law* 7.

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scholars to focus their research almost exclusively on *national* legacies.[10] This gap may be reinforced in the case of EU law, whose claim of a *sui generis* nature entails a radical rupture with the past – departing from both national legal traditions and international law.[11] As it recognizes no predecessor, the historically dominant paradigm of EU law has tended to consider itself *immune* from the traces of colonialism which are purportedly all to be found in the Member States, seen as the carriers of colonialism.[12]

And yet, running against this *immunity thesis*, as recent scholarship has pointed out, the various European legal projects in the fields of human rights or economic law did not emerge in a historical vacuum devoid of colonies and empires. The European Convention on Human Rights (ECHR), the Treaty of Paris and the Treaty of Rome were not crafted and theorized *after*, that is, as a result of the failure of the Member States' 'colonial projection', but rather *during* empires. Four out of the six founding Member States were still colonial powers.[13] And there is more: these legal undertakings were all framed at the time of the '*late* colonial State',[14] that is under the long shadow of colonial wars but also by a variety of attempts to revamp and 'modernize' the colonial relationship in response to the increasing mobilization for independence. Among these, the striking semantic transformation of French colonialism in the post-Second World War period which moves in the context of the Constitution of the Fourth Republic (1946) from 'Empire' to 'French union', and explicitly rejects 'all systems of colonization founded upon arbitrary rule'.[15] In a context open to reformist strategies, social and legal sciences are called upon to play a new role in staging a more 'ethical' and more 'participatory'

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[10] K. Nicolaïdis, B. Sèbe and G. Maas (eds.), *Echoes of Empire. Identity, Memory and Colonial Legacies* (London: Bloomsbury, 2014).

[11] On the centrality of the *sui generis* claim in the emergence of EU law, see A. Vauchez, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity* (Cambridge: Cambridge University Press, 2015).

[12] Strikingly, even the promoters of a 'historical turn' in European law scholarship, including the author of these lines, have most often neglected to fully thematize the colonial issue in their account.

[13] Eklund, 'Peoples, Inhabitants and Workers'.

[14] J. Darwin, 'What Was the Late Colonial State?' (1999) 23 *Itinerario* 73.

[15] Amélie Imbert, Presentation at the *European Public Law after Empires* conference, Humboldt Law School, May 2023 (on file with the author).

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colonial relationship.[16] The European legal projects in Strasbourg, Luxembourg or Brussels are deeply rooted in this context. While there are many domestic and international factors that account for the development of pan-European legal undertakings,[17] their intersection with colonialism and in particular the rights of the colonized in terms of freedom of circulation and human rights have rarely been explored. In fact, the connections between the two (the European colonial and the European law projects) are many: for some, particularly among the French political class, the making of the European Communities could be seen as a way of consolidating the colonial state through a Euro-African project whereby European countries would mutualize their colonies and create a third pole between the Soviet 'East' and the American 'West'; for others, particularly among national bureaucrats and diplomats, European law projects (whether in the ECHR or the Paris and Rome treaties) were seen as a potential threat to the colonial relationship and therefore needed to be negotiated with their eventual effects on colonial territories in mind. Thereby, the research agenda is not just about continuities of colonialism into European law and politics that could be identified in particular in the asymmetrical African–EU relationship and in the management of issues of migration or in the export of the rule of law;[18] it is also about 'entanglements' as definitions of 'Europe', 'European-ness', 'European law', 'European human rights', 'freedom of circulation' or 'European citizenship' were initially framed and discussed in that context.[19]

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[16] On the new context for colonial expertise in the post-Second World War period, see two recent books: F. Wagner, *Colonial Internationalism and Governmentality of Empire, 1893–1982* (Cambridge: Cambridge University Press, 2022); D. Matasci, *Internationaliser l'éducation. La France, l'UNESCO et la fin des empires coloniaux en Afrique (1945–1961)* (Villeneuve d'Ascq: Presses universitaires du Septentrion, 2023); and the review by J. Vogel, 'Les experts coloniaux dans la décolonisation : une histoire très politique' (2023) 51 *Histoire Politique* 1–15.

[17] See for example M. Duranti's work pointing at the conservative and Christian-democratic rationales in the writing of the ECHR as a shield against the development of Welfare States and secularism in Europe: M. Duranti, *The Conservative Human Rights Revolution. European Identity, Transnational Politics and the Origins of the European Convention* (Oxford: Oxford University Press, 2017).

[18] See e.g. R. Kleinfeld and K. Nicolaidis 'Can a Post-Colonial Power Export the Rule of Law? Elements of a General Framework' in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2008), pp. 139–170.

[19] Caruso and Geneve, '*Melki* in context', p. 506; Eklund, 'Peoples, Inhabitants and Workers'.

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And yet while historians and lawyers are bringing increasing evidence that European law's trajectory is not *immune* from colonial issues but may also be a 'carrier of continuity', some scepticism still arises from some quarters of EU law scholarship: is this yet another 'critical' agenda adding yet another layer of infamous reputation to the European project and, most importantly, moving research away from the most pressing issues of our time? The response to such criticism is that this historical detour is not just an erudite interest in the past but a research methodology through which legal scholars can recover the sense of contingency of the trajectory taken by their field of specialization: first, by rediscovering the space of possible interpretations that was initially open for Euro-lawyers and, second, by identifying the social and political dynamics that contributed to frame what are now the taken-for-granted issues, definitions and alternatives in the field of European law.[20] In other words, we don't need to put yet another nail in the coffin of the golden legend of a pacific, democratic and liberal European legal project born out of the defeat of Nazism and out of the end of empire.[21] Rather, we need to think of this reopening of the colonial archive of the European law projects as a way to better grasp the enduring contradictions and tensions that still lie at the core of European law as it rearticulates such questions as residence, nationality, mobility and identity. Still, as in any emerging field of research, there is a risk attached to making grand but vague and rhetorical claims, and to promoting another type of monocausal explanation to substitute the previous ones. I therefore suggest adopting an analytical framework and research alleys able to assess 'continuities' and 'entanglements' between European law and (post)colonialism before tentatively trying to identify what this new research agenda could bring to the field of European law scholarship.

15.2 CONTINUITIES AND ENTANGLEMENTS: A TENTATIVE RESEARCH FRAMEWORK

While the search for continuities and transplants is a classic in the field of postcolonial studies, allowing us to look beyond the formal legal and

[20] But see I. Solanke's Chapter 16 in this volume.

[21] See Duranti, *The Conservative Human Rights Revolution.*

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political rupture introduced by formal independence, the analytical toolbox with which one can trace these (or the absence thereof) is not always equally robust, as testified to by the great variety of words that are used for this purpose: 'legacies', 'continuities', 'footprints', 'imprints', 'traces' and so forth. In dealing with these forms of transplants and entanglements between colonial issues and European law projects, one should be wary about simple, causal and linear claims of transplants or transfers moving from one context to another and looking for mere similarities or resemblances across time or space. Rather, I suggest a research agenda more centred on *processes of transfer*, reinvention, adaptation and incorporation that allow both continuities *and* discontinuities to be accounted for.[22] Such a shift in focus is particularly adapted to the law as lawyers are masters in the art of building legal arrangements that mix the old and the new, thereby continuously reinventing the legal tradition. It is well known that in legal milieux value references to the 'legal tradition' and courts tend to frame judicial decisions within the boundaries of precedents (be they *stare decisis* or *jurisprudence constante*, depending on the specifics of one's national legal culture). While lawyers do innovate, they often do so by claiming that their solution is the least innovative and the most faithful to the 'legal tradition'.[23] As such, lawyers (together with bureaucrats) are arguably key producers of continuities,[24] and therefore provide a privileged entry-point into the study of continuities between the (post)colonial contexts and European law projects. These legal 'carriers of continuity' include individual or collective biographies, forms of knowledge and professions/institutions.[25]

The first and most obvious form of continuity between these different contexts is biographical: Euro-lawyers are connected to a variety of colonial

[22] I am adapting here the analytical framework built by Wolfram Kaiser and Kiran Patel in their study of continuities between practices and experiences of international organizations and the European Communities: W. Kaiser and K. Patel, 'Continuity and Change in European Cooperation during the XXth Century' (2018) 27 *Contemporary European History* 165.

[23] On these issues, see K. McIntosh and C. Kates, *Judicial Entrepreneurship. The Role of Judges in the Marketplace of Ideas* (Westport: Greenwood Press, 1997).

[24] On colonial continuities among EU bureaucrats of the Commission's Directorate General on Cooperation, see the classic work by V. Dimier, *The Invention of a European Development Aid Bureaucracy* (London: Palgrave Macmillan, 2014).

[25] Kaiser and Patel, 'Continuity and Change'.

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experiences (previous or simultaneous) that may have shaped their world view as they contributed to shaping the course of European legal integration.[26] European law's 'founding fathers' were most often *juristes d'Etat* close to diplomatic or executive circles and seasoned actors of international relations playing a variety of representative roles outside of the '*métropole*' (successively or simultaneously) such as bureaucrat, judge, minister, politician or professor.[27] Massimo Pilotti, for example, who was the first president of the European Court of Justice (1952–1958),[28] played a critical role as the League of Nations' vice-secretary general in the Italo-Ethiopian conflict (1935), in which he proved to be extremely loyal to the interests of the Italian government.[29] Likewise, Michel Erpelding has identified a number of Euro-lawyers who came to the fields of European human rights (Arnold Struycken and Polys Modinos) and of the European Communities (Nicola Catalano and Michel Gaudet) from an experience in the 'semi-colonial context' of the mixed arbitration tribunals created in the wake of the Versailles Treaty.[30] The trajectory of Nicola Catalano, who would later become one of the most zealous advocates of a constitutional reading of EU law, is particularly telling: he spent three years in Tangier as the legal adviser of the mixed court of the international zone of Tangier (1951–1953), often presented as a 'form of federal integration' (albeit at the expense of the Sultanate), right before he joined the legal service of the High Authority.[31] Other cases

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[26] On this, see V. Dimier's Chapter 10 in this volume.

[27] On the specific position of these *juristes d'Etat* in international law, see M. Koskienniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations in the Field of International Law* (New York: United Nations, Offices of Legal Affairs, 1999), p. 495; and G. Sacriste and A. Vauchez, 'The Force of International Law. Lawyers' Diplomacy on the International Science in the 1920s' (2007) 32 *Law and Social Inquiry* 83.

[28] Later renamed Court of Justice of the European Union (CJEU).

[29] V. Fritz, *Juges et avocats généraux de la Cour de justice de l'Union européenne (1952–1972). Une approche biographique de l'histoire d'une révolution juridique* (Frankfurt: Klostermann, 2018).

[30] See M. Erpelding's contribution to this volume (Chapter 11) and his paper: 'Juristes internationalistes, juristes mixtes, *Euro-Lawyers*: l'apport de l'expérience semi-coloniale à l'émergence d'un droit supranational' (2022) *Clio@Themis*.

[31] On the biography of N. Catalano, see also T. Pavone, 'Making the European Court Work. Nicola Catalano and the Origins of European Legal Integration' in D. Gallo, R. Mastroianni and F. Nicola (eds.), *The Italian Influence on European Law: Judges and Advocates General, 1952–2000* (Oxford: Hart Publishing, 2024), pp. 33–62.

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include Michel Gaudet, member of the *Conseil d'Etat* (Council of State), legal adviser to Jean Monnet and first head of the Commission's legal service, who joined EEC institutions immediately after a three-year period as legal adviser to the French protectorate in Morocco (1946–1949). Interesting cases include not only successive positions but also the managing of *simultaneous* positions in colonial and European sites of negotiations. One prominent example is Ganshof van der Meersch, a top-ranked magistrate (*avocat général près la Cour de cassation*), who was at the turn of the 1960s a central sponsor of EU law in Belgium as founding member of the Association belge pour le droit européen (Belgian Association for European Law) (1958), author of one of the first handbooks on EU law (1961)[32] and founder of the Institut d'études européennes of the Université libre de Bruxelles (Institute for European Studies of the Free University of Brussels) (1963),[33] while at the same time a specialist of Congo law,[34] and most notably the minister in charge of 'affaires générales en Afrique et de la décolonisation du Congo' ('general African affairs and decolonization in Congo') (1960) negotiating and organizing the transition to independence.[35] For lack of a systematic prosopographical study of these first Euro-lawyers, it remains impossible to assess the extent to which the two communities of (Euro- and colonial) lawyers overlap. While the moving from one experience to another is by no means a proof of influence (*post hoc ergo propter hoc*, as Latinists would say), a consistent collective overlap of the two worlds of lawyers would certainly be indicative of possible continuities and circulations across contexts.

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[32] W. J. Ganshof van der Meersch, *Le droit des Communautés européennes – Structures – Conseils, Haute autorité, commissions* (Strasbourg: Faculté internationale pour l'enseignement du droit comparé, 1961).

[33] *Miscellanea Ganshof Van Der Meersch* (Brussels: Bruylant, 1972).

[34] Cf. W. J. Ganshof van der Meersch, 'Le droit électoral au Congo belge' (Université libre de Bruxelles, XVème journée interuniversitaire d'études juridiques, Bruxelles, Bruylant, 1959), at 25; W. J. Ganshof van der Meersch, *Fin de la souveraineté belge au Congo. Documents et réflexions* (Brussels: Institut royal des relations internationales, Martinus Nyhoff, La Haye, 1963).

[35] The ECHR system also abounds with similar biographical continuities: see for instance B. F. M. van Asbeck, first Dutch judge at the European Court of Human Rights who came to Strasbourg after an experience as special adviser to the governor general of the Dutch colony of Indonesia in 1945: see W. Hommes, *Co-creating European Human Rights*, p. 34.

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Hence, the interest in considering a second driver of continuity, one that runs through *forms of knowledge* as legal categories or forms of legal reasoning, circulates across domains of law and periods of time. Here is not the place to tackle the old connections between the idea of Europe as a civilization and the colonial project. As sociologist Craig Calhoun has pointed out, before being a work of introspection, the objectification of Europe and its identity first took place through 'non-Europeans', in particular colonized countries in which the elements of 'European civilization' had to be inculcated, or through the foundation of American universities based on the exaltation of a 'European culture' (culture here referring to the study of the classics, the humanities, etc.).[36] Likewise, colonization was often perceived by the colonized as being, broadly speaking, 'European'. However, in the post-Second World War context these entanglements between the field of European studies and the colonial project have become more concrete and specific, as the search for 'modernized' forms of colonial domination and the building of new regional organizations at the level of European countries run parallel to and influence one another.[37]

One first terrain of observation to assess these forms of continuity lies in the drafting of European treaties as they display the making of foundational legal categories for Europe *under colonial constraint*. While the progressive narratives of the 'rise and rise' of post-Second World War liberal Europe most often take 'Europe' – and therefore 'Europeans' – as a fixed geographical meaning, the opening of the colonial archive points at the early and oft forgotten legal, political and bureaucratic battles surrounding the definition in terms of legal entitlements and geographical scope of implementation. A case in point is the open debate at the French Parliament about whether people from the colonized territories should be represented at the parliamentary assembly of the Council of Europe: the minister of foreign affairs, Robert Schuman, argued against such representation because 'only European problems will be raised and

[36] C. Calhoun, 'European Studies: Always Already There and Still in Formation' (2003) 1 *Comparative European Politics* 5.

[37] See for example, M. Madsen, 'From Cold War Instrument to Supreme European Court. The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2008) 32 *Law and Social Inquiry* 137.

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dealt with at the Council of Europe'; Leopold Sédar Senghor, a prominent independentist leader and MP from Senegal, in sharp opposition, argued vigorously that the representatives of overseas countries and territories should be included in the European parliamentary assembly in the name of equality of political rights. This was a clear example of the opposition between an exclusionary and an emancipatory usage of the 'European' signifier.[38] In a similar vein, we might also recall the intense discussions between various French bureaucrats from, on the one side, the Ministry of Colonies and, on the other, the Ministry of Justice regarding the recognition of individual petitioning before the European Court of Human Rights (ECtHR) as well as those regarding the 'colonial exemptions'. Interestingly, the solutions eventually adopted were neither homogenous over time, nor clear-cut, but resulted in the creation of many ad hoc statutes and transitional measures. Thus the French 'overseas countries and territories' (to which Algeria, as a French *département*, did not belong) were not part of the European Coal and Steel Community (1951) nor of the failed European Defence Community project, nor of the ECHR, while the Treaty of Rome negotiators (under strong French pressure) made a point of including them, devoting a fourth part of the treaty entirely to delineating their 'special relations' and intermediate position through a series of derogations (second-rate forms of citizenship status).[39]

A second interesting terrain of observation lies in the circulation of legal categories used to define these post-national forms of relationship (*union*, *community*, *federalism*, *association*) both as they are currently used and as they circulate back and forth between the colonial and the European contexts. While projects such as the *Union française* (French Union) 1946 Constitution or later the *Communauté française* (French Community) 1958 Constitution, or even the 'Dutch–Indonesian Union', may be forgotten nowadays in light of their short-lived existence, they were essential parts of the many attempts (particularly inside Ministries of the Colonies and Foreign Affairs Ministries) to craft a 'renewed' colonial relationship. Discussions on the notion of 'colonial federalism' are

[38] P. Bonino, *La France face*, p. 19.

[39] See Eklund, 'Peoples, Inhabitants and Workers'.

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proof that these discussions did not develop along separate tracks but rather with interesting and still unexplored circulation between colonial and non-colonial (legal) sciences. A striking example of such overlap is Claude-Albert Colliard, a central figure of post-Second World War French legal academia. One of the founding figures of EU law as the author of a handbook on *Organisations européennes* (1967) and the co-founder of *Revue trimestrielle de droit européen* (1963), he had earlier been a regular contributor to the *Revue juridique et politique de l'Union française* and in 1950 to the *Mélanges* in honour of international lawyer Georges Scelle with a paper on '*fédéralisme colonial et Union française*' ('colonial federalism and the French Union') which questions the *federal* nature of the *Union française* – a system in which 'la suprématie métropolitaine se combinerait avec l'autonomie limitée des colonies' ('metropolitan supremacy would be combined with limited autonomy for the colonies').[40] Scholars have also made interesting claims regarding long continuities. Amélie Imbert, for example, has shown how the colonial legal laboratory has contributed to uncouple categories of nationality, residence, citizenship and rights, making it possible to accumulate different types of citizenship in both the 'Union citizenship' of the *Union française* and of the EU.[41]

The third and last driver of continuity lies in *legal institutions and professions* themselves which engage in a complex balancing act between facts, contexts and norms. As they have claimed over the decades to build a '*jurisprudence constante*' beyond the many *political* ruptures of their parent organization (enlargements to new Member States, 'exits' of colonies through independence, revisions of the founding treaties, etc.), both the CJEU and the ECtHR have indeed been crucial producers of continuity.[42] Marise Cremona offers a striking example in this volume through her in-depth analysis of the Opinion of Advocate General

[40] C.-A. Colliard, 'Fédéralisme colonial et Union française' in *La technique et les principes de droit public, Etudes en l'honneur de George Scelle* (Paris: LGDJ, 1950), p. 655.

[41] Amélie Imbert, Presentation at the *European Public Law after Empires* conference, Humboldt Law School, May 2023 (on file with the author).

[42] A. Vauchez, 'Keeping the Dream Alive. The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' (2012) 4 *European Political Science Review* 51–71.

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Trabucchi in the *Bresciani* case.[43] Famously the key player in the *Van Gend en Loos* decision on direct effect, Trabucchi argued that the first Yaoundé Convention (which brought together the ex-colonies of the six founding Member States) had to be granted direct effect as the convention was a *direct concretization* of Article 136 EEC on the Treaty of Rome's association of oversees countries and territories, thereby pursuing the 'special nature' and 'privileged relationship' between the EEC and these countries.

Generally speaking, in the building of legal continuity across colonial and postcolonial situations, one needs to consider the professional *habitus* of lawyers who are particularly experienced in the production of double discourses that affirm the universality of norms while concretely organizing the exceptions that undermine their validity on the (colonial) ground – something Pierre Bourdieu used to coin as lawyers' 'pious hypocrisy',[44] which can only be accounted for through the functioning of a legal field socializing its agents to a legal *illusio* of detachment and disinterestedness. In his ongoing historical research into the making of Europe's mobility regime post-Second World War, Karim Fertikh shows this *habitus* at play as European labour lawyers frame the mobility regime of workers coming from ex-colonies in the 1960s. While accepting that the possibility of 'mobility' and 'circulation' between the European Communities and the former colonies is maintained in theory in the context of independence, he highlights the continuing forms of discrimination and exclusion through a complex reworking/rearrangement of legal notions such as residence, nationality, citizenship, rights and mobility.[45] The freedom of establishment which is granted to European companies in the former colonies in Africa is not matched by the freedom of movement of African workers – this inequality of treatment has been justified by a 'European preference', by a racialist belief that European immigrants would integrate better and by the idea that the equality of treatment would endanger the development of colonial

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[43] M. Cremona's Chapter 2 in this volume. Case 87/75 *Bresciani*, EU:C:1976:18.

[44] This is of course most striking in the discourse on citizenship in the colonies: L. Blevis, 'Quelle citoyenneté pour les Algériens?' in *Histoire de l'Algérie à la période coloniale (1830–1962)* (Paris: La découverte, 2014), p. 352.

[45] K. Fertikh's Chapter 4 in this volume.

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territories.[46] Many of these postcolonial stories read like striking exercises in legal hypocrisy or at least in double discourse when formal inclusiveness (maintaining, for example, the façade of universality of human rights) goes with de facto exclusion (exclusion or inequality in the implementation) through a series of regimes of transition, special statutes and exceptions, oft displaying law as a laboratory of monstrous legal solutions.

15.3 EUROPEAN LAW REVISITED: FROM CATHEDRAL TO ARCHIPELAGO

Now that we have identified a variety of grounds and levers through which circulations across contexts and periods may happen, it may be interesting to question how this postcolonial turn of European law scholarship could potentially help us reconsider some of the classic questions in the field. I follow two possible threads here: one regarding the very narrative of European legal integration, and the other, the canonical notion of EU legal order.

Even though we are not yet at a point where a new narrative can be built, the emerging (post)colonial scholarship contributes to reposition the genesis and dynamics of post-Second World War European law projects beyond the liberal and progressive genealogy of both the ECHR and the EEC by questioning the colonial and the racial entanglements of these European projects. This line of research provides a further complexification – adding to the revisionist historiography of European law projects promoted by scholars that have contributed to re-embed the making of European human rights in (conservative, Christian-democrat, free-market) contexts and influences.[47] Under the spotlight of the chapters of this volume, European legal integration becomes less internal and Eurocentric and displays new encounters, tensions and forms of domination.

What this scholarship also brings to light is a different image of EU legal order which looks less like the 'cathedral' often praised by EU law scholars and more like a complex 'archipelago' whose legal borders and

[46] Ibid.

[47] Duranti, *The Conservative Human Rights Revolution.*

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principles appear blurred. When looked at not from 'core Europe' but from the former colonies and current peripheries, one discovers a profoundly different view of the canonical notion of EU legal order whose *borders* have been continuously discussed and (re)negotiated and whose *uniqueness* has been questioned and contested by the persistence of competing legal regimes inherited from colonial regimes. This is true when it comes to defining *who are the 'Europeans'* of EU law or of European human rights law. With the legacy of past colonial regimes, there is indeed no clear-cut and mutually exclusive relation between 'Europeans' and 'non-Europeans' but rather a whole array of *intermediate regimes* that allowed for the continuation of special (oft discriminatory) regimes for the former 'inhabitants of the overseas countries and territories' mentioned in the Treaty of Rome with a mix of legal rights, paternalism and asymmetric relations.[48] This is equally true when it comes to defining *what is the 'European' territory of the EU law* (or of the ECHR's law) whose perimeter remains a contested notion with changing legal geographies in the complex relationship between 'Europe' and the associated countries and territories. One striking example is that of the fishing rights of EU fishers in Greenlandic waters, which have been maintained even after the completion of the decolonization process (and the related exit from the EU).[49] As we explore the many *grey areas* and porous borders, we discover the extra-territoriality of EU legal order and its continuing effects through the 'overseas country and territory' status in a form of postcolonial extension of EU law. Thereby, the postcolonial outlook brings into evidence the structural tension in notions of 'Europe' and 'Europeans' which can serve at one and the same time including and excluding functions and further complexifies the relationship between the (theoretical) map and the (actual) territory of EU law.[50]

[48] See the protracted judicial case of the Moroccans formerly working for the SNCF (French train company) at the time of the colonies as studied by L. Zevounou in Chapter 5 of this volume.

[49] U. Neergaard's Chapter 13 in this volume.

[50] A. Vauchez, 'The Map and the Territory. Re-assessing EU Law's Embeddedness in European Societies' (2020) 27 *Maastricht Journal of European and Comparative Law* 133.

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CHAPTER 16

Decolonizing Research and Teaching in EU Law

Purpose, Principles and Practice

IYIOLA SOLANKE

16.1 INTRODUCTION

At the conference she organized in Copenhagen in 2022, Hanna Eklund suggested that:

> Understanding more about colonialism and the EU legal order is not merely, although is importantly also, a historical exercise; it has the potential to constitute a starting point for examinations of the EU law of today.[1]

A decolonial approach to research and teaching in European Union (EU) law constitutes such a starting point. It is an exciting approach which has the potential to open up the world of European integration and EU law to a new generation of Black scholars and audiences, both in Europe and beyond.

This paper will consider what this starting point could look like – what happens when we take colonialism as the starting point for our interaction with EU law? How does a decolonial approach amend the purpose, principles and practice that inform our research and teaching in EU law today? After a short explanation of the meaning of 'decolonization', I set out the purpose, practice and principles of this approach in relation to EU law.

16.2 DECOLONIZATION IN GENERAL

First, a general word on 'decolonization': in everyday use, 'decolonization' refers to the overt end of political and military rule by invaders

[1] See Chapter 1 by H. Eklund in this volume.

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who forcibly occupy and seize control in a formerly independent territory, as the United States did in places such as Hawaii or European powers did across Africa, Asia and the Caribbean in the late nineteenth century.[2]

However, in education, the word 'decolonization' refers to the long-term pedagogical impact of political colonization, such as the continued use of the colonizers' language and scholarship to teach and assess learning. It is most often used in conjunction with the curriculum, as in 'decolonizing the curriculum', to refer to advocacy in higher education for a fundamental examination and reconsideration of norms embedded as tradition in these scholarly environments – norms of access, knowledge production and dissemination, teaching and assessment, scholarship and authorship, recognition and reward. This word is not without its own problems: as Folúkẹ́ Adebisi suggests, it has become something of a buzzword, dis-anchored from its political and anti-colonial origins as use has spread through university settings in the United Kingdom (UK).[3]

While the following quote focuses on the UK, it is useful for this paper on EU law because it explains the origin of the concept: it anchors decolonization in imperialism and stresses the goal of decentralizing imperialist ways of seeing through reflection on the locus of power underpinning knowledge production and dissemination – what is taught, and what materials are used to answer which questions:

> We must first understand what is meant by 'colonial' education and its intrinsic link to academia […] The British education system itself, is firmly rooted in colonial epistemology, which centres and upholds the British

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[2] H. G. Allen, *The Betrayal of Liliokulani: The Last Queen of Hawaii, 1838–1917* (Honolulu: Mutual Publishing, 1982); Chinweizu, *Decolonising the African Mind* (Lagos: Pero Press Sundoor Dist., 1987); M. S. Grovogui, *Beyond Eurocentrism and Anarchy: Memories of International Order and Institutions* (London: Palgrave MacMillan, 2016); O. Táíwò, *Against Decolonisation: Taking African Agency Seriously* (London: Hurst, 2022). The literature on colonization is huge but a start can be made with the following: T. Pakenham, *The Scramble for Africa* (London: Abacus Press, 1992); K. Block, *Ordinary Lives in the Early Caribbean: Religion, Colonial Competition, and the Politics of Profit* (Georgia: University of Georgia Press, 2012); H. Fischer-Tine and M. Framke, *Routledge Handbook of the History of Colonialism in South Asia* (Oxfordshire: Routledge, 2022).

[3] F. Adebisi, *Decolonisation and Legal Knowledge: Reflections on Power and Possibility* (Bristol: Bristol University Press, 2023), preface vi. See also Táíwò, *Against Decolonisation.*

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> empire and the forms that it takes today. What this can look like in schooling is a whitewashed retelling of the history of empire that speaks only to its 'successes', whilst omitting its evils, the voices of the oppressed and the lasting legacy of imperialism today. Decolonising education, however, is often understood as the process in which we rethink, reframe and reconstruct the curricula and research that preserve the Europe-centred, colonial lens.[4]

Decolonization is therefore an active process of first, restoring visibility to untold his- and herstories and second, reframing the gaze, to change the way of seeing. Decolonization should be approached as a 'speaking back' (hooks) and a return of the gaze (Spivak) which proactively redirects both the voice and vision with the same focus and discipline as a return by tennis champion Serena Williams.[5] In other words, there is power in the decolonial agenda – as put by Adebisi: 'Decolonisation invites us to think of power differently. Therefore it is disruptive. Decolonisation requires discontinuation of the epistemologies that have produced colonialism. Decolonisation demands dismantling, delinking, decentring or disobeying epistemic coloniality of power and the reproduction of hierarchy upon which it proceeds. So, that the *uni*versity may be superseded by an equal *pluri*versity of knowledges [italics in original]'.[6]

Decolonization, or the decolonial approach, is therefore not simply a theoretical idea, but can have a practical impact on social justice – it has a purpose, principles and practices. In this contribution I consider what this means in relation to teaching and research in EU law and the EU legal order. I begin in Section 16.3 with purpose.

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16.3 PURPOSE

There are three parts to the purpose of a decolonial approach in EU law – excavation, dissemination and reversal.

Excavation is what took place at the conference in Copenhagen. While a decolonial approach is not synonymous with colonization,

[4] S. Akel, 'What Decolonising the Curriculum Really Means', *EachOther*, 14 August 2020.

[5] G. Spivak, 'Can the Subaltern Speak?' in C. Nelson and L. Grossberg (eds.), *Marxism and the Interpretation of Culture* (London: Macmillan, 1988), pp. 271–313; and b. hooks, *Talking Back: Thinking Feminist, Thinking Black* (Abingdon: Routledge, 2014).

[6] Adebisi, *Decolonisation and Legal Knowledge*, pp. 35–36.

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papers illustrated how the two overlap. Contributors highlighted and thought about the imprint of colonialism in its varied iterations on the EU constitution, discussing 'the ways in which colonialism has shaped the EU legal order' as well as the situation of individuals and societies subjected to EU law. Through archival work, contributors were able to track the footprints of colonization, and in some cases its preservation, in the process and structures of European integration.[7]

It is indeed hard to deny that colonialism has left an institutional and social imprint on Europe and its peoples, as well as on the peoples of those colonized lands, whether they are resident in the formerly colonized territories or in Europe. We see this imprint very clearly in policy approaches and public discourse concerning development, immigration and asylum – the EU's New Pact on Migration and Asylum,[8] as well as in plans by EU Member States to deport asylum seekers to third countries,[9] and rhetoric and practice from the EU on pushing – back out to sea.[10] These policies stem from a certain way of viewing peoples seeking safety, the majority of whom are racialised and from formerly colonized countries that may be undergoing economic or political upheaval.

This colonial imprint on the EU and European structures can only be understood once it is excavated – like an archaeological find, this work needs to be conducted carefully and purposefully, as for example, by Janine Silga in her work on the immigration–development nexus.[11] Beyond this, excavation can include investigation on the macro-environment in the EU to ask how colonialism has shaped European consciousness – how did Europe use the colonized lands to create a new self-understanding that

[7] See chapters in this volume by M. Cremona (Chapter 2), H. Eklund (Chapter 1), M. Erpelding (Chapter 11), L. Zevounou (Chapter 5) and K. Fertikh (Chapter 4).

[8] The EU adopted the 'New Pact on Migration and Asylum' in 2023. See the chapters in this volume by J. Silga (Chapter 9) and V. Corcodel (Chapter 8).

[9] Such as Italian plans to hold asylum seekers in Albania, see L. Piccoli, 'Offshoring Asylum the Italian Way: No Model for Others to Follow' (14 November 2023) VerfBlog or the UK Safety of Rwanda (Asylum and Immigration) Bill (Bill 38 58/4).

[10] K. Fallon, 'Revealed: EU Border Agency Involved in Hundreds of Refugee Pushbacks', *The Guardian*, 28 April 2022.

[11] J. Silga, 'The Migration-Development Nexus in the European Union Policy Framework – A Legal Perspective' (2020) 24 *UCLA Journal of International Law and Foreign Affairs* 163.

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became the basis for the foundations of the EU legal order? A further question for excavation would focus on relationships between individuals and institutions in the EU legal order, or even relationships between individuals in the EU legal order.

Excavation is not conducted for its own sake. The second purpose is to disseminate knowledge on the existence of these imprints. Answers to the questions above create knowledge that would broaden the story we tell about the evolution of European integration and EU law, as well as who tells those stories: it would create space for stories that at present are only seen sporadically in the cinema, to be discussed in the classroom.[12]

Inclusion of such stories would require review of the topics covered in the EU canon, especially (but not only) in relation to the history of European integration – the way in which it is taught and the questions that are asked. The role of former colonies would not be studied and researched as part of EU external affairs but would be integral to the understanding of the foundations of the present-day EU.[13] Students would be clear that EU law and policies extend beyond the continent to include various overseas territories and countries. In relation to teaching EU law, this would not necessarily require expansion of an already full curriculum but reflection upon where examples to illustrate core principles are drawn from – why not use cases concerning voting rights in overseas territories when discussing EU citizenship, or Europol and Frontex as examples in discussions of indirect or direct access to the Court of Justice of the European Union (CJEU)?

To summarize, decolonization in higher education is not just an intellectual exercise but has important practical applications for social justice. The ultimate purpose of adopting a decolonial approach in EU law is to review current ideas underpinning EU laws and policies, ideas that may be harmful to racialized peoples in Europe when, for example, seeking asylum, protection from the police or even medication during

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[12] For instance, Léonor Serraille's 'Mother and Son' and Céline Sciamma's 'Girlhood'.

[13] For an example see D. Caruso, '*Melki* in Context: Algeria and European Legal Integration' in W. Davies and F. Nicola (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017), pp. 506–527.

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childbirth.[14] Excavation is therefore important because it creates the knowledge basis for revision and a potential for renewal – how might the public approach to immigration across the EU change if (a) the extent of European colonization and (b) the varied contribution of peoples from the colonized territories to European wars were common knowledge? Maybe it would not make any difference, but without sharing this information the answer cannot be known.

16.4 PRINCIPLES

What principles should support these three purposes of excavation, dissemination and reversal? I suggest core principles are intentionality, internationalism and pro-democracy. I discuss these here, beginning with intentionality.

As mentioned previously, the decolonial approach is not an abstract exercise but a study of power and the delivery of justice. As such, it demands intentionality – a proactive determination and discipline to identify 'dominant discourses and the influence of dominant groups in what/who we research'.[15] Yet, at the same time, this work requires sensitivity – the decolonial approach is a reminder that intellectual activity requires vigilance and care. When we think about decolonization, we should in particular be intentional about reflecting upon our own assumptions bearing in mind that even our own beliefs 'about rationality derive from a literature that developed at a particular time and place'.[16]

Internationalism is a necessity as the boundaries of the colonial imprint are hard to ascertain – while the focus of this volume is on Europe, it must be recognized that colonialism was a system of injustice with multiple nodes and many tentacles of power. Colonization was a global endeavour

[14] The risk of maternal death in the UK in 2020–2022 was statistically significantly almost three times higher among Black women when compared with White women, see The National Perinatal Epidemiology Unit, Data brief: Maternal mortality UK 2020–2022. Pain medication is sometimes withheld from these mothers due to the belief that Black women can tolerate more pain.

[15] See https://warwick.ac.uk/fac/soc/ces/research/current/socialtheory/maps/decolonising/.

[16] Ibid.

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that spanned continents and crossed countries; a decolonial approach of necessity requires the acknowledgement of this. This especially applies to a multi-level entity such as the EU, which institutionalizes at a regional level the prevailing structures that perpetuate 'enduring asymmetries of power between the global South and global North'.[17] Thus decolonizing teaching and research in EU law must be at the same time supranational, cross-continental and intra-national to understand how the contours of power in EU law affect the lives of those still present in formerly colonized territories, as well as those from these territories present in Europe be it as refugees, asylum seekers, entrepreneurs, workers or citizens.

Finally, a decolonial approach must be pro-democracy. Colonization was inherently anti-democratic – it took away all rights, including enjoyment of basic human rights and equality, from those who were colonized. Thus a decolonial approach must at heart be committed to the perpetuation and ongoing protection of democratic principles for all. As I have written elsewhere,

> decolonization of EU law is important because education is inextricably linked to democracy and democratic institutions. Exclusion in the context of higher education – from research and scholarship to the scholars themselves – results in homogenous social thinking and social institutions which, as recent events have shown, all too easily become hosts of practices and policies that undermine democracy. Pursuit of the decolonization agenda should therefore be seen as the key to a stronger European democracy.[18]

Decolonizing the teaching of EU law is therefore an opportunity to reinvigorate the study of democracy – in all of its deficits, surfeits, tyrannies – in Europe, and how this underpins anti-discrimination, equality and the rule of law. In relation to EU law, this principle acts as a reminder that decolonization is part of a larger agenda: it is ultimately about social justice and building a strong and intentionally anti-discriminatory

[17] E. Darian-Smith, 'Postcolonial Law' in J. D. Wright (ed.), *International Encyclopaedia of the Social and Behavioural Sciences* (Amsterdam: Elsevier, 2015), pp. 647–651.

[18] I. Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in M. R. Madsen, F. Nicola and A. Vauchez (eds.), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge: Cambridge University Press, 2022), pp. 343–353.

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democracy in Europe. This is important to stress explicitly, given democratic 'backsliding' in many locations around the world.

16.5 PRACTICE

I would suggest that there are four core areas of practice: decolonization must be attentive to identifying omission – the voids and silences in EU law – so as to create inclusive narratives and diverse narrators; it should be empirical, systemic and collaborative.

A decolonial approach in EU law would encourage sensitivity to who is missing from the stories that we tell about European integration and EU law. Where for example are the colonial territories and their contribution to the rebuilding of Europe after the Second World War in the run-up to the Treaty of Paris? What attention was given to the colonies during this period?[19]

Other than my own, at the time of writing only one textbook on EU law mentions the relations of the European Economic Community (EEC) in the late 1950s to former colonized territories, even though colonies were a reality for four founding Member States: France still had 'possessions' in Africa, Asia, the Caribbean and the Pacific; Belgium ruled over Zaire and held 'trusteeship' of Rwanda – Burundi; the Netherlands maintained dependencies in the Pacific (Surinam) and Caribbean (Aruba); and Italy had a mandate over Somalia.[20] Only Germany had no colonial connections anywhere in the world, having reluctantly relinquished control over its territories as part of the post-First World War settlement at Versailles.[21] While Luxembourg may not have possessed any colonies of

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[19] On Algeria, see D. Caruso and J. Geneve, '*Trade and History: The Case of EU-Algeria Relations*', No. 14-49 Boston University School of Law, Public Law Research Paper (2014); M. Brown, *Algeria: The Seventh Member State* (Boston: Harvard University Press, 2022).

[20] A. M. El-Agraa, *The European Union: Economics and Policies* (Cambridge: Cambridge University Press, 2011); I. Solanke, *EU Law*, 1st ed. (London: Pearson, 2015); and I. Solanke, *EU Law*, 2nd ed. (Cambridge: Cambridge University Press, 2022).

[21] See e.g. K. Oguntoye, *Eine afro-deutsche Geschichte: Zur Lebenssituation von Afrikanern und Afro-Deutschen in Deutschland von 1884 bis 1950* (Michigan: HoHo Verlag Christine Hoffmann, 1997); T. M. Campt, *Other Germans: Black Germans and the Politics of Race, Gender, and Memory in the Third Reich* (Michigan: University of Michigan Press, 2004).

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its own, a 2022 exhibition at the National Museum of History and Art in Luxembourg City exposed how it benefitted from colonialism through its agreements with colonizers such as Belgium. These colonized countries were integrated into the EEC Treaty under Articles 131–136, which set out the idea adopted from France of 'associationism' as a method to manage relationships between the colonial powers in Brussels and these countries.[22]

Also missing is information on the contributions made by people from colonized countries to rebuild Europe: for example, those from the Caribbean who served the UK as personnel in the armed forces (currently trying to rebuild their lives after the Windrush scandal in 2018) and – especially during the COVID pandemic – as keyworkers in hospitals and local transport.[23] Their living and working experiences are nowhere reflected in EU studies or EU law. Miller and Nicola make the point that the failure of legal scholarship to pay attention to the role of Europe's colonial history in Europe's present has significant consequences for knowledge production in Europe.[24]

Studying these omissions will enable EU law to become more inclusive, and should stimulate reflection on the demographics of EU law: who teaches EU law? What actions, interventions and scholarship are recognized and how does this influence the distribution of rewards – studentships, research grants, Visitorships, posts and even the naming of Chairs. When will we have the Claude Moraes Chair in EU Law,[25] to recognize the first Black MEP, or the Olivette Otele Chair in European History, recognizing the only Black woman in the

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[22] E. R. Grilli, *The European Community and the Developing Countries* (Cambridge: Cambridge University Press, 1993).

[23] See H. Wardle and L. J. Obermuller, '"Windrush Generation" and "Hostile Environment": Symbols and Lived Experiences in Caribbean Migration to the UK' (2019) 2 *Migration and Society* 81–89. Research could for example inquire into the effectiveness of the Windrush Compensation Scheme. On the history of Black Britons see I. Solanke, *Making Anti-racial Discrimination Law: A Comparative History of Social Action and Anti-racial Discrimination Law* (Abingdon: Routledge, 2009); K. Hammond Perry, *London is the Place for Me: Black Britons, Citizenship and the Politics of Race* (Oxford: Oxford University Press, 2018).

[24] J. Miller and F. Nicola, '*The Failure to Grapple with Racial Capitalism in European Constitutionalism*', No. 201 I-Courts Working Paper Series, No. 8 IMAGINE Paper (2020).

[25] Claude Moraes OBE, British MEP for London (1999–2020).

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UK to be a professor of history?[26] Reducing racial homogeneity is urgently needed in relation to research, teaching, management and leadership in the EU and EU law. As I have asked in the past, where are the Black professors in Europe? Or more specifically: where are the Black professors in EU law? The field has done an abysmal job in attracting Black Europeans – there are less than a handful of Black scholars working in this field.

Homogeneity is bad for knowledge production in the EU and for EU law. To adapt a statement made by Lady Brenda Hale: EU law, the EU legal profession and the EU courts 'are there to serve the whole population, not just a small section of it. They should be as reflective of that population as it is possible to be'.[27] There are practical consequences to this homogeneity: the absence of a critical mass of Black scholars results in a lack of research into the living and working experiences of Black Europeans. This absence also facilitates attacks on theories that prioritize research into these lives: French academics faced little opposition when in November 2020 they decried critical race theory as contributing to the killing of a schoolteacher.[28] While academics of colour in the United States are numerous enough to fight back against political attempts to silence them, this does not apply in Europe.

A decolonial approach in EU law should therefore prioritize empirical studies. There is much scope for this. For example, case law from the European Court of Human Rights and studies by the European Union Agency for Fundamental Rights (FRA) indicate that racial harassment and violence by the police is commonplace across the EU but there is no academic empirical research drilling into this phenomenon.[29] This would entail looking into the data to interrogate deaths in police custody

[26] Olivette Otele, Professor in History, SOAS (first Black female professor in history in the UK in 2021).

[27] Brenda Hale, former president of the UK Supreme Court, as cited in S. Bearne, 'Lady Hale: "Studying Law? Make Sure You Have the Stomach for It"', *The Guardian*, 16 February 2018.

[28] Open Letter from Alana Lentin and Co-Signatories on the threat of academic authoritarianism – international solidarity with antiracist academics in France (2020), which can be found at www.opendemocracy.net.

[29] The European Union Agency for Fundamental Rights, 'Being Black in the EU: Second European Union Minorities and Discrimination Survey' (2019).

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across the EU of healthy young Black men and women such as Oury Jalloh and Christy Schwundeck in Germany.[30]

The emphasis of these empirical studies should be on systemic biases: the purpose of this research agenda is to highlight structural and institutional processes that make Black Europeans invisible by paying no attention to their living and working experiences. This applies to both the private as well as the public sphere. There are opportunities for private law scholars, such as those interested in company law, to think about what can be learnt from a decolonial approach to business practices across the EU. Or indeed in relation to equality, diversity and inclusion agendas, the legal competence in Article 19 Treaty on the Functioning of the European Union (TFEU) has been used to develop Diversity Charters across the EU Member States, which are used to promote and support best practices in diversity management in many private (and some public) organizations.[31] They are adopted voluntarily by businesses in the Member States working in collaboration with national ministries. To date, there are twenty-six Diversity Charters, spanning the breadth of prohibitions listed in Article 19 of the TFEU.[32] It is noteworthy that they have proliferated in countries that have only recently adopted laws prohibiting discrimination beyond gender. Little is known about these and their impact on improving living and working conditions for Black Europeans. Research on these would therefore make an important contribution to EU law.

In thinking about co-production as a practice, this needs to be approached horizontally in terms of multiple disciplines and sectors. Like the conference mentioned at the beginning of this article, decolonizing research and teaching in EU law is of necessity multidisciplinary – it is a task for EU lawyers as well as historians, sociologists and political scientists. It is also beneficially cross-sectoral. Collaborations between

[30] See www.ouryjallohcommission.com; http://initiative-christy-schwundeck.blogspot.com/; and N. Parveen and S. Morris, 'Death of Cardiff Man after Night in Police Custody "Deeply Concerning"', *The Guardian*, 12 January 2021.

[31] See I. Solanke, 'Where Are the Black Judges in Europe?' (2019) 34 *International Journal of Constitutional Law* 289.

[32] Article 19 TFEU prohibits discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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the CJEU/Commission and schools/universities are necessary. Without interesting Black students in EU law, there will always be a dearth of Black legal practitioners and professors in this field.[33]

Co-production in decolonial research is raised to an ethical issue in two ways. First, it is linked to the pro-democracy principle discussed earlier – integral to democracy is participation, and this is increasingly important in relation to research cultures. Second, decolonial research in the 'Global North' must be in collaboration with the 'Global South', promoting interaction and conversations across and between peoples in these regions wherever they may be, remembering that these are geopolitical and historical terms – being of one does not preclude being of the other.

In particular, excavating and reversing the imprints of colonialism in EU law and empirical research into EU law should be conducted together with those having direct biographical links to peoples that were colonized. This extends to citational practices, which can often result in extraction and silencing.[34] For in the absence of co-production, decolonizing EU law merely becomes a guise for neocolonialism – a twenty-first century version of colonialism where the lives of Black Europeans are visible but only via the voices and choices of non-Black Europeans. At the same time, as succinctly put by Adebisi, care must be taken with co-production to not conflate 'embodied difference with epistemic difference'.[35]

16.6 CONCLUSION

A decolonial approach to research and teaching in EU law encourages adoption of a way of thinking that is non-Eurocentric and removes the privilege afforded to Eurocentrism.[36] This approach moves legal

[33] Santander Bank recently curated with the Open University an online education programme called 'Union Black' to contribute to anti-racism on campus. Another example is the UNITE/HEPI research on 'Living Black at University', see www.unitegroup.com/living-black-at-university.

[34] See Adebisi, *Decolonisation and Legal Knowledge*, pp. 144–145.

[35] Ibid., p. 146.

[36] P. McIntosh, 'White Privilege: Unpacking the Invisible Knapsack' (1989) *Peace and Freedom Magazine* 10.

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education in this field towards a reframing and reconstructing of questions and methods. It incorporates but goes beyond the diversity agenda: diversity can still exist within a 'western bias' while decolonization attempts to go 'further and deeper in challenging the institutional hierarchy and monopoly on knowledge'.[37]

It would help EU law to reflect upon what is seen as worthy of study, as well as the way in which core issues pertaining to Europe are told and who has legitimacy to tell those stories: why is there in this field no study of the lives of Black and minority ethnic Europeans, in all of their diversity? When evidence from the FRA suggests that policing across the EU may be marred by racism, why do we not investigate this? Why are there so few Black and minority ethnic scholars engaged in the field who might lead this work? EU law needs to shift its vision from the mainstream to the margins; in doing so it will, as put by Ali Meghji, 'shake off its commitment to colonial ways of thinking' so that decoloniality, in all its aspects, becomes embedded in EU law and studies.[38]

A focus on excavation will result in the practice of questioning the normative content and assumptions of EU legal studies – the production of themes and priorities, the interests reflected in topics and assessment, as well as an analysis of those whose research is taught and whose work is published. As suggested above, a decolonial practice in EU law would emphasize co-production, a systemic focus on omission and empirical work. This work would be informed by the principles of intentionality, an international perspective and pro-democracy.

Thought needs to be given on how to sustain a decolonial approach in EU law as an effective practice in the long term. Creating opportunities for teaching and research relating to decolonizing will enrich EU legal studies intellectually as well as build future capacity for faculty diversity in the field. As the American Bar Association argues, 'diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes'.[39] A broad range of views can discover better answers for our complex and intersectional world and potentially produce new

[37] S. Akel, 'What Decolonising the Curriculum Really Means', *EachOther*, 14 August 2020.

[38] A. Meghji, *Decolonizing Sociology* (Cambridge: Polity Press, 2020).

[39] 'Diversity in Law: Who Cares? Why Justice John Robert's Implications Were Wrong' (2016) American Bar Association.

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solutions. In order to achieve this, legal scholars in the United States are turning to investigate elite schools' diversity hiring practices and the impact that this has on education and ultimately, on social justice and society.[40] However, it must be remembered that a decolonial approach goes beyond diversity to question ways of seeing and knowing, as well as who is seen – not only Jean Monnet but also Olivette Otele – and accepted as having knowledge worth knowing.

Finally, adoption of a decolonial approach in teaching and research in EU law would offer a moment for pause and reflection across the continent on two interrelated broader questions: first, what is legal education for and second, who should the legal profession be training to create an accessible and sustainable justice system that both supports and strengthens democracy and non-discrimination?[41] Higher education – both in Europe and on the EU – should reflect the goals of equality and justice that the continent espouses in the world: put simply, a decolonial approach in EU law can help the EU become the change that it wants to see.

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[41] S. Collini, *What Are Universities For?* (London: Penguin, 2012); F. L. Adebisi and S. Jivraj, 'Racism as Legal Pandemic: Thoughts on Critical Legal Pedagogies' in D. Cowan and A. Mumford, *Pandemic Legalities: Legal Responses to COVID-19 – Justice and Social Responsibility* (Bristol: University of Bristol Press, 2021), pp. 65–78.

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