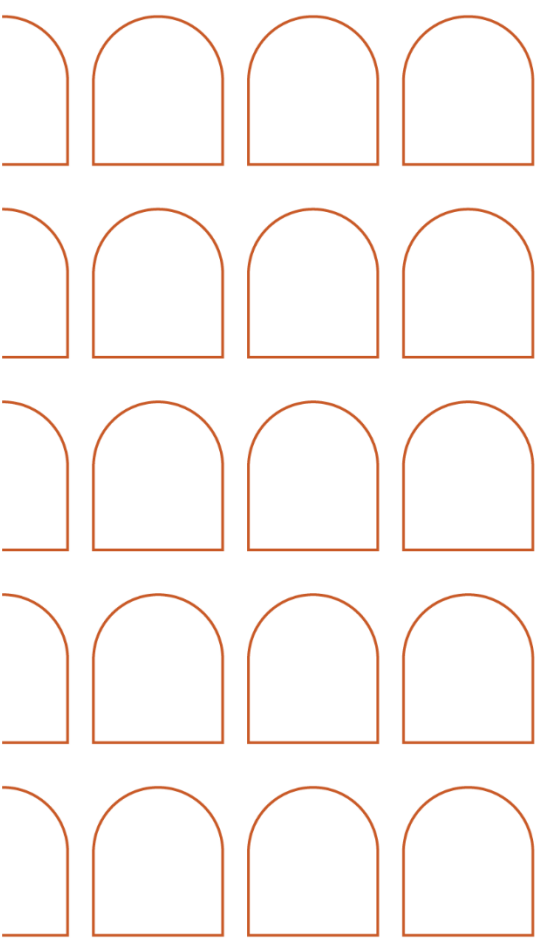




LAW 2026/5  
Department of Law

# WORKING PAPER

**The Law of the Everyday.  
An inquiry into the legal fabrics of  
European lives**

Loïc Azoulay, Jack Meakin, et al. (Eds.)



European University Institute  
**Department of Law**

**The Law of the Everyday.**  
**An inquiry into the legal fabrics of European lives**

Loïc Azoulay, Jack Meakin, Anna d'Agostino, Prince Amadi, Judith Bauder, Vittoria Becci, Jacob van de Beeten, Renan Bodin, Mateus Correia de Carvalho, Marthe-Hélène de Dinechin, Sarah Glaser, Irina Muñoz Ibarra, Tereza Kanova, Clara Muller, Johannes Müller, Narin Nosrati, Mikael Ruukel, Lukas Schaupp, Alex Schuster, Hubert Sitnik, Marc Steiert, Luca Tenreira, Davide Tomaselli, Timo Zandstra, Karla Žeravčić (Eds.)

LAW Working Paper 2026/5

ISSN 1725-6739

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Published in April 2026 by the European University Institute.

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Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

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With the support of the  
Erasmus+ Programme  
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

## **Abstract**

This collection of papers is the result of a seminar held in the fall of 2024 on '*European Law of the Everyday. The Way We (Legally) Live in Europe Now*'. The seminar was an attempt to develop an innovative legal method that explores the relationship between law and everyday life through the stories told in Ben Judah's book '*This is Europe: The Way We Live Now*' (2023). The book consists of a series of short stories about different forms of invisible yet 'ordinary' lives in today's Europe. By dissecting the thin yet rich material collected in this book, this collection investigates the role of law in informing/or not, structuring, and/or de-structuring, the lives of 'ordinary' Europe's citizens and residents. Based on several of the book's chapters, the pieces collected in this volume turn the stories into case studies, reflecting on their treatment and silences in Judah's book, investigating the structural effects of the presence or absence of law.

## **Keywords**

Europe; Law; Everyday; Society; Social; Legal Method; Critique

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*We should like to dedicate this collection to the memory of Saniya Amraoui, former PhD researcher at the EUI. Her passing has left many of us inconsolable. Her uprightness in life and her unfinished work on migrants' life and law in Europe has been a constant inspiration during this collective endeavour.<sup>1</sup>*

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<sup>1</sup> S Amraoui, 'Othering in EU Law. The Case of Migrants', *Verfassungsblog* (4 June 2025).



# The Law of the Everyday: Europe's Method

by Loïc Azoulai\* & Jack Meakin\*\*

In the fall of 2024 at the EUI, we, together with a group of young researchers, ran a seminar on *European Law of the Everyday*. The group endeavoured to explore the role of law or lack thereof in the stories told by Ben Judah in his book *This is Europe: The Way We Live Now* published in 2023.<sup>2</sup> Explicitly inspired by the tales and dramas of Boccaccio's *Decameron*, the book turns from the depiction of fourteenth century Florence to a means of instruction for twenty-first century Europeans. The book presents a series of short stories about various forms of 'ordinary' lives in today's Europe: from the dock-worker in Rotterdam to the Romanian lorry-driver, from the turbulent journey of an Ivorian migrant to the Afghan fruit-picker on a Greek island, from the gay asylum seeker in Berlin to the elderly musician struggling with domestic violence in Tbilisi. Based on a close reading of these stories, our seminar started a conversation about the concept of the everyday, the nature and limits of the representation of the everyday in Judah's book, and about how life is experienced in Europe today, given the institutions and laws of Europe.

This collection collects some of the short essays produced in the framework of this seminar. Their topics are as varied as the stories contained in the book. Each of these essays is marked by an extreme attention to the details of the stories, critically reflects on its own methodology and offers thoughts on the feasibility and function of a law of the everyday. As a whole, they punctuate a path of reflection that, we believe, has the potential to form a new approach to European law, in parallel and in dialogue with approaches that are currently emerging, such as critical approaches to EU law,<sup>3</sup> law and geography,<sup>4</sup> and the contribution of law and political economy perspectives.<sup>5</sup> In this short introduction, we wish to do no more than mark some modest steps on this path.

## 1. The Everyday

*Law of the everyday*: seemingly an aporia, a category that is hard to approach.

In a first approximation, the everyday is the environment in which we all live: at home, at work, in the street, in our social relationships and in private existence. The everyday is our common social practices, our ordinary modes of existence and our most general forms of representation, in a given society at a given moment. It is not free from normativity, but this is the kind of social normativity that shapes concrete ways of living and shared understandings of reality. It is concerned with social patterns of action, not with legal rules laid down by state agencies. Modern law, in its most diffuse definition, is precisely what denies, disturbs and defies the everyday: it is a normative order based on a set of abstract and standardised statements, backed by a technology of power, and that has as its ends in the social regulation of human behaviour.<sup>6</sup> The point of modern law is precisely to depart from and reshape everyday habits and social patterns. European law, in its postwar reconfiguration at the national and supranational level, can be seen as a radical expression of that modern conception of law whereby law is entrusted not just with social ends but with its own ends. This

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<sup>2</sup> B Judah, *This is Europe. The Way We Live Now* (Picador 2023).

<sup>3</sup> P Neuvonen and P Linden-Retek (eds.), *Critical Theory and European Union Law* (Hart Publishing, forthcoming 2025); I Isailovic, 'Critical approaches in EU law – still a blindspot' (September 2023, *online*).

<sup>4</sup> F de Witte, 'Here Be Dragons: Legal Geography and EU law' (2022) *European Law Open*, 113-125.

<sup>5</sup> I Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' (2021) *Journal of Law and Political Economy*, 301-332.

<sup>6</sup> H Kelsen, *Pure Theory of Law* (University of California Press, 1967); P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal*, 814-853.

is perhaps most visible in the conception of European Union law: since the inception of European integration, law was designed as a means to construct a “community of law”, disembedded from national and international legal frameworks but also freed from chaotic terrain of power relationships, social conflicts and ideological struggles, with a view to creating a ‘Common Market’, i.e. a legally constituted entity, making it work at the institutional level.<sup>7</sup>

However, it turns out that this special form of legal normativity, meant to establish a peaceful form of relationship between European states and to fashion the precarious integration process into a legitimate construction, has generated a form of disconnect from the specific conditions of existence of people living in Europe. Such disconnect currently takes a variety of forms: the invisibilisation of basic conditions of social reproduction, the obfuscation of a large part of social realities, and the suppression of singularity, differences and otherness.<sup>8</sup> The reader will be all too aware of law’s failure and irreverence to exploitative working conditions, social rights protections, xenophobia, and sexual violence, as examples that only scratch the surface of law’s uncoupling from social reality. The introduction of the category of the everyday is our response to this state of affairs: this is not to bring law back to social existences in their alleged spontaneity and as they are lived; this is to resist the reduction of the “*basic terms of social life*” in Europe to purely institutional practices, narrative, and knowledge;<sup>9</sup> this is to reintroduce into the matters of concern of European lawyers the crises of the everyday of European societies.<sup>10</sup> The reference to the everyday corresponds, thus, to a decision to suspend the conceptual world we inherit, the so-called intellectual and practical programme of “integration through law”, and to start from another end: one that is less abstract, one that is not purely institutionally moulded.

It does not mean that we give up on the objectives and values that have found shelter in the European integration project. It means that European law should no longer be content with constructing a market, fashioning a value-based European society, and ruling the world: it should rather be concerned with lives as “market-embedded”, globally fashioned and ruled by the laws of Europe. The everyday is a category to account for the *experience of Europe* beyond the construction of Europe’s institutional order. It refers to the different ways in which living conditions are experienced and the ways in which people reflect on their own conditions of existence in Europe. This is driven by a dual concern for both the diversity of European society as it is shaped by European law *and* a critique of its normativity, the social relations it constitutes, its image of social reproduction, and (in)capacity to respond to the multiple crises that face European society.

It should be clear that references to ‘European law’ in the symposium ought not to be reduced to ‘The Law of the European Union’. While there is inevitable slippage in this introduction and the essays that follow, due to the reach and significance of EU law, the distinction matters for a number of reasons. First, there are a plurality of legal orders in Europe that have a profound effect on our everyday lives, which are not necessarily shaped by or fall within the competence of EU law. We see this in the provision of healthcare, employment protections, and distinctions in legal culture among European states, not to mention the uneven enforcement of law that is related to local practices and knowledge. Second, the idea of ‘Europe’ and the lives of those that are shaped by it are not confined to the jurisdictional scope of EU law. As the stories in

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<sup>7</sup> J van de Beeten, ‘On Metaphor and Meaning: the Autonomy of the EU Legal Order Through the Lens of Project and System’ 8 (2023) *European Papers* 1441-1464.

<sup>8</sup> See further L Azoulay, ‘European Society and its Law: EU Law in light of Social Theory’ *European Law Open* (forthcoming 2025).

<sup>9</sup> The expression is from R Mangabeira Unger, ‘The Critical Legal Studies Movement’ 96 (1983) *Harvard Law Review* 563-675.

<sup>10</sup> See also F de Witte, ‘Is this Europe? *EU law’s rendering of European society*’ *European Law Open* (forthcoming 2025).

the book reveal, the economic activities of actors within the Union – such as banks and the oil and gas industry – are to be found in remote locations, including in the Arctic Circle. Activities which can be seen as central to providing the energy required for reproducing European society and feeding ledgers in Turin and Paris.<sup>11</sup> At the same time, those working on the ground in Sabetta and indigenous communities, who suffer the adverse effects of neo-colonial resource extraction, are not subject to EU law per se. In other words, there is a need to account for the reach of European influence where it does not fit neatly within the territorial or jurisdictional boundaries of the European Union. A different but parallel story of the effect of European law on lives lived in and outside Europe. Third, a critical approach to the law of Europe cannot be constrained by EU law. Not only does a sociology of European law require a definition that accounts for the plurality of legal orders and how they are experienced and understood by those that are affected and reproduced by them. A critical reflection must be capable of transcending the boundaries of the European Union, recognising its institutional deficiencies,<sup>12</sup> and the complicity of its deeds and policies in the erosion of fundamental rights in the periphery to sustain the centre.<sup>13</sup>

## 2. The representation of the everyday

The experience of Europe has already been subject of research in European studies. There has been what has been termed a “*practice turn*” in this field.<sup>14</sup> The studies embracing this turn, pertaining to sociology, political science and anthropology, focus on how people live with the EU as institutional machinery, and as a set of policies and symbols. They attend and explore the concrete development of transnational patterns of interaction and socialisation.<sup>15</sup> They document a genuine process of “*Europeanisation of everyday life*”: the sharing among the peoples of Europe of institutions, resources, modes of living as well as social ideals and political ideologies. This approach is highly valuable. However, it continues to be characterised by an institutional bias: it is essentially based on the uncovering of artefacts, including legal artefacts, which make the EU work on an everyday level.<sup>16</sup> The challenge, instead, is to account for the variety of experiences that unfold in Europe beyond, because and in spite of its institutional and legal framework. The everyday is shorthand for foregrounding the lived experiences that Europe’s institutional discourse fails to capture.<sup>17</sup>

In our work, Ben Judah’s book provides a departure point for considering an alternative to that discourse. It consists of a collection of short stories about irregular migrants, precarious workers, members of minority groups in society, women suffering from the threat and effects of domestic violence, war and illness. This book is the repository of a social reality that is essentially fragmented, precarious, and misaligned with the EU ideal of a prosperous and cohesive society. Judah’s project aims to tell stories about “*lived Europe, not the Europe of memory or political systems.*” His everyday is not the flatly quotidian, the banal and the habitual; it is full of dramatic experiences re-told on behalf of the people themselves, fraught

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<sup>11</sup> See the contribution of Zandstra in this symposium.

<sup>12</sup> M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP, 2021).

<sup>13</sup> A.J. Menéndez, ‘The Crisis of Law and the European Crises: From the Social and Democratic “Rechtsstaat” to the Consolidating State of (Pseudo-)Technocratic Governance’ (2017) 44 *Journal of Law and Society* 56; I Katsaroumpas, ‘De-Constitutionalising Collective Labour Rights: The Case of Greece’ (2018) 47 *Industrial Law Journal* 465.

<sup>14</sup> R Adler-Nissen, ‘Towards a practice turn in EU studies: the everyday of European integration’ (2016) 54 *Journal of Common Market Studies*, 1

<sup>15</sup> E Recchi et al. (eds.), *Everyday Europe: Social transnationalism in an unsettled continent* (Policy Press, 2019); T Kuhn, *Experiencing European Integration. Transnational Lives and European Identity* (OUP, 2015); K McNamara, *The Politics of Everyday Europe: Constructing Authority in the European Union* (OUP 2015).

<sup>16</sup> On legal artefacts see F Nicola & B Davies, *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (CUP, 2017)

<sup>17</sup> S Laugier, ‘From the Ordinary to the Everyday’33 (2024) *Qui parle* 17-34.

with physical or moral hardships and breakthroughs, and filled with heroic achievements. In the collection of essays that follow, we endeavour to turn this rich material into case studies about the experience of Europe. And yet, we are aware that the book relies on a specific representation of Europe's social reality that comes with its own limits.<sup>18</sup> These limits are at once epistemic and ethical.

As Judah makes clear, the book is not about "*characters or subjects*". It does not draw a social or moral picture of Europe based on reified characters representing distinct classes or delimited portions of society. This is really about people on the move, either geographically or existentially, caught up in situations of distress and embedded in broader movements affecting the structure of Europe as a whole, such as migration, war, technological revolution or climate change.<sup>19</sup> The stories are selected as an illustration for these broader trends and with an emphasis on the narratives of 'storytellers' so-called.<sup>20</sup> As a result, despite Judah insisting that he is telling "*their own stories*", adopting the style of the third-person perspective, some salient aspects of Europe's social reality are obscured. For instance, the book refers to racial discrimination only in relation to migrants and from the point of view of the average European who sees migrants as essentially looking for stability and integration into national societies. The own specific forms of relationships of migrants to Europe do not find home in the book.<sup>21</sup> Moreover, the stories of natives of Europe who are exposed daily to forms of discrimination and racism are not told.<sup>22</sup> Similarly, those non-mobile European citizens who are broadly represented in the structures of power and constitute the standards in relation to which other forms of life are assessed, and yet perceive and are encouraged themselves as being exposed to threats from outside and inside Europe, with a part of them prone to regressive tendencies or even racist views, is not to be found. Instead, the discourse of fear and racism is shared in the book by those who may be expected to be its target, such as Aboud, the delivery driver from Syria working in Storkow, commenting that "*Berlin is full of crime*". Therefore, the kind of representation of social reality enshrined in this book is both insightful and problematic. It gives a voice to those who are often unheard but not without raising concerns about the distortion of social reality.

The book consists of individual stories framed in terms of coherent narratives, full of personal voices and emotions: mainly fear, loneliness, and a sense of being-out-of-place or of not-being-at-home in Europe. This mode of exposition is integral to the task of generating ethical thinking, inviting the reader to share the hardships of the protagonists of the book, and therefore to develop a new consciousness in the form of a more empathic 'We': as this is "*the way we live now*". Yet, this invitation is problematic on at least two counts. First, it is based on a form of extraction of stories from individuals that is at risk of reproducing the problem to which it is meant to direct our attention, namely the sense of alienation and dispossession that is pervasive in European society.<sup>23</sup> Second, it is aimed to arouse indignation or even anger in a context in which the question "*is this the way we want to live now?*" does not always produce

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<sup>18</sup> During the seminar, we were guided in the exploration on the limits to literary representation by the extraordinary book of E Auerbach, *Mimesis: The Representation of Reality in Western Literature* (Princeton University Press, 1946/2003).

<sup>19</sup> An interview with Ben Judah, 'How Europeans Live Now: Ben Judah on Capturing the Arc of Life in Our Time' The Review of Democracy (online).

<sup>20</sup> B Judah, *This is Europe. The Way We Live Now* (Picador 2023), at 499.

<sup>21</sup> For an inquiry into migrants' specific forms of identification, J Schapendonk, Finding Ways Through Eurospace. West African Movers Re-viewing Europe from the Inside (Engels 2020).

<sup>22</sup> See the contribution of Muñoz Ibarra in this symposium.

<sup>23</sup> On the problem of extraction in social sciences see E Pittaway, L Bartolomei, R Hugman, 'Stop Stealing Our Stories': The Ethics of Research with Vulnerable Groups' (2010) 2 Journal of Human Rights Practice, 229–251.

critical reflexivity and progressive policies, but rather works as an interpellation and a rallying cry for those who are willing to feed collective resentment and polarisation.<sup>24</sup>

While the book is not subject to the methodological rigours of the academy, it does make a claim to narrate stories about how lives are lived, which raised nagging doubts and concerns about the representativeness of *This is Europe* throughout our seminars and in the essays that follow. In the absence of the author's original transcripts and the inevitable re-presentation that occurs when speaking on behalf of another,<sup>25</sup> we do not reify but treat the stories presented in the book with necessary skepticism. At the same time, we resolved that they serve as a window into the diversity of European lives, as a point of departure which transcends Judah's work, to comprehend the role of law in constituting the everyday, and to reflect on the ir/relevance of law to each of these stories and our own.

### 3. The law of the everyday

We now come to the most difficult question: How to develop an idea of law that is not only based on institutional knowledge but also on the everyday experience of Europe? This project builds and draws upon existing interdisciplinary methods, but we are not bound to existing conceptual and theoretical ways of seeing European law and society. On the contrary, we embrace a methodological openness that responds to the aim of our inquiry – a 'methodological bricolage' that produces a complex, non-totalising picture of the everyday experience through law, to show how diverse concerns of European society is constituted by law, how it responds to and defies law's forms.<sup>26</sup>

To this end, we require tools that transcend disciplinary approaches, including the need to examine the political economy of European labour regimes, the geographical bounds of EU law, the normative foundations of the Single Market and its relationship with competing ambitions of a 'Social Europe'.<sup>27</sup> The contours of such a method can be found in the distinct approaches of each of the authors in this symposium. Of course, each understanding of the everyday presented here is both necessarily incomplete and essential to our task. The complexity of social reality cannot be bound or satisfied by one perspective or even a commitment to methodological openness without leaving something out. Nonetheless, we strive for a contextualised conception of the everyday, one that is situated in time and place, knows the historical foundations of the European project, takes its lead from the people and communities it speaks of, and recognises the structural tension between the economic, political, and the social in contemporary Europe.<sup>28</sup> For example, to the extent that we can conceive of the everyday experience of cross-border transport workers whose sleep, mealtimes, social relations, and health are shaped by just-in-time global supply chains, we require not only a complex conception of the structural relations that reproduce working conditions in Europe, but a sensitivity to the rhythms of daily life on the road, the extent to which life is and is not dictated by EU-mandated rest periods, the demand for profit of managers in home countries and that of remote shareholders, the distortion of family life as well as the desire to finally arrive home.

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<sup>24</sup> Note that this question resonates with a long tradition in moral philosophy and critical theory. To name but a few recent publications along this tradition: R Jaeggi, *Critique of Forms of Life* (Harvard University Press 2018); S Laugier, 'The Texture of Importance: Ethics after Cavell and Diamond' in von Sass & Amesbury (eds.), *Ethics after Wittgenstein. Contemplation and Critique* (Bloomsbury Academic 2021); J Butler, *What World is This?* (Columbia University Press 2022).

<sup>25</sup> On the notion of representation see H Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (OUP, 2013), esp. Chapter 4.

<sup>26</sup> On the notion of 'bricolage' see C Lévi-Strauss, *La pensée sauvage* (Plon, 1983).

<sup>27</sup> A.D. Andry, *Social Europe, The Road Not Taken. The Left and European Integration in the 1970s* (OUP, 2022).

<sup>28</sup> M Goldoni and M.A. Wilkinson, 'The Material Constitution' 81 (2018) *The Modern Law Review* 567-597.

Adopting this approach cannot mean developing just another abstraction, the description of a 'legal reality' based on the principles of a "good society".<sup>29</sup> Our account ought not to be independent from the social reality that it addresses: it assumes to carry out a work of description.<sup>30</sup> And yet, we do not intend to simply reproduce or rely upon the reality of a European society fraught with various forms of exploitation, domination and injustice. Therefore, rather than simply looking for the place of law throughout the book, we propose to attend to the systemic vulnerabilities experienced by people in Europe as they emerge from each of these stories, to then wonder about the agency of legal forms and processes in fashioning these experiences, whether they exacerbate, displace or attempt to remedy them.

A method that seeks to account for the way life is lived with law may draw inspiration from legal consciousness studies that have shown the ways that "*law works in everyday life, how people experience and understand law, and what potential this has for understanding and reshaping the relationship between law and society.*"<sup>31</sup> However, to the extent that our project shares some of its aims with legal consciousness scholars, it is closer to the critical ambitions of this tradition. Rather than reproducing and describing the diversity of legal meaning and people's consciousness, we share an ambition to return to the materiality of the social in the study of the law.<sup>32</sup> To recognise the social foundations of law, its relations and effects on individuals and how law is reproduced through social understandings. While the legal consciousness field has developed to provide numerous accounts of how different social groups interpret the law or their attitude toward it,<sup>33</sup> Susan Silbey's original aim was to investigate the hegemonic nature of law, how its authority and ideologies are reproduced over time, and the effect of its structures on everyday life.<sup>34</sup> This is key to our present ambition to inquire into how law is experienced and reproduced in practice. It also shares a concern for the ways that law produces material inequalities in society.<sup>35</sup>

We draw upon insights and methods of legal consciousness studies, to recognise that any critical concept of the law of the everyday must seek to comprehend the ways that the law imposes and sustains structures of domination, which shape not just how people think about law but how they act in relation to it. However, our point of departure is not found in legal rules or 'legalities', defined as a set of personal perceptions and reactions about law, but in personal experiences and social practices as long as they are imbued with a complex of socio-legal normativities.<sup>36</sup> We begin not with individuals' relations to law but with diverse social experiences as they are fashioned by law, or the lack thereof, developing in the interstices of it.

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<sup>29</sup> The notion of good society has been picked up by Advocate General Ćapeta in her Opinion in Case C-769/22, *Commission v Hungary* concerning the infringement action against the Hungary's anti-LGBTIQ+ law: Opinion of 5 June 2025, ECLI:EU:C:2025:408, para 157.

<sup>30</sup> A Orford, 'In Praise of Description' 25 (2012) *Leiden Journal of International Law* 609-625.

<sup>31</sup> R Harding and A Keeling, 'Raising relational legal consciousness through co-production research? Making law more accessible' (2024) *Journal of Law and Society* 51 (Suppl. 1) 3.

<sup>32</sup> S Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 327.

<sup>33</sup> E Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50 *Industrial Law Journal* 405-433. Sarat, Knowledge of Law; Harding and Keeling; Use Kirk to signpost some of these studies

<sup>34</sup> S Silbey; L.J. Chua and D.M. Engel, 'Legal Consciousness Reconsidered' (2019) 15 *Annual Review of Law and Social Science* 335.

<sup>35</sup> S Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323. See P Ewick and S Silbey (eds.), *The Common Place of Law. Stories from Everyday Life* (The U. of Chicago Press, 1998) on the role of competing narratives and approaches to the law which sustain and reproduce its hegemony in various forms

<sup>36</sup> On legalities see S Halliday, 'After Hegemony. The Varieties of Legal Consciousness Research' (2019) 28(6) *Social & Legal Studies* 864. For a similar focus on social practices see A Sarat and T.R. Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life' in A Sarat & T.R. Kearns, *Law in Everyday Life* (U. of Michigan Press, 1993)

Now, we acknowledge that we do this in the context of a society that is no longer that in which the so-called “everyday studies” emerged in Europe, at the age of the development of industrial capitalism, modernisation and productivism.<sup>37</sup> We live in a post-Covid society that is undergoing major disruptive events, whether crises or catastrophes, such as climate change, the digital revolution, the return of war on the continent, in a global context in which individual and social lives are governed by a new form of capitalism, whether it is called “absolute capitalism”, “cognitive capitalism” or “surveillance capitalism”.<sup>38</sup> This structure is based on a political economy, a “*framework of law and governance*” as Bakker and Gill put it,<sup>39</sup> that relies on both ever denser webs of interdependence between national societies in Europe, including economic, institutional, technological, social, cultural and legal interdependencies, and upon a new level of dependency on complex technical systems, external resources and actors, and natural processes beyond our control. This structuration gives rise to a tension that unfolds on the psychosocial level: on the one hand, this may seem to enhance personal agency, give rise to new forms of ‘individuation’,<sup>40</sup> and even expands the very notion of ‘agency’ to include artefacts and non-humans;<sup>41</sup> but, on the other hand, it may be felt that the complex set of techno-social systems that bind European societies together limits individuals’ agency, disempowers and dispossesses them, generating a sense of “social insecurity” that certain political forces are prone to exploit, including with the intention of pitting the middle class Europeans and minority groups or migrants against each other.<sup>42</sup> Today, more and more people in Europe experience a feeling of loss, vulnerability and “*placelessness*.”<sup>43</sup>

What has emerged from our inquiry is that the legal forms and processes through which lives are lived in Europe vary depending on the field concerned, whether it is work, migration, domestic violence, healthcare or religion. But, in each case, we found that these are essentially of two kinds. One is the objective or structural forms under which social practices develop and lives are lived in Europe. The task here is to unveil the complex co-integration of ecosystems, technical structures and political ideologies that produce material, social and legal constraints on the everyday life of workers, migrants, or women in Europe. The other kind refers to the subjective or existential forms through which people relate to themselves, to each other and to the world. The task here is to decipher people’s affective, embodied, imaginary and conceptual engagements that condition the various ways in which they perceive, relate to and rely upon law in their everyday life.

In this context, the challenge is to articulate and combine the distinct methodologies associated to the objective and subjective forms of the everyday. Accounting for the ‘objective everyday’ requires a reliance on new forms of materialism attentive to “embodied subjectivities,” able to unveil the operation of broad structures of power and social constraints that unevenly affects the condition of Europeans.<sup>44</sup> Accounting for the ‘subjective everyday’ requires the mobilisation of new forms of existentialism able to think the “lived body” and “social structure” together, in

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<sup>37</sup> B Highmore, *Everyday Life and Cultural Theory. An introduction* (Routledge, 2002).

<sup>38</sup> E Balibar, ‘Exiles in the Twenty-First Century: The New “Population Law” of Absolute Capitalism’ in M de Nanteuil and A Fjeld, *Marx and Europe: Beyond Stereotypes, Below Utopias* (Springer, 2024) 161-174 ; Y-M. Boutang, *Cognitive Capitalism* (Wiley, 2004); S Zuboff, *The Age of Surveillance Capitalism. The Fight for a Human Future at the New Frontier of Power* (Public Affairs, 2019).

<sup>39</sup> I Bakker and S Gill (eds.), *Power, Production and Social Reproduction. Human In/Security in the Global Political Economy* (Palgrave 2003), at 27.

<sup>40</sup> See the contribution of Steiert in this symposium.

<sup>41</sup> T Garcia, ‘Est-ce que tout agit?’ *Philosophie magazine* (2025) n° 185.

<sup>42</sup> The concept of social insecurity has been developed by R Castel, *L’insécurité sociale. Qu’est-ce qu’être protégé?* (Seuil 2003).

<sup>43</sup> A Reckwitz, “The Challenge of Loss” (January 2023, *online*); E Relph, *Place and Placelessness* (London, Pion, 1976).

<sup>44</sup> D Coole and S Frost (eds.), *New materialisms. Ontology, Agency, and Politics* (Duke University Press 2010) at 28. See further J Hohmann, ‘Diffuse subjects and dispersed power: New materialist insights and cautionary lessons for international law’ 34 (2021) *Leiden Journal of International Law* 585-606.

the geo-ecological and psycho-social context of today's Europe.<sup>45</sup> When applied to individual stories, the former approach insists on instances of domination and processes of disenfranchisement and exploitation. The latter insists on damaged ways of living, social struggles, and forms of re-inhabiting the world in a precarious or even devastated social, political, and natural context. Both perspectives are required to make sense of stories such as that of Nora, the young girl from the Latvian city of Liepāja, who is forced into sex work to finance her studies in Italy and to help her family, is both a damning story of structural exploitation and a story about a young woman's resilience and struggle to achieve her aims on her own terms;<sup>46</sup> or such as that of Graña, the fisherman from Corrubedo, a small fishing village in the community of Galicia, Spain, that is increasingly transformed into a site of overtourism, is both a story of systemic extraction and exploitation of natural resources within and beyond the borders of Europe and a story about the development of a "reconnection to earth" in the life and consciousness of an old fatigued European man.<sup>47</sup> To account for these complex dialectics of social oppression and reconnection to life, we were prepared during our seminar to 'wildly' associate sociologies of everyday life, philosophies of the ordinary, critical social theory, moral philosophy, science and technology studies studies, feminist phenomenologies or black studies.<sup>48</sup> In bringing them all under the umbrella of 'the law of the everyday', our aim is to draw attention to the existential fractures left by law, as well as 'existential territories' secured with the help of the law.<sup>49</sup>

One specific form of fracture repeatedly present in the stories of *This is Europe* is the socio-economic disadvantage suffered by people. In the essays collected for this symposium, the authors insist on the role of law in exposing and exacerbating such vulnerability. The fact of which comes as no surprise in a time of gross inequality, but it demands critical questions regarding the distribution of irresponsibility through law, how it denies collective organisation, enables exploitative working conditions to proliferate through inadequate regulatory frameworks, and why certain social groups and demographics are over-represented in the informal economy and denied access to healthcare and other basic needs.<sup>50</sup> Law plays a critical role here in including and excluding individuals and social groups, defining them as employees or independent contractors, citizens or illegal migrants. And yet, the reality of Europe is not defined by dispossession and exploitation alone, but also by wealth and prosperity. This is a Europe defined by both precarity and privilege, often in the same place, transaction, and relationship. Under these conditions, any method that seeks to comprehend the everyday experience of law is obliged to reflect on the political economic consequences of

<sup>45</sup> I.M. Young, 'Lived Body vs. Gender: Reflections on Social Structure and Subjectivity' in Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essays* (Oxford University Press 2005); T Griffin (ed.), *The New Existentialism* (Les presses du réel 2017); A Schultz, 'A New Existentialism for the Anthropocene. How the Climate Crisis has changed Being' (12 June 2024, *online*); G Olson, *From Law and Literature to Legality and Affect* (Oxford University Press 2022).

<sup>46</sup> See the contribution of Schuster and Tomaselli in this symposium.

<sup>47</sup> See the contribution of D'Agostino, Schaupp, Sitnik in this symposium.

<sup>48</sup> Among many references were included: T Adorno, *Minima Moralia. Reflections on a Damaged Life* (Verso, 1951, 2020); N Ajari, *Dignity or Death. Ethics and Politics of Race* (Polity Press, 2022); J Butler, *What World Is This? A Pandemic Phenomenology* (Columbia U. Press, 2022); S Cavell, *In the Quest of the Ordinary* (U. of Chicago Press, 1988); K Crenshaw, *Critical Race Theory: The Key Writings That Formed the Movement* (New Press 1995) D Das, *Textures of the Ordinary: Doing Anthropology after Wittgenstein* (Fordham U. Press, 2020); M. de Certeau, *The Practice of Everyday Life* (U. of California Press, 1980-1988); P Fasula and S Laugier (dir.), *Concepts de l'ordinaire* (Ed. de la Sorbonne, 2021); M Horkheimer, *Critical Theory: Selected Essays* (Continuum, 1972, 2002); S Jasanoff (ed.), *Science and Public Reason* (Routledge, 2012); B Latour, *Reassembling the Social* (OUP, 2005); H Lefebvre, *Critique de la vie quotidienne*, I et II (L'Arche, 1977); E Lévinas, *Totality and Infinity: An Essay on Exteriority* (Springer 1979); J Stauffer, *Ethical Loneliness* (CUP, 2018).

<sup>49</sup> The notion of "existential territory" has been developed by Félix Guattari. It refers to a dimension of subjectivity that consists in providing meaning and habitability to singular individuals and social groups in a context characterised by domination, exploitation or destruction: F Guattari, *The Three Ecologies* (The Athlone Press 2000).

<sup>50</sup> On irresponsibility through law see L Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge, 2007).

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*An inquiry into the legal fabrics of European lives*

the present distribution of legal entitlements in Europe,<sup>51</sup> from its role in determining the scope of bargaining power, excluding certain categories of workers from the scope of employment protections, governing the movement of people and business, facilitating (de)regulatory agendas, and the hollowing-out of social rights provisions. This means that we must reflect on the normative foundations of Europe, the dominant discourses that exclude alternative visions of social reality and shape the terms of Europe's reproduction alongside the stories of how this Europe is lived.<sup>52</sup>

The experience of the everyday in Europe is at once about the connivance of Europe's institutions, policies and laws in entrenching systems of social, political, and economic domination, exploitation and destruction, and about modes of acting and living with the help of the law. The law of the everyday reflects the ambiguity of these two movements, the one hardly graspable without the other. Taken as a whole, this collection of essays maintains this complex uncertainty in various guises, with each of them accentuating one or the other of these movements. It aims at sticking to the complex dialectic of social reality itself. Waving this ambiguity would amount to questioning the continuation of the European project as a whole and as such. Some authors in the collection may lean toward this approach. This will be perhaps the next step in our collective inquiry: exposing the law of everyday Europe to a more radical reconsideration and re-imagining, yet being aware of the promises and risks entailed by a retreat from the social structures and the laws in which we are embedded.

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<sup>51</sup> I Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' (2021) 1(2) Journal of Law and Political Economy.

<sup>52</sup> See the contribution of Glaser in this symposium.

# Confronting European Society with the Everyday

by Jacob van de Beeten\*

## 1. Introduction

Ben Judah's *This is Europe* offers a powerful reminder that European legal integration is ultimately a process of ordering social relationships. Turning away from the grand narratives of European integration – those that start from high-minded ideals of peace and prosperity – Judah offers a sobering account of how many individuals live in Europe today. Only few of the stories in the book can be read as a success-story, such as those of Sezen and Andy that ends with the birth of an Erasmus baby and the home-coming of Syrian refugee Haidar in Berlin's LGBT-community.<sup>1</sup> The vast majority of narratives found in the book, however, have a more sombre outlook. Their protagonist are of those at the margins of European societies, whose everyday lives are characterised by limitation rather than opportunity, oppression instead of emancipation and isolation rather than integration. Through these lived experiences, Judah presents a continent full of inequality, exclusion and alienation.

While it remains an open question to what extent this image offers a truthful account of contemporary life in Europe<sup>2</sup>, the basic thrust behind Judah's intervention – to present 'Europe' through everyday lived experiences – offers an important lesson for EU legal scholarship. In recent years, legal scholars increasingly attempt to confront the 'reality deficit' in European legal studies as well as the disconnect between EU law and 'European society'.<sup>3</sup> The intuition behind these efforts is that many individuals and groups in Europe do not find EU law on their side, especially those that are not economically productive, law-abiding and financially self-sufficient.<sup>4</sup> The everyday lived experiences that are recounted in *This is Europe*, in other words, can be read as an invitation for EU legal scholars to widen their gaze and give a 'voice to those who have been marginalized and/or disempowered by the law'.<sup>5</sup>

But beyond that, the 'everyday' can also serve as a starting point for legal scholars to critically reflect on how EU law in the past has been conceptualised as a tool for European integration. In the attempt to legitimise European integration through law, EU law has been constructed without accounting for the way in which legal concept and tools affect specific individuals and groups. This is particularly the case with regard to the emerging notion of a 'European society' that increasingly finds resonance in institutional and scholarly discourses. By presenting EU law as constructing and being legitimated by a society that is founded on shared values, EU institutions and scholars attempt to legitimise far-reaching legal and political innovations, without accounting for the plurality of values and lived experiences on the ground. By taking the plurality of perspectives of those beyond the institutional gaze as a starting point, *This is Europe* thus offers a welcome roadmap to think and do EU law differently.

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<sup>1</sup> Ben Judah, *This is Europe: The Way we Live Now* (Picador 2023), Chapter 3 (Istanbul) and Chapter 15 (Berlin).

<sup>2</sup> There is no doubt that Ben Judah has his own blind spots, see for example the contribution by Irina Munoz Ibarra to this symposium.

<sup>3</sup> Antoine Vauchez, 'The Map and the Territory: Re-Assessing EU Law's Embeddedness in European Societies' (2020) 27 Maastricht Journal of European and Comparative Law; Loïc Azoulay, 'Reconnecting EU Legal Studies to European Societies' [2024] Verfassungsblog <<https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/>> accessed 26 March 2024.

<sup>4</sup> Floris de Witte, 'The Liminal European: Subject to the EU Legal Order' (2021) 40 Yearbook of European Law 56; Charlotte Rachel O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937.

<sup>5</sup> Charlotte O'Brien, 'Bringing EU Law Back down to Earth' (2022) 18 International Journal of Law in Context 450.

## 2. Constructing a European Society through law

Although jurists generally do not think of themselves as storytellers, the legal construction of Europe cannot be understood without the narratives that provide this activity with a sense of purpose and direction. Every legal analysis and argument is embedded within a broader conceptual framework that renders the law intelligible and meaningful.<sup>6</sup> One of the key themes that run through the narratives legal scholars tell about legal Europe is that the law serves to promote and legitimise the integration project. In this understanding, law forms a tool to construct a new legal-political order on the European continent. Consequently, EU law is presented not as expressing a pre-existing socio-economic and political reality, but rather as a tool that will bring a new reality about. The jurist's view of their own role, as the title of a recent festschrift reads, is one of *Building the European Union*.<sup>7</sup>

But what is being built? In the past, legal scholars considered law as an instrument to build a common market and as an emancipatory force that would release individuals from the shackles of the nation state.<sup>8</sup> These narratives provided a rationale to propel the legal order forwards by presenting judicial innovations in areas like free movement and citizenship as the result of the inherent logic and ideals encoded in the foundational treaties. They also served as a way for legal scholars to understand their own role in this process: to interpret the law in a way that would create a more integrated market, enhance the rights of individuals (and, of course, businesses!) and contribute to the completion and 'perfectioning' of the EU legal order.<sup>9</sup>

Recently jurists have set themselves an even more ambitious task. Increasingly the EU's legal-political framework is described in terms of shared identity, common values and – most importantly – as a nascent *society*. The functional and emancipatory rhetoric that justified the role of EU law in the past is now complemented with the narrative in which the law promotes and preserves a 'European way of life'.<sup>10</sup> The task now is, in other words, to construct a European society through law. In this narrative, shared values rather than economic objectives or individual rights are at the heart of EU law. These values are not only supposed to express what Europeans hold in common, but also form 'part of the very foundations of the European Union legal order'<sup>11</sup> and define 'the very identity of the European Union as a common legal order'.<sup>12</sup>

Even if the narrative of a 'European society' was invented as part of the European Commission's communication strategy<sup>13</sup>, various legal scholars and officials at the Court of Justice embrace this narrative as their own. Conceptualising the EU as a society offers a way to make sense of the integration project at a time when traditional legal concepts have lost their explanatory and justificatory force. The evolution of EU law can then be told not as a process of market making, but as a transformation that led from '*the state-centred law of the European powers*' to the normative structure of a *democratic European society*.<sup>14</sup> By

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<sup>6</sup> Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review; For the application of Cover ideas on narrative and law in the context of the EU, see Paul Linden-Retek, *Postnational Constitutionalism: Europe and the Time of Law* (Oxford University Press 2023).

<sup>7</sup> Koen Lenaerts and others (eds), *Building the European Union: The Jurist's View of the Union's Evolution* (Bloomsbury Publishing 2021).

<sup>8</sup> Loïc Azoulay, '"Integration through Law" and Us' (2016) 14 International Journal of Constitutional Law 449.

<sup>9</sup> Jacco Bomhoff, 'Perfectionism in European Law' (2012) 14 Cambridge Yearbook of European Legal Studies 75.

<sup>10</sup> see e.g. [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life_en).

<sup>11</sup> C-621/18 *Whitman* ECLI:EU:C:2018:999, para. 62

<sup>12</sup> C-156/21 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97, para. 127.

<sup>13</sup> For a critical analysis, see Francois Foret and Noemi Trino, 'The "European Way of Life", a New Narrative for the EU? Institutions' vs Citizens' View' (2023) 24 European Politics and Society 336.

<sup>14</sup> Armin von Bogdandy, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024) 11.

conceptualizing the EU law as a stand-in for a society, the foundational values that are codified in the Treaties appear as the focal point and glue that hold the legal system together and drive its future development. They can be deployed to ascertain and assess how the action of Member States impact ‘the functioning of the European Union as a common legal order.’<sup>15</sup> This narrative not only justifies the continuous expansion of EU law’s scope and reach, but also enables jurists to do what they have also done: to operationalise rules and principles in service of the EU’s institutional goals.<sup>16</sup>

As such, the idea of society refers not to an empirical reality, but to a conceptual frame that carries the potential and promise to create novel institutional facts. The emerging society discourse is thus intimately tied to an institutional vision of European integration that presents the EU legal order as a self-sufficient and complete system, carrying within itself all the necessary resources for its future development. As part of the society discourse, for example, Article 2 TEU values are presented as always having been present within the EU legal order, reflecting an ‘original consensus’ that is now violated by some Member States.<sup>17</sup> If these values have always been there, their legal mobilisation suddenly appears self-evident, as does the emergence of a ‘European society’ founded on those values.

Constructed from above, European society is thus presented as being co-constitutive with the European institutional machinery in Brussels, Luxembourg and elsewhere. It is found not in the streets, but in the Court room, leading some commentators to muse how ‘[o]ne could not escape the impressions that the vast majority of this European society was assembled behind the Commission’s plea.’<sup>18</sup> In this vision, even the amazing claim that: ‘nowhere Europe is more real than in the law’ suddenly becomes intelligible.<sup>19</sup> And it is precisely in that sense that this ‘European Society narrative – despite all its promise of transformation and renewal – appears highly traditional, echoing Lecourt’s advice that to observe European integration: ‘*c’est dans le pretoire qu’il convient de se placer*’.<sup>20</sup>

### 3. Problematising EU law’s disembeddedness

But is the court room really the best place to grasp the successes and vicissitudes of European (legal) integration at the present moment? The ‘European society’ discourse intimates a certain proximity between EU legal and institutional machinery and thereby obscures the various ways in which individuals and groups are ignored, marginalised and alienated by EU law. Strikingly, in the quest for self-legitimation the individuals and groups that constitute this European society are absent in the narratives of those proclaiming that such a society already exists. These legal discourses, in other words, are disembedded from the plurality of perspectives, lived experiences and stories of those at the margins of European society. What is missing from those who deploy this language, as Leino-Sandberg notes, is an ‘interest in the empirical

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<sup>15</sup> C-181/23 Commission v Malta (Citizenship by Investment) ECLI:EU:C:2025:283, para. 89

<sup>16</sup> Morten 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.

<sup>17</sup> For the notion of original consensus, see Tomasz Tadeusz Konciewicz, ‘The Politics of Integration in Retrospect and the Supranational Mega-Politics of Governance and Design in Prospect: A Roadmap’ (2024) 30 European Law Journal 284.

<sup>18</sup> Lena Kaiser, Andreas Knecht and Luke Dimitrios Spieker, ‘European Society Strikes Back: The Member States Embrace Article 2 TEU in Commission v Hungary’, *VerfassungBlog*, 2024/11/26, <https://verfassungsblog.de/european-society-strikes-back/>, DOI: [10.59704/00f6c17a50fc172c](https://doi.org/10.59704/00f6c17a50fc172c).

<sup>19</sup> Bogdandy (n 14) 115.

<sup>20</sup> Robert Lecourt, *Le juge devant le Marché commun* (Institut universitaire de hautes études internationales 1970) 8.

consequences of their project', which follows from a belief that 'the expansion of institutions and instruments is "good" and an objective in itself.'<sup>21</sup>

*This is Europe* offers a profoundly different image of European society, or rather its absence, than found in scholarly and institutional discourses. Judah's protagonists are isolated, atomized individuals that are subjected to a variety of external forces that are beyond their own control: natural disasters, economic pressures and political conflicts leave a profound mark on most of the lives recounted in the book, while leaving them with little agency to address those problems. The vision of Europe that is contained in *This is Europe* thereby foregrounds how there exists 'no EU legal vision of collective being as a social form, a notion of society' as the law struggled 'to set out on whose behalf the Union acts or, more symbolically, what vision of life it represents.'<sup>22</sup>

As such, reading Judah vividly illustrates problem with the attempt to assert the existence of a 'European society' through the study of legal texts, institutional procedures, and political communications: it remains an abstraction. 'European society' as a conceptual framework is a figment of the imagination, something on the books, idealised, but not a lived experience. As a term it is deployed to frame and shape one's perception of the EU and its law, namely, as the means to offer a refuge in times of geopolitical conflict, social unrest and internal divisions. It creates the idea of a consensus about what Europeans have in common, while implying that the EU's embodies our hopes, dreams and futures. But in doing so it continues to ignore the perspectives of the periphery that are central to *This is Europe*, and challenge, for better and worse, the EU's value discourse.<sup>23</sup>

To put it in one word, the narrative of a European society aims to *reify* a specific understanding of the integration project. The notion of reification is a familiar instrument in the toolbox of Critical Theorists to account for the way in which abstractions are treated as if there were a concrete, real things with the result that contingent social relationships appear as natural, immutable, and objective.<sup>24</sup> Talking about EU law in abstraction such as society is a way of treating the law as if it has a life of its own, and as if its evolution is predetermined and pre-programmed in line with its 'objective' inner ideals, beyond human agency or subjectivity. In such a narrative there are no conflicts about the right direction, moments of discontinuity or contestation, but only the rational unfolding of the inner logic of the law.<sup>25</sup> The emergence of values as a prominent tool of EU law's expansion than simply appears as part of the 'legal DNA' of the EU, inherent and unquestionable. It is a familiar strategy to assert the authority of EU law. As Shapiro already noted in the 1980s, considering the EU's fragile legitimacy, it may be best 'to deal with juristic developments as if they were autonomous ... After all, legal realities are realities too.'<sup>26</sup>

The narrative of European society, however, not only objectifies, but also obscures. As an illustration, we can turn to the recent publication *70 years of EU law* that has been used by the Legal Service of the European Commission to celebrate and promote its own role as the

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<sup>21</sup> Päivi Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?' (2022) 1 European Law Open 231, 239.

<sup>22</sup> Damian Chalmers, 'The Unconfined Power of European Union Law' 1 European Papers 405, 416.

<sup>23</sup> Linden-Retek (n 6).

<sup>24</sup> Todd Hedrick, 'Reification in and through Law: Elements of a Theory in Marx, Lukács, and Honneth' (2014) 13 European Journal of Political Theory 178.

<sup>25</sup> Morten Rasmussen, 'How to Enforce European Law? A New History of the Battle over the Direct Effect of Directives, 1958-1987' (2017) 23 European Law Journal 290.

<sup>26</sup> Martin Shapiro, 'Comparative Law and Comparative Politics Symposium: Conference on Comparative Constitutional Law: Comment' (1979) 53 Southern California Law Review 537, 542.

guardian of the treaties.<sup>27</sup> In the narrative this book presents, the ‘integration of markets has notably been the outer form of the EU, whereas *ideals* have been the inner drive.’<sup>28</sup> These ideals, so claims the president of the Commission, are expressed through values as ‘hard law’ that protect ‘every single EU citizen in the same way, across all Member States.’<sup>29</sup> But in contrast to the stories in *This is Europe* in the Commission’s institutional prose these citizens are never concretised - are they students, expats, workers, mothers, activists? No one can tell.

The only concrete example of a citizen that is found in the book is the hypothetical case of a young woman who dreams of ‘working in Lisbon despite coming from Helsinki’.<sup>30</sup> Not only has she a right to free movement, but also can she export her social security benefits and ‘buy Finnish food products in Lisbon’.<sup>31</sup> And while it is undoubtedly true that ‘EU law and the case-law of EU courts have brought about this process of transformation’, the very example also reveals a clear lack of imagination about whose lives are being transformed by EU law.

Where are those citizens without the social, economic and cultural capital to work across borders or those who do just that but without the comfort of the protections that EU law offers? And what about the residents in Lisbon – in that regard this example is particularly unfortunate – who in recent years have protested against the gentrification, rising living costs and ever higher rents that accompany the rise of expats in the place they call home?<sup>32</sup> What role is envisaged for them in a European society constructed by jurists? And how does EU law protect those – the lorry drivers, seasonal workers, immigrants – that are so important to maintain ‘European competitiveness’<sup>33</sup> yet lack the voice to make themselves heard?

#### 4. Conclusion: from construction to critique

Ben Judah’s *This is Europe* vividly illustrates what is lost when scholars co-opt the concepts and tool that are used by institutions for reasons of self-promotion and legitimation. By identifying EU institutions with the notion of a ‘European society’, the latter term is reduced to an instrument of construction and emptied of its critical potential. That is particularly unfortunate, because the idea of ‘society’ has a long tradition of being invoked *against* the state.<sup>34</sup> The constructive route also appears as a dead end. If it is true that ‘the possibility of referring to a grand structural plan or to a compelling ethical rule is no longer available’, then narratives of common values and a shared ‘way of life’ will do little to reaffirm the role of EU law.<sup>35</sup> Unsurprisingly, others have also concluded that the turn the EU’s turn to narratives about values, society and a ‘European way of life’ seems to ‘be “more of the same” in the long litany of EU legitimating narratives’ while having little changes to legitimise the EU.<sup>36</sup>

What is required, therefore, is to adopt a different posture towards the EU and its law. Long gone are the times that the EU required scholars to legitimise and support its institutional framework; as a more ‘mature’ body politic the EU increasingly implicated in the exercise of coercive measures (via budget conditionality or border management), while the transparency of its procedures, and the democratic legitimacy of its decision-making continue to leave

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<sup>27</sup> See in more detail Jacob van de Beeten, ‘How (not) to narrate the history of EU law: the importance of a contextual approach’ *Heidelberg Journal of International Law* (2025 Forthcoming)

<sup>28</sup> Legal service (European Commission), *70 Years of EU Law: A Union for Its Citizens* (Publications Office of the European Union 2022) 30.

<sup>29</sup> *ibid* 3.

<sup>30</sup> *ibid* 129.

<sup>31</sup> *ibid* 130.

<sup>32</sup> <https://www.reuters.com/world/europe/thousands-protest-portugal-over-surging-house-prices-rents-2024-09-28/>

<sup>33</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ac\\_25\\_309](https://ec.europa.eu/commission/presscorner/detail/en/ac_25_309)

<sup>34</sup> Pierre Clastres, *Society Against the State: Essays in Political Anthropology* (Princeton 1990)

<sup>35</sup> Azoulay (n 8).

<sup>36</sup> Foret and Trino (n 13) 348.

something to be desired. These developments call for more critical distance, a form of 'disenchantment' with the EU as a political project, if you will.<sup>37</sup> Or, put differently, perhaps the Court and Commission can fend for themselves, without needing scholars to affirm their actions and discourses.

Rather than reaffirming the idea(l) of society as a means to explain and justify the role of law in process of integration, legal scholars should thus subject institutional to scrutiny and questioning. Reading Ben Judah's *This is Europe* offers a useful starting point in that regard, as it makes one step in the shoes of those less fortunate and privileged, thereby bringing into view at least some of the many everyday lives of those living in European society today.

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<sup>37</sup> Leino-Sandberg (n 22).

# This is (white) Europe: Race and European Law of the Everyday

by Irina Muñoz Ibarra\*

## 1. Introduction: Is this colourblind Europe?<sup>1</sup>

Through short stories set in different contexts across Europe, Judah's *This is Europe* zooms in on the real lives of the people behind the facade of European democratic values and economic prosperity. In this way, the book exposes largely invisibilised global and regional hierarchies, the deadly impacts of climate change, as well as the precariousness and disposability of the working class for the European economy. The individual vignettes presented in Judah's book are, of course, in no way representative of all the lived realities on the continent, yet they engage with a breadth of lived realities. By focusing on individual experiences (which are, however, always clearly connected to regional and global dynamics), the book shows how differently everyone experiences "Europe". At the same time, it will strike a critical reader as odd that the range of experiences presented in Judah's book completely leaves aside the perspectives of racialised Europeans.<sup>2</sup> In fact, the book limits itself to exclusively representing the perspectives of BIPOC<sup>3</sup> who are new immigrants to Europe, thereby ignoring the long historical presence of racialised communities in Europe and the entangled histories between Europe and its (former) colonies.

One may recall, in particular, that in 2019, only a few years before Judah published *This is Europe* (2023), a not so dissimilar book project about everyday life in Europe made the news:<sup>4</sup> *Afropean* by Johny Pitts, which documented the perspectives of Black Europeans, and has been translated into at least eight European languages.<sup>5</sup> For this book, Johny Pitts, who identifies "as whole and unhyphenated: Afropean",<sup>6</sup> travelled through different European countries in order to document the histories and lives of Black Europeans. Based on his own positionality as Black European, Pitts thus contributed to articulating the Everyday from a specific non-white European perspective. Indeed, Pitts' book is part of a larger project collecting narratives from the "Afro-European" diaspora.<sup>7</sup> Despite the ambition to portray Europe in its breadth, a Black European perspective did not feature at all in Judah's 643 pages long book – nor did any perspective of (un)hyphenated Europeans, i.e. European citizens of colour, or second or third generation migrants. In Judah's account, Black and POC perspectives appear exclusively in the context of migration. This absence raises some questions about the underlying assumptions about who counts as "European" in *This is*

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<sup>1</sup> 'Colourblindness' is used here in reference to the cross-cutting problem described in Kimberlé Crenshaw and others (eds), *Seeing Race Again: Countering Colorblindness across the Disciplines* (University of California Press 2019).

<sup>2</sup> According to ENAR (European Network Against Racism) "[i]n Europe, racialised people include Black persons, people of African, Arab, Asian, Caribbean, Latin American, Roma or Sinti descent, Muslims or Jews (or perceived as such) as well as indigenous people, including migrants among these groups". ENAR, 'A Europe for All: A Roadmap for Change European Elections 2024 Manifesto' (European Network Against Racism 2024) 1 (footnote 1) <<https://www.enar-eu.org/enar-eu-elections-manifesto-europe-for-all/>>.

<sup>3</sup> Abbreviation for "Black, Indigenous and People of Colour".

<sup>4</sup> Colin Grant, 'Afropean by Johny Pitts Review – Black Europe from the Street Up' *The Guardian* (30 May 2019) <<https://www.theguardian.com/books/2019/may/30/afropean-by-johny-pitts-review>> accessed 26 March 2025.

<sup>5</sup> Johny Pitts, *Afropean: Notes from Black Europe* (Allen Lane 2019) available in English; translations published in Dutch, French, German, Italian, Portuguese, Polish and Spanish.

<sup>6</sup> *ibid* 1.

<sup>7</sup> See the blog collecting and articulating the 'Afropean' experience in Europe: 'Narratives – Afropean: Your Guide to the Afro European Diaspora and Beyond' (20 March 2025) <<https://afropean.com/category/narratives/>> accessed 26 March 2025; For the 'Afro-European' identity, see for instance 'De Afro-Europeaan' (VPRO, 29 August 2024) <<https://www.vpro.nl/programmas/de-afro-europeaan.html>> accessed 7 April 2025.

*Europe*, questions that are only reinforced in light of the criticism Judah received for using racialised language and tropes in his previous book.<sup>8</sup>

Given the above background, the purpose of this paper is to propose a critique of racialisation in *This is Europe*, connecting it with the specific notion of the Everyday that is constructed in the book. This paper is the first of two interlinked papers put forth as joint contribution to the “European Law of the Everyday” symposium: My own paper provides a critique of racial representation in Judah’s book. I argue that the book lacks an adequate engagement with the racialised experience of everyday life in Europe; the narrative is tendentious and selective, reproducing the notion that Europeans are exclusively *white*. Identifying the theoretical shortcomings of *This is Europe*, my paper analyses the book from a critical race theory perspective.

To counterbalance the whiteness in Judah’s narrative, the second, interlinked paper, entitled ‘Europe today: Law, Race and Social Reality’ and written by my colleague Prince Amadi, presents a case study of European Law of the Everyday from an “Afropean” perspective. In his case study, based on the chapter on Amsterdam by Pitts, Prince will address the issue of racialised structural inequalities in Europe and draw connections with institutional racism as part of the everyday that is not adequately captured by European law. Prince’s paper also explores the everyday resistance by racialised Europeans to counter structural discrimination, racialised violence and neglect, and assert their own history and identity as BIPOC Europeans. Jointly, these two contributions intend to assert race and racism as urgent critiques in a discussion on European law of the everyday.

## 2. ‘Europeans’ and ‘Others’

### Theoretical framework: Critical Race Theory

This section will give a brief introduction to the theoretical framework that I rely on to critique the specific imagery of Europe and Europeans conveyed in Judah’s book. These theoretical considerations are also relevant for our conceptualisation of European law of the Everyday. Informed by the rich tradition of critical race theory in the United States,<sup>9</sup> the concepts of race and racialisation have only gradually – and relatively recently – begun to emerge as categories of critical analysis in mainstream European legal scholarship.<sup>10</sup> Notably, the concept of race is still contested in Europe, and there are diverging interpretations and political/legal discourses across the Member States.<sup>11</sup> Recent research also indicates that there has been a relatively low amount of case law at the CJEU dealing with race discrimination.<sup>12</sup> A similar

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<sup>8</sup> Ben Judah, *This is London: Life and Death in the World City* (Pan 2016); see critique by Joshi Herrmann and Andrew Kersley, ‘A Government Advisor Wrote a Libel against London. Why Did We Believe It?’ *The Londoner* (London, 13 December 2024) <<https://www.the-londoner.co.uk/a-government-advisor-wrote-a-libel-against-london-why-did-we-believe-it/>> accessed 26 March 2025.

<sup>9</sup> For a good overview, see Richard Delgado and Jean Stefancic, *Critical Race Theory: The Cutting Edge* (Third edition, Temple University Press 2013); Kimberlé Crenshaw, *Critical Race Theory: The Key Writings That Formed the Movement* (New Press 1995).

<sup>10</sup> Despite the long-standing EU principle of equal treatment irrespective of racial or ethnic origin enshrined in the Race Equality Directive, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; For a critical analysis, see Shreya Atrey, ‘Race Discrimination in EU Law after Jyske Finans’ (2018) 55 Common Market Law Review 625; Nozizwe Dube, ‘A Typology of Comparators and Comparisons in EU Equality Law’ (2025) 62 Common Market Law Review.

<sup>11</sup> Doris Liebscher, *Rasse im Recht – Recht gegen Rassismus: Genealogie einer ambivalenten rechtlichen Kategorie* (Originalausgabe Edition, Suhrkamp Verlag 2021) 293–299; Cengiz Barskanmaz, ‘Critical Race Theory in Deutschland’ (*Verfassungsblog*, 24 July 2020) <<https://verfassungsblog.de/critical-race-theory-in-deutschland/>> accessed 27 March 2025.

<sup>12</sup> Especially compared with other areas of EU equality law, such as sex and age discrimination, respectively. See Grainne De Burca and Virginia Passalacqua, *The Curious Absence of Race Discrimination Litigation in EU Law*, EUI, LAW, Working Paper 2025/15 - <https://hdl.handle.net/1814/93987> accessed 27 February 2026.

absence of explicit references to race in *This is Europe* is striking – it does not, however, indicate an absence of racism in the everyday lives portrayed.

Two interrelated theoretical concepts seem particularly relevant for critically dissecting the racialised idea of Europe conveyed in *This is Europe*: “racial aphasia” and “white innocence”. We will briefly introduce each in turn, and then develop them further in the case studies below. Firstly, “racial aphasia”, coined by the critical race scholar Debra Thompson, emerged as a critique of the innocence concealed by references to racial or colonial “amnesia” in international relations scholarship.<sup>13</sup> By contrast, Thompson’s concept of racial aphasia emphasises the intentionality and functionality of erasing certain narratives and pasts, which indicate “a calculated forgetting, an obstruction of discourse, language and speech”.<sup>14</sup> Precisely in contexts where race is treated as no longer relevant, or indeed where purportedly “race-free discourses” are imposed as means to *combat* racism, racialised hierarchies are often effectively entrenched, albeit under the guise of colourblindness.<sup>15</sup> By removing the vocabulary of race, the function of aphasia, then, is to protect institutions against opposition rooted in colonial and imperial history. Thompson argues that whereas amnesia suggests that certain memories, located in a distant past, are (unfortunately) irretrievably lost, aphasia allows for connections to be drawn between “our racist past [and] the still racist present”, highlighting colonial and racist continuities in institutional frameworks.<sup>16</sup>

The second, interrelated theoretical concept is “white innocence”, a term introduced by the Afro-Surinamese Dutch scholar Gloria Wekker.<sup>17</sup> Speaking from a Dutch context, Wekker describes how racism is part of Black people’s everyday in the Netherlands. She observes two important facets of racism: denial and disavowal - arguing that “race pops up in unexpected places and moments, as the return of the repressed, while the dominant discourse stubbornly maintains that the Netherlands is and always has been color-blind and antiracist.”<sup>18</sup> Similar to racial aphasia, denial and disavowal entails a deliberate forgetting of a colonial past, and the delusion that racism cannot exist in a society committed to liberal values.<sup>19</sup> Interestingly, Wekker shows that Dutch liberal society is constructed not merely as national identity, but draws on an idea of a white Europe: a dichotomy between “us”, those constructed as belonging to Europe, and ‘them’, those constructed as not belonging” denies hyphenated identities.<sup>20</sup> Instead, it is based on the assumption of a “fundamental impossibility of being both European [...] and being black-Muslim-migrant-refugee.”<sup>21</sup> Afro-Europeans, as well as

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<sup>13</sup> It has become quite common to refer to ‘amnesia’ in this context, although this implies a sort of ‘force majeure’ in the form of an illness, as critiqued by Thompson. Yet ‘amnesia’ is used as a critique of denial and forgetting of Europe’s colonial past, see Kalypso Nicolaïdis, ‘Southern Barbarians? A Post-Colonial Critique of EU Universalism’ in Kalypso Nicolaïdis, Berny Sèbe and Gabrielle Maas (eds), *Echoes of Empire: Memory, Identity and Colonial Legacies* (IB Tauris 2009) 285–288; for a legal critique of Europe’s colonial ‘amnesia’ see Diamond Ashiagbor, ‘Rethinking EU Social and Labour Law through Racial Capitalism’ in Hanna Eklund (ed), *Colonialism and the EU Legal Order* (Cambridge University Press 2025) 138; Antoine Vauchez, ‘The Missing View from the Cathedral: European Law during and after Colonies and Empires’ in Hanna Eklund (ed), *Colonialism and the EU Legal Order* (Cambridge University Press 2025) 345 seq.

<sup>14</sup> Debra Thompson, ‘Through, against and beyond the Racial State: The Transnational Stratum of Race’ (2013) 26 *Cambridge Review of International Affairs* 133, 135.

<sup>15</sup> *ibid* 135 and 146.

<sup>16</sup> *ibid* 135.

<sup>17</sup> Gloria Wekker, *White Innocence: Paradoxes of Colonialism and Race* (Duke University Press 2016).

<sup>18</sup> *ibid* 30–31.

<sup>19</sup> *ibid* 1.

<sup>20</sup> *ibid* 21.

<sup>21</sup> ‘black-Muslim-migrant-refugee’ functioning here as a hyphenated amalgam to illustrate the point. *ibid*.

any non-white European identities simply do not exist in this imaginary – and if they do, only as hyphenated, disruptive, not quite European ‘Other’.<sup>22</sup>

How do these two concepts – racial aphasia and innocent whiteness – help us understand race in *This is Europe*? First, by excluding the perspectives of BIPOC Europeans, the book reaffirms the assumption of a “fundamental impossibility” of non-white European identities.<sup>23</sup> The argument is therefore not merely a lack of comprehensiveness or that Judah fails to account for yet another discarded category of people. Instead, this paper argues that *This is Europe* constructs a clear dichotomy between non-white, ergo non-European, ‘Others’ and an ethnically homogeneous white Europe. In view of the length of the book and the breadth of accounts included, the omission of the experiences of any single European of colour speaks for itself.<sup>24</sup>

In fact, in several chapters, the book exploits the trope of the “black-Muslim-migrant-refugee” (Wekker) as essential non-European ‘Other’ coming from violent places outside Europe.<sup>25</sup> The political, historical, social and economic contexts of the conflicts in those places are eclipsed, suggesting that they are not part of a European reality. Instead, migration to Europe is almost exclusively presented as a form of emancipation from intrinsically violent structures elsewhere.<sup>26</sup> Because the environment of crisis from which the protagonists flee is not in any way linked to persisting colonial legacies and neo-colonial extraction, in which Europe is deeply implicated, migration is reduced to an individual decision and action, separate from the social, political and economic context. When the in-betweenness is encountered, it converts European spaces into non-European ones, like the “Middle Eastern city”<sup>27</sup> at the heart of Athens, which makes “you forget [that this] really is Europe”.<sup>28</sup> What are the assumptions about what Europe has to look like, if the presence of non-white people makes it almost unrecognisable?

Secondly, the fact that race is not explicitly addressed beyond the proxy of nationality in Judah’s book indicates a certain inability to speak about the topic, or in fact, a diversion away from it – racial aphasia. While race is implicit in many interactions throughout *This is Europe*, it remains unspoken. If at all, there seems to be a degree of conflation between citizenship and race.<sup>29</sup> As the section below will illustrate, the chapters on Baloga and Storkow, respectively, engage with racial hierarchies, but only in terms of nationality. In the chapters on Briançon and Col de l’Échelle, Judah engages with the deadly implications of racial borders,

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<sup>22</sup> In everyday interactions, this is frequently exhibited through the question ‘Where are you really from?’. Nariell Morrison and others, “Where Are You Really from?: A Qualitative Study of Racial Microaggressions and the Impact on Medical Students in the UK” (2023) 13 *BMJ Open* e069009.

<sup>23</sup> quoted from Wekker (n 17) 21.

<sup>24</sup> Especially in light of the European Network Against Racism’s estimate that racialised people make up at least 10% of the European Union’s population. ENAR, ‘Challenging the Status Quo: A Critical Analysis of the Diversity Trends in the European Parliament’ (European Network Against Racism 2024) 6 <<https://www.enar-eu.org/wp-content/uploads/ENAR-Diversity-in-the-European-Parliament-2024.pdf>> accessed 14 May 2025.

<sup>25</sup> Chapter 5 ‘Budapest’, Chapter 10 ‘Le Col de l’Échelle’, Chapter 11 ‘Briançon’, Chapter 13 ‘Storkow’, Chapter 18 ‘Avignon’, Chapter 20 ‘Evia’ Ben Judah, *This Is Europe: The Way We Live Now* (Picador 2023).

<sup>26</sup> See Chapter 15 ‘Berlin’, and also Chapter 11 ‘Briançon’. In fact, the reader learns that the dream of freedom in Europe is so great that people are willing to sacrifice their lives for it, see Chapter 10 ‘Col de l’Échelle’. *ibid*.

<sup>27</sup> direct quote from the book, *ibid* 546; For the racialised connotations of ‘Middle East’ in Eurocentric frames of reference, see Lanouar Ben Hafsa, ‘Overcoming the “Other’s” Stigma: Arab and Muslim Representations in US Media and Academia’ (2019) 7 *Int’l J. Soc. Sci. Stud.* 1, 2.

<sup>28</sup> Judah (n 25) 546–547 Note that this is not written in Italics, meaning it is not a direct quote of an interview partner; these are Judah’s own words.

<sup>29</sup> Judah’s approach here is not unique. In academic literature, other placeholders for race (‘the R-word’) are also frequently used, diverting attention away from the problem of racism. See critique by Olivia Umurerwa Rutazibwa, ‘From the Everyday to IR: In Defence of the Strategic Use of the R-Word’ (2016) 19 *Postcolonial Studies* 191.

reinforced by European asylum and migration law.<sup>30</sup> The racialised global hierarchy of the freedom to travel becomes clear in those cases,<sup>31</sup> but is again framed in terms of nationality. When Simone, the rescuer in the chapter on Le Col de l'Échelle, realises that the border is "invisible" only to some, he does not link this fact with race.<sup>32</sup> For him, there are "two categories of human beings" – implying those with an EU passport and those without.<sup>33</sup>

Firstly, passports are not racially neutral devices, contributing to a much more complex categorisation of people.<sup>34</sup> In addition, the fact that Simone distinguishes only between these "two categories" indicates an unawareness of the role of race – independently of nationality or legal status – in the European border regime.<sup>35</sup> Irrespective of an individual's legal identity, physical features determine whether the border is experienced as invisible in a context where "differences in (legal and political) belonging are inscribed onto the body".<sup>36</sup> Legal consciousness in relation to borders is in fact different not only based on formal elements such as citizenship but diverges even among EU citizens and permanent residents depending on intersectional positionality. As such, there are arguably not only two categories of people, as Simone's account suggests: "those that could and those that could not cross the border";<sup>37</sup> in addition, there is at least a third category: those who legally *could* cross the border but cannot do so without obstacles.<sup>38</sup> Free movement, one of the key achievements of European integration, is not experienced equally by all EU citizens regardless of race and ethnicity.<sup>39</sup>

<sup>30</sup> E Tendayi Achiume, 'Racial Borders' (2021) 110 Geo. LJ 445; Aoife O'Donoghue and Amanda Gray Meral, 'Tyranny at Europe's Borders...' (*Critical Legal Thinking*, 14 March 2025) <<https://criticallegalthinking.com/2025/03/14/tyranny-at-europes-borders/>> accessed 27 March 2025; Sarah Ganty and Dimitry Vladimirovich Kochenov, 'How the EU Death Machine Works' [2024] *Verfassungsblog* <<https://verfassungsblog.de/how-the-eu-death-machine-works/>> accessed 26 March 2024.

<sup>31</sup> Achiume (n 30); see also Dimitry Kochenov, *Citizenship* (MIT Press 2019).

<sup>32</sup> Judah (n 25) 268.

<sup>33</sup> *ibid.*

<sup>34</sup> In fact, '[t]he very origin of biometric surveillance stems from colonial practices of dominating and discriminating against certain groups of people.' Laurence Meyer and Chloé Barthélémy, 'The Colonial Biometric Legacy at Heart of New EU Asylum System' *EUobserver* (8 April 2024) <<https://euobserver.com/migration/arc9435f8b>> accessed 12 June 2024.

<sup>35</sup> This concerns racial and ethnic profiling in intra-European border controls, see *Basu v Germany* [2022] ECtHR 215/19; Note that ethnic and racial profiling concerns ID checks in general and is not limited to border crossings: Open Society Justice Initiative, 'A Divided ECtHR Fails Victims of Discriminatory ID Checks In Spain, Argue Human Rights Groups' (*Open Society Foundations*, 18 October 2022) <<https://www.justiceinitiative.org/newsroom/a-divided-ecthr-fails-victims-of-discriminatory-id-checks-in-spain-argue-human-rights-groups>> accessed 8 April 2025.

<sup>36</sup> Stefan Salomon, 'The Racialized Borders of the Netherlands' [2022] *Verfassungsblog* <<https://verfassungsblog.de/the-racialized-borders-of-the-netherlands/>> accessed 26 March 2025; The projection of identity on the basis of physical features was also striking in the facts of the case in *Muhammad v Spain*. The applicant of Pakistani origin holding a long-term Spanish residence permit, describes how, when asking for the reason for an ID check, one of the police officers replied: 'Yes, because you are black, and that's all. I am not going to stop a German citizen.' *Muhammad v Spain* (ECtHR) [6].

<sup>37</sup> Judah (n 25) 268.

<sup>38</sup> Julie Ringelheim, 'Basu v. Germany and Muhammad v. Spain: Why the First European Court of Human Rights' Judgments on Racial Profiling in Identity Checks Are Disappointing' (*EJIL: Talk!*, 7 February 2023) <<https://www.ejiltalk.org/basu-v-germany-and-muhammad-v-spain-why-the-first-european-court-of-human-rights-judgments-on-racial-profiling-in-identity-checks-are-disappointing/>> accessed 27 March 2025; Mathias Möschel, 'Basu v. Germany and Muhammad v. Spain: Room for Improvement in the Court's First Judgments on Racial Profiling' (*Strasbourg Observers*, 8 November 2022) <<https://strasbourgothers.com/2022/11/08/basu-v-germany-and-muhammad-v-spain-room-for-improvement-in-the-courts-first-judgments-on-racial-profiling/>> accessed 27 March 2025; Mohamed Amjahid, *Alles nur Einzelfälle?: Das System hinter der Polizeigewalt: Über Racial Profiling, NSU 2.0 und Machtmissbrauch in der Polizei* (Piper Paperback 2024) 195 seq.

<sup>39</sup> Indeed, this is not a new insight. Already in 1987, Caryl Phillips – arguably one of Judah's predecessors – wrote about the racism he experienced on his travels across Europe. Caryl Phillips, *The European Tribe* (Faber 1987); note that this issue has received more attention in recent years due to the resistance by Europeans of colour. See, for instance, Fatima El-Tayeb and Vanessa Eileen Thompson, 'Alltagsrassismus, staatliche Gewalt und koloniale Tradition: ein Gespräch über Racial Profiling und intersektionale Widerstände in Europa' in Mohamed Wa Baile

The problem with the assumption that racism does not exist in liberal societies is that due to a categorical denial, structural racism cannot be properly addressed or critiqued. The context of aphasia leaves the victims of racism voiceless (in the sense of not having words to describe their situation)<sup>40</sup>, a situation that becomes very visible in *This is Europe*, most strikingly when gender and race intersect, as in the chapter on Evia. At the beginning of the chapter, we get the sense that Nazneen and her female colleagues are constantly exhausted, so much so that they can quite literally no longer speak.<sup>41</sup> Their voicelessness is exacerbated when they are left alone with the fire approaching, even their phones stop working making it impossible to call for help.<sup>42</sup> In a colourblind - or in Wekker's words "innocent" - society that assumes that everyone is equal, Nazneen's experience will barely be noticed as a tragic circumstance. However, it is clear from the sequence of events in the chapter that it is their status as racialised women with precarious immigration status that exposes them to the highest danger.<sup>43</sup>

### 3. Identifying *Othering* and Racialised Difference in *This is Europe*

Throughout the stories, there are hints that the way we live in Europe is (at least partly) shaped by differentiations between people based on nationality, class, and gender. This section will analyse how *This is Europe* engages in a construction of racialised difference.<sup>44</sup> The argument is that Judah's foregrounding of specific views without context, and the omission of relevant perspectives lead to a racialised narrative.

It is apparent that several of the short stories are developed on the basis of a distinction between Europeans and aliens; through the selection of perspectives, it is conveyed that BIPOC are not European, but newcomers trying to make it in Europe. This includes new immigrants, i.e. third country nationals (see chapters on Budapest, Berlin, Evia, Col de L'Échelle, Storkow and Briançon), as well as those who arrived long ago and have since built a life in Europe without ever being fully assimilated (Avignon). Meanwhile, there is always a risk of either not being let in (Col d'Échelle, Briançon, Evia) or, once "inside" and settled, the looming risk of expulsion (Avignon).<sup>45</sup> The implicit message here: Europeans are white by default, and people of colour are not really part of "this" Europe. Instead, they are either an unwelcome reality (e.g. Turkish business owners referred to in the Storkow chapter), vulnerable and in need of protection from violent non-Europeans (Berlin, Briançon), an easily exploitable human resource (Evia) or flamboyant outsiders (Budapest).

Often, these differences are implicit and left for the reader to untangle. Racialised hierarchies can be identified, for instance, in working conditions.<sup>46</sup> We get an explicit sense of structural

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and others (eds), *Racial Profiling: Struktureller Rassismus und antirassistischer Widerstand* (transcript Verlag 2019); courts at the national level have increasingly been confronted with this matter, see Sigrid Boysen, 'Racial Profiling' (2020) 42 JURA - Juristische Ausbildung 1192.

<sup>40</sup> Indeed, one could argue that there are two types of aphasia: active aphasia on the side of the dominant society and individual perpetrators that consists in ignoring, silencing, denying and disavowing racism; and a passive aphasia on the side of victims of racism that limits their ability to speak about their experience.

<sup>41</sup> 'Most of the women are so tired after working so hard they eat dinner silently and they seem to simply collapse and immediately sleep. They are crowded together in that room with bunk beds.' Judah (n 25) 551.

<sup>42</sup> *ibid* 559.

<sup>43</sup> The Greek women leave the factory early on when they realise the fires are approaching; the Afghan women stay and when their boss finally mentions the danger, she still insists that the Afghan women first complete the work before being allowed to leave the workplace. Later, when the women call their boss for help, the boss says 'You're not in danger. Just stay there.' (despite being aware of the approaching fire). *ibid* 555–557.

<sup>44</sup> Liebscher (n 11) 26.

<sup>45</sup> Le Conseil d'État, 'La juge des référés valide l'expulsion de l'imam Mahjoub Mahjoubi' (*Tribunal administratif de Paris*, 4 March 2024) <<https://paris.tribunal-administratif.fr/decisions-de-justice/dernieres-decisions/la-juge-des-referes-valide-l-expulsion-de-l-imam-mahjoub-mahjoubi>> accessed 8 April 2025.

<sup>46</sup> This is also relevant for a conceptualisation of European law of the Everyday and will be discussed more in detail in Prince Amadi's contribution.

racism in Chapter 13, when Aboud, a Syrian driver for Amazon in Germany, explains the racialised hierarchies he observes at work: “It’s the Germans at the top, you can barely see them, they are behind computers. Then the Western Europeans, the ones who think they are their equals. Then the Turks, they own so much here. Then the Eastern Europeans. Then the Asians. Then the refugees: Arabs, Africans, all of them at the bottom.”<sup>47</sup> Indeed, this would have been an interesting cue for a journalist like Judah to follow up on to get to the bottom of how these racialised hierarchies operate, yet a Turkish German perspective is not included anywhere in the book, nor is there any engagement with the history of Turkish migrant workers and the lived realities of this racialised community in Germany.<sup>48</sup> Instead, the reader is left with a decontextualised and distorted observation that Turks own “so much” in Germany.<sup>49</sup>

Another example illustrates the *othering* of non-European ‘Others’ and the concomitant construction of “Europeans”. This is best illustrated by the two chapters that in one way or other celebrate putative European sexual freedom: Budapest and Berlin. These two chapters engage rather one-sidedly with the stories and do not engage with the intersectional realities of racism against LGBTQI+ migrants and people of colour in Europe. Instead, the selected narratives play into the common orientalist stereotype built on an inherent difference between Arab communities – depicted as in *essence* repressive and patriarchal - and generally open-minded, feminist and queer-friendly Europeans.<sup>50</sup> In Budapest, Ibrahim, the refugee turned porn star in Europe, gets death threats and his Syrian family breaks off contact after asking him to stop working in the porn industry.<sup>51</sup> While the argument here is not to deny that these threats from his own community are real, the chapter does not engage at all with the complexity of racialised fetishisation and vulnerability, and European demand for refugee porn.<sup>52</sup> Rather than focusing exclusively on prejudices and violence as coming from non-European ‘Others’,<sup>53</sup> recognising the structural problems *within* Europe would have been crucial from an anti-racist perspective in order to get a more layered and critical understanding of “the way we live now” in Europe.

Another Syrian protagonist, Haidar, on the other hand, comes to Berlin to escape his violent homophobic family.<sup>54</sup> In Berlin, he is finally free to live as a queer person. In both *Berlin* and *Budapest*, Syrian families are depicted as conservative, opposed to “European” sexual liberty. The Orientalist narrative of sexual repression is thus repeated twice, while European anti-

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<sup>47</sup> Judah (n 25) 342.

<sup>48</sup> Jennifer A Miller, ‘A History of Turkish Guest Workers in Germany’ *Routledge Handbook of Turkey’s Diasporas* (Routledge 2024); Ruth Mandel, “Fortress Europe” and the Foreigners Within: Germany’s Turks’ *The Anthropology of Europe* (Routledge 1994).

<sup>49</sup> Such a statement is not only distorted and ignorant of patterns of racism in Germany, but also dangerous, as it reaffirms a prevalent latent racial prejudice about ‘unmerited’ economic advantages. A recent survey by the German National Monitor for Discrimination and Racism (DeZIM) found that almost a quarter (22%) of respondents agreed that religious and ethnic minorities had benefited more economically than they deserved. See Leonie Fuchs and others, ‘Verborgene Muster, Sichtbare Folgen. Rassismus & Diskriminierung in Deutschland’ (DeZIM Institut 2025) 18 <<https://www.rassismusmonitor.de/publikationen/monitoring-rassismus-und-diskriminierung-in-deutschland/>> accessed 8 April 2025.

<sup>50</sup> Such a racialised opposition has been critiqued e.g. by Suhaimah Manzoor-Khan, ‘The Feminist and Queer-Friendly West? The Patriarchal Rest?’ *Tangled in Terror: Uprooting Islamophobia* (1st edn, Pluto Press 2022); See also Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Reprint Edition, Harvard University Press 2015); Rafia Zakaria, *Against White Feminism: Notes on Disruption* (First edition, WW Norton & Company 2021).

<sup>51</sup> Judah (n 25) 141.

<sup>52</sup> Cf. Mohamed Amjahid, ‘Sexism: A New Desire for Refugee Porn’ *Die Zeit* (Hamburg, 15 May 2018) <<https://www.zeit.de/gesellschaft/2018-05/sexisms-refugeeporn-refugees-pornography-germany-analysis>> accessed 1 June 2025.

<sup>53</sup> For a critical analysis of the racialised, spatial relegation of queerphobia to places outside of Europe, see Rahul Rao, ‘The Locations of Homophobia’ (2014) 2 *London Review of International Law* 169.

<sup>54</sup> Judah (n 25) 395.

LGBTQI+ sentiment does not feature at all in the book.<sup>55</sup> Intersectional discrimination faced by queer people of colour in Europe remains marginal.<sup>56</sup> Instead, the selective narrative suggests that it is only the (Arab/Muslim) foreigners who are backward and not quite able to accept the progressive, open-minded “European way of life”.<sup>57</sup> In light of worrying legal and political developments within European countries, it is puzzling that these reactionary ways of thinking are exclusively associated with non-Europeans.<sup>58</sup> Europe, on the other hand, is presented as a safe haven in terms of sexual identity and sexuality.<sup>59</sup> If “this” is Europe, the reader could almost be forgiven for forgetting about the pervasive and structural queerphobia among Europeans.<sup>60</sup> Indeed, there is no mention of trans- and queerphobia as a *European* problem at all in *This is Europe*, let alone an intersectional engagement with the issue.<sup>61</sup>

One could argue that racialised stereotypes and prejudices are merely incidentally reproduced, because Judah deliberately chose to narrate *This is Europe* through the eyes of his interview partners. Certainly, prejudiced views *are* – as regrettable as it may be – part of European society.<sup>62</sup> Since Judah seems to have the ambition to represent even the most uncomfortable realities on the continent, the critique is thus not that such views should have been entirely edited out of the stories. The problem is, however, that problematic views are neither counterpoised by including diverging voices, nor is racism adequately depicted as a structural issue across Europe. Interestingly, there is no representation of Western Europeans with openly racist views in Judah’s book, which is surprising given the rise of the far-right across Europe. The only European with openly racist prejudices is an Eastern European lorry driver, who is a victim of discrimination in Western Europe himself.<sup>63</sup> In the chapter on Baloga, the protagonist recognises that Eastern European workers are treated like “sub-humans” in

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<sup>55</sup> Likewise, the reader also does not learn about the multiple facets of queerness and feminism in Muslim countries. Mohamed Amjahid, *Let’s Talk About Sex, Habibi: Liebe und Begehren von Casablanca bis Kairo* (Piper ebooks 2022); Regarding a critique of essentialism in queer legal theory, see Damir Banović, ‘Queer Legal Theory’ in Dragica Vujadinović, Antonio Álvarez del Cuvillo and Susanne Strand (eds), *Feminist Approaches to Law: Theoretical and Historical Insights* (Springer 2023) 78–80.

<sup>56</sup> Serawit Debele, ‘Anti-Black Racism: Queer Europe’s Inconvenience Beyond the Law’ [2024] Verfassungsblog <<https://verfassungsblog.de/anti-black-racism/>> accessed 8 April 2025.

<sup>57</sup> Note also the critique regarding the political link between ‘our European way of life’ and migration, see Matina Stevis-Gridneff, ‘“Protecting Our European Way of Life”? Outrage Follows New E.U. Role’ *The New York Times* (12 September 2019) <<https://www.nytimes.com/2019/09/12/world/europe/eu-ursula-von-der-leyen-migration.html>> accessed 27 March 2025.

<sup>58</sup> ‘Hungary: Pride Ban Is Full-Frontal Attack on LGBTI People and Must Not Be Signed into Law’ (*Amnesty International*, 18 March 2025) <<https://www.amnesty.org/en/latest/news/2025/03/hungary-pride-ban-is-full-frontal-attack-on-lgbti-people-and-must-not-be-signed-into-law/>> accessed 1 June 2025.

<sup>59</sup> Note how this echoes the concept of homonationalism. Debele (n 56); Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007); Keith E McNeal and Sarah French Brennan, ‘Between Homonationalism and Islamophobia: Comparing Queer Caribbean and Muslim Asylum Seeking in/ to the Netherlands’ in Richard CM Mole (ed), *Queer Migration and Asylum in Europe* (UCL Press 2021) <<https://uclpress.co.uk/book/queer-migration-and-asylum-in-europe/>> accessed 8 April 2025.

<sup>60</sup> Jordi Bonet-Martí, Bárbara Biglia and Sara Cagliero, ‘De la movilización antiabortista a Vox La incorporación del antifeminismo en la agenda política de la derecha populista español’ [2023] *Articles publicats en revistes (Sociologia)* <<https://diposit.ub.edu/dspace/handle/2445/206721>> accessed 9 February 2025; Romain Carnac, ‘Imaginary Enemy, Real Wounds: Counter-Movements, “Gender Theory”, and the French Catholic Church’ (2020) 19 *Social Movement Studies* 63; Anna Lavizzari and Zorica Siročić, ‘Contentious Gender Politics in Italy and Croatia: Diffusion of Transnational Anti-Gender Movements to National Contexts’ (2023) 22 *Social Movement Studies* 475; Paul Stubbs and Noémi Lendvai-Bainton, ‘Authoritarian Neoliberalism, Radical Conservatism and Social Policy within the European Union: Croatia, Hungary and Poland’ (2020) 51 *Development and Change* 540.

<sup>61</sup> For a more detailed critique, I refer to my colleagues Karla Žeravčić and Davide Tomaselli’s illuminating piece on *Berlin* in this collection.

<sup>62</sup> Cf. Loic Azoulai, ‘“Living Together” in Europe’s Polarised Societies: Navigating the ECtHR and CJEU Case Law’ (European University Institute 2024) Working Paper <<https://cadmus.eui.eu/handle/1814/77442>> accessed 14 November 2024.

<sup>63</sup> We get a glimpse of how he has internalised the prejudices against Romanians, for instance when he says: “Who the fuck cares about a Romanian lorry driver?” Judah (n 25) 30; Regarding internalised racism, see Karen D Pyke, ‘What Is Internalized Racial Oppression and Why Don’t We Study It? Acknowledging Racism’s Hidden Injuries’ (2010) 53 *Sociological Perspectives* 551.

the West.<sup>64</sup> He feels unsafe at work and blames mainly non-European “immigrants” (but also Eastern Europeans) for the high levels of criminality on the road.<sup>65</sup> This perspective is, however, not contextualised or counterbalanced by the author. Without any empirical basis, the reader is left with the problematic impression that Europe’s roads are unsafe because of “rogues” from outside Europe.<sup>66</sup>

This section raises questions about the selection of interview partners in *This is Europe*, and the narratives about Europe that become entrenched through their gaze. It is impossible to overlook that in the set of protagonists presented, a preconception of “white Europe” shines through: indeed, all people of colour that are featured in Judah’s book are new immigrants or somehow forever foreign to Europe.<sup>67</sup> To put it bluntly, in *This is Europe*, whiteness seems to be the condition for fully belonging in Europe. Choosing *not* to engage with the perspectives of Black Europeans and Europeans of colour when exploring the everyday in Europe perpetuates a notion of Europeanness as whiteness.<sup>68</sup> Indeed, “everyday racism and feeling out of place” are two adjacent everyday experiences for BIPOC in Europe.<sup>69</sup> Judah’s portrayal of the way “we” live in Europe contributes to this feeling of exclusion. There are several more aspects in the short stories presented by Judah that allow for a critique in this context, which will be addressed in the following sections.

#### 4. Structures and repetition: “everyday” racism?

Invoking the “everyday” in the context of racism almost seems to trivialise and normalise the structural and institutionalised harm racialised people experience on a daily basis in Europe.<sup>70</sup> Yet, racism is and has been, undeniably, part of the everyday of European law since its inception.<sup>71</sup> As documented by the EU Fundamental Rights Agency, being Black in Europe often means an exposure to repeated experiences of harassment and sometimes even physical violence motivated by racism.<sup>72</sup> Racist discrimination can impede a free enjoyment of the fundamentals of everyday life in very specific ways: free movement, access to adequate housing, education and employment.<sup>73</sup> Despite efforts to promote diversity, race and racism

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<sup>64</sup> Judah (n 25) 45.

<sup>65</sup> *ibid* 48; The racialised distinction between immigrants of different ethnic origins could also be discussed in the context of recent legal developments in EU law, see Silvia Steininger, ‘They Not Like Us’ [2025] Verfassungsblog <<https://verfassungsblog.de/they-not-like-us/>> accessed 27 March 2025.

<sup>66</sup> Judah (n 25) 48.

<sup>67</sup> In the case of Mahjoub, a long-term resident and imam in Avignon, a large part of the story focuses on his migration story and his childhood in Tunis, a city described in Orientalist tropes, such as ‘the basket-weavers in the street, the beggars in the souk, [...] the donkey carts behind the shiny new buses, the cries of the morning hawkers.’ His first childhood memory is of his erratic and violent family. *ibid* 489 seq.; notably, the only non-white interview partner who was also settled in Europe (and not a newcomer), was later subject to an expulsion order, see d’État (n 45).

<sup>68</sup> Regarding the notion of white Europe or ‘Eurowhiteness’, see recent critiques by Neema Begum, ‘“The European Family? Wouldn’t That Be the White People?”: Brexit and British Ethnic Minority Attitudes towards Europe’ (2023) 46 *Ethnic and Racial Studies* 3293; Hans Kundnani, *Eurowhiteness: Culture, Empire and Race in the European Project* (C Hurst & Co Publishers Ltd 2023).

<sup>69</sup> Neema Begum, ‘Is Being European a White Identity? Brussels Needs Deep Reflection in the Wake of the Black Lives Matter Movement’ (*The Conversation*, 8 July 2020) <<http://theconversation.com/is-being-european-a-white-identity-brussels-needs-deep-reflection-in-the-wake-of-the-black-lives-matter-movement-141902>> accessed 18 December 2023.

<sup>70</sup> Instead, ‘everyday racism’ should be seen in the context of structural and institutional discrimination, see Michaela Benson and Chantelle Lewis, ‘Brexit, British People of Colour in the EU-27 and Everyday Racism in Britain and Europe’ (2019) 42 *Ethnic and Racial Studies* 2211.

<sup>71</sup> Hanna Eklund, ‘Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome’ [2023] *European Journal of International Law* chad060.

<sup>72</sup> European Agency for Fundamental Rights, ‘Being Black in the EU - Second EU Minorities and Discrimination Survey’ (2018) 27 <<https://fra.europa.eu/en/publication/2018/being-black-eu>> seq.

<sup>73</sup> *ibid* 54 seq.

impact every aspect of European law, ranging from political participation and representation<sup>74</sup> to the composition of the judiciary.<sup>75</sup> Even teaching in European law schools has been described as a racialized experience.<sup>76</sup>

Everyday racism means that racism constitutes a destabilising repetition. This is by far not a new revelation, and Judah's omission of the everyday hurdles and threats for racialised people in Europe, as described by his predecessors including Pitts and Phillips,<sup>77</sup> is stunning. The racist encounters Caryl Phillips described in 1987 could just as well have happened in 2025. For people experiencing racism, this repetition is a core element of their experience of the everyday – both in the sense that it happens every day, but also that it repeats itself over and over again. Most likely, Judah did not encounter the same hurdles collecting testimonies as Pitts and Phillips did for their own book projects. Pitts, for instance, became a victim of racial profiling at least twice during his travels across Europe. He describes his experience of exiting the refugee camp in Calais, which he had visited for his research as follows:

“I left [...] on my bicycle and slowly realized that I was being watched and followed through the blustery streets of Calais by the French military police, the Gendarmerie. Attempting to enter the white gates of the port to catch my ferry back to the UK, I was stopped before I could even get to passport control, searched, asked for my ID, where I was going, where I'd come from, how long I'd been away, and why. Finally, after more questioning and looks of suspicion, I was allowed to enter an official compound I'd seen other brown-skinned men of my age look longingly at from a distance. I was in; they were out.”<sup>78</sup>

Because whiteness is systemically embedded in Europe's political, economic and legal system, racism is a part of the Everyday that is felt only by some of us.<sup>79</sup> Who is in and who is out, is not only a question of epistemic justice,<sup>80</sup> in terms of representing more different perspectives, but an existential one. As many critical race scholars have noted, individual awareness or education are an important step, but insufficient to combat this problem.<sup>81</sup> As EU legal scholars, we need to tackle “coloniality and structural racism in the everyday” both cognitively within our discipline, but also materially in the legal architecture of the system we work with.<sup>82</sup>

Race determines the everyday both at and within European borders, but also in the context of larger global structures. Timo Zandstra's paper in this symposium makes an important contribution to the debate by analysing the reproduction of Eurocentrism and (neo)coloniality

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<sup>74</sup> This is true for the national level, see e.g. Tobias Jones, 'Why Is Italy Still so Racist?' *The Guardian* (30 July 2013) <<https://www.theguardian.com/world/shortcuts/2013/jul/30/italy-racism-cecile-kyenge-esterofilia>> accessed 3 December 2024; Kate Connolly, 'Germany's First Black African-Born MP to Stand down after Racist Abuse' *The Guardian* (10 July 2024) <<https://www.theguardian.com/world/article/2024/jul/03/germanys-first-africa-born-mp-to-stand-down-after-racist-abuse>> accessed 26 March 2025; as well as at the European level Johanna Kantola and others, “‘It's Like Shouting to a Brick Wall’: Normative Whiteness and Racism in the European Parliament” (2023) 117 *American Political Science Review* 184; Magdalena Bartłomiejczyk, 'How Much Noise Can You Make through an Interpreter?: A Case Study on Racist Discourse in the European Parliament' (2020) 22 *Interpreting. International Journal of Research and Practice in Interpreting* 238.

<sup>75</sup> Iyiola Solanke, 'Where Are the Black Judges in Europe?' (2018) 34 *Connecticut Journal of International Law* 287.

<sup>76</sup> Rishiti Choudaha, 'Editorial #39: Hey! Teacher! Leave Them Kids Alone!': On the Racialized Experience of Teaching “Almost” International Law' [2024] *Völkerrechtsblog* <<https://voelkerrechtsblog.org/editorial-39-hey-teacher-leave-them-kids-alone/>> accessed 6 November 2024.

<sup>77</sup> Phillips (n 39); Pitts (n 5).

<sup>78</sup> Pitts (n 5) 3.

<sup>79</sup> Kehinde Andrews, *The Psychosis of Whiteness: Surviving the Insanity of a Racist World* (Allen Lane, an imprint of Penguin Books 2023) xvi.

<sup>80</sup> Miranda Fricker, 'Evolving Concepts of Epistemic Injustice' *The Routledge Handbook of Epistemic Injustice* (Routledge 2017).

<sup>81</sup> Andrews (n 79) 47.

<sup>82</sup> Rutazibwa (n 29) 197.

in Judah's *This is Europe*. Indeed, the way we live now in Europe materially depends on and is sustained by the extraction of resources<sup>83</sup> and European political involvement beyond its borders.<sup>84</sup> The problem of race cannot be fully understood without a deeper analysis of Europe's history of colonialism and persisting coloniality. Colonial legacies, alongside the racialised nature of the everyday in Europe, and how law structures and reproduces experiences of discrimination, exclusion and extraction bear the key to understanding the deep-rooted nature of white Europe.

## 5. Conclusions

Based in the secluded hills of Florence, at a research institute that is known for shaping the imaginary of "Europe",<sup>85</sup> this EUI symposium used Ben Judah's book as a starting point for a discussion about what it means to live in Europe. This paper has argued that in our discussions on European law of the Everyday, we need to fundamentally question the pervasive presumption of Europeanness as whiteness, and challenge which "stories [...] are seen as important to tell".<sup>86</sup> While Judah's book does not claim comprehensiveness, it showcases a tendentious selectivity. In *This is Europe*, prejudices are reproduced and remain largely unchallenged, including the racialisation of criminality. Even if we assume that Judah's aim was to stick to the authentic perspectives of his interview partners, who are often victims of prejudice themselves, it is concerning that these narratives were not properly counterbalanced.

What does it reveal about us as scholars of European law that we chose to include the perspectives of hyphenated or un-hyphenated Europeans only as an afterthought? There is sufficient material about the "everyday" confronted by racialised Europeans: POC and Black European feminists,<sup>87</sup> European Muslims (and those read as such),<sup>88</sup> or by Black Europeans who have been in Europe for generations and still face racism every day.<sup>89</sup> Where are the voices of Roma people,<sup>90</sup> the descendants of low-paid imported labour that ensured European prosperity,<sup>91</sup> or of the young people all across Europe committed to building an archive on

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<sup>83</sup> Illustrated by the case of EU external fisheries, see the chapter on Corrubedo, Judah (n 25) 589.

<sup>84</sup> There are several layers of this in the chapter on Briançon, where the EU's relations with Niger and Libya are touched upon, see *ibid* 272.

<sup>85</sup> Jan Komárek, 'Political Economy in the European Constitutional Imaginary – Moving beyond Fiesole' [2020] *Verfassungsblog* <<https://verfassungsblog.de/political-economy-in-the-european-constitutional-imaginary-moving-beyond-fiesole/>> accessed 21 January 2025.

<sup>86</sup> Iyiola Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice* (1st edn, Cambridge University Press 2022) 346.

<sup>87</sup> Akwugo Emejulu and Francesca Sobande, *To Exist Is to Resist: Black Feminism in Europe* (Pluto Press 2019); and podcast projects, such as 'Vocal About It' <<https://open.spotify.com/show/3q6v0TpR9j0JCtugWYmVEW?si=a4fae56fe2de41cd>>; and 'We Belong' <<https://open.spotify.com/show/6M0alo9zIHFSHgKB8UJpJ4>> accessed 27 March 2025.

<sup>88</sup> Suhaimah Manzoor-Khan, 'White People of France: Being Forced to Undress Wasn't the Liberation I Wanted' *The Independent* (24 August 2016) <<https://www.independent.co.uk/voices/burkini-ban-muslim-women-france-nice-beach-forced-undress-liberation-burkha-islam-dear-white-people-a7207811.html>> accessed 1 December 2023; Holger Heimann, 'Mohamed Amjahid: "Unter Weißen" - Wie Alltagsrassismus ein Leben prägt' *Deutschlandfunk Kultur* (25 February 2017) <<https://www.deutschlandfunkkultur.de/mohamed-amjahid-unter-weissen-wie-alltagsrassismus-ein-100.html>> accessed 27 March 2025.

<sup>89</sup> Olivette Otele, *African Europeans: An Untold History* (First Edition, Basic Books 2021); Nadine Wojcik, 'Making Afro-German History Visible' *dw.com* (8 October 2023) <<https://www.dw.com/en/africa-germany-history/a-66493515>> accessed 19 March 2025.

<sup>90</sup> Alexandra Oprea, 'Re-Envisioning Social Justice from the Ground up: Including the Experiences of Romani Women' (2004) 1 *Essex human rights review* 29; Angéla Kóczé and Márton Rövid, 'Roma and the Politics of Double Discourse in Contemporary Europe' (2017) 24 *Identities* 684.

<sup>91</sup> Peter Hille, 'In 1961, Germany Needed Workers and Turks Answered the Call' (*dw.com*, 5 October 2021) <<https://www.dw.com/en/the-german-turkish-recruitment-agreement-60-years-on/a-59398455>> accessed 8 April 2025; Jérôme Gonnnot, 'As France Moves to Limit the Rights of Migrants, Research Reveals Just How Reliant on

Black European history and coloniality?<sup>92</sup> Are we satisfied with pointing at foreigners featured in *This is Europe*, while ignoring the everyday struggles of activists opposing European reactionary politics and authoritarian backsliding within Europe?<sup>93</sup> What about the many people residing in Europe who no longer feel safe, whose “everyday” is shaped by exclusions and threats to their lives?<sup>94</sup> Is this not also Europe? Without listening to the multifaceted perspectives and experiences of Europeans who are forced to constantly fight for their place in Europe, we will not be able to develop a profound concept of the everyday.

How do “we” really live now? And how do we *want* to live in Europe? Most of the stories in *This is Europe* seem to be about human material, highlighting how the hunger for commodities turns humans – especially those already vulnerable – into a disposable resource. Using Judah’s book as a point of departure, this paper argued for the development of a method that is capable of engaging with the diversity of European experiences and does not reproduce racialised, non-white Europeans as an ‘Other’ but as integral to understanding contemporary Europe today and historically. In fact, we are convening this symposium at a time when the European peace project is shadowed by moral abdication.<sup>95</sup> Now more than ever, the facets of white complicity – including the omission of the realities of race – must be scrutinised.<sup>96</sup> This paper therefore tried to contribute to the debate by centring aspects of the everyday as it is lived by racialised people in Europe. Too often, this perspective has been left out in discourses on European law.<sup>97</sup> Let us not make the same mistake again in this effort to conceptualise European law of the Everyday.

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Them It Is’ *The Conversation* (22 December 2023) <<http://theconversation.com/as-france-moves-to-limit-the-rights-of-migrants-research-reveals-just-how-reliant-on-them-it-is-220243>> accessed 8 April 2025; Eleonora Roldán Mendivil and Bafta Sarbo (eds), *Die Diversität der Ausbeutung: Zur Kritik des herrschenden Antirassismus* (4th edn, Dietz Vlg Bln 2023) 51–56; Mesut Bayraktar, *Aydin: Erinnerung an ein verweigertes Leben* (1st edn, Unrast Verlag 2021).

<sup>92</sup> Johnny Pitts portrays the Black Archives Project in Amsterdam. Pitts (n 5) 162 seq.; There are many similar projects across Europe. Examples include Daphné Budasz and Markus and Wurzer, ‘Postcolonial Italy, A Public History Project Mapping Colonial Heritage’ (2024) 26 *Interventions* 1069; ‘Decolonising Europe Booklet’ (*Decolonial Europe Day*, 10 April 2023) <<https://decolonial.eu/booklet/>> accessed 27 March 2025; Yasminah Beebeejaun, ‘Regarding Statues: Whiteness, Space, and the Postcolonial European Imagination’ [2024] *Journal of Planning Education and Research* 0739456X241268492.

<sup>93</sup> Silvia Suteu, ‘The Rule of Law Crisis Was Always Gendered: The Anti-Gender Playbook in Europe’, *European Constitutional Law Review* 21(1)(forthcoming, 2025); Agnieszka Kubal, ‘The Women’s Complaint: Sociolegal Mobilization against Authoritarian Backsliding Following the 2020 Abortion Law in Poland’ (2023) 31 *Journal of Contemporary Central and Eastern Europe* 585.

<sup>94</sup> Oscar Herzog Astaburuaga, ‘The Hanau Massacre and State (in)Action: A Dossier’ (2023) 64 *Race & Class* 87; Rokhaya Diallo, ‘A Worshipper Is Murdered in a French Mosque. How Can This Be “Just Another Crime”?’ *The Guardian* (13 May 2025) <<https://www.theguardian.com/commentisfree/2025/may/13/worshipper-murdered-french-mosque-politicians-crime-islamophobia>> accessed 14 May 2025.

<sup>95</sup> Didier Fassin, *Moral Abdication: How the World Failed to Stop the Destruction of Gaza* (Gregory Elliott tr, Verso Books 2025).

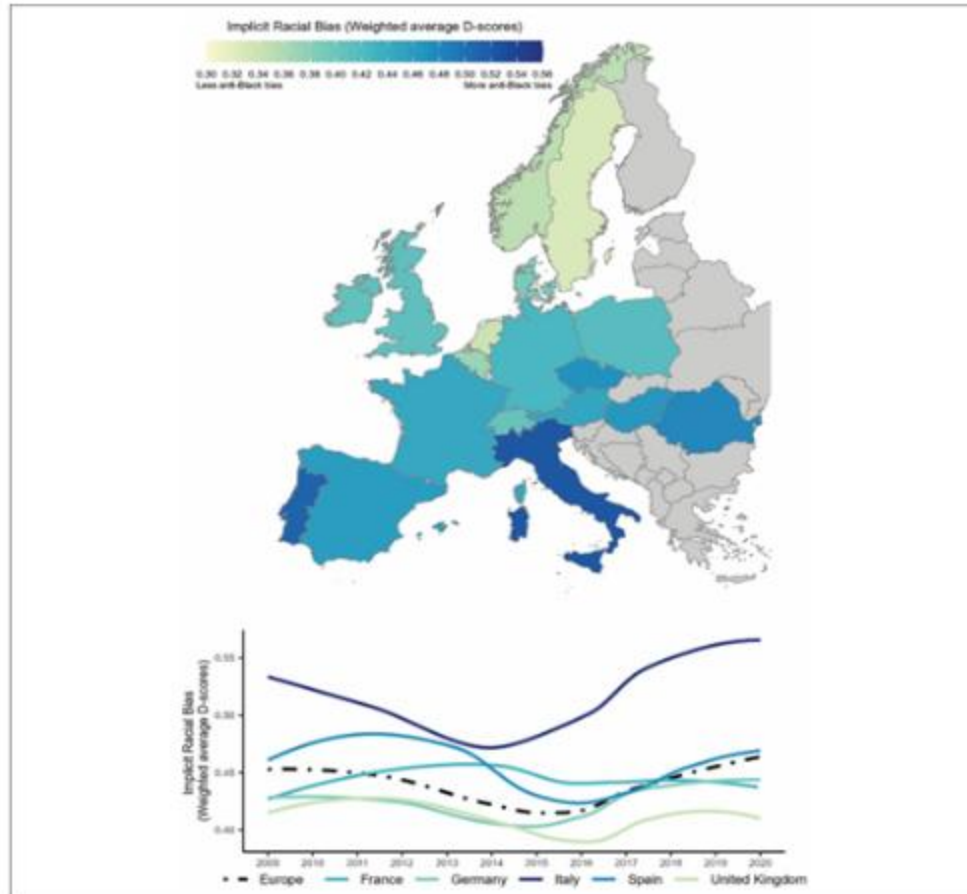
<sup>96</sup> Musa Okwonga, ‘White Complicity Matters: The Nazis by the Lake’ (*Byline Times*, 5 June 2020) <<https://bylinetimes.com/2020/06/05/white-complicity-matters-the-nazis-by-the-lake/>> accessed 15 October 2024.

<sup>97</sup> With some exceptions, including most recently Nozizwe Dube, ‘The Unbearable Whiteness of EU Law’ (EUI Working Papers, October 2025); Mathias Möschel, Costanza Hermanin and Michele Grigolo (eds), *Fighting Discrimination in Europe: The Case for a Race-Conscious Approach* (1st edn, Routledge 2016); Jeffrey Miller and Fernanda G Nicola, ‘The Failure to Grapple with Racial Capitalism in European Constitutionalism’ in Jan Komárek (ed), *European Constitutional Imaginaries* (1st edn, Oxford University PressOxford 2023); Raphaële Xenidis, ‘Multiple Discrimination in EU Anti-Discrimination Law: Towards Redressing Complex Inequality?’ in Uladzislau Belavusau and Kristin Hennard (eds), *EU anti-discrimination law beyond gender* (OUP 2019); Jens T Theilen, ‘Racialised Climate Justice: Contextualising the Climate Change Cases before the European Court of Human Rights’ [2024] *Völkerrechtsblog* <<https://voelkerrechtsblog.org/racialised-climate-justice/>> accessed 27 February 2026.

# Europe Today: Law, Race, & Social Reality

by Prince Samuel Amadi\*

## 1. Introduction: Visualizing the Problem



**Figure 1.** Implicit racial bias in Europe: cross-national variation and time trends.  
Note: The figure shows country-level implicit bias among majority members against Black people revealed in implicit association tests available in the Project Implicit international dataset ( $n = 184,745$ ). Higher D scores indicate stronger bias against Black people. All scores are reweighted on the basis of sex, age, level of education, and political positioning. Locally estimated scatterplot smoothing is applied to produce the time trends. The trend for Europe reflects implicit racial bias in all countries included in our analysis, reweighted by their respective population size.

**Figure 1: Showing “implicit racial bias in Europe: cross-national variation and time trends.”**

This essay examines what it means to live in Europe and under European law as a person of African descent. Through the lens of Ben Judah’s *“This is Europe”*<sup>2</sup> and Johnny Pitts’ *“Afropean,”*<sup>3</sup> it reveals the daily realities of Black Europeans and the institutional and social structures that perpetuate discrimination. By analysing these texts, the essay highlights systemic disparities that have produced a power imbalance—one that endures despite a robust legal framework ostensibly committed to equality.

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<sup>1</sup> Kasimir Dederichs and Pieter-Paul Verhaeghe, ‘Implicit Racial Bias in Europe: Cross-National Variation and Time Trends’ (2024) *Socius* 10, 1–3 <https://doi.org/10.1177/23780231241291131> accessed 9 August 2025.

<sup>2</sup> Ben Judah, *This is Europe: The Way We Live Now* (Picador 2023).

<sup>3</sup> Johnny Pitts, *Afropean: Notes from Black Europe* (Penguin 2020).

*This is Europe* represents Ben Judah's effort to capture the meaning of life on the continent for those who inhabit it. Drawing on a continent-wide journey, Ben Judah set out to depict the "lived Europe" beyond historical "memory or political systems."<sup>4</sup> His choice of characters, however, is telling: Black Europeans, some with family histories in Europe stretching back to the fifteenth century, were absent. When they do appear, they are often framed solely as immigrants, reinforcing the notion that Blackness is peripheral to European identity.<sup>5</sup> This omission, whether deliberate or unconscious, reflects deeper societal discomfort with recognizing Black Europeans as integral to the continent's fabric. In doing so, it illustrates both the covert and unconscious dimensions of racism, forces fundamentally at odds with the EU's professed commitment to equality for all.<sup>6</sup>

Ben Judah's stated mission is to tell the story of the "lived Europe"<sup>7</sup> implicitly promises inclusivity, yet only two chapters in his nearly 600-page work feature Blacks, albeit as immigrants.<sup>8</sup> Even so, these chapters rest on narratives of desperation, poverty, and criminality: imagery historically used to characterize, marginalize, and dehumanize Black communities.<sup>9</sup> In sections like "Balogo"<sup>10</sup> and "Storkwo,"<sup>11</sup> Black people are either associated with crime or presented solely through the lens of struggle and failure. While such realities in Ben Judah's epistemological choice may reflect genuine hardships, it overlooks the systems that create and perpetuate these conditions, casting Black Europeans as perpetual outsiders rather than as citizens shaped by centuries of struggles powered by racial discrimination.<sup>12</sup> More importantly, Ben Judah's deliberate diction fails to recognize the contribution of the Black communities to Europe in the face of racism.<sup>13</sup>

In contrast, Johnny Pitts' *Afropean* places the Black European experience at the centre of its narrative. Johnny Pitts explores the lives of Black communities across Europe, confronting systemic racism, cultural erasure, and institutional neglect. His chapter on Amsterdam, for example, details racial profiling,<sup>14</sup> unequal access to housing<sup>15</sup> and education, and exclusion from national memory.<sup>16</sup> More broadly, *Afropean* challenges stereotypes by celebrating the richness of Black European identity. It tells a tale of heritage shaped by subjugation, emancipation, and achievement in science, literature, politics, art, and culture. Unlike Ben Judah, Johnny Pitts envisions a continent where Black people are not peripheral but an integral part, contributing to the continent's development and shaping its cultural identity.<sup>17</sup>

By juxtaposing Ben Judah's selective portrayal with Pitts' deliberate illumination, this essay interrogates both overt and covert forms of racism in Europe and the broader mechanisms that have sustained them. In that sense, it views Ben Judah's omissions as perpetuating a constrained vision of European identity, while Johnny Pitts' inclusive approach reveals the hidden contributions of Black Europeans. This contrast underscores a central tension around

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<sup>4</sup> See Ben Judah, *supra* at 499.

<sup>5</sup> Elena Ball, Melanie C Steffens and Claudia Niedlich, 'Racism in Europe: Characteristics and Intersections with Other Social Categories' (2021) *Frontiers in Psychology*, 1.

<sup>6</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, Preamble 1.

<sup>7</sup> Ben Judah, *supra* at 499.

<sup>8</sup> Ben Judah, *supra*, in chapters on Baloga and Ruckla at pp. 33 and 414 respectively

<sup>9</sup> Kennetta Hammond and Perry Kia Thurman, 'Black Europe: A Useful Category of Historical Analysis' (*Black Perspectives*, 20 December 2016) <https://www.aaihs.org/black-europe-a-useful-category-of-historical-analysis/> accessed 9 August 2025.

<sup>10</sup> Ben Judah, *supra* at 16-37.

<sup>11</sup> Ben Judah, *supra* at 264-282.

<sup>12</sup> Elena Ball, Melanie C Steffens, and Claudia Niedlich, *supra*.

<sup>13</sup> "Photobombing de Gaulle: how a forgotten picture rewrites the history of WWII" (*Financial Times*, August 3, 2024) accessed 10 August 2025.

<sup>14</sup> Johnny Pitts, *supra* at 3.

<sup>15</sup> Johnny Pitts, *supra* at 151.

<sup>16</sup> Johnny Pitts, *supra* at 136, 138-139, and 145.

<sup>17</sup> Johnny Pitts, *supra* at 131-133.

which this short essay is woven. That is the ideological rift between legal idealism and lived reality.<sup>18</sup> From this foundation, the essay turns to a central question: can legal instruments alone combat racism and racial discrimination in Europe?

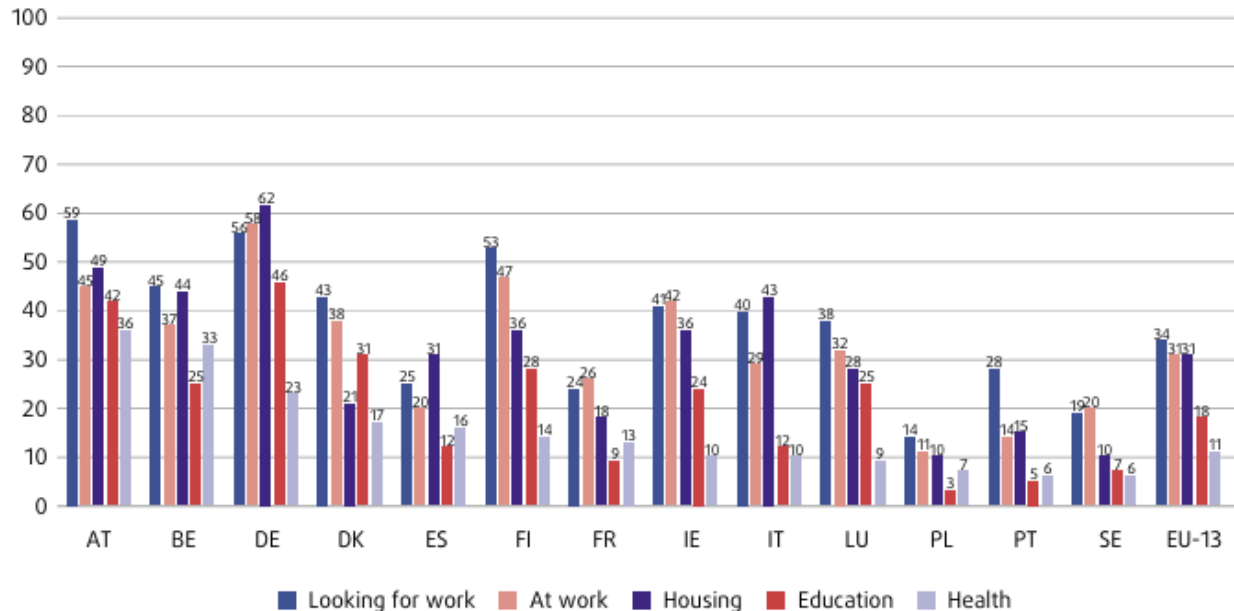
Given the foregoing, this essay proceeds as follows: Part 2 surveys the development of EU anti-discrimination law, tracing its origins and evolution through statutory frameworks and decisions of the Court of Justice of the European Union. Part 3 evaluates the law's shortcomings in confronting racial realities, examining both the stated purposes of anti-discrimination measures and their failure to produce meaningful change. Finally, Part 4 proposes a sociopsychological framework for addressing racism. One that treats racism as a socio-psychological condition requiring tools from sociopsychology alongside legal measures. It then asserts that by integrating these approaches, the EU can move closer to addressing racism not only in law but also in the lived experiences of its inhabitants.

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<sup>18</sup> Daniel Thabani Ncube, 'Anti-Racism Law and its Limits: Contemplating the "Conceptual Blurriness" of Race' (Verfassungsblog, 18 October 2024) <https://verfassungsblog.de/anti-racism-law-and-its-limits/> DOI:10.59704/0580eac586c818ce accessed 23 May 2025.

## 2. The Image of Europe and Its Legal Order: Non-Discrimination and Other Matters

**FIGURE 13: PREVALENCE OF RACIAL DISCRIMINATION IN DIFFERENT AREAS OF LIFE IN THE 5 YEARS BEFORE THE SURVEY, BY COUNTRY (%)<sup>a,b,c</sup>**



**Figure 2: Showing the prevalence of racial discrimination across 13 Member States of the EU.<sup>19</sup>**

Europe has long cultivated an image of itself as a global leader in human rights, equality, and democracy. The Treaty on the European Union (TEU) enshrines these commitments, with Article 2 affirming the Union's foundation on "human dignity, freedom, democracy, equality, the rule of law and respect for human rights."<sup>20</sup> These values are echoed across other EU legal instruments, as will be seen below.

Initially, the inclusion of the principle of equality was not designed to tackle racism or racial discrimination. Its purpose was to serve primarily the EU's economic integration project. Put differently, anti-discrimination provisions were introduced to facilitate the free movement of labour and services within the Union.<sup>21</sup> Over time, however, this framework evolved, extending the principle of equality to encompass racism and racial discrimination. The event leading to the present EU anti-discrimination law is the Treaty of Amsterdam (1997), which marked a doctrinal shift by empowering the EU to legislate against discrimination on grounds including racial and ethnic origin, moving from a purely market-based approach to a broader rights-based one.

Building on historical momentum, the EU, in 2000, introduced two remarkable anti-discrimination instruments. Thus, the year 2000 became a turning point in the EU's anti-discrimination regime. The two landmark directives adopted were: the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC). These instruments were significant for several reasons. They established a minimum standard of protection against

<sup>19</sup> The Agency report, 42.

<sup>20</sup> Cite the provision here.

<sup>21</sup> Jan Cremers, 'Economic freedoms and labour standards in the European Union' (2016) 22 *Transfer: European Review of Labour and Research* 149-162. See also Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 2, Preamble 13.

discrimination across the Union;<sup>22</sup> they were dedicated to anti-discrimination measures rather than ancillary provisions; they defined both discrimination and discriminatory practices;<sup>23</sup> they extended protection beyond employment to areas such as education, healthcare, housing, access to goods and services, and social protection;<sup>24</sup> and they created enforcement bodies to oversee compliance.<sup>25</sup>

Moreover, the EU Charter of Fundamental Rights (CFR) reinforced these commitments, consolidating rights from the TEU, TFEU, and “constitutional obligations common to Member States”<sup>26</sup> into a legally binding framework throughout the Union. Particularly, Article 21 prohibits discrimination based on nationality, while Article 20 affirms equality before the law. Collectively, these legal instruments appear, albeit on paper, to present an image of unwavering commitment to racial equality, fostering an impression, an image, which in many ways creates an illusion of a Europe free from racism, which in turn can feed a culture of denial about its persistence, racial aphasia.

Still, it is important, however, to recognize the origins of these laws. Indeed, teleologically, many were not born of a moral imperative but from practical concerns about market efficiency, ensuring the smooth functioning of the single market by guaranteeing equal treatment for workers across borders.<sup>27</sup> However, the commitment expanded to the realm of racial equality, although slowly and gradually. This gradual expansion toward a broader human rights agenda was driven by internal political pressure fuelled by human rights movements and by international obligations under instruments such as the European Convention on Human Rights, the Universal Declaration of Human Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, etc.<sup>28</sup>

Despite the evolution and development of comprehensive legal instruments for anti-discrimination, their enforcement remains uneven across the Union.<sup>29</sup> While some Member States have been far more effective in implementing anti-discrimination measures, others have not. To put this simply, while the directives established equality bodies, their capacity or willingness to comply with the enforcement requirements of the directives varies substantially across Member States<sup>30</sup> Equality bodies, created by Member States under the directives, often lack sufficient funding, staff, or political independence.<sup>31</sup> Moreover, EU law relies on national implementation, leaving it vulnerable to political interference and prevailing societal

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<sup>22</sup> See Migration Policy Group, ‘24 Years On: How Far Have EU Anti-Discrimination Laws Come?’ (7 April 2025) <https://www.migpolgroup.com/index.php/2025/04/07/24-years-on-how-far-have-eu-anti-discrimination-laws-come/> accessed 10 August 2025.

<sup>23</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>24</sup> *Ibid.*, Article 2.

<sup>25</sup> *Ibid.*, Articles 9-14.

<sup>26</sup> See Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (26 October 2012), Preamble 5.

<sup>27</sup> The present equality principle is traced to the Treaty of Rome of 1957, Articles 48-51, which gives citizens the right to movement and employment.

<sup>28</sup> See European Convention on Human Rights (ECHR) (1950) ETS 5; Universal Declaration of Human Rights (UDHR) UNGA Res 217A (III) (10 December 1948); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) 660 UNTS 195; International Covenant on Civil and Political Rights (ICCPR) (1966) 999 UNTS 171; and International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) 993 UNTS 3.

<sup>29</sup> Isabelle Chopin and Catharina Germaine, *A Comparative Analysis of Non-Discrimination Law in Europe 2024: The 27 EU Member States Compared* (European Network of Legal Experts in Gender Equality and Non-Discrimination, December 2024), p. 141.

<sup>30</sup> *Ibid* at 138 – 140.

<sup>31</sup> Evelyn Collins, ‘Enhancing Europe’s Equality Framework’ (Social Europe, 22 March 2022) [https://www.socialeurope.eu/enhancing-europes-equality-framework?utm\\_source=chatgpt.com](https://www.socialeurope.eu/enhancing-europes-equality-framework?utm_source=chatgpt.com) accessed 7 August 2025.

attitudes.<sup>32</sup> These factors, among others, render EU anti-discrimination laws ineffective, as even the most progressive legal frameworks can be undermined by prevailing social attitudes.

Further limitation lies in the scope of these laws. They tend to address individual instances of discrimination rather than the structural and systemic nature of racism holistically.<sup>33</sup> This approach situates discrimination as a squarely legal anomaly rather than a pervasive condition. By focusing narrowly on individual grievances, it presents a fundamental flaw. The flaw in this approach is that the law overlooks how institutions like police, justice systems, schools, etc., reproduce racial discrimination.<sup>34</sup> This may explain why, since its inception, the CJEU has heard of only three race-based cases.<sup>35 36</sup>

Thus, while the EU's legal order contains mechanisms to combat discrimination, it has not succeeded in eradicating racism. This shortfall does not rest solely on deficiencies in the laws themselves but on a deeper dissonance between legal code and existential social realities. A dissonance that leads us directly to the relationship between law and social reality in Europe below.

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<sup>32</sup> Ibid

<sup>33</sup> Politico, 'EU's Fight Against Racism Isn't Working' (19 March 2021) <https://www.politico.eu/article/eus-fight-against-racism-isnt-working> accessed 7 August 2025.

<sup>34</sup> Amiiarah Salleh-Hoddin, Ghyslaine Vedeux and Karen Taylor, 'Will the EU Walk the Talk on Tackling Structural Racism?' (*Euractiv*, 24 June 2020) <https://www.euractiv.com/section/politics/opinion/will-the-eu-walk-the-talk-on-tackling-structural-racism/> accessed 7 August 2025.

<sup>35</sup> Jeffrey Miller and Fernanda G Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutionalism' in Jan Komárek (ed), *European Constitutional Imaginaries* (OUP 2023), p.336; See also, Raphaële Xenidis and Linda Senden, 'EU Non-Discrimination Law in the Era of Artificial Intelligence: Mapping the Challenges of Algorithmic Discrimination' in Ulf Bernitz, Xavier Groussot, Jaan Paju and Sybe de Vries (eds), *General Principles of EU Law and the EU Digital Order* (Wolters Kluwer Law International 2020), 175-176.

<sup>36</sup> Jeffrey Miller and Fernanda G Nicola, *ibid.* at 336.

### 3. Europe's Laws and the Social Reality: Does Racism Exist?



**Figure 3.** Assa Traoré, sister of black man who died while in custody in France, acquitted of defamation | Euronews<sup>37</sup>

The dissonance between the EU's anti-discrimination laws and the lived experiences of Black people is emblematic and largely due to two circumstances: a phenomenon that David Theo Goldberg refers to as "racial Europeanization."<sup>38</sup> The second phenomenon is what Hans Kundnani refers to as "Eurowiteness."<sup>39</sup> The former represents an idea that denies racism in Europe, and the latter represents the notion of Europe as synonymous with Whiteness. Forged through these notions are concepts that present Europe solely as a White continent, at the same time denying the existence of racism or racial discrimination.

At the outset, "racial Europeanization," as David Theo Goldberg observes, reflects a belief among many Europeans that race no longer exists, is visible, or holds relevance in present-day Europe.<sup>40</sup> This attitude is reflective of what he terms "European racial denial," a notion rooted in the post-World War II desire for the very concept of race to collapse, to vanish, or to "erase itself" from Europe's political, sociocultural, and collective consciousness of the people of Europe.<sup>41</sup> Embedded within the framework of racial Europeanization are two intertwined ideas drawn from critical race theory: racial aphasia, which denotes the inability or unwillingness to speak about race, and white innocence, which frames Europe as morally absolved of racial wrongdoing. Together, these concepts explain how race and racial discourse are characteristically suppressed or rendered invisible in contemporary Europe.

Racial aphasia, particularly, is a key conceptual tool for understanding the contradiction of racism and race discourse in Europe. As a scholarly tool, it refers to a collective inability or refusal to acknowledge race and racism. Ann Stoler explains it as "an occlusion of knowledge, a difficulty generating a vocabulary that associates appropriate words and concepts with

<sup>37</sup> See 'Sister of Black Man Who Died in Police Custody Acquitted of Defamation' (Euronews, 2 July 2021) <https://www.euronews.com/video/2021/07/02/assa-traore-sister-of-black-man-who-died-while-in-custody-in-france-acquitted-of-defamatio> accessed 7 August 2025.

<sup>38</sup> David Theo Goldberg, 'Racial Europeanization' (2006) 29(2) *Ethnic and Racial Studies*, 331, 333.

<sup>39</sup> Hans Kundnani, *Eurowiteness: Culture, Empire and Race in the European Project* (C Hurst & Co Publishers Ltd 2023)

<sup>40</sup> David Theo Goldberg, *Ibid.*, at 334.

<sup>41</sup> David Theo Goldberg, *Ibid.*, at 334.

appropriate things, and a difficulty comprehending the enduring relevancy of what has already been spoken.”<sup>42</sup> In this sense, Europe’s legal discourse is often woven by euphemism, avoidance, or outright denial. Such practices help perpetuate racism across the continent, leading many Europeans either to deny the existence of race and racism or to evade the subject altogether.<sup>43</sup> For most, it remains a difficult, uncomfortable topic.<sup>44</sup> One perceived as unfit for open discussion and incompatible with Europe’s self-image as a bastion of democracy, equality, and the rule of law.<sup>45</sup>

A striking illustration of this mindset is provided in József Böröcz’s account of a conference “on the conditions of European Roma communities” in Budapest.<sup>46</sup> As József Böröcz explained, when he had questioned a Scandinavian scholar about his avoidance of the use of racial terminology since the presentation was clearly understood as a racial debate. The scholar replied, “We don’t have race in Europe. That is an American concept.”<sup>47</sup> Such thinking highlights both popular and academic denial of racism’s existence in Europe, even though, tellingly, the term “Europe” is often used in ways that equate it with Whiteness. This concept is expressed as Eurowhiteness, Europeaness, or simply Whiteness. An idea, as Hans Kundnani explains, signifies an ideology that interprets European identity as implicitly aligned with whiteness. Thus, “the mapping of white identity onto Europe and the insistence on distinguishing it from all *Others*,” has a corollary effect, as Josef Borocz noted, a “partial view of humanity, where the symbolic violence of simplification or exclusion extends beyond those represented in the “scholarly” typologies once displayed in the *tableau* of the *Musée de l’Homme*.”<sup>48</sup> In this framing, Blackness is rendered perpetually foreign to the continent or completely ignored despite the existence of legal protections. This racialized perception persists, shaping policy, media narratives, public discourse, and academic debate across Europe.

Ben Judah’s text epitomizes racial Europeanization—manifested through racial aphasia and whiteness. By framing Black people solely as immigrants, he contributes to a discourse that excludes them from the European imaginary. His characterization reinforces the notion of Blackness as external, temporary, and problematic. This epistemological style suppresses Black Europe’s achievements and its struggles. It conveys, both indirectly yet unmistakably, a ‘reassurance’ to Black people and those of African descent that their place in Europe is ultimately transient. This perspective, it must be observed, lies at the heart of what it has long meant to be Black or of African descent in Europe. Ben Judah’s narrative gestures toward a Europe without Black people, except as immigrants. And this category he invokes tactically whenever it suits his purpose.

Through this approach, Judah reproduces the same systemic racism that silences Black voices, relegates them to the margins, and disregards their sustained contributions to Europe’s development, even amid persistent discrimination. In *This is Europe*, Black people first appear at Le Col de L’Echelle, where Judah introduces his Black Europeans as African immigrants fleeing their homelands in search of a better life. These Black individuals were depicted as

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<sup>42</sup> Ann Laura Stoler, ‘Colonial Aphasia: Race and Disabled Histories in France’ (2011) 23 *Public Culture* 121-56. See also Ann Laura Stoler, ‘Colonial Aphasia: Disabled Histories and Race in France’ in *Duress: Imperial Durabilities in Our Times* (Duke University Press 2016) 122–70.

<sup>43</sup> Miriam Juan-Torres, ‘On Europeans (not) Talking About Race’ (Blogpost, 15 June 2023) <https://belonging.berkeley.edu/europeans-not-talking-about-race> accessed 11 August 2025.

<sup>44</sup> József Böröcz, “Eurowhite” Conceit, “Dirty White” Ressentment: “Race” in Europe’ (2021) *Sociological Forum* [https://www.researchgate.net/publication/355203118\\_Eurowhite\\_Conceit\\_Dirty\\_White\\_Ressentment\\_Race\\_in\\_Europe](https://www.researchgate.net/publication/355203118_Eurowhite_Conceit_Dirty_White_Ressentment_Race_in_Europe) accessed 8 August 2025.

<sup>45</sup> Hans Kundnani, Hans Kundnani, *Eurowhiteness: Culture, Empire and Race in the European Project* (C Hurst & Co 2023), 50-53

<sup>46</sup> József Böröcz, *supra* at 1.

<sup>47</sup> *Ibid.*

<sup>48</sup> See József Böröcz, *supra* at 7.

poor and helpless “in the cheapest jumpers. None with real scarves”<sup>49</sup> This was the only occasion throughout the text where Ben Judah spoke about the quality of wears of his characters. In another chapter, Brianco, Ben Judah presents a similar figure: a migrant driven by economic hardship toward the ‘promise’ of Europe. Likewise, in Baloga, Storkwo, Ruckla and other chapters, Black people or those of African descent appear primarily as immigrants, criminals, or both. A striking example is found in “Baloga,” where Judah attributes criminal activity in England to Africans and other immigrants, reinforcing an image of Blackness inherently linked to social disorder.<sup>50</sup>

Judging by historical patterns in both academic and non-academic writing, Ben Judah’s framing is not merely an oversight but an epistemological act with significant sociopsychological consequences. If one assumes his exclusion of Black Europeans is unintentional, it reveals the persistence of covert racism. It is unmistakably a subconscious bias expressed by individuals who might not be unaware of the impact of their actions or inactions.

In contrast to Ben Judah’s *This is Europe*, Johnny Pitts’ *Afropean* offers a compelling counternarrative. In the Amsterdam chapter, Pitts documents the lived reality of Black people in the Netherlands, revealing how racial profiling, institutional neglect, and cultural erasure remain entrenched. One telling incident is the violent arrest of a teenager for wearing a T-shirt reading “Zwarte Piet is Racist.”<sup>51</sup> The Dutch state’s reaction to this simple act of protest exposed a deep-seated intolerance toward anti-racist expression. As Johnny Pitts records, not only were teenagers arrested, but the media deliberately portrayed them as middle-aged adults. A calculated misrepresentation that stripped them of the sympathy typically extended to young people. This episode serves as a clear illustration of how racism in Europe operates through systemic channels, embedded in both state and media structures.

Pitts further highlights structural segregation in housing and education. In Amsterdam’s Bijlmer district, a predominantly Black area, residents live under conditions shaped by urban policy that has long maintained its status as the city’s “worst ghetto.”<sup>52</sup> Schools in such neighbourhoods systematically omit Black history and contributions, forcing Black communities to create their own educational initiatives. These patterns of exclusion, as documented by Pitts, echo the findings of the European Union Agency for Fundamental Rights.<sup>53</sup>

The Agency’s 2024 report shows that racial discrimination against people of African descent in the EU has escalated since 2016. Based on surveys in 13 Member States, 39% reported experiencing discrimination in 2016; by 2022, the figure had risen to 45%, and by 2024, it had reached 49%—on all grounds covered by EU anti-discrimination directives.<sup>54</sup> For the general EU population, the average 12-month discrimination rate was 17% (Eurobarometer 2019), compared with 36% for people of African descent in 2022.<sup>55</sup> The data identify persistent discrimination in policing, education, employment, housing, and service provision.

The human impact of these statistics is vividly illustrated by the death of Adama Traoré in France in 2016.<sup>56</sup> Arrested on suspicion of violent robbery—without being caught in the act—

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<sup>49</sup> Ben Judah, *supra* at 201.

<sup>50</sup> Ben Judah, *supra* at 33.

<sup>51</sup> Johnny Pitts, *supra* at 163.

<sup>52</sup> Johnny Pitts, *supra* at 151.

<sup>53</sup> See European Union Agency for Fundamental Rights, *Being Black in the EU – Experiences of People of African Descent* (Publications Office of the European Union 2024) <https://data.europa.eu/doi/10.2811/4285140> accessed 8 August 2025. Otherwise known here as the Agency report. Otherwise known here as the Agency report.

<sup>54</sup> The Agency report, 14.

<sup>55</sup> The Agency report, 15.

<sup>56</sup> See Euronews, ‘France: What Happened to Adama Traoré?’ (4 June 2020, updated 6 June 2020) <https://www.euronews.com/2020/06/04/france-what-happened-to-adama-traore> accessed 8 August 2025.

Traoré died two hours later in police custody. His death sparked nationwide protests led by his sister, who accused the authorities of racial profiling and police violence. Rather than holding the responsible officer to account, the state arrested Traoré's sister, while the officer was acquitted within the bounds of the law. This case, like Pitts' examples from the Netherlands, reveals how institutional racism is maintained by systems designed to shield perpetrators and silence dissent.

From the Netherlands to France, and across the wider EU, these patterns reveal a consistent contradiction: Europe's legal commitments to equality and anti-discrimination stand in stark opposition to the lived experience of Black communities.<sup>57</sup> The persistence of these conditions indicates that racism in Europe is not an incidental flaw, but a constitutive feature of its social order, one embedded in institutions, normalised in public discourse, and sustained by a *politics* of denial.<sup>58</sup>

Axiomatically, Europe possesses legal tools to combat racial discrimination. Thus, the question is not whether the instrument exists; surely, it does. However, the real question is whether they are deployed in a society willing to confront its racial *malady*. The evidence suggests otherwise. The lived reality, at least of the Black communities as illustrated here, is at odds with the self-image of a Europe founded on "democracy, freedom, equality, and the rule of law," revealing a legal order profoundly distant and disconnected from its social psychology and everyday practice, which is shown in figure 2, a statics conducted by the EU Fundamental Rights Agency.<sup>59</sup>

#### 4. Conclusion: The Way Forward

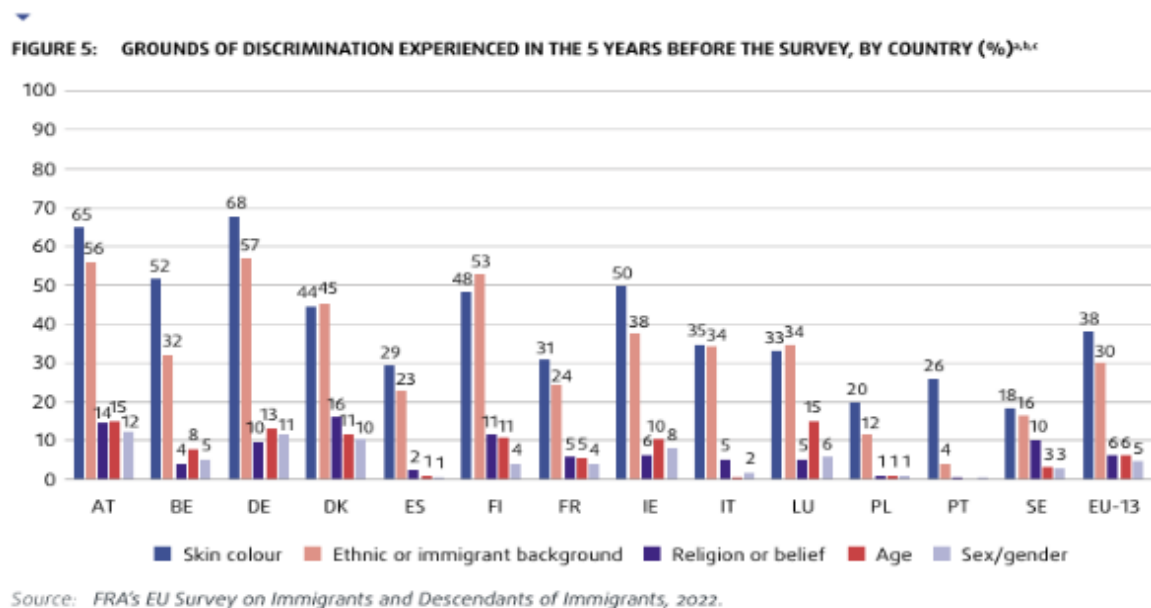


Figure 4: Showing grounds of discrimination experienced within 5 years before the survey of the Agency.<sup>60</sup>

<sup>57</sup> Euronews, 'Which European Countries Are the Most Racist?' (25 October 2023) <https://www.euronews.com/2023/10/25/shocking-levels-of-racism-rising-in-europe-finds-report> accessed 8 August 2025

<sup>58</sup> See David Theo Goldberg and József Böröcz, *supra*.

<sup>59</sup> The Agency report, 33.

<sup>60</sup> The Agency report,

This essay begins by identifying four central issues. First, it examines the persistent problem of racism and racial discrimination against Black people in Europe. Second, it traces the historical development of EU anti-discrimination legislation. Third, it highlights the gap between the existence of robust legal instruments and the reality of ongoing discrimination. And finally, as a forward-looking response, it proposes a sociopsychological framework for addressing these entrenched challenges. Having considered the first three points, this section is devoted to a proposal for addressing the problem.

Therefore, in seeking out a plausible solution to the conundrum of racism and racial discrimination, the cardinal observation to note is that despite the EU's sophisticated legal regime, racism remains deeply rooted across the continent.<sup>61</sup> Available data indicate that since 2016, the problem has intensified, manifesting in both overt acts and covert ways,<sup>62</sup> notwithstanding robust legal instruments.

That is to say, the enduring nature of racism stems from the law's inability to address its psychological and cultural foundations. Racism is not solely a legal or economic matter; it is a social and psychological problem.<sup>63</sup> While legal provisions can set behavioural standards, they cannot transform the beliefs, assumptions, and fears that sustain prejudice. These underlying factors inform discriminatory attitudes and practices that have remained largely beyond the reach of legal mechanisms.

A sociopsychological approach, therefore, offers a necessary complement to legal measures.<sup>64</sup> Such an approach does more than diagnose the problem; it offers a better understanding of racism.<sup>65</sup> It examines how societal attitudes are formed, reinforced, and altered; how historical narratives shape contemporary realities; how institutions internalize and reproduce bias; and how individuals navigate identity in racialized contexts.<sup>66</sup> Viewing racism through this lens acknowledges it as a complex socio-psychological phenomenon, requiring interventions that extend beyond the legal domain.

Ultimately, Europe cannot legislate its way out of racism. A cultural transformation, grounded in a deep understanding of the sociopsychological dimensions of racial ideology, is essential. Thus, the commitment invested in creating legal instruments must be matched by cultural and sociopsychological inquiry into racism, particularly considering the rise of contemporary fascist movements, a moderate form of state-sponsored racism. While countries such as Sweden, Hungary, Italy, and Germany are more visible trends, similar patterns risk emerging elsewhere in the EU.<sup>67</sup> Growing discontent among segments of the White population toward non-White residents reinforces the argument that racism cannot be eradicated by legal provisions alone. Hence, sustainable progress requires active involvement of all stakeholders: policymakers, sociopsychologists, and educators. Only through such a coordinated effort can the EU move toward fulfilling its aspiration as a beacon of hope: a continent where equality is not a paper expression, but also a lived experience.

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<sup>61</sup> The Agency report *supra*.

<sup>62</sup> Kasimir Dederichs and Pieter-Paul Verhaeghe, *supra* note 1.

<sup>63</sup> Phia S Salter, Glenn Adams and Michael J Perez, 'Racism in the Structure of Everyday Worlds: A Cultural-Psychological Perspective' (2018) *Current Directions in Psychological Science* 27(3) 150–155.

<sup>64</sup> Directorate-General for Education, Youth, Sport and Culture (European Commission), *Tackling Different Forms of Discrimination in and through Education and Training: Working Group on Equality and Values in Education and Training (2021–2025) – Issue Paper* (Publications Office of the European Union, 27 July 2023).

<sup>65</sup> Phia S Salter, Glenn Adams, and Michael J Perez, *supra* at 153.

<sup>66</sup> Mia Pattillo, Sigsten Stieglitz, Konstantinos Angoumis and Nora Gottlieb, 'Racism against racialized migrants in healthcare in Europe: a scoping review' (2023) *International Journal for Equity in Health* 22(187), 1-2.

<sup>67</sup> European Economic and Social Committee, 'Fascism on the Rise: Where Does It Come From, and How to Stop It, with a Common European Response' (30 October 2018) <https://www.eesc.europa.eu/en/news-media/news/fascism-rise-where-does-it-come-and-how-stop-it-common-european-response> accessed 11 August 2025.

*The Law of the Everyday.*  
*An inquiry into the legal fabrics of European lives*

# Ways of Seeing European Law Anew: The Everyday, Risk, and Resilience

by Marc Steiert\*

## 1. Introduction: Structure, Social Risk, Individuation, and Resilience

Ben Judah's *This is Europe* opens with an evocative call to witness how Europe's 748 million inhabitants 'live now'.<sup>1</sup> Through twenty-three remarkable testimonies of everyday life,<sup>2</sup> Judah reveals both the diversity of experience across Europe and the structural constraints that shape and often limit those lives.

This essay posits four core arguments. First, Judah's narratives show how everyday life in Europe is deeply embedded in social structures – relations, institutions, and expectations that enable or constrain agency, vulnerability to injustice, and even how society and its injustices are understood. Drawing on critical realist social theory, injustice, I argue, emerges not merely from isolated acts but from this structural embeddedness turning into structural injustice (Section 2).<sup>3</sup> Second, I explore how European law – both via regulation and its omission – constructs and is constructed by these structures. Law is a key mode of societal organisation that allocates social risks across a multipolar space of societal actors and networks, such as the individual, the state, the family, the employer, or worker organizations. For this purpose, I adopt a broad understanding of *European* law that encompasses all law and its interaction with policy on the European continent (Section 3).

Third, European law has increasingly shifted social risks and responsibility for them onto individuals in the outgoing 20<sup>th</sup> and early 21<sup>st</sup> centuries, a process I refer to as individuation.<sup>4</sup> Individuation, while enabling those with stronger positions in social structures, leaves many others to navigate structurally embedded injustice alone. It thereby masks the responsibility of collective institutions in mitigating injustice (Section 4). Fourth, I propose a way of seeing<sup>5</sup> European law of the everyday as a framework for *resilience*, centered on risk allocation and

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<sup>1</sup> Ben Judah, *This Is Europe: The Way We Live Now* (Picador 2023) Preface.

<sup>2</sup> 'Everyday life' finds increasing interest in social science research. It often denotes a move from macro-level research to grounded realities, Xavier Guillaume and Jef Huysmans, 'The Concept of "the Everyday": Ephemeral Politics and the Abundance of Life' (2019) 54 *Cooperation and Conflict* 278; Ettore Recchi, *Everyday Europe: Social Transnationalism in an Unsettled Continent* (Policy Press 2019). The concept also found interest in (EU) law, Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998); Marc Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan UK 2018); Loïc Azoulay, 'The Law of European Society' (2022) 59 *Common market law review* 203. However, the research agenda still needs theorisation. An attempt, Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press 2010) 21–61.

<sup>3</sup> The concept of structural injustice traces to Iris Marion Young, *Responsibility for Justice* (1st ed., Oxford University Press 2011). Young describes structural injustice as 'exist[ing] when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them. [...] Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.' Further, Maeve McKeown, 'Structural Injustice' (2021) 16 *Philosophy Compass*. Structural injustice was characterised as injustice of 'everyday life', Maeve McKeown, *With Power Comes Responsibility: The Politics of Structural Injustice* (Bloomsbury Academic 2024) 1. For structural injustice explained in social structures themselves, Sally Haslanger, 'Systemic and Structural Injustice: Is There a Difference?' (2023) 98 *Philosophy* 1.

<sup>4</sup> For my concept of individuation, Marc Steiert, 'The EU and the Regulation of Young People's Work Transitions - Individuation, Governance and Quality' (ETUI 2025) Working Paper 2025.02.

<sup>5</sup> I borrow the expression *way(s) of seeing* from John Berger, *Ways of Seeing* (Penguin 2008). In this short volume, Berger critiques and makes available to a larger public several ways of seeing art, i.e., in which it is presented and perceived.

arguing against its prevailing individuation. Resilience here does not mean conservation, but the capacity of social structures - shaped and reshaped by law - to adapt in ways that prevent and contain injustice. This way of seeing reasserts three dimensions of European law: its nature as a product and architect of social relations – a way of critique,<sup>6</sup> its capacity to recalibrate rights and responsibilities<sup>7</sup> impacting a society's habitability,<sup>8</sup> and the need for reflexivity, review and reiteration in seeking to mitigate injustice via legal risk sharing. Moreover, inclusive participation is key to making society more resilient to injustice (Section 5 - Conclusion).<sup>9</sup>

## 2. Putting Structural Injustice into European Law

*This is Europe* powerfully illuminates how structural injustice permeates everyday life in Europe and its legal regulation.<sup>10</sup> This injustice is revealed through stories such as Nazneen's life – a refugee worker in Greece subjected to gendered and racialized discrimination, then abandoned by her employer during wildfires –<sup>11</sup> or Nora's struggle, a Latvian teenager financing her education abroad through work in sex chats due to her family's economic precarity.<sup>12</sup> While individual, these accounts expose how law mediates access to security, opportunity, and dignity. This second section therefore emphasises that social structures embed everyday life and its regulation in Europe. Central to this analysis are the concepts of social structures and structural injustice.<sup>13</sup>

Critical realist social theory highlights that people act in social structures, that is in networks of social relations with their position in these networks constraining or enabling personal agency and ways of seeing society and its injustices.<sup>14</sup> Structures evolve through the cumulative, often unintended effects of agency, including regulatory change. Life is not pre-determined, but available choices are embedded.<sup>15</sup> Nazneen's refugee identity and economic marginalization increase her vulnerability to discrimination and amplify her exposure to environmental disaster. Nora's limited financial capital and geographical origins paired with her wish to migrate inside the EU condition her engagement in sex chat work.

These same structures can enable life trajectories as shown in Jean-Marc's story from France's prestigious winemaking *terroir* Meursault.<sup>16</sup> This son of a winemaking family initially defies family expectations to become an actor, then reconciles acting and winemaking after his

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<sup>6</sup> On the establishment of the legal field, Pierre Bourdieu, 'La Force Du Droit - Eléments Pour Une Sociologie Du Champ Juridique' (1986) 64 *Actes de la Recherche en Sciences Sociales* 3.

<sup>7</sup> Scott Veitch presents law similarly. By recognising law's role in the proliferation of irresponsibility, he recognises its potential to distribute responsibility. Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish 2007).

<sup>8</sup> This essay's concept of *habitability* is inspired by planetary habitability in astrobiology, i.e., a planet's potential to develop and sustain environment hospitable to life. E.g., Sara Seager, 'Exoplanet Habitability' (2013) 340 *Science* 577.

<sup>9</sup> The essay adopts a reformist vision of (European) law. Even where law is abolished, it assumes law will be replaced by other means of societal organization.

<sup>10</sup> Judah's account can be read in many ways and is richer than this essay can acknowledge.

<sup>11</sup> Judah (n 1) 421–439.

<sup>12</sup> *ibid* 141–158.

<sup>13</sup> Virginia Mantouvalou and Jonathan Wolff (eds), *Structural Injustice and the Law*. (1st ed., UCL Press 2025); Virginia Mantouvalou, *Structural Injustice and Workers' Rights* (First edition, University Press 2023).

<sup>14</sup> Haslanger (n 3); McKeown, *With Power Comes Responsibility* (n 3) 33–35. On critical realist social theory, including social structures, Margaret S Archer, *Realist Social Theory: The Morphogenetic Approach* (Cambridge University Press 1995) in particular Chapter 2. A different vision of social structures in Giddens's structuration theory, Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984).

<sup>15</sup> On 'determinist' social theory that focuses only on the macro-level, McKeown, *With Power Comes Responsibility* (n 3) pp.20.

<sup>16</sup> Judah (n 1) 242–263.

father's premature death. While his individual agency is notable,<sup>17</sup> his story reveals a different kind of structural embeddedness - one marked by access to social, cultural and economic capital which makes this self-achieving life possible.<sup>18</sup> Compared to Nazneen and Nora, Jean-Marc's structure is one of privilege, not constraint. Social structures thus not only affect life chances but also the very perception of what is possible or just. Judah's way of seeing Europe itself reflects this. While his aim is to make visible unseen injustice, his narrative isolates individuals from the broader collectives that shape their experience.<sup>19</sup> This mirrors a wider cultural tendency to interpret life courses as the outcome of individual opportunity seized.<sup>20</sup>

Structural injustice itself manifests in Europe, the world and Judah's account thereof in at least three ways: pure, avoidable, and deliberate structural injustice.<sup>21</sup> According to McKeown, the creator of this taxonomy, what differentiates the types of structural injustice is the amount of power which societal actors hold in relation to each other and over the structural injustice.<sup>22</sup> *Pure structural injustice* arises from the unintended accumulation of social practices without a clear, responsible actor. Herein, social structures considerably constrain the actors involved to reproducing the injustice. McKeown suggests that climate change resembles pure structural injustice insofar as it depends on a multiplicity of 'actions and processes' impossible to pin on a single (group of) actors and therefore requiring systemic overhaul of contemporary capitalism.<sup>23</sup> *Avoidable structural injustice* implies social agents having the capacity to prevent or contain it by interacting with the social structures in which it arises. For example, Nora obtained a scholarship to study in Italy, but no financial support for transportation from the scholarship-granting organisation. Not granting financial support for transposition presupposes sufficient family resources and implies a power to remedy the injustice concerned. *Deliberate structural injustice* means that social agents maintain injustice and the structures in which it operates to their benefit, e.g., Nazneen's employer forcing her to work in dangerous conditions of wildfire.

In sum, *This is Europe's* stories reveal the varied degrees of power people possess to navigate and resist structural injustice, degrees of power shaped by their embeddedness in social structures. By analysing injustice as structural and herein as pure, avoidable, or deliberate, we gain tools to critique how law operates within social structures - sometimes correcting injustice, often reproducing it. European law is a product and an architect of social relations and, thereby, interacts in manifold, sometimes ideologically inspired, sometimes unforeseeable ways with injustice. Law however contributes to the (re)formation of injustice. This role and its origins can be exposed, analysed, and critiqued.

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<sup>17</sup> I use Jean-Marc's story as an ideal type of everyday life in Europe. For example, Judah briefly alludes that this protagonist passed two tough years in Paris working in precarious small jobs before starting his training as actor. *ibid* 252.

<sup>18</sup> Pierre Bourdieu, *La Distinction : Critique Sociale Du Jugement* (Éditions de Minuit 1979).

<sup>19</sup> Collective embeddedness could have been prominent in Judah's account of the Belarussian protest movement ('Homyl'), or the story of the Portuguese village Linhares de Beira. Judah (n 1) pp.159-180 and 344-373. That collective embeddedness can find its place in a similar book, Johnny Pitts, *Afropean: Notes from Black Europe* (Allen Lane 2019). See further in this collection, Irina Muñoz Ibarra, 'This is (white) Europe: Race and European Law of the Everyday', paper n. 3.

<sup>20</sup> In my view, the life course does – and should – include individual choices, yet they are embedded by the person's positionality in social structures.

<sup>21</sup> This relies on McKeown's development of Young's theory of structural injustice, McKeown, *With Power Comes Responsibility* (n 3) 41.

<sup>22</sup> *ibid*.

<sup>23</sup> The author admits, though, that these actors are blameworthy for their actions and must bear different degrees of responsibility therefor, *ibid* 104.

### 3. European Law and Social Risk

This third section stresses that European legal frameworks, in concert with other means of societal organization, delineate social structures by allocating social risks.<sup>24</sup> These legal frameworks are incorporated in and shaped by the social structures in which they are made, but they also contribute to these structures' (re)formation. Whether through regulation or its absence, they distribute structural risks in a multipolar space of societal actors and networks.

This risk allocation interacts critically with the three forms of structural injustice identified earlier. Although climate change, as a possible example of pure structural injustice, may be built into contemporary, growth-oriented capitalism, law can contribute to sharing the power of how people affected by climate change can respond to it. Lawmakers have room to fight avoidable structural injustice. Often considered emancipatory,<sup>25</sup> EU free movement law conditions Nora's mobility on financial means entrenching social class.<sup>26</sup> EU lawmakers however have powers to widen access to study finance abroad,<sup>27</sup> and could promote employment prospects in disadvantaged EU regions via EU cohesion.<sup>28</sup> Law can also fight deliberate structural injustice by shifting power to those who suffer from injustice. European migration and labour law structure Nazneen's life. Labour law, for instance, establishes employer duties to care for health and safety at work.<sup>29</sup> Nazneen's employer deliberately neglected these during wildfires.<sup>30</sup> If enforcement authorities were effective and equally treated a refugee, this deliberate structural injustice could be modified via effective, enforced legal arrangements. Across these examples, what emerges is a pattern of multipolar risk distribution via European law. Social risk is rarely shouldered by one actor alone; rather, it is divided – often unequally – in a multipolar space of societal actors and networks that involves the individual, public institutions,<sup>31</sup> the family,<sup>32</sup> employers,<sup>33</sup> or worker organizations.<sup>34</sup> Risk sharing via law can be understood as an on-going process of multipolar '(de-)mutualisation'.<sup>35</sup> Following World War II, European welfare states pursued risk mutualisation, which broke up certain unjust social

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<sup>24</sup> Unlike in, e.g., environmental regulation where risk is a narrow, legally contested term, this essay uses the notion more broadly as a way of seeing law.

<sup>25</sup> As discussed in Floris De Witte, 'Emancipation Through Law?' in Loïc Azoulay, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016).

<sup>26</sup> Infamously foregrounded in CJEU, *Judgment of 11 November 2014, C-333/13, Dano*, ECLI:EU:C:2014:2358; *Judgment of 15 September 2015, C-67/14, Alimanovic*, ECLI:EU:C:2015:597.

<sup>27</sup> Via the equal treatment guarantee applicable to EU citizens. Access to study finance abroad, for example, was comparatively 'narrowed' through European Parliament and Council, 'Directive 2004/38/EC 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 L 158, 30.4.2004, p. 77–123'; *Judgment of 18 November 2008, C-158/07, Förster*, ECLI:EU:C:2008:630.

<sup>28</sup> Arts 174-178 TFEU. On the possibility, Marc Steiert, 'An Opportunity or a Threat to Cohesion? Brain Drain, Young People, and Geographical Mobility in the EU' (2024) 2023 *Revue des affaires européennes - Law and European Affairs* 739.

<sup>29</sup> E.g., Council of the European Communities, 'Council Directive 89/391/EEC of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work', OJ L 183, 29.6.1989, p. 1–8'.

<sup>30</sup> Judah (n 1) 429–433.

<sup>31</sup> Political economy outrightly develops scholarship delineating types of states in their relationship to economic regulation, e.g., Ulrike Lepont and Matthias Thiemann, 'The European Investor State: Its Characteristics, Genesis, and Effects' (2024) 28 *Competition & Change* 381.

<sup>32</sup> Prominently, Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990).

<sup>33</sup> An example is occupational health and safety regulation which creates employer duties of care, e.g., Council of the European Communities (n 29).

<sup>34</sup> In some EU countries, e.g., Denmark, collective agreements create pension funds mutualising (parts of) pension risk, Greg Brunner, *Risk-Based Supervision of Pension Funds: Emerging Practices and Challenges* (World Bank Publications 2008) 96.

<sup>35</sup> On risk (de-)mutualisation, Mark Freedland and Nicola Countouris, 'Conclusion: Mutualization and Demutualization in the Legal Construction of Personal Work Relations' in Mark Freedland and Nicola Countouris (eds), *The Legal Construction of Personal Work Relations* (Oxford University Press 2011); Nicola Countouris and Mark Freedland, 'Introduction - The Myths and Realities of "Social Europe"' in Mark Freedland and Nicola Countouris (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 7.

structures. Disciplines like labour and consumer law have long been rooted in power inequalities and risk sharing.<sup>36</sup> Social security law also obliges public institutions or employers to cover for risks like unemployment or care duties. In contrast, contemporary regulatory choices often reflect processes of demutualisation where regulatory design shifts risk away from collective institutions. Although possibly accidental, these regulatory choices are not neutral: they are shaped by political projects, economic ideologies, and the social structures in which lawmakers themselves are embedded. Understanding the *law of the everyday* as being about risk sharing provides the insight that social risk sharing is a lever to prevent and contain injustice. The set-up of this lever is political, reversible and can be recalibrated among a multipolar set of societal actors and networks that bear risk.

#### 4. This is Individuation of Risk in Europe

This section argues that contemporary European legal frameworks increasingly shift responsibility for social inclusion to individuals, a shift I refer to as individuation. This shift pushes demutualisation to extremes. Judah's *This is Europe* is replete with examples that illustrate how dominantly this shift enables those already advantaged by social structures – like in the stories on Linhares da Beira or Meursault, while compounding injustice for the structurally marginalised as in Judah's accounts of Storkow or Baloga. For them, individuation perpetuates, possibly exacerbates structural injustice and legitimises the retreat of law and the state from efforts to advance social justice.

Individuation can arise both intentionally, as a normative programme of legal design, and accidentally, as a partly unforeseen by-product of the struggle amid competing political projects. In its intentional form, individuation reflects neoliberal and Third Way policies that emerged from the 1970s to the turn of the millennium and promoted personal responsibility over collective welfare, such as via the conditionalization of social protection benefits.<sup>37</sup> The story of Aboud in *Storkow* exemplifies this trend: a Syrian refugee in Germany, Aboud is forced into informal work for a delivery subcontractor of Amazon due to restrictive conditions attached to his wife's social benefits.<sup>38</sup> To retain these essential benefits, he undertakes precarious, unjust work excluded from social security, labour law, and occupational health and safety protection. In other cases, individuation may be more accidental emerging from institutional arrangements whose original purpose is not so easily determined amongst competing political projects. A carefully reconstructed example is found in Murlon-Druol's historical analysis of the EU Economic and Monetary Union's ('EMU') absent democratic oversight.<sup>39</sup> While EMU is often – rightly - associated with regressive social policy,<sup>40</sup> European policymakers seemingly were aware of imperfections in its democratic oversight, but without necessarily being aligned with neoliberal ideology. Yet EMU's institutional practice and (re)interpretation led to deregulation and an erosion of social risk sharing, in short neoliberal outcomes. This underscores how complex social systems can intensify individuation, in parts accidentally.

Individuation also operates at both the subjective and collective level. Subjectively, individuals experience risk differently depending on their embeddedness in social structures. Consider the contrast between the stories from Linhares da Beira and Baloga. In the former, EU free movement law facilitates the mobility of remote workers - often well-educated, affluent, and

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<sup>36</sup> Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011); Lisa Waddington, 'Vulnerable and Confused: The Protection of "Vulnerable" Consumers under EU Law' (2013) 38 *European Law Review*.

<sup>37</sup> Illustrated in Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press 1998).

<sup>38</sup> Judah (n 1) 264–282.

<sup>39</sup> Emmanuel Murlon-Druol, 'Accidental Neoliberalism: Democratic Accountability in the Making of the Euro, 1957–92' [2025] *Contemporary European History* 1.

<sup>40</sup> Francesco Costamagna, 'National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal' (2018) 24 *European Law Journal* 163.

mobile individuals - who repopulate a rural Portuguese town.<sup>41</sup> These *digital nomads*' freedom to work remotely across borders exemplifies how individuation may appear as empowerment when supported by socio-economic capital and their regulatory framework. In contrast, Ionut, a Romanian truck driver from Baloga, embodies a very different, precarious form of EU-enabled mobility. Despite being essential to the EU's internal market,<sup>42</sup> his individual trajectory is marked by precarity, deteriorating health, and an obligation to migrate out of economic necessity.<sup>43</sup> While both actors engage with the same legal framework, their outcomes diverge sharply due to their different structural positioning. This illustrates how individuation perpetuates structural injustice.

Collectively, individuation reshapes how societies perceive injustice. Jean-Marc's story in Meursault, for instance, reflects how climate change - a collective, systemic emergency - is framed through the lens of personal entrepreneurial responsibility and opportunity. European law facilitates his and other winemakers' capacity to explore new opportunities in other, colder parts of Europe and the world in the face of climate change.<sup>44</sup> Their decision to move, however, is portrayed as individual innovation and possibly even reinforces the power they enjoy through their economic position in society. In this story, human-made climate change is read as both a risk for French winemaking, and as a business opportunity for those holding know-how *and* mobile capital. What it is largely not is being read as a human-made collective and systemic emergency that threatens the planet's very ecological habitability.

In sum, individuation distorts the understanding of (in)justice by isolating individuals from the social structures that shape their opportunities and risks. It reframes structural harm as personal failure. To a noteworthy extent, this individuation is intentional today deriving from the mainstreaming of individual responsibility in neoliberal, yet also social-democrat policies. These insights can allow to reclaim law's redistributive potential albeit with awareness of its limits, such as the unforeseeability of social structures, law's bias through the very structures in which it is made and how they shape the available ways of seeing the world, and the risk of paternalism linked to shifting risk from above. Reflexivity and inclusive participation are key to mitigating these limits as far as possible. While recentring European law on risk mutualisation will not remove all injustice, it can help to improve not only Europe's but this planet's habitability, that is its potential to sustain an environment hospitable to, in particular more just, life.

## **5. Conclusion – A Way of Seeing Anew: European Law of the Everyday as Resilience**

This essay proposes a way of seeing European law anew as resilience: a framework for allocating social risks that enables the adaptative capacities of social structures to prevent and contain injustice.<sup>45</sup> Resilience here does not mean conservation, but the capacity of social structures - shaped and reshaped by law - to adapt in ways that prevent and contain injustice. Framing European law through risk sharing refocuses legal analysis on political choices and structural outcomes. It brings into view the unseen sites where injustice proliferates and where

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<sup>41</sup> Judah (n 1) 159–180.

<sup>42</sup> Arts 28-37 TFEU. Consider also EU transport policy, Arts 58, 90-100 TFEU. For Ionut's story, *ibid* 16–37.

<sup>43</sup> Ionut lets the reader quickly know that his 'whole generation' migrated away from his home village. *ibid* 19.

<sup>44</sup> Judah (n 1) 242–244.

<sup>45</sup> The concept of resilience has different, even conservative meanings, such as a substance's ability to return to its usual shape after modification. Cambridge Dictionary, 'Resilience' (25 June 2025) <<https://dictionary.cambridge.org/dictionary/english/resilience>> accessed 26 June 2025. I relate to another strand focused on the adaptive capacities of complex systems/communities to prevent, adapt to, and protect from existing and emerging threats, in this case structural injustices. Lee Boshier, 'Built-in Resilience through Disaster Risk Reduction: Operational Issues' (2014) 42 Building Research & Information 240.

legal frameworks reinforce or recalibrate structural harm. Law can thus be both a tool of critique and a means of making society habitable. Individuation, by contrast, recasts structural injustice as a personal failure.

Ben Judah's *This is Europe* illustrates that Europe's entrenched injustices – from migrant labour exploitation to class-bound mobility – demand legal frameworks that explicitly allocate social risks rather than individuating them. To do so requires acknowledging law's embeddedness in social structures.<sup>46</sup> By mapping how social structures, such as migration status, economic capital, or family context, condition agency, world views, and interact with their legal frameworks, lawmakers and others can identify actionable sites for prevention and contention of structural injustice. In the process, such a type of law must account for the limits of law, such as the unforeseeability of social structures and that the latter already condition how societal injustice is perceived. Reflexivity, review, and reiteration are therefore essential in mitigating injustice via legal risk sharing. Moreover, inclusive participation is a precondition to see what is not seen and, thus, to make society more resilient to injustice.

My reading, like Judah's edited, often individuated collection,<sup>47</sup> is itself subjective and embedded in its own positionality. This essay offers not the definitive account, but one way of seeing European law of the everyday – a way that foregrounds social embeddedness, risk mutualisation, and the pursuit of a more habitable, more just European society. To paraphrase Judah, seeing *European law of the everyday* as resilience means grasping *why* we live as 'we live now'.<sup>48</sup> It means to uncover the social structures that embed everyday life, its manifold injustices and how risk sharing via law interacts with them.

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<sup>46</sup> Growingly in European legal scholarship, Mantouvalou and Wolff (n 13).

<sup>47</sup> As rightly acknowledged by Judah in an *Author's note*, Judah (n 1).

<sup>48</sup> *ibid* Preface.

# People: what EU law does not understand about tech

by Mateus Correia de Carvalho\*

*“All that we ask of people in this society must be rational. It is rational to consume more, to change immediately what is worn out, to acquire more information, to satisfy an increasing number of desires. Constant growth is rational for our economic system. (...) Is not this situation clearly much better than that which our ancestors could know, immersed as they were in a world of nature and then of society?”*

Jacques Ellul, ‘The Technological Bluff’ (1990)

## Methodological preface: how to inquire into the law of everyday?

Before starting this essay, I would like to briefly share my reflections on the methodology of this enterprise of studying the ‘European law of the everyday’ as proposed by the organisers of this publication. These reflections intend to disclose all limitations that I believe my own essay has.

This essay is born out of an EUI seminar titled ‘European Law of the Everyday: Europe, the Law and the Ordinary’, whose aim was to investigate “the role of law in informing (or not), structuring and/or de-structuring the lives of ‘ordinary’ Europeans”.<sup>1</sup> This seminar was based on the assumption that dominant EU law scholarship is disconnected from contemporary social reality,<sup>2</sup> thereby largely overlooking the question of how EU law produces and/or structures the modes of life in the territory of the EU and may, consequently, generate and perpetuate “economic, social and cultural injustices”.<sup>3</sup> Joining the critical methodological move of both resistance against the abstractness of EU law’s practice, discourse and research, and contestation of key EU law concepts upon which the authority of this legal system is premised,<sup>4</sup> this research endeavour sought to explore and reflect upon “the kinds of life that people manage to live – or do not manage to live – given the law of Europe”.<sup>5</sup> In order to do so, participants were asked to take one story from Ben Judah’s book *This is Europe: The Way we Live Now*, “turn it into a case study, and investigate the place and role of European law in

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\* PhD Researcher, EUI Department of Law. I would like to thank Loïc Azoulay, Jack Meakin, Irina Ibarra Muñoz and Marc Steiert for convening the EUI seminar ‘EU Law of the Everyday’ that prompted the writing of this essay. Many thanks to all my colleagues who participated in the fascinating exchanges of this seminar, I have truly learnt a lot from them and significantly improved this essay based on their comments. I would also like to sincerely thank Julia Galera Oliva, Davide Tomaselli, Paul Linden-Retek, Päivi Neuvonen, and Ivana Isailović for their thoughtful comments on earlier versions of this essay. However, all opinions expressed here and, consequently, all mistakes are mine.

<sup>1</sup> European Law of the Everyday: Europe, the Law and the Ordinary, LAW-DS-LAWEVE-24, (*European University Institute*, 5 September 2023) <[https://www.eui.eu/DepartmentsAndCentres/academic-catalogue/Course-detail?course\\_id=LAW-DS-LAWEVE-24](https://www.eui.eu/DepartmentsAndCentres/academic-catalogue/Course-detail?course_id=LAW-DS-LAWEVE-24)>. Who are Europeans and who is considered to live in Europe is a lengthy discussion that is outside the scope of this essay. However, I should like to adopt here a broad conception of what it means to be European, one that goes beyond legal categories of nationality and European citizenship and that, instead, includes all individuals who come to exist in the geographical space of Europe, even those “rightless people” who live in this geographical space while not being fully-fledged members of any polity or community and are, thus, devoted to the extremities of European society, i.e., a site of complete deprivation and loss of “all other qualities and specific relationships – except that they [are] still human”, see Hannah Arendt, *The Origins of Totalitarianism* (Re-edited by Penguin Classics 2017; first published in 1951) 384–389, 392. The conception of ‘European’ here employed includes, therefore, European citizens such as lorry worker Jelle (*Rotterdam* chapter) or retired Swedish national Maria (*Norrköping* chapter), but also Ivorian migrant and detention camp-detainee Brico (*Briançon* chapter) or the people whom rescuers found or saw flee in France-Italy border crossings of the Alps (*Le Col de l’Échelle* chapter) – all examples are taken from Ben Judah, *This Is Europe: The Way We Live Now* (Picador 2023).

<sup>2</sup> Loïc Azoulay, ‘Reconnecting EU Legal Studies to European Societies’ [2024] *Verfassungsblog* <<https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/>> accessed 27 March 2024.

<sup>3</sup> Loïc Azoulay, ‘Living with EU Law’ (2022) 1 *European Law Open* 140, 141–142.

<sup>4</sup> Päivi Johanna Neuvonen, ‘A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?’ (2022) 1 *European Law Open* 60, 60–66; Azoulay (n 3) 143; Azoulay (n 2).

<sup>5</sup> Azoulay (n 3) 140.

relation to this case”.<sup>6</sup> In my case, I accepted a slightly different challenge: to look throughout all of the book’s stories for the role that both technology and technology regulation play in ordinary life in Europe.

Immediately, one – quite simple - question surfaced: how to go about this? After following and thinking about the (intense) seminar discussions about the conditions for the possibility of such an inquiry into the ‘European law of the everyday’, I have come to two main conclusions.

The first conclusion relates to the mechanics of this enterprise: in order to understand the law of the everyday, one has to embark on a journey of constant mobility between the *everyday* and the *law*. This requires, in my view, a permanent shift of the researcher between four levels of analysis:

First, one should start by looking at what the law says about its objects, that is, the social realities it purports to regulate. What account of social life does the law give, and how does it portray that which it regulates?

Second, one has to look for and thickly describe the *everyday*, i.e., the lived experiences of people in a given place and time. This description of the everyday should prioritise depth over breadth. This means defending the epistemological and methodological value of extensively describing the experiences of a few, as opposed to the dominant scholarly preference for quantitative statistical aggregations as proxies for explaining social reality.<sup>7</sup> What such thick descriptions of the everyday of a few may lack in generalisability in quantitative empirical terms, they compensate for through the in-depth understanding of the social lived context where law operates and people’s perception and understandings about the law.<sup>8</sup>

Third, one must seek to explain not just the everyday, but the everyday of law, meaning the material conditions of life as experienced by individuals *given* the law. This, in essence, means asking two questions: (i) how are the conditions and possibilities of individuals’ and communities’ lives structured, determined and/or made (im)possible by the law?<sup>9</sup>; and (ii) how do those individuals make sense of that law which structures their lives (be it by accepting, using, reconstructing, contesting, resisting, or ignoring it)?<sup>10</sup>

Fourth, finally, and crucially, one must take this inquiry into the *everyday* and the *everyday of law* back to the law. This means reflecting on the knowledge gathered in the prior three stages of analysis and asking: what does the law not capture or understand about lived reality? Only

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<sup>6</sup> European Law of the Everyday: Europe, the Law and the Ordinary (n 5).

<sup>7</sup> Austin Sarat and Thomas R Kearns, ‘Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life’ in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press 2009) 60.

<sup>8</sup> Brian C Rathbun, ‘Interviewing and Qualitative Field Methods: Pragmatism and Practicalities’ in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds), *The Oxford Handbook of Political Methodology* (Oxford University Press 2008) 685–690; Aikaterini Argyrou, ‘Making the Case for Case Studies in Empirical Legal Research’ (2017) 13 95, 98–99; for a comprehensive discussion of the debates between the quantitative and qualitative approaches to social sciences and how they are sustained in different epistemological paradigms, see Donatella Della Porta and Michael Keating, ‘How Many Approaches in the Social Sciences? An Epistemological Introduction’ in Donatella Della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (Cambridge University Press 2008) <<https://www.cambridge.org/core/books/approaches-and-methodologies-in-the-social-sciences/D4DB36D30BB76DAF1EDA3A04F657879F>> accessed 20 November 2024.

<sup>9</sup> Simon Deakin and others, ‘Legal Institutionalism: Capitalism and the Constitutive Role of Law’ (2017) 45 Journal of Comparative Economics 188; Isabella Bakker and Stephen Gill, ‘Rethinking Power, Production, and Social Reproduction: Toward Variegated Social Reproduction’ (2019) 43 Capital & Class 503, 511; Floris de Witte, ‘Here Be Dragons: Legal Geography and EU Law’ (2022) 1 European Law Open 113, 114–115, 119, 121–122, 124.

<sup>10</sup> This last question relates to legal consciousness research, see Sarat and Kearns (n 7) 21–23, 31, 38, 50–52; Simon Halliday, ‘After Hegemony: The Varieties of Legal Consciousness Research’ (2019) 28 Social & Legal Studies 859.

once this step is complete, can one claim to be *connecting* social reality and practices with the law. This mental move allows us to judge the accuracy with which law and legal institutions describe the reality they set out to regulate. Even more importantly, this may help us understand the extent to which law overstates or fully misses the depiction of the social reality which it sets out to regulate, and which ultimately justifies the decisions of whether and how to regulate such reality.

In other words, moving between these four levels of analysis enables a critical project aimed at inquiring the very justificatory premises for the concrete existence and shape of law in a given area of social life.

The second conclusion relates to the conditions for the validity claims one may make as a consequence of this 'law of everyday' enterprise: I believe that the stories of Ben Judah's book are not a sufficient and appropriate basis for making claims about the ontology of life in Europe and, relatedly, about the insufficiencies of European law in capturing such lived realities. On the contrary, these stories can only constitute a much-welcomed alert and starting point for a much deeper and comprehensive inquiry into the social realities that legal research and practice do not usually reflect. I have reached this conclusion by engaging with critical social theory along the lines proposed by Neuvonen.<sup>11</sup> This author proposes that one engages with critical theory not as "a homeland but [as] a method", that is, "a strategy of reflection that aims to trouble all forms of untroubled cathexis [emotional investment] – even the cathexis with critical theory<sup>12</sup> itself".<sup>13</sup> This methodological engagement with critique requires, according to Neuvonen, that one is predisposed to (i) constantly perform meta-critique, i.e., adopt a posture of self-reflexivity about the very conditions for the possibility of critique; and (ii) avoid any essentialising theorisation or claim of knowledge about the object of inquiry and/or critique, that is, of any social reality, concept, practice or even (EU) law itself.<sup>14</sup> To provide a totalising or essentialising explanation of any observed or critiqued social object would mean that the researching subject – following the modern, deemed rational scientific paradigm – would establish an artificial (and impossible) separation between themselves and the studied object. This ultimately affects the understanding of the 'researched' object by ignoring the particular social relations that co-constitute the researcher and the 'researched' and that make the two relate to one another; leading to the superimposition – coated as objective truth – of the researcher's particular and biased perception of the object onto itself.<sup>15</sup>

Applying these insights to the project at hand – and thus engaging in meta-critique of the critical project this essay is a part of, I do not think that one can (i) take the stories of Ben Judah; (ii) accept that they are representative of lived reality in Europe; and then (iii) make, based on them, claims about how specifically EU law does not capture what lived reality is. At least one cannot, given only this "thin" basis,<sup>16</sup> affirm points (ii) and (iii) with certainty, in a definitive and totalising way. To begin with, the stories that Ben Judah collected based on interviews he himself set up and conducted, even if they reflect a myriad of realities, positionalities and modes of being and living in Europe remain, in essence, *collected*: they are filtered by him, a writer of a specific positionality – a white man – and intentionality – an artistic or literary one.

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<sup>11</sup> Neuvonen (n 4).

<sup>12</sup> Or, I would add, with any given critical project, including our own.

<sup>13</sup> Neuvonen (n 4) 72.

<sup>14</sup> *ibid* 72–76. Neuvonen also argues that one needs to acknowledge the immanence of critique as well as the contingent and socially performed nature of any social practices or facts one may study or critique. For as much as I agree with these methodological prescriptions, the two highlighted in the main text seemed more pertinent for the present methodological reflections.

<sup>15</sup> Max Horkheimer, *Critical Theory: Selected Essays* (Matthew J O'Connell tr, Continuum 2002) 190–242; Neuvonen (n 4) 76; Pol Bangués and others, 'Hope after "the End of the World": Rethinking Critique in the Anthropocene' (2024) 23 *Contemporary Political Theory* 187, 188–196.

<sup>16</sup> *European Law of the Everyday: Europe, the Law and the Ordinary* (n 5).

We do not know what Judah cut, left out, or overlooked. We do not know the processes by which he gave or reconstructed meaning to the social realities he observed. We do not know the process of selection of interviewees, we do not know what Judah ignored while in his travels. To be clear, this is not an indictment of Judah; this is of no relevance to this argument. My point is that, for as much as he can take those artistic liberties in writing a book about how life is in Europe, we cannot, as researchers, afford ourselves that same liberty. In other words, we cannot simply take what is, in essence, *a portrait of how Judah perceived life in Europe to be* and turn it into the sole material basis to claim that this is how life is or, to borrow the book's words, that 'this is Europe'. What is a certainly compelling artistic statement cannot be turned into an empirical or ontological claim. Such an ontological claim cannot, in turn, be the basis for claiming exactly how EU law does not capture reality. That would amount to offering a totalising positive<sup>17</sup> version of both social reality in Europe (that it is x) and of EU law (that it specifically does not capture x).

In this sense, I argue that, while Ben Judah's stories cannot be the material reality for totalising claims about (i) what the lived reality of Europeans is and (ii) the extent to and ways in which EU law does not consider such lived realities, they nonetheless contain the conditions for other types of (negative) claims. They, first and foremost, point our attention to the fact that EU law scholarship does *not*, for the most part, consider certain aspects of lived social reality, the experiences of lay persons in their day-to-day lives. Second, they 'sound the alarm' regarding the methodological need for thick descriptions of that lived social reality. It is in this sense that I have used Ben Judah's stories in this essay: as clues, hints of potentially existing lived experiences of social reality that constitute injustices that (EU) law either causes, structures or amplifies and that should, therefore, be made visible. I have taken those clues to elicit an analysis of more widely documented instances of tech-related or induced injustice in the everyday. Whenever I point to one such lived experience and/or injustice, I do not mean to state that they definitively exist as described; or that I am not missing anything about such social reality. And this is because I cannot possibly fully grasp the incommensurable infinitude of how the individuals depicted in the case studies of *This is Europe* have existed, perceived and lived through those instances of harm.<sup>18</sup> Whatever conclusions I reach in the next paragraphs are precarious and temporary; I mean them like this. They are not a destination but mainly the very inception of a reflection that needs to venture way deeper into both the everyday of law and the law of the everyday. In proffering them, I am motivated, just like the conveners and participants of this seminar, by a profound worry regarding the disconnect between, on the one hand, EU (and all) law's production and reproduction and, on the other hand, social reality.



## 1. Introduction

In this essay, I will argue that if we look at the signs coming from the everyday interactions of people with technology, we can understand how little EU law understands about technology. '*Understanding technology*' requires, certainly, understanding the capabilities, functionalities and other technical characteristics of technological artifacts. But it also means, as argued by Tranter,<sup>19</sup> *seeing* technology's impact in its presentness and embeddedness within the

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<sup>17</sup> Positive not in the sense of good but in the sense of active/existing.

<sup>18</sup> Emmanuel Lévinas, *Totality and Infinity: An Essay on Exteriority* (Springer 1979); Douglas A Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press 2010) 204.

<sup>19</sup> Whenever I write (EU) law, I wish to express that the observations I make regarding EU law's relation with and regulation of technology could, equally, be made regarding any other law regulating technology.

everyday lives of all people.<sup>20</sup> As Ben Judah himself has claimed, technology is acutely present in the lives of Europeans.<sup>21</sup> But, as I will argue throughout this essay, EU law does not fully see such presence of technology in the everyday. And, ultimately, EU law cannot fully *understand* that which it does not fully see.

EU law certainly sees the benefits of tech. Technologies are seen, first and foremost, as products which benefit people seen, first and foremost, as consumers. These market benefits of technology are used as a justification for a developing a tech regulatory practice which, under the motto of securing innovation and efficiency, creates a compliance apparatus that does not force tech companies to change their business models. Instead, it secures such business models: EU tech law has mostly aimed to ensure the integrity of technology production and circulation processes, striving to make these processes ever faster, ever greater and more efficient. In the process, it neglects or altogether sidelines the harms caused by technology or through technology, to many individuals and communities in their everyday life. Those affected range far beyond consumers, from children experiencing depression or self-harm tendencies due to excessive social media use, to delivery platform workers forced into extreme anxiety due to task volume and app surveillance. Other marginalised groups are particularly impacted by or increasingly marginalised through tech, as is, for example, the case of migrants exposed to tech-mediated degrading treatment at the borders of Europe.

There is, therefore, a breadth of complexity about technology that (EU) law does not – or does not want to – fully see. For it to be otherwise, I argue that two main conceptual moves would be needed. First, regulatory interventions on tech should not mostly conceptualise tech harm as something that *may* occur in the future but, instead, engage with the negative impacts caused by the present uses of technology. Second, tech's negative impacts – those that need regulation and that the law aims to address – should be analysed in sociotechnical terms, i.e., as arising not just from technological tools themselves but rather from the dynamic interactions between technologies and the socio-institutional contexts in which they are embedded.<sup>22</sup> This ultimately requires understanding that all technologies are part of broader social systems where they shape and are shaped by existing social practices (meaning values, norms, institutions, relationships, multiple different actors, and other technologies).<sup>23</sup>

As a consequence of these two conceptual moves, one conclusion is necessarily reached: the meaning and impact of technology on the everyday lives of people and social communities – which is (or should be) the target of law/regulation – cannot be fully understood through purely technical and quantitative analyses that mostly seek to predict future harms of technology. Yet, this is exactly how EU law tends to capture and regulate technology. This way of looking at

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<sup>20</sup> Kieran Tranter, 'The Law and Technology Enterprise: Uncovering the Template to Legal Scholarship on Technology' (2011) 3 *Law, Innovation and Technology* 31, 73–74; Kieran Tranter, 'From Law and Technology to Law as Technology', *Living in Technical Legality: Science Fiction and Law as Technology* (Edinburgh University Press 2018) 18, 28, 30, 35.

<sup>21</sup> *This Is Europe Now by Ben Judah* (Waterstones, 2023), <<https://www.youtube.com/watch?v=mE3LM7GLz3Q>>, at minute 0:39.

<sup>22</sup> Merel Noorman and Tsjalling Swierstra, 'Democratizing AI from a Sociotechnical Perspective' [2023] *Minds and Machines* 4–5 <<https://link.springer.com/10.1007/s11023-023-09651-z>> accessed 8 February 2024; Brian J Chen and Jacob Metcalf, 'Explainer: A Sociotechnical Approach to AI Policy' (Data & Society 2024) 2–5 <<https://datasociety.net/library/a-sociotechnical-approach-to-ai-policy/>> accessed 3 October 2024; Brian Chen, 'Why AI Policy Needs a Sociotechnical Perspective' (*Tech Policy Press*, 29 May 2024) <<https://techpolicy.press/why-ai-policy-needs-a-sociotechnical-perspective>> accessed 29 May 2024; Kimon Kieslich, Natali Helberger and Nicholas Diakopoulos, 'Scenario-Based Sociotechnical Envisioning (SSE): The Guidebook' (OSF, 2025) 2 <[https://osf.io/j5ske\\_v1](https://osf.io/j5ske_v1)> accessed 3 July 2025.

<sup>23</sup> Julie E Cohen, 'Configuring the Networked Citizen' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Imagining New Legalities: Privacy and Its Possibilities in the 21st Century* (Stanford, CA: Stanford University Press, 2012) 129–130; Noorman and Swierstra (n 22) 4.

and regulating tech comes at a cost: people, or better yet, the ‘have-nots’ of technological progress.

## 2. Is this tech? An account of what EU law says about tech

In line with the first step of the methodological strategy outlined in the preface - to establish how law accounts for the social realities that it sets out to regulate - I start my argument by looking at what EU law says about tech, its uses and effects. This requires answering three questions: (i) how does EU law see tech?; (ii) why does it regulate tech?, and (iii) how does it regulate tech? These three questions are successively interconnected. EU law’s account about technology (*how does it see tech?*) determines, to a large extent, the reasons why EU law intervenes in this field and the broader normative concerns guiding its regulatory intervention (*why does it regulate tech?*). And, in turn, those normative justifications for regulating tech determine and shape the regulatory framework, governance structures and toolbox of EU tech law (*how does it regulate tech?*). In this section, I focus on these three interconnected questions. For reasons of length, analytical feasibility, and their predominance in Ben Judah’s stories, I will focus my analysis mostly on digital technologies.<sup>24</sup>

So let me start with how EU law sees tech. To begin with, and as with any other segment of social reality, technology is part of (EU) law’s object, something that the law purports to regulate.<sup>25</sup> Following the contemporary definition of ‘technology’ as “any tool or technique, any product or process, any physical equipment or method of doing or making” which, as a material manifestation of scientific knowledge, extends human capability,<sup>26</sup> then a great deal of what EU law regulates is, indeed, technology. Agricultural tools, lorries’ infrastructure, most physical products consumed in the internal market (a fork, a phone, a frying pan), as well as online search engines, social media platforms, or AI systems: all constitute technologies, and all of them, their uses and negative effects are regulated by EU law. That technology is, in this sense, an object of EU law is no minor point. Differently from other jurisdictions – most notably the US – that adopt a de-regulatory stance that makes law intervene substantially less in the development and deployment of technology,<sup>27</sup> the EU has used internal market law to adopt a myriad regulations whose stated aim is to impose certain limits and ground rules about how technology is to be developed and used.<sup>28</sup> This exercise of regulatory power is actively exploited by the Union to politically signal to the rest of the world that, compared to other jurisdictions, Europe has a differentiated ethos when it comes to technology: the EU intervenes in this field and imposes a regulatory burden on tech companies in order to secure EU values,

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<sup>24</sup> By this, I mean both electronic equipment, Internet’s online platforms and related digital and physical infrastructure, and artificial intelligence.

<sup>25</sup> Law claims for itself the role of ordering social life, from which it emerges and which it seeks to regulate by setting rules for social cohabitation, organization and behaviour. It is in this sense that I affirm that technologies, their uses and effects are part of EU law’s object: law refers to them as an object of regulation, but, at the same time, it emerges (and is, therefore, co-constituted and dependent on) from their coming into existence and practice. See, in this sense, Petru Tarchila, ‘The Evolution of Law’ (2015) 6 *Journal of Humanistic and Social Studies* 133, 138; Stefano Pietropaoli and Thomas Casadei, ‘Nota editoriale. “Ricucire” prassi e teoria del diritto: spunti di riflessione a partire da Santi Romano’ (2018) 15 *Jura gentium* 7, 7.

<sup>26</sup> Lyria Bennett Moses, ‘Why Have a Theory of Law and Technological Change? Symposium: Towards a General Theory of Law and Technology’ (2007) 8 *Minnesota Journal of Law, Science & Technology* 589, 592; Tranter, ‘The Law and Technology Enterprise’ (n 20) 34.

<sup>27</sup> Anu Bradford, ‘The False Choice Between Digital Regulation and Innovation’ (2024), SSRN Paper 2, 7–9 <<https://papers.ssrn.com/abstract=4753107>> accessed 16 March 2024.

<sup>28</sup> Antonella Galetta and Paul De Hert, ‘The Proceduralisation of Data Protection Remedies under EU Data Protection Law: Towards a More Effective and Data Subject-Oriented Remedial System?’ (2015) 8 *Review of European Administrative Law* 125, 128; Giovanni De Gregorio and Pietro Dunn, ‘The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age’ (2022) 59 *Common Market Law Review* 473, 477–478, 483, 488, 499; Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023) 130.

from the protection of fundamental rights and democracy to other values such as fairness, safety, and human dignity.<sup>29</sup>

But apart from treating tech as its regulatory object, in what other ways does EU law see technology? In line with its market nature, EU tech regulation conceives of technologies as products that circulate in the internal market,<sup>30</sup> striving to secure the constitution and operation of technological sub-markets within the broader single market.<sup>31</sup> In other words, EU law accepts, assumes and ensures that technologies will be developed, made available and used by persons and companies. Equally and consequently, EU law accepts that technologies will cause harm. Indeed, as is often repeated in legislation and policy documents, technology will bring benefits to individuals and society and, at the same time, pose risks of harm.<sup>32</sup> This last sentence is worth unpacking in two main respects.

First, according to EU law, technology benefits people considered, first and foremost, in their capacity as consumers: they will enjoy the advantages that different technologies offer as available products in the market.<sup>33</sup> Technology regulation, thus, shares the same main underlying rationale as any form of market regulation: to secure the market processes that enable and sustain current consumption patterns, while at the same time ensuring product safety and trustworthiness. In other words, EU law aims to ensure that people are able to consume technology (think of the newest iPhone) or *through* technology (think of online shopping platforms) while, crucially, trusting that what they consume is safe. In this sense, it

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<sup>29</sup> Bradford (n 28) 105–111; Robert Gorwa, *The Politics of Platform Regulation: How Governments Shape Online Content Moderation* (Oxford University Press 2024) 46–47. Although that is not within the scope of this essay, I disagree with Bradford's argument that the EU indeed *effectively* has a differentiated model to regulate tech - when compared with the US or China, one based on rights. Even though I agree, as said in the main text, that such a differentiated *ethos* for regulating tech is politically *claimed* by EU institutions, I consider that much of such rights-based regulation is performatively concretised – as argued further down in this essay – and, therefore, does not in practice differ that much from that of other jurisdictions in terms of the leeway given to regulated private actors to operate in the market as they see fit.

<sup>30</sup> To give the most recent example of online platforms and AI systems, see, e.g., 'European Commission, White Paper On Artificial Intelligence - A European Approach to Excellence and Trust, COM(2020) 65 Final' (2020) 1–4, 10, 12, 14–15, 23–25, which makes numerous references to AI as being part of 'the data economy' and as circulating in the 'single market'. AI is seen as being a source of well-being for citizens but such well-being is created through 'economic growth' and market processes. See also recitals 1, 4–7 and art. 1(1) of the E-Commerce Directive, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000; recitals 2, 5, 7, 13 of the General Data Protection Regulation, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter GDPR); recitals 1, 2, 4, 7 and 9 of the Digital Services Act, the main EU regulation for digital platforms, titled Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single *Market* [emphasis added] for Digital Services (hereinafter DSA); or recitals 1–4, 8–9, 47, 111, 129 and 176, as well as art. 1, 3(65) and Annex XIII, f) of AI Act, Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 (hereinafter AIA).

<sup>31</sup> I read the references cited in the footnote above, and similar statements in EU law regulating digital technology in light of Marija Bartl, 'Socio-Economic Imaginaries and European Private Law' in Poul F Kjaer (ed), *The Law of Political Economy* (1st edn, Cambridge University Press 2020) 229 <[https://www.cambridge.org/core/product/identifier/9781108675635%23CN-bp-9/type/book\\_part](https://www.cambridge.org/core/product/identifier/9781108675635%23CN-bp-9/type/book_part)> accessed 5 December 2024; Ioannis Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' (2021) 1 *Journal of Law and Political Economy* 301, 301–302, 306–309.

<sup>32</sup> See, e.g., recitals 2–3, 40, 68, 76 DSA; recitals 1, 6, 14 and 27 of the Digital Markets Act, Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 (hereinafter DMA); and recitals 4 and 5 AIA.

<sup>33</sup> See, e.g., recitals 1, 2, 4 DSA; and recital 1, 3, 4 AIA read in light of 'European Commission, White Paper On Artificial Intelligence - A European Approach to Excellence and Trust, COM(2020) 65 Final' (n 30) 1–2; and Marco Almada and Nicolas Petit, 'The EU AI Act: A Medley of Product Safety and Fundamental Rights?' (2023) 7, 17 <<https://papers.ssrn.com/abstract=4308072>> accessed 1 November 2023. Both these references demonstrate that AI in the AI Act is, first and foremost, conceived as a product (made available in the internal market) whose safety must be ensured.

strives to achieve an optimal balance between, on the one hand, technology production, circulation and innovation, and, on the other hand, the protection of tech consumers.<sup>34</sup>

Second, technologies are not seen by EU law as creating harm *right now*; instead, they are seen as posing *risks* of harm, i.e., they *may* cause harm. The grammar of risk – present in all internal market law from, amongst others, food,<sup>35</sup> to environmental,<sup>36</sup> to medicine and vaccine,<sup>37</sup> to digital regulation<sup>38</sup> – is crucial here, being the underlying presupposition of EU law vis-à-vis tech harms. For example, in the Digital Services Act (DSA), digital platforms' design and algorithmic systems are not said to *be causing* harm to e.g., electoral processes, child safety, or gender minorities, even though there is plenty of evidence to affirm that they are;<sup>39</sup> instead, they are conceived as posing risks of potential harm.<sup>40</sup> This risk-based approach is not unique to the DSA, as explained by De Gregorio and Dunn, who argue that such an approach forms part of a common constitutional aspiration of the EU legislator to ensure an optimal balance between innovation and the protection of rights.<sup>41</sup> I would say more: risk has become the regulatory term-of-art used by EU law to achieve the abovementioned optimal balance between tech innovation and any protective objectives that the EU claims for its secondary law, from rights, to digital fairness, product safety, democracy, or civic discourse, just to give a few examples.<sup>42</sup>

But the 'risk way' did not have to be 'the way'. In fact, framing technologies' harms as risks is not a neutral, innocent choice; on the contrary, it implies clear political choices about the regulation of technology.<sup>43</sup> Here, I wish to highlight four of these choices: risk regulation's (i) forward-looking perspective, (ii) acceptance of harm as a technical matter, (iii) empowering of

<sup>34</sup> See, e.g., recitals 3, 9, 12, 40 recitals 1-3, 6 AIA as well as 'European Commission, White Paper On Artificial Intelligence - A European Approach to Excellence and Trust, COM(2020) 65 Final' (n 30) 1–3. See also Moritz Laurer and Timo Seidl, 'Regulating the European Data-Driven Economy: A Case Study on the General Data Protection Regulation' (2021) 13 Policy & Internet 257, 267.

<sup>35</sup> Giandomenico Majone, 'Foundations of Risk Regulation: Science, Decision-Making, Policy Learning and Institutional Reform' (2010) 1 European Journal of Risk Regulation 5, 17. See, e.g., Article 1, (f) and Annex II, Chapter I, 8, or Chapter III, 1. and 2.(h) of Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.

<sup>36</sup> Brian Wynne, 'Risk and Environment as Legitimatory Discourses of Technology: Reflexivity Inside Out?' (2002) 50 Current Sociology 459, 460–461. See, e.g., recital 44 and art. 16 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

<sup>37</sup> Tamara K Hervey and Jean V McHale, *European Union Health Law: Themes and Implications* (Cambridge University Press 2015) 292–432; Ana Hidalgo-Simon, Radu Botgros and Emil Cochino, 'Authorization of Vaccines in the European Union' (2021) 05 Molecular Frontiers Journal 58.

<sup>38</sup> Gregorio and Dunn (n 28). See, e.g., arts. 34 and 35 DSA or art. 6 AIA.

<sup>39</sup> To give just a few examples, see Aksha M Memon and others, 'The Role of Online Social Networking on Deliberate Self-Harm and Suicidality in Adolescents: A Systematized Review of Literature' (2018) 60 Indian journal of psychiatry 384; Silvia Semenzin and Lucia Bainotti, 'The Use of Telegram for Non-Consensual Dissemination of Intimate Images: Gendered Affordances and the Construction of Masculinities' (2020) 6 Social Media + Society 1; Kara Kelleher, 'Revenge Porn and Deep Fake Technology: The Latest Iteration of Online Abuse' (*Boston University Law School*, 10 August 2023) <<https://sites.bu.edu/dome/2023/08/10/revenge-porn-and-deep-fake-technology-the-latest-iteration-of-online-abuse/>> accessed 22 April 2024; Victoria Oldemburgo de Mello, Felix Cheung and Michael Inzlicht, 'Twitter (X) Use Predicts Substantial Changes in Well-Being, Polarization, Sense of Belonging, and Outrage' (2024) 2 Communications Psychology 1; Catalina Goanta and others, 'The Great Data Standoff: Researchers vs. Platforms Under the Digital Services Act' (arXiv, May 2025) 4–11 <<http://arxiv.org/abs/2505.01122>> accessed 10 July 2025.

<sup>40</sup> See recitals 2, 9, 76, 79–83 and art. 34(1) DSA.

<sup>41</sup> See footnote 38. Regarding De Gregorio and Dunn (n 28), see in particular pp. 473, 499–500.

<sup>42</sup> Gregorio and Dunn (n 28) 494–496, 500.

<sup>43</sup> Josephine Adekola, *Power and Risk in Policymaking: Understanding Public Health Debates* (Springer International Publishing 2020) 18–19, 109–110; Rachel Griffin, 'What Do We Talk about When We Talk about Risk? Risk Politics in the EU's Digital Services Act' (*Digital Services Act Observatory*, 31 July 2024) <<https://dsa-observatory.eu/2024/07/31/what-do-we-talk-about-when-we-talk-about-risk-risk-politics-in-the-eus-digital-services-act/>> accessed 2 September 2024.

regulated private actors as primary decision-makers, and (iv) limited predictive capacity for unquantifiable harms.

Let me start by unpacking risk regulation's forward-looking perspective. Indeed, such a regulatory approach is underpinned by the assumption that harms *may* happen in the future, without any certainty of it – there is only a *risk* of that happening.<sup>44</sup> In this sense, risk regulation makes the law look ahead, to technologies' futures.<sup>45</sup> This means that the purpose of tech law primarily becomes not to engage with present technological harms but, instead, not to engage with present technological harms but, instead, to (i) foresee what are the expected risks of a given technology and their respective magnitude; and, accordingly, (ii) develop an adequate approach to manage and mitigate such emerging risks.<sup>46</sup> Only in very exceptional cases will the future perceived risk of a technology or technological use be considered so unacceptable that it warrants outright technological prohibition.<sup>47</sup>

This forward-looking logic of risk regulation ultimately means that the latter accepts as inevitable the presence of a source of risk in society and, relatedly, that such risk source will, to a certain extent, cause harm to some individuals or communities.<sup>48</sup> Applying a risk-based approach to tech regulation means accepting that technologies will circulate in the market and that, as sources of risk, they will create harm. This is treated as inevitable. Even though there may already be existing indications of tech harms and threats, risk-based tech regulation does not set out, as a general rule,<sup>49</sup> to impede tech production and consumption so as to prevent or eliminate the continued materialisation of a tech harm. Instead, it aims to *manage* those harms, i.e., to (i) reduce the likelihood of such harm being caused; or (ii) in case harm is indeed caused, minimise its consequences.<sup>50</sup> In both cases, some degree of harm – or threat thereof – remains and is accepted by regulators.<sup>51</sup> The normative justification for accepting such residual harm is a trade-off done in the name of the benefits of a given source of risk: certain risks (and implicitly their corresponding harms) are accepted because they are said to be outweighed by the benefits of their corresponding risk source.<sup>52</sup> These trade-offs are presented as the most efficient and rational regulatory solution, ensuring the optimal balance between

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<sup>44</sup> Margot E Kaminski, 'Regulating the Risks of AI' [2023] Boston University Law Review 1347, 1391.

<sup>45</sup> Tranter, 'From Law and Technology to Law as Technology' (n 20) 34.

<sup>46</sup> Fiona Haines, 'Regulation and Risk' in Peter Drahos (ed), *Regulatory theory: Foundations and applications* (Australian National University Press Acton, ACT, Australia 2017) 188–192; Martin Husovec, 'The Digital Service Act's Red Line: What the Commission Can and Cannot Do About Disinformation' (2024) 1, 7 <<https://papers.ssrn.com/abstract=4689926>> accessed 16 January 2024.

<sup>47</sup> E.g., art. 9(1) GDPR and art. 5 AIA.

<sup>48</sup> Kaminski (n 44) 1392, 1395–1397.

<sup>49</sup> See footnote 46 for some exceptions in EU tech law where certain technological uses are prohibited. However, even in those articles the argument can be made that, even though they present prohibitions as their default rule, the number of exceptions thereafter foreseen curb to a significant extent the prohibitive content of such articles. See, e.g., regarding art. 5 AIA, 'Partial Ban on "Predictive" Policing and Crime Prediction Systems Included in Final EU AI Act' *Fair Trials* (11 December 2023) <<https://www.fairtrials.org/articles/news/partial-ban-on-predictive-policing-included-in-final-eu-ai-act/>> accessed 20 December 2023; Chloe Bouvier, 'A Dangerous Precedent: How the EU AI Act Fails Migrants and People on the Move' (*PICUM*, 4 April 2024) <<https://picum.org/blog/a-dangerous-precedent-how-the-eu-ai-act-fails-migrants-and-people-on-the-move/>> accessed 15 November 2024. Also, regarding art. 9 GDPR, see all exceptions to the prohibition of processing of sensitive personal data in art. 9(2); the CJEU has stated that these exceptions must be construed narrowly, but it is still possible to interpret them in a more permissive way as can be seen in, e.g., Edward S Dove and Jiahong Chen, 'What Does It Mean for a Data Subject to Make Their Personal Data "Manifestly Public"? An Analysis of GDPR Article 9(2)(e)' (2021) 11 International Data Privacy Law 108–109.

<sup>50</sup> Seth D Baum, 'Risk and Resilience for Unknown, Unquantifiable, Systemic, and Unlikely/Catastrophic Threats' (2015) 35 Environment Systems and Decisions 229; Kaminski (n 44) 1390–1399.

<sup>51</sup> Under a risk grammar, the potential of this remaining harm materialising is named 'residual risk'. See, e.g., Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford University Press 2001) 33; Ortwin Renn, *Risk Governance: Coping with Uncertainty in a Complex World* (Earthscan 2008) 246.

<sup>52</sup> Kaminski (n 44) 1395.

the potential harms and benefits of any given risk source.<sup>53</sup> This regulatory narrative is present in EU tech law: under risk regulation, more and faster technological innovation and consumption is allowed to continue as long as their perceived benefits outweigh their perceived harms. Technologies' risks of harm are to be managed through non-prohibitive regulatory strategies, meaning that certain eventual harms are accepted as collateral damage of the benefits of technological circulation.<sup>54</sup> What is more, the decisions taken under risk regulation when it comes to assessing and managing any given risk are communicated as if they were purely technical choices. This obfuscates the inherent political implications of choosing to assess or manage risks in any given way, as those decisions always imply that certain risks of harm are tolerated by the risk decision-maker.<sup>55</sup> Ultimately, this leads to a fundamental distancing between the law and the lived negative experiences of its subjects: the communicated technocratic nature of a risk management decision implies a shirking away of the responsibility towards the individuals and societal goods potentially harmed by a risk source.<sup>56</sup>

For all the talk about the decisions taken under risk regulation, the question must be asked: who makes them? Who, for the most part, becomes the primary decision-maker of which technological risks emerge, what will be their impact and how to best manage them? The answer is simple: regulated private actors themselves, meaning, in this case, those private actors who develop or deploy a technology in the internal market. EU law imposes on them the obligation to iteratively identify, assess and choose how to mitigate tech risks.<sup>57</sup> In order to discharge these obligations, regulated actors have to continuously make risk management decisions and, in that sense, they themselves become regulators. They are delegated the regulatory responsibilities<sup>58</sup> to assess their technologies' risks and develop the best strategies to manage them. In this context, the public regulator assumes a function of oversight over how regulated private actors regulate themselves.<sup>59</sup> It is worth noting that these self-regulatory - or meta-regulatory - schemes, as the literature amply points out, create risks of regulatory capture, lack of accountability, and of reducing regulatory compliance to mere 'box-ticking' exercises.<sup>60</sup> Crucially, compliance with risk regulation may produce a lot of documentation and

<sup>53</sup> Kysar (n 18) 224; Kaminski (n 44) 1391–1392.

<sup>54</sup> Read, for example, recitals 76, 86 and arts. 34 and 35 DSA or recitals 3, 4, 8, 26 and arts. 6, 8 and 9 (particularly 9(2)(5)) AIA in light of Kysar (n 18) 224. This assertion is curbed, regarding the AI Act by its article 5, see footnote 49 above.

<sup>55</sup> Kaminski (n 44) 1397; Rachel Griffin, 'Governing Platforms through Corporate Risk Management: The Politics of Systemic Risk in the Digital Services Act' [2025] *European Law Open* 1, 18–20. See, in practice, the example of art. 9(2)(5) AIA.

<sup>56</sup> Kysar (n 18) 224–225.

<sup>57</sup> See, e.g. arts. 5(2) GDPR, 34–35 DSA, or 6, 16 and 53, AIA. See also Mateus Correia de Carvalho, 'It Will Be What We Want It to Be: Sociotechnical and Contested Systemic Risk at the Core of the EU's Regulation of Platforms' AI Systems' (2025) 16 *JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law* 54–55.

<sup>58</sup> In the improper and not classic administrative law sense, see for this Javier Barnes, 'An Expanding Frontier of Administrative Law: The Public Life of Private Actors (a Functional Approach)' (2018) 24 *European Public Law* 598, footnote 8; Marco Almada, 'Delegating the Law of Artificial Intelligence: A Procedural Account of Technology-Neutral Regulation' (Thesis, European University Institute 2024) <<https://cadmus.eui.eu/handle/1814/77064>> accessed 17 July 2024.

<sup>59</sup> Peter Grabosky, 'Meta-Regulation' in Peter Drahos (ed), *Regulatory theory: Foundations and applications* (ANU Press 2017) 149; Haines (n 46) 188–192.

<sup>60</sup> Rachel Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality' (2023) 2 *European Law Open* 30, 43–51; Anna-Katharina Meßmer and Martin Degeling, 'Auditing Recommender Systems Putting the DSA into Practice with a Risk-Scenario-Based Approach' (Stiftung Neue Verantwortung (SNV) 2023) 36 <<https://shorturl.at/viWyd>> accessed 17 January 2024; Kaminski (n 44) 1379–1380; Niklas Eder, 'Making Systemic Risk Assessments Work: How the DSA Creates a Virtuous Loop to Address the Societal Harms of Content Moderation' (2023) 13 <<https://papers.ssrn.com/abstract=4491365>> accessed 31 October 2023; Marta Maroni, "'Mediated Transparency": The Digital Services Act and the Legitimation of Platform Power' in Päivi Leino-Sandberg, Maarten Zbigniew Hillebrandt and Ida Koivisto (eds), *(In)visible European Government: Critical Approaches to Transparency as an Ideal and a Practice* (Routledge, 2023); Giovanni De Gregorio and Oreste

bureaucratic hurdles while at the same time failing to force regulated actors to meaningfully engage with the harms they create and, where needed, enact necessary changes to how they operate.<sup>61</sup>

Finally, choosing risk regulation means choosing a regulatory form that typically focuses on quantitatively identifying and assessing risks of harm, focusing predominantly on instances of harm caused to specific individuals or entities.<sup>62</sup> These dominant conceptions of risk fail to fully capture less quantifiable and intangible technological risks – e.g., to civic discourse, to the mental health of certain population segments or of gender-based violence – whose perceptions are contestable, highly subjective and that, due to the structural presence of technology in mediating people's social exchanges,<sup>63</sup> cannot be completely explained through single instances of harm caused to specific persons.<sup>64</sup>

So, the question must be asked: why did EU institutions choose risk regulation as the strategy to regulate tech in the internal market? The argument usually goes that risk regulation offers the necessary flexibility to adapt the law to the fast-paced evolution of the capabilities and uses of technology in modern life.<sup>65</sup> In this way, law can accompany the *speed* of tech and preserve a space where technological innovation can thrive.<sup>66</sup> EU law's intention to be fast is key here: it does not just want to accompany tech development and innovation; it wants to *secure* it. The lighter-touch risk regulation that by default, (i) accepts tech's introduction in the internal market; (ii) accepts that it will create harm; (iii) mostly foresees regulatory interventions that reduce complex contextual assessments of tech's impact to quantitative variables and are primarily directed at mitigating risks; and (iv) entrusts regulated tech companies to make the corresponding decisions is all predicated, I argue, on an intention of the law to allow those companies to claim they are compliant with it while creating minimal disruption to their business models.<sup>67</sup> This regulation approach that the EU takes, even if it is coated under strong regulatory claims made by the institutions that they are asserting EU rules against big tech companies, is in line with the policy and scholarly proposals of tech regulatory arrangements that do not excessively constrain private tech companies' ability to innovate.<sup>68</sup> Such regulatory

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Pollicino, 'Auditing Platforms under the Digital Services Act' [2024] *Verfassungsblog* <<https://verfassungsblog.de/dsa-auditors-content-moderation-platform-regulation/>> accessed 25 September 2024; Martin Senftleben, 'Human Rights Outsourcing and Reliance on User Activism in the DSA' (*Verfassungsblog*, 21 February 2024) <<https://verfassungsblog.de/human-rights-outsourcing-and-reliance-on-user-activism-in-the-dsa/>> accessed 21 February 2024.

<sup>61</sup> Eder (n 60) 15–16; 'Towards Meaningful Fundamental Rights Impact Assessments under the DSA' (European Center for Not-for-Profit Law, Access Now Europe 2023) 7 <<https://www.accessnow.org/wp-content/uploads/2023/09/DSA-FRIA-joint-policy-paper-September-2023.pdf>> accessed 10 April 2024; Meßmer and Degeling (n 60) 2.

<sup>62</sup> Michael Veale and Frederik Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' (2021) 22 *Computer Law Review International* 97, 99; Margot E Kaminski, 'The Developing Law of AI: A Turn to Risk Regulation' (April 2023) 14–16; Griffin, 'Rethinking Rights in Social Media Governance' (n 60) 42–46; Kaminski (n 44) 1390–1391.

<sup>63</sup> Cohen (n 23).

<sup>64</sup> Kaminski (n 44) 1392–1393.

<sup>65</sup> Gregory N Mandel, 'History Lessons for a General Theory of Law and Technology' (2007) 8 *Minn. JL Sci. & Tech.* 551, 563–568; Stefan Larsson, Jockum Hildén and Kasia Söderlund, 'Between Regulatory Fixity and Flexibility in the EU AI Act' 2 <<https://portal.research.lu.se/en/publications/between-regulatory-fixity-and-flexibility-in-the-eu-ai-act>> accessed 15 March 2024.

<sup>66</sup> E.g., recitals 4, 9, or 109 DSA, 107 DMA, or 1-3, 8, 20 AIA; see also 'European Commission, White Paper On Artificial Intelligence - A European Approach to Excellence and Trust, COM(2020) 65 Final' (n 30) 2–7.

<sup>67</sup> For similar arguments, see Griffin, 'What Do We Talk about When We Talk about Risk?' (n 43); Kaminski (n 44) 1354, 1408; Griffin, 'Rethinking Rights in Social Media Governance' (n 60) 33, 50; Petros Terzis, Michael Veale and Noëlle Gaumann, 'Law and the Emerging Political Economy of Algorithmic Audits', *Proceedings of the 2024 ACM Conference on Fairness, Accountability, and Transparency* (Association for Computing Machinery 2024) 1464 <<https://dl.acm.org/doi/10.1145/3630106.3658970>> accessed 27 January 2025.

<sup>68</sup> Asya Zhelyazkova, 'Challenges in EU Law Enforcement and the Digital Age' in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU Law* (2023) 98; Bradford (n 27) 17–18, 30.

arrangements, it is claimed, will provide economic growth and ensure that European societies enjoy more and more quality of life.<sup>69</sup>

So, what if tech ends up causing or posing foreseeable problems? Then the solution is to develop and design better tech. The question of whether a given technology or certain uses of that technology should be allowed is sidestepped, and the regulatory discussion starts at a later stage: it instead asks how tech can be designed, used, and finetuned to be more accurate, function better, and cause fewer problems.<sup>70</sup> This ‘techno-solutionist’ or ‘techno-correctionist’<sup>71</sup> mentality underpinning EU tech regulation mostly serves, I argue, an aim of trust production both in technology and the law that regulates technology. Since the presence of tech in the everyday, even if it may cause harm, is accepted as inevitable, then EU law is set up to make people *trust* tech’s everyday presence in their lives.<sup>72</sup> EU legal discourse openly states that it seeks to make technology fair, safe, and, crucially, *trustworthy*.<sup>73</sup> Trustworthiness is a quality of tech that will make those interacting with it trust that, even if tech might cause harm and not deliver its promised potential, it is, nevertheless, fair and safe.<sup>74</sup> The fairness and safety of tech are, for these purposes, a perception: more important than making technology fair and safe is that people *trust* technology and its uses to be fair and safe.

This is, in conclusion, my account of EU law’s approach to tech. As Tranter argues for tech law in general,<sup>75</sup> technological futures are the present of (EU) law’s mechanisms and, I would add, justificatory discourse. EU law looks forward, empowers tech companies to predict and address the risks their tech creates – and not only *may* create, and attaches to those procedural actions of companies a value of ‘compliance’ intended at producing people’s trust in tech’s safety. All the foregoing raises an interesting hypothesis: is EU tech law missing something, particularly about the everyday presence of tech in Europeans’ lives, by mainly looking at the future through a risk lens?

### 3. What does EU tech law not understand about technology? Almost everything

This is where Ben Judah’s *This is Europe* comes in: it gives us some clues about where to start our inquiry about tech’s presence in everyday life in Europe. As stated in the preface, this is only a starting point, and thicker inquiries of tech and tech law’s presence in everyday life must follow. In any case, this section aims to start a venture into the second and third steps of the law and everyday analytical strategy devised in the preface: to look for the lived

<sup>69</sup> See, e.g., ‘European Commission, White Paper On Artificial Intelligence - A European Approach to Excellence and Trust, COM(2020) 65 Final’ (n 30) 2–3. See also recitals 2 DSA, and recitals 4, 25 AIA; as well as European Commission, Proposal of the DSA, COM(2020) 825 final 2020/0361 (COD), 1-2. For a critical reading of this type of argument, see Jacques Ellul, *The Technological Bluff* (William B Eerdmans Publishing Company 1990).

<sup>70</sup> Petros Terzis, ‘Against Digital Constitutionalism’ (OSF, 2024) 8–9 <<https://osf.io/6d247>> accessed 12 July 2024.

<sup>71</sup> Natasha Dow Schüll, ‘The Folly of Technological Solutionism: An Interview with Evgeny Morozov’ (*Public Books*, 9 September 2013) <<https://www.publicbooks.org/the-folly-of-technological-solutionism-an-interview-with-evgeny-morozov/>> accessed 13 December 2023; Kaminski (n 44) 1354.

<sup>72</sup> A telling example is present in ‘European Commission, White Paper On Artificial Intelligence - A European Approach to Excellence and Trust, COM(2020) 65 Final’ (n 30) 1, 3, ‘As digital technology becomes an ever more central part of every aspect of people’s lives, people should be able to trust it’ and talking about creating a “unique ecosystem of trust” around AI as a ‘policy objective in itself’. Other references to trust in pp. 8-10, 20-21, 23-25. See also recital 6 AIA.

<sup>73</sup> ‘Ethics Guidelines for Trustworthy AI’ (Independent High-Level Expert Group On Artificial Intelligence - European Commission 2018); European Commission, ‘AI Act: Have Your Say on Trustworthy General-Purpose AI’ (30 July 2024) <<https://digital-strategy.ec.europa.eu/en/consultations/ai-act-have-your-say-trustworthy-general-purpose-ai>> accessed 19 November 2024. See also recitals 3, 12, 72-73 DSA; or recitals 1-3 AIA.

<sup>74</sup> Matteo Bonelli and Mateus Correia de Carvalho, ‘No Need to Look, Trust Me! Mutual Trust and Distrust in the European Arrest Warrant System’ (2024) 3 *European Law Open* 281, 301.

<sup>75</sup> Tranter, ‘The Law and Technology Enterprise’ (n 20) 34.

experiences of people with technology and seek to explain how the material conditions of their lives are, at least in part, made possible by tech law.

As Judah claims, tech is profoundly present in the lives of Europeans, profoundly altering and re-shaping everyday interactions, from communication to love.<sup>76</sup> Indeed, there are countless examples in the book of tech's ability to connect people with their fellow community members and loved ones, e.g., the phone of Imam Mahjoub being flooded with messages from the faithful of his religious community in the wake of France's first COVID lockdown;<sup>77</sup> or Syrian refugee Laila's ability to momentarily escape depression and discontent about leaving in Germany by talking on Whatsapp with her sister who lived in Syria.<sup>78</sup> In addition, social media platforms are shown to create the possibility for romantic relationships of people who would have otherwise most likely never met – like the two lonely Romanian truck drivers, Camila and Ionut,<sup>79</sup> or elderly couple Maria and (also) truck driver Gustaf.<sup>80</sup> This 'connective' potential of digital technologies and social media is not something that escapes EU law, which often cites this as one of the main benefits of the introduction of such technologies in the internal market.<sup>81</sup>

Nevertheless, the pervasive presence and use of tech in ordinary life<sup>82</sup> also creates instances of violence, alienation and dehumanisation. It is the latter, structurally caused by digital technologies,<sup>83</sup> that, I argue, are hardly a concern of EU digital regulation. I have grouped these oft-invisible instances of tech violence into three three main tropes: (i) everyday total surveillance of individuals; (ii) tech-induced stress and addiction; and (iii) tech-mediated gender-based violence.

The two main instances of tech total surveillance described in *This is Europe* relate to work and migration. In the *Briançon* and *Budapest* chapters, Ivorian refugee Brico<sup>84</sup> and Syrian asylum seeker Ibrahim<sup>85</sup> are forced to give their fingerprints through a biometric scanner. Right after the despair, danger, and, in the case of Brico, near-death experience associated with fleeing their origin countries to arrive in Europe, this fingerprint collection is their first contact with the state in Europe, and it is mediated by technology. What is in the EU a highly intrusive and, in principle, prohibited data collection operation of sensitive data (art. 9 GDPR) is forced upon these migrants with no information about related consequences ("I signed. I didn't know what I was signing. But I signed.", says Brico). Indeed, in line with the extremely broad national security exemptions from EU tech law obligations afforded to Members States,<sup>86</sup> highly intrusive technologies – from biometric scanners to AI-powered emotion recognition systems – are used every day to violently 'datify' migrants, facilitating – in the name of efficiency – their detention and sorting, and reducing compliance with the law to performative actions like Brico's uninformed signature of a form.<sup>87</sup> In other words, the law of tech creates 'technological states of exception', i.e., tech law is invoked to produce spaces where the law does not exist thereby

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<sup>76</sup> *This Is Europe Now* by Ben Judah (n 21), at minute 1:58-2:06.

<sup>77</sup> Judah (n 1) 378.

<sup>78</sup> *ibid* 315–316, 326.

<sup>79</sup> *ibid* 39.

<sup>80</sup> *ibid* 531–532.

<sup>81</sup> E.g., recitals 1, 18 E-Commerce Directive; and recitals 28-29 DSA.

<sup>82</sup> This is, by no means, specific to life in Europe.

<sup>83</sup> Rachel Griffin, 'Procedural Fetishism in the Digital Services Act' (2025) 16 *European Journal of Legal Studies* 11, 17; Correia de Carvalho (n 57) 49.

<sup>84</sup> Judah (n 1) 272.

<sup>85</sup> *ibid* 117.

<sup>86</sup> E.g., recital 16 and art. 23(1)(a) GDPR; art. 5(2)-(5) AIA.

<sup>87</sup> Michiel Besters and Frans WA Brom, "'Greedy' Information Technology: The Digitalization of the European Migration Policy" <[https://brill.com/view/journals/emil/12/4/article-p455\\_4.xml](https://brill.com/view/journals/emil/12/4/article-p455_4.xml)> accessed 31 March 2025; Bouvier (n 49).

enabling the unconstrained application of intrusive technologies with very little (if any) regard from the human targets of said application.<sup>88</sup>

Going beyond migration control, Judah also describes instances of total surveillance of delivery workers, where technology is deployed to control the location of truck and Amazon drivers at all times during their workday, setting a strict route for their deliveries and notifying them incessantly of their non-compliance with that route if they are late or take alternative paths - which can be forced on them by external circumstances, the most common of them being traffic. The devices used to control their location and route compliance – the so-called tacograph in the case of truck drivers like Ionut,<sup>89</sup> or an app in the case of Amazon driver Aboud<sup>90</sup> – are described as incredibly powerful and omnipresent sources of stress, used to constantly remind them to drive “more”, “get there faster”, and that they are “going to be late”. This is consistent with the increased demands for ever-faster and more efficient circulation of products in the digital economy, which is done at the expense of these lived realities of precarious and incredibly stressful work experienced by delivery workers under digital surveillance.<sup>91</sup>

In the *Budapest* chapter, Judah also describes the social media addiction of pornographic content creator Ibrahim, who is obsessed with finding evermore dehumanising ways of producing porn in a way that boosts his online reach to a profitable extent,<sup>92</sup> and is, in addition, addicted to consuming online porn.<sup>93</sup> His exposure to social media even led him to experience suicidal thoughts.<sup>94</sup> These experiences are not exclusive to Ibrahim. Predominantly but not exclusively amongst adolescents, social media use may generate addiction,<sup>95</sup> produce alienating feelings of anxiety and self-loathing,<sup>96</sup> increase the likelihood of self-harm and suicidality<sup>97</sup> and promote the engagement in violent behaviour towards others.<sup>98</sup> Even though

<sup>88</sup> Dan McQuillan, *Resisting AI: An Anti-Fascist Approach to Artificial Intelligence* (Bristol University Press 2022) 74–79.

<sup>89</sup> Judah (n 1) 30–31. See Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport.

<sup>90</sup> Judah (n 1) 307–312.

<sup>91</sup> Karolien Lenaerts and Willem Waeyaert, ‘The Platform Economy and Precarious Work’ [2020] European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies; Hannah Johnston and others, ‘Working on Digital Labour Platforms A Trade Union Guide for Trainers on Crowd-, App- and Platform-Based Work’ (European Trade Union Institute 2021) 25–27 <<https://shorturl.at/8pZGC>> accessed 26 May 2025; Aude Cefaliello, ‘An Occupational Health and Safety Perspective on EU Initiatives to Regulate Platform Work: Patching up Gaps or Structural Game Changers?’ (2023) 1 Journal of Work Health and Safety Regulation 117, 132; Benta Mbare, Mikko Perkiö and Meri Koivusalo, ‘Algorithmic Management, Wellbeing and Platform Work: Understanding the Psychosocial Risks and Experiences of Food Couriers in Finland’ (2024) 34 Labour and Industry 386, 395–402.

<sup>92</sup> Judah (n 1) 109–110, 129–132.

<sup>93</sup> *ibid* 123.

<sup>94</sup> *ibid* 130.

<sup>95</sup> Amandeep Dhir and others, ‘Online Social Media Fatigue and Psychological Wellbeing—A Study of Compulsive Use, Fear of Missing out, Fatigue, Anxiety and Depression’ (2018) 40 International Journal of Information Management 141; Suzanne Zivnuska and others, ‘Social Media Addiction and Social Media Reactions: The Implications for Job Performance’ (2019) 159 The Journal of Social Psychology 746; Alfonso Pellegrino, Alessandro Stasi and Veera Bhatiasavi, ‘Research Trends in Social Media Addiction and Problematic Social Media Use: A Bibliometric Analysis’ (2022) 13 Frontiers in Psychiatry.

<sup>96</sup> Emily Tanner, ‘Girls, Instagram, and the Glamorization of Self-Loathing’ (2015) 4 Dissenting Voices; Dhir and others (n 95); ‘Anxious about Your Health? Facebook Won’t Let You Forget’ (*Panoptykon Foundation*, 6 December 2023) <<https://en.panoptykon.org/algorithms-of-trauma-2-anxious-about-health>> accessed 15 February 2024.

<sup>97</sup> Memon and others (n 39); Jory A Fulcher and others, ‘#selfharm on Instagram: Understanding Online Communities Surrounding Non-Suicidal Self-Injury through Conversations and Common Properties among Authors’ (2020) 6 Digital Health 1.

<sup>98</sup> Desmond Upton Patton, Robert D Eschmann and Dirk A Butler, ‘Internet Banging: New Trends in Social Media, Gang Violence, Masculinity and Hip Hop’ (2013) 29 Computers in Human Behavior A54; Desmond Upton Patton and others, ‘Social Media as a Vector for Youth Violence: A Review of the Literature’ (2014) 35 Computers in Human Behavior 548; Mai ElSherief, Elizabeth Belding and Dana Nguyen, ‘#NotOkay: Understanding Gender-Based

EU law now enables the identification and management of systemic risks of social media platforms and their AI systems through arts. 34 and 35 of the DSA, it is unlikely that these obligations will make platforms structurally change their business models which are meant to capture user attention and hook people to unhealthy amounts of social media use. In fact, the first round of systemic risk management reports and audits has shown how EU law enables platform performative and ‘box-checking’ regulatory compliance exercises, rather than structural changes to harmful platform design practices and business models.<sup>99</sup>

Furthermore, and despite the current European Commission’s action to tackle certain systemic risks such as electoral Russian misinformation campaigns and online child abuse,<sup>100</sup> these are enforcement priorities which are limited in addressing other already existing structural harms perpetuated or amplified by social media. At the top of the list is gender-based violence, alluded to in the *Liepaja* chapter, where 16-year-old Nora is harassed, body-shamed and forced to strip in an online chat.<sup>101</sup> Add to this the countless episodes of women whose intimate images<sup>102</sup> or instances of abuse<sup>103</sup> are shared amongst thousands of men on social media platforms like Telegram or those cases where false AI-generated and AI-disseminated pornographic content targets and debases women, sometimes as a part of broader shaming online campaigns.<sup>104</sup> There have been, to date, no enforcement actions seeking to force platforms and AI companies to structurally change their policies and design that allow for the massification and increased reach of these instances of gender-based violence. On the contrary, social media platforms and their algorithmic recommender systems<sup>105</sup> are used to engender and perpetuate long-existing patterns of gender-based violence: they promote, especially amongst young men, extremely violent content and ideologies of women hate;<sup>106</sup> and demote or make totally invisible content whereby LGBTQ+ activists and social media users attempt to express their identities and fight discrimination.<sup>107</sup>

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Violence in Social Media’ (2017) 11 Proceedings of the International AAAI Conference on Web and Social Media 52.

<sup>99</sup> Sally Broughton Micova, ‘Evaluating Systemic Risk Management under the DSA’ (*CERRE*, 6 December 2024) <<https://cerre.eu/news/evaluating-systemic-risk-management-under-the-dsa/>> accessed 6 December 2024; ‘Evaluating the First Systemic Risk and Audit Reports under the Digital Services Act’ <<https://open.spotify.com/episode/1SluZGXL7uEqT2yvGCEp5h?si=bfd121e878304c20>> accessed 3 March 2025, at minute 5:40, 7:15, and 11:05; Griffin, ‘Procedural Fetishism in the Digital Services Act’ (n 83) 26–33.

<sup>100</sup> European Commission, Directorate-General for Communications Networks, ‘Digital Services Act: Application of the Risk Management Framework to Russian Disinformation Campaigns’ (Publications Office of the European Union 2023) <<https://data.europa.eu/doi/10.2759/764631>> accessed 15 February 2024; ‘Call for Evidence for an Initiative: Digital Services Act - Guidelines to Enforce the Protection of Minors Online’ (*European Commission*, 25 September 2024) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14352-Protection-of-minors-guidelines\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14352-Protection-of-minors-guidelines_en)> accessed 25 September 2024; Griffin, ‘What Do We Talk about When We Talk about Risk?’ (n 43).

<sup>101</sup> Judah (n 1) 166–181.

<sup>102</sup> E.g., Semenzin and Bainotti (n 39).

<sup>103</sup> E.g., ‘Adolescente violada por grupo em Loures. Três jovens entre os 17 e os 19 anos detidos. Crimes foram filmados e divulgados nas redes sociais’ [Author’s translation: ‘Teenager raped by group Loures. Three youngsters between 17 and 19 years old detained. Crimes were filmed and shared on social media’] (*CNN Portugal*) <<https://cnnportugal.iol.pt/violacao/loures/jovem-de-16-anos-violada-por-grupo-em-loures-tres-rapazes-entre-os-17-e-os-19-anos-detidos/20250327/67e5102bd34e3f0bae9c2b70>> accessed 31 March 2025.

<sup>104</sup> European Commission, Directorate-General for Communications Networks (n 100) 30; Dexter Ramirez Andrada Christian, ‘70 Deepfake Statistics You Need To Know (2024)’ (*Spiralytics*, 26 September 2024) <<https://www.spiralytics.com/blog/deepfake-statistics/>> accessed 6 December 2024; Gretchen Peters, ‘Time to Act on Harmful Deepfakes & Algorithms’ (*Tech Policy Press*, 31 October 2024) <<https://techpolicy.press/time-to-act-on-harmful-deepfakes-algorithms>> accessed 20 November 2024.

<sup>105</sup> These are fully or partially algorithmically driven systems “used by an online platform to suggest” and/or prioritise specific information “in its online interface”.

<sup>106</sup> Patton, Eschmann and Butler (n 98); Anda Iulia Solea and Lisa Sugiura, ‘Mainstreaming the Blackpill: Understanding the Incel Community on TikTok’ (2023) 29 *European Journal on Criminal Policy and Research* 311.

<sup>107</sup> Griffin, ‘Procedural Fetishism in the Digital Services Act’ (n 83) 16–17.

#### 4. It's about people, not tech

What is common to all the above-described lived experiences is their effect: tech-mediated dehumanisation and alienation of people from the societies they exist in. It is not that all harms described above are new: in some cases, technology amplifies the magnitude of problems that pre-existed it, contributing to the structural conditions that produce such harms – think, for example, of violence against women. In any case, all of this is treated under EU law as inevitable collateral damage of the ever-greater and ever-faster introduction and circulation of tech within the internal market.

In this sense, I wish to make four main concluding claims. Firstly, contrary to what many claim, it is false that EU regulation is very constraining of tech development.<sup>108</sup> It is not. It creates a big compliance apparatus that legitimises and does not question ever greater and faster introduction of technologies in our lives despite the harms that they presently create. Secondly, EU tech law is, like most or maybe even all tech law, misguidedly structured by reference to the future, failing to fully engage with the everyday presence and very tangible negative effects that certain tech uses are already producing. Thirdly, and fundamentally, EU tech law worries little about people beyond their existence as consumers: it is more worried about making European consumers trust tech than about holding their developers and deployers accountable for already existing forms of tech-mediated injustice suffered by several individuals and communities in Europe. In this sense, EU law does not fully see, and therefore, epistemically excludes these lived experiences of tech harm from the regulatory dialogue. And a polity that does not see and recognise all lived realities within it, and especially those which are not hegemonic, is a polity which ultimately fails at a deeper, moral, even constitutional level.<sup>109</sup>

Finally, I claim that all these deeply political choices shaping tech regulation are, through the grammar of risk, communicated as if they were merely technical.<sup>110</sup> The harms one ignores and therefore accepts are the rational outcome of a balancing exercise. To such technical balancing exercise that fails to fully see the other, EU law attaches a value of compliance. EU law chooses a language of balance and risk over other possible ones, namely one of permanent contestation of how tech is produced, regulated and introduced in Europeans' lives.

It is in this sense that I consider that there are deeper political (constitutional even) questions to be asked: should tech law focus on the future or the everyday present of tech? And, speaking of the present, what type of reality do we want? One where technology serves ever faster free movement and ever greater growth in the name of rational progress and happiness? One of absolute technological efficiency of consumption processes - at the expense of workers - and of public administrations – at the expense of totalising people surveillance? Or do we want less tech? Do we want a reality of selective capabilities, where people and communities can choose when they want more tech or less tech? Can we have a reality where spaces for contestation are opened, and people are given the space to resist and say no to tech and progress where that either does not serve or actively harms them?<sup>111</sup> Or any other ways of introducing and regulating tech while fully accounting for its presence in societies?

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<sup>108</sup> For a similar argument, see Bradford (n 27).

<sup>109</sup> Similar arguments of a moral commitment of polities (and even law) to the full recognition of their subjects can be found in different strands of critical theory, such as Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Polity 2008) 144–147; Kysar (n 18) 223, 237–245, arguing that moral responsibility to the lived and yet-to-be lived realities of 'the other' should be a normative orientation of liberal constitutionalism; Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711, 717; Emiliós Christodoulidis, Ruth Dukes and Marco Goldoni, *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019) 24–25.

<sup>110</sup> Kaminski (n 44) 1397; Griffin, 'What Do We Talk about When We Talk about Risk?' (n 43).

<sup>111</sup> For example, McQuillan (n 88).

*The Law of the Everyday.  
An inquiry into the legal fabrics of European lives*

Whatever one answers to these questions would dictate EU law's approach to tech. The problem of EU tech law is, I am afraid, a democratic one: we are not even asked or allowed to ask those questions. In other words, our problem is one of imagination: EU law moves forward, unincumbered by those who may want different presents (and futures) for tech.

# Illness in Europe: A Caring Contribution to the Law of the Everyday

by Sarah Glaser\*

## 1. Introduction: EU Law by the logic of life, day after day

*Europe, The Way we Live Now* is a book of hardship. It is punctured by the kind of personal implosions and brutalities that cut through the everyday while a person is alive. It closes on Sheila O'Kneefe's epitaph: Sheila O'Kneefe, 7<sup>th</sup> of February 1973 – 6<sup>th</sup> of February 2023. Hers is the story of a fight against cancer. She is, in her own words, not an old woman. Initially portrayed as a fit young mother her chapter starts on an energetic day where the shivers start. She descends into sickness within a couple of pages. Her path through medical institutions sees her misdiagnosed at first, then informed that she suffers from colon cancer. In rapid succession, she undergoes a first surgery, followed with another five interventions, the cancer has spread to her liver, then to her lungs. There comes a point where we know the sickness is terminal. Sheila O'Kneefe will die in palliative care and knows it. She is stable until she won't be. Her Chapter, *Castletownroche*, contains a philosophy. There is a counter-logic to Sheila O'Kneefe's progressive enrollment into medical care. Her daughter is two years old at the beginning of the story, thirteen at the end. Seeing her grow up marked, in the mother's account, the milestones of her life. This is life by a very different measure than "years left to live", periods of stabilization, the suspense of good or bad news. The medical development of the cancer is contradicted by life paced by the growing up of a child, a reality no less material for being human. There is a great deal of dignity in Sheila O'Kneefe's account of how she entered into the kind of resistance that recentered her life around the everyday<sup>1</sup>. The everyday suggests a continuity beyond chronological unfolding of event; maintaining its fragile thread requires work, attention and a commitment to keep life livable<sup>2</sup>. By this account, life is relational and constitutive of the self; it complements a definition of life as opposed to death with a notion of life as resisting the unlivable<sup>3</sup>. In this understanding, care describes an individual path.

When apprehended through law, however, the *collective* side of the continuous protection of everyday life comes to light. The *European Union law of the everyday* can in this regard be understood as the normativity that intervenes in building the collective conditions of care for maintaining people's lives livable. It raises the question: how does EU law intervene on the material conditions of lived lives? Instead of treating European law as a legal order which emancipates individuals into a European society, meeting people in Europe with care places the law in an altogether different position. From the vantage point of the continuous thread of everyday life, EU law intervenes in a scattered way. The coherence of institutional accounts of personhood and European society cede the way to human trajectories pathed by discontinuous, unexpected, more or less visible interventions of EU law.

Such a change in point of view readies a two-fold analytical ground in EU law: the study of the legal infrastructure everyday life can rely on safely – finds its reverse side in the description of legal threats to care. Such threats lead us on the everyday itinerary of a conceptual clarification: hardship in "the way we live now" depicted in Ben Judah's Book makes, by contrast, the meaning of care come to light (2). Hardship has a long tradition of being associated to alienation in the political thought of capitalist labor extraction (3). Exploitation,

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<sup>1</sup> JUDAH Ben, *This is Europe : The Way we Live Now*, Dublin, Picador, 2023, p. 480-497.

<sup>2</sup> For clarification on the notion of « livable lives » see the conversation between Judith Butler and Frédéric Worms BUTLER Judith et WORMS Frédéric, *Le vivable et l'invivable: une conversation à l'initiative d'Arto Charpentier et Laure Barillas*, Paris, Presses universitaires de France, coll. « Questions de soin », 2021.

<sup>3</sup> WORMS Frédéric, « Pour un vitalisme critique », *Revue Esprit*, n° 411, janvier 2015, p. 15-29.

however, finds another opposite in the notion of “carelessness” when apprehended in the private, personal, low-key ways everyday life struggles to sustain itself (4). Beyond exploitation, other threats suggest yet another system of opposites to clarify the meaning of care: collective expressions of resentment could be traced back to forms of neglect for everyday struggles EU law simply fails to see (5).

## 2. Hardship in Europe, the way we live now

*Europe, The Way we Live Now* is punctured by the kind of personal implosions and brutalities that cut through the everyday while a person is alive. A Turkish student who suffers several miscarriages describes herself as “a walking cementary” (*Istambul*)<sup>4</sup>. A hotelkeeper in *Norrköping* can’t bear to lose her mother and regresses into living with the ghosts of her past, rather than the unsatisfactory romantic encounters of her present<sup>5</sup>. An Amazon delivery driver’s wife is so traumatized by her flight from Syria that she suffers debilitating depressions<sup>6</sup>. The lorry driver sees the accident coming<sup>7</sup>. Brico’s story is the most brutal one of all (*Briançon*). “*I was living like a man should live in Abidjan*” in the beginning, but the escape leads through a Libyan refugee camp, where he is forced to witness his wife’s rape before losing her trail. “That was when he felt it: what it feels to be nothing”<sup>8</sup>.

The switch from direct speech to third person narration fails to do the case justice. The weaving of hope into pathos, of a person’s own *italic* voice into straight narration seems, at junctures like this, inadequate to render the severance of a livable life. In the failure to translate the breaking of a person into a true disruption of the story’s flow lies perhaps the greatest limitation of Ben Judah’s compelling portrayals of *The Way we Live Now*. Too easy to work, the switch from the first-person narration to the narrator’s secondment in a moment where that person has been alienated beyond self-assertion, is evocative, by contrast, of how far literature can penetrate brutality at the cost of its own shattering. Jean Améry’s account of his torture at Fort Breendonck in nazi captivity before being deported to Auschwitz contains the same switch between first-person testimony and theoretical moments, still conducted by Améry, who approaches his own experience of the structures of brutal power by means of a different writing. The truth about torture cannot be conveyed by a coherent voice alone, as it tears a person apart. He expresses a loss of hope that anyone will come to his rescue, while he is tortured *to no end* (a particularity, according to Améry, of the nazi regime). The breaking of a body marks the abandonment of all human attachment, personal or collective<sup>9</sup>.

A continent of fear, loneliness and disconnection is nevertheless revealed in *This is Europe*. Illness is but one way to touch upon the human being’s fragility. Torture, madness, the inability to grieve, *the grinding of a body*. Some experiences threaten the fundamental relationships that carry the self, whether they are relationships of love, friendship, work or cultural ties. Rather than perceive dependency as a weakness, it describes anybody’s reliance on relations constitutive of the subjective development, life and survival<sup>10</sup>. EU law plays a part in shaping the material conditions that either protect or fragilize vital interdependencies. I would like to call the protection of all elements that sustain the daily continuity of a livable life *care*. Thus understood, care has to opposites which pose different threats to a livable life. *Exploitation*

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<sup>4</sup> JUDAH Ben, *op. cit.*, p. 38-59.

<sup>5</sup> *Ibid.*, p. 440-458.

<sup>6</sup> *Ibid.*, p. 264-282.

<sup>7</sup> *Ibid.*, p. 16-37.

<sup>8</sup> *Ibid.*, p. 229.

<sup>9</sup> AMÉRY Jean, *At the Mind's Limits : Contemplations by a Survivor of Auschwitz and Its Realities*. Trans. Sidney and Stella Rosenfeld, Bloomington, Indiana University Press, 1980.

<sup>10</sup> See BUTLER Judith and WORMS Frédéric, *The Livable and the Unlivable*, New York, Fordham University Press, 2023.

menaces the continuity of the everyday by making livelihoods more precarious. Here the law intervenes to build material conditions that either support care or expose to alienation.

### 3. Care and exploitation

There is one evident system of opposites: care is resistance to exploitation. *Exploitation* contains a polysemy which is very palpable in the Lorry driver's story<sup>11</sup>.

On one hand it is an exemplary tale of labor exploitation. In its best theorized, Marxist, understanding, exploitation describes labor extraction on which capitalistic production relies: the higher the surplus gained by the owner of capital the greater the difference between the price of the good a worker produces and his capacity to afford it on his wage. The deterioration of a worker's very capacity to work in the process is the sign of his exploitation<sup>12</sup>. The technological device made mandatory by European regulation to track the lorry driver's time and resting periods achieves, in the view of the workers, little than just make alienation safer<sup>13</sup>. Exhaustion of labor force is met by Critical theory with aspirations for emancipation<sup>14</sup>.

However, the tale contains another layer of understanding when paying attention to the way the lorry driver *phrases* his story. He expresses his worry for his wife's safety and his own. It is palpable that they see the accident coming. "*He'd think of the husband and wife crew that had been driving near Mulhouse. They'd been working shifts. Right after the husband took the wheele something failed. Something was worn out. Exhausted. Not working anymore (...) The wife died on impact*". A precarious, exhausted world failed them. While in a Marxist theory of labor extraction, we could expect the human being to be described in reified terms, the lorry driver's story displaces that expectation. Instead, it is the material world which is humanized in a terrible, brutal way as if to stress the worker's relationship to an unreliable surrounding.

When put in opposition to *care* rather than *emancipation*, exploitation carries an existential meaning which is only implicit in theories of value extraction. Exploitation then describes threats posed to the continuity of a shared daily life between partners in life and work, as dependencies towards their surrounding run the danger of failing them.

### 4. Pulling trough fragile bodies in Hatvan (Hungary)

*Hatvan*, a town in Hungary, offers an analytical ground for the way EU law participates in setting the conditions of care and exploitation. There is a Lidl supermarket in Hatvan, where Szilvia works and, one day, finds love. She falls pregnant very unexpectedly (as her partner suffers from fertility problems) during the early covid pandemic. Her infection leads to her hospitalization, where she is put in a weeks-long coma. A c-section is performed, and her child is born healthy. In a poignant scene, she wakes up, regains progressive consciousness and realizes she has given birth but cannot see her baby because of covid-guidelines in the hospital<sup>15</sup>.

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<sup>11</sup> JUDAH Ben, *op. cit.*, p. 16-37.

<sup>12</sup> Karl Marx develops his theory of alienation explicitly in the *Economic and Philosophic Manuscripts of 1844* (*Paris Manuscripts*).

<sup>13</sup> Regulation (EU) 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Council Regulation (EEC) 3821/85 on recording equipment in road transport and amending Regulation (EC) 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport Text with EEA relevance, OJ L 60, 28.2.2014, pp. 1–33.

<sup>14</sup> HORKHEIMER Max, "Traditional and Critical Theory", Matthew O'Connell (trans.), in *Max Horkheimer, Critical Theory: Selected Essays*, New York, Continuum, 1972, p. 188–243, (originally published in 1937).

<sup>15</sup> JUDAH Ben, *op. cit.*, p. 325-343.

On first glance, this situation evades EU law. At least, in the European socio-legal order's self-understanding as vector of individual emancipation Szilvia's story isn't evocative of personhood endowed with subjective rights granted by EU law<sup>16</sup>. A Hungarian woman seeks medical attention in Hungary. The setting is purely internal and therefore doesn't involve social security coordination for patients who seek treatment in other member states<sup>17</sup>. It also doesn't imply freedom of movement. As for matters relating to the administration and organization of the hospital, they fall largely outside of the scope of European legislative competence<sup>18</sup>, as do the covid-guidelines (the only form of normativity mentioned). No individual rights of European crafting, limited European competence, no application of EU regulations – there seems little to work with in terms of European doctrines of integration and society building. *And yet...* EU law participates in establishing the conditions of care and exploitation which applies to Szilvia's life. It plays a part in having made her world both at the same (critical) time more precarious and more protective.

The precarity is given by her working conditions at the Lidl supermarket. The hard physical conditions ("she would bend down and pick up those boxes too until her back ached and her hands were sore") in what is described as an automated entity ("*Da-da-dam. Cashier manager required*")<sup>19</sup>. During the covid-pandemic, she turns into an essential worker in an exposed, air-conditioned place, which is representative of EU market integration. Indeed, Lidl has a name-sake case-law, which spans from the removal of double taxation for groups with establishments across the EU (C-414/06), to advertisement rules (C-356/04) and consumer protection (C-134/15 on price labelling regulation)<sup>20</sup>. Lidl is a European company not merely in terms of business expansion, but also in so far as its dealings with national administrations has led to case law clarifying the very meaning of European market regulation. Just as the lorry drivers (*Baloga*), Szilvia is not merely vulnerable as *any body* would be, but made more vulnerable to exhaustion, sickness, accidents, and the kind of experiences susceptible of cutting through the thread of a daily life.

Care on the other hand is delivered to Szilvia in the hospital, that appears as the counter-institution to Lidl in her depiction of life and survival in Hatvan. While the supermarket made conditions of her survival more precarious, easy access to hospital proved vital to carry both the mother and the unborn child through the pandemic. The hospital is the scene of the greatest subjectively felt distress due to the covid-guidelines that would isolate Szilvia from her newborn; while at the same time it is arguably also the structure that has assumed care for the continuity of fundamental relationships that constitute her family.

EU law relates to hospitals in an ambivalent way: on one hand they are important consumers and producers of pharmaceuticals and medical technologies which justifies treating them as market players and subjecting them to competition regulation; on the other hand, hospitals carry out a public service and stand for the accomplishment of social solidarity within European States. Hospitals, therefore, crystallize a typical market/non-market polarity doubled with a national/European tension in the relationship between European integration and the national welfare State.

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<sup>16</sup> For critical studies on the construction of personhood and emancipatory aspirations of the individual in EU law see AZOULAI Loïc, BARBOU DES PLACES Ségolène et PATAUT Étienne (dir.), *Constructing the Person in EU Law : Rights, Roles, Identities*, Portland, Hart Publishing, 2016.

<sup>17</sup> Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, p. 45–65.

<sup>18</sup> Article 168 TFEU.

<sup>19</sup> JUDAH Ben, *This is Europe : The Way we Live Now*, op. cit., p. 325.

<sup>20</sup> Judgment of 15 May 2008, *Lidl Belgium*, C-414/06, ECLI:EU:C:2008:278; Judgment of 19 September 2006, *Lidl Belgium*, C-356/04, ECLI:EU:C:2006:585; Judgment of 30 June 2016, *Lidl*, C-134/15, ECLI:EU:C:2016:498.

During the pandemic however, hospitals became the touchstone of a significant evolution of European doctrine relating to public service. The change is tangible in recommendations issued by the *European Semester*, initially established in the wake of the financial crisis as an economic and fiscal governance tool to control budgetary compliance. In its country-specific recommendation for Hungary during the pandemic the focus shifts from reforms needed to decrease public expenditure to the kind of public expenditure needed to meet the population's needs for health care. The Commission's country report contains an account of unequal access to health care in Hungary, stressing, in particular, the lack of infrastructure marginalizing of remote parts of the country, exclusions that make elderly people more vulnerable and structural discriminations against Roma and Sinti<sup>21</sup>. The precarities identified in the access to public health services translate, in Hungary's recovery plan within the *NextGenerationEU* program, into a share of over 10% of 6,512 million € of European grants allocated to improving the health care system<sup>22</sup>. The approved recovery plan comprises investments in the modernization, logistics, payment methods, equipment and infrastructure for hospitals. It also finances the digital improvement of health care services (such as a telemedical platform or an enhanced IT security systems for clinics), a remote health monitoring system for the elderly and the development of primary health care networks across the country<sup>23</sup>. Those measures speak of a deep change in the way the EU relates to public health service. Rather than making loans conditional upon reforms directed towards cuts in public expenditure, the program invests non-refundable grants directly into national circuits of solidarity, strengthening their material infrastructure and reach. Somewhat overshadowed by debates on making recovery-funds for Hungary conditional upon respect for European values a more quiet and yet very significant change of European practices affects daily life in the Hungarian town of Hatvan. EU law has substantiated its definition of public health, not merely by improving or using its competence for a "European Health Union"<sup>24</sup>, but by committing to improving the domestic collective structures, that protect lives against isolation from dependable care.

European Union law is deeply invested in multiple layers of building the ground for everyday life. It pierces through to the purely domestic experience of the pandemic in a small Hungarian town. European normativity plays an ambivalent role in setting up material conditions for care or exploitation.

By apprehending exploitation with care, a dimension of hardship induced by alienating working and living conditions comes to light: the exposure to disruptions in the continuity of relational entanglements capable of carrying the self through life.

## 5. Care and neglect

*This is Europe* is a book of hardship. There is no doubt about the actual violence of the experiences, be it violent ills, violence inflicted by other humans, by institutions, the violence of despair and trauma. Throughout their difficult trajectories Europe's protagonists *retain* and seem sometimes even able to *reclaim* their health, their dignity, their aspirations. If care is a continuous effort to keep from annihilation what cannot be repaired, the protagonists of Ben

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<sup>21</sup> Country Report Hungary 2020 Accompanying the document Communication from the Commission to the European Parliament, the European Council, the European Central Bank and the Eurogroup 2020 « European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011 », SWD (2020) 516 final.

<sup>22</sup> Proposal for a Council implementing decision amending implementing decision (EU) of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, COM (2023) 748 final.

<sup>23</sup> Annex to the Council implementing decision amending Implementing Decision of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, ST 15964 (2023) ADD 1, p. 88-89.

<sup>24</sup> Advertized in President von der Leyen's State of the Union Address: charting the course out of the coronavirus crisis and into the future, Brussels, 16 September 2020.

Judah's book are exceptionally true to character. There is, however, a menace to the care of a life that Judah's Book fails to capture.

The depiction of Covid is interesting in this regard: the essential worker who falls very ill of the coronavirus (Hatvan), has her symmetrical opposite in a stewardess who is pinned to the ground and locked down. The story of illness in a domestic setting echoes the story of isolating distress in the most mobile of person's life. In both cases the hardship is real. By contrast, missing from edifying tales of the book is the person who has perceived the European covid-vaccine roll-out as an attack against her bodily integrity. That person's experience too tells an exemplary story of individual and collective struggles that rock the way we live now. We also look in vain for the nurse whose experience it is that her work conditions have deteriorated, not improved, by automizing patient paths through medical treatment<sup>25</sup>. Absent too is the menopausal woman who has seen a doctor roll his eyes once too often at her ills and has been left to "do her own research". Those stories are too easily be discredited as those characters bear an ambiguity that contradicts clear victimhood.

Those are all situations invested by EU law: a jurisprudence of vaccine hesitancy has clustered in European case law<sup>26</sup>; the EU has been critical in funding the modernization of medical infrastructure through its funding programs for innovation and digitalizing healthcare<sup>27</sup>; the European bioeconomy present itself as aware of inequalities and intent of promoting women's health<sup>28</sup>. There seems to be a disconnect between lived experiences of care, however ill-perceived, and European efforts to build and optimize health care.

The untold stories of uncertain hardship in *This is Europe: The Way we Live Now* could compound a book of their own: *Is this Europe? The fears we bear now*. The very same struggles are ignored by EU law and, it seems, for the same reasons: the reality of the hardship can be called into question by expert authority. In those cases, there is a menace to *care* of people's everyday life stemming, not so much from actively institutionalizing exploitative power-relationships, as from ignoring unsettling situations. *Careful Europe* carries a warning. It calls out the construction of a legal order for its specific way to recognize some realities and neglect others. The fears and sense of disconnection harbored by being left out of what European normativity sustains, encourages, protects and take responsibility for present the risk of turning into expressions of resentment<sup>29</sup>. Carelessness by neglect would then describe an attitude that fails to recognize expressions of distress as it knowingly dismisses them as misdirected.

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<sup>25</sup> For a personal account of this ambiguity, see SNYDER Timothy, *Our Malady: Lessons in Liberty from a Hospital Diary*, New York, Crown, 2020.

<sup>26</sup> See for example the judgement of 27 avril 2022, *Roos and others*, affaires jointes T-710/21, T-722/21 et T-723/21, ECLI:EU:T:2022:262 and the order of April 29, 2022, *Abenante and Others v. Council and Parliament*, T-527/21, ECLI:EU:T:2022:278. Consider especially the application lodged on August 30, 2021, *Abenante and Others v. Council and Parliament*, T-527/21. On the other hand the judgement of 17 July 2024, *Auken and others*, T-689/21, ECLI:EU:T:2024:476. and judgement of 17 July 2024, *Fabien Courtois and others*, T-761/21, ECLI:EU:T:2024:477. don't display the same vaccine hesitant attitudes in spite of questioning the European vaccine strategy.

<sup>27</sup> The digitalization of health care (e-health, digital health services and patient paths automatization) is one of the focus points for the allocation of funds in the Resilience and Recovery Facility (one of the main financing instruments of the NextGenerationEU program). Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, pp. 17–75.

<sup>28</sup> For an overview of the investment of research funding into women's health see ([https://research-and-innovation.ec.europa.eu/research-area/health/womens-health\\_en#:~:text=The%20EU%20is%20actively%20funding,drive%20advancements%20in%20personalised%20medicine](https://research-and-innovation.ec.europa.eu/research-area/health/womens-health_en#:~:text=The%20EU%20is%20actively%20funding,drive%20advancements%20in%20personalised%20medicine)).

<sup>29</sup> For a philosophical and psychological exploration of today's collective resentment, see FLEURY Cynthia, *Here Lies Bitterness: Healing from Resentment*, (Translated by Cory Stockwell), Cambridge, Polity Press, 2023.

The project to reconnect EU law with people's everyday lives is meant to regain neglected ground and, thus, rebuild public trust. It describes a European reckoning with conflictual social realities, which the law struggles to hear or to see. In Loïc Azoulay's description, the European legal order as it has been built over the past decades entertains a sense of disconnection: "what is striking now is that this has made us somewhat blind to the crises of the everyday in domestic societies. These crises manifest today in a number of ways, from disagreement to protest, from disillusion to collective resentment, from a form of dispossession to a sense of alienation. How to reconnect EU law with the real society, its actual practices, beliefs and needs? How to recover the continuity with the genuine experiences of ordinary people, willing to re-establish local communities and prone to de-institutionalizing Europe whilst, on the other hand, not compromising the transnational and emancipatory sense of the European project?"<sup>30</sup>. The most constant feature of this depiction is the deployment of the lexical field expressing the endeavor to make visible what is hidden ("has made us somewhat blind", "the crisis manifests", "we have made ourselves unaware", "open our eyes", "what we need is a critical look from inside"<sup>31</sup>).

There is an unsettling part to taking *some* neglected realities seriously in EU law. While there is no objection to questioning the causes of *true* hardship by asking whether EU law intervenes on daily life by making it more precarious, other parts of the growingly audible collective anger directed against the EU seems symptomatic for regressive, even destructive expressions of anger. The first difficulty lies in distinguishing real and misdirected perceptions of hardship. This epistemological problem leads EU law into another normative crucible: how to deal with social and democratic crises arising from unfounded fears – *true* fears, which we know for certain rely on *false* facts and perceptions? To take illness as a prototypical example: Vaccine defiance for instance, has been met with institutional effort to combat misinformation with information<sup>32</sup> and by easy dismissals of claims brought before European jurisdictions<sup>33</sup>. The judges would typically rectify the instrumentalization of scientific expertise and uphold procedural clarity leading to the recurrent dismissal of actions, which assumes that the EU exercises a covert vaccine mandate, implicit in the European vaccine strategy<sup>34</sup> and the design of the European covid-passport<sup>35</sup>. Paradoxically, EU lawmakers and judges alike risk further polarizing European societies as they rightfully direct people back to expert authority. Indeed, health-care related fears aren't simply the expression of errors that call for correction, however ill-founded: by taking them seriously we could venture the hypothesis that such fears express acute suspicions about whether the EU guarantees that scientific research, industrial

<sup>30</sup> AZOULAI Loïc, « The Law of European Society », *Common Market Law Review*, n° 59, special issue, 2022, p. 203-214, p. 206.

<sup>31</sup> *Ibid.*, p. 206-207.

<sup>32</sup> The initial model was given by WHO, « Coronavirus disease (COVID-19) advice for the public : Mythbusters », who.int, 19 January 2022 ; the Commission followed this lead by setting up an EU platform : « Tackling Covid-19 Disinformation – Getting the Facts Right », JOIN (2020) 8 final. Furthermore the Commission issued « Guidance on Strengthening the Code of Practice on Disinformation », COM (2021) 262 final.

<sup>33</sup> Most vaccine grievances fail on procedural grounds. Both the action for annulment brought against the vaccine passport, and the challenge to the regulation facilitating the use of GMOs in clinical trials for "messenger RNA" vaccines fail to satisfy the conditions for bringing an action against Union legislative acts, and result in dismissal orders (Order of September 27, 2021, *CNMSE and others v. Parliament and Council*, T-633/20, ECLI:EU:T:2021:678.). In addition, the ECJ recurrently encounters the argument that the EU establishes a vaccine obligation by recalling the scope of application of Union law, which excludes public health decision such as making vaccines compulsory (Union law does not regulate questions of vaccination obligation that belong to the States, see Order of July 17, 2014, *Široká, C-459/13*, ECLI:EU:C:2014:2120. See the reiterations in Order of 29 April 2022, *Abenante and Others v. Council and Parliament*, T-527/21, ECLI:EU:T:2022:278, paragraphs 22-23; Judgment of 17 July 2024, *Fabien Courtois and Others*, T-761/21, ECLI:EU:T:2024:477, paragraph 210.).

<sup>34</sup> « EU Strategy for COVID-19 vaccines », COM (2020) 245 final.

<sup>35</sup> Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ L 211, 15.6.2021, p. 1–22.

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production and health policies - for which it provides a legal infrastructure - are truly directed towards care. In other words, does the EU build reliable conditions for our dependencies or do “the dependent” risk the continuity of their livable lives for the fulfillment of interests devoid of care? The challenge for the European lawmaker as well as for the judges consists in taking the fear seriously without granting fallacious or heinous claims legal legitimacy. Care, in the practice of EU law, is no automatic legal endowment; it is simply a way to recognize realities that require work.

# At the Edge of the Col de l'Échelle: Migration and the Meaning of Borders in Europe

by Vittoria Becci\*, Clara Muller\*\* and Hubert Sitnik\*\*\*

## 1. Introduction

Ben Judah's 'This is Europe: The Way We Live Now' offers different perspectives on the meaning of borders, migration, and humanitarianism in contemporary Europe. 'Le Col de l'Échelle' is one of the many stories included in the book, where the author conjures the following vignette: Simone, a rescuer from Turin, is dispatched, for the first time, to the titular mountain pass as high as 1762 metres situated at the French-Italian border. As he arrives there, he encounters a group of African men who attempt to make their way to France under extreme conditions: through the snow and freezing cold. Their encounter in the mountains is symptomatic of migrants' condition in the EU, highlighting the political and legal dimensions this natural border has acquired in recent years. Through Simone's story, we enter the everyday of his experience with the material and legal space of the border. From the intimate consciousness of "his" places, we observe how this intimacy changes into a legal consciousness that leads to a more complex, critical, and – we suggest – colonial understanding of the border. Ultimately, in this article, we turn the story into a case study, focusing on the legal, geographical, and colonial dimensions of the French-Italian border. They are not isolated from each other: rather, the geographical and the colonial border are critical lenses through which the categories of the legal border can be questioned.

## 2. The legal border

### Mobility-enabling and mobility-blocking statuses under EU law

Simone observes: *'It was almost like there were two categories of human beings, he thought. Those that could, and those that couldn't'*.<sup>1</sup> This affirmation is reflected in legal reality: one's ability to cross the Union's internal borders is conditioned by one's legal status. Legal categories created by EU law, such as Union citizen or asylum seeker, shape one's ability to move.

As a national of a Member State, Simone benefits from Union citizenship and the rights associated with this status, most importantly, the right to free movement under Article 21 TFEU.<sup>2</sup> Hence, for Simone, the border does not materialise legally: its crossing has no legal consequence as he keeps his rights under EU law intact. EU citizenship law, thus, enables its subjects to move across borders without even being aware of them.

In contrast, the legal regime applicable to African men – *'refugees, or something like that'*<sup>3</sup> – who attempt to cross the French-Italian border is generally considered to act as a barrier to the movement within the EU. Applicants for international protection do not benefit from the free movement.<sup>4</sup> The Asylum Procedure Directive only allows their presence in the Member State's territory 'for the sole purpose of the procedure'.<sup>5</sup> Explicitly falling short of entitlement

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<sup>1</sup> Judah (n1), 211.

<sup>2</sup> Consolidated version of the Treaty on the Functioning of the European Union 2012 art 21(1).

<sup>3</sup> Judah (n1), 201.

<sup>4</sup> Daniel Thym, *European Migration Law* (1st edn, Oxford University Press 2023) 318.

<sup>5</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) 2013 art 9(1).

to a residence permit,<sup>6</sup> the right to remain excludes the possibility of legal mobility within the EU.<sup>7</sup>

This prohibition is supported by the Dublin III Regulation, which outlines the obligations of a Member State responsible for examining an application for international protection and sets forth criteria for determining this responsibility.<sup>8</sup> Accordingly, the responsible Member State must ‘take charge [...] of the applicant who has lodged an application in a different [one]’<sup>9</sup> and take back an applicant who has made a new application in another Member State, regardless of whether they had first withdrawn their application, or whose application has been rejected, or who is in another Member State without a residence document.<sup>10</sup> Although responsibility lies primarily with the Member State where the applicant’s family legally resides, and secondarily with the one where the applicant has been issued a valid residence document,<sup>11</sup> the first-entry rule takes precedence in practice.<sup>12</sup> This is because Member States ‘are more likely to accept evidence from Eurodac or Visa Information System than evidence on family units’.<sup>13</sup> Thus, the application of the Regulation impedes the movement of asylum seekers within the EU.

The mobility of the beneficiaries of international protection is also circumscribed, although in a different manner.<sup>14</sup> The Qualification Directive only entitles them to free movement within the relevant Member State.<sup>15</sup> Beyond that, as holders of a valid residence permit, they are allowed to move freely within the Schengen Area for a short period not exceeding three months.<sup>16</sup>

Accordingly, the Asylum Procedure Directive, Dublin III Regulation, and the Qualification Directive, and the Schengen Agreement purport to define ‘the permitted spatial range of migrant mobility inside the Union’.<sup>17</sup> As evidenced by the practice at the French-Italian border – ‘*Police at every station and border to catch them*’<sup>18</sup> – the temporary reintroduction of internal

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<sup>6</sup> *ibid.*

<sup>7</sup> Cf The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders art 21.

<sup>8</sup> 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) 2013 ch V and III.

<sup>9</sup> *ibid.* 18(1)(a).

<sup>10</sup> *ibid.* 18(1)(b)-(d).

<sup>11</sup> *ibid.* 12.

<sup>12</sup> Martin Wagner, Jimmy Perumadan and Paul Baumgartner, ‘Secondary Movements’ (2019) 34 CEASEVAL RESEARCH ON THE COMMON EUROPEAN ASYLUM SYSTEM 16

<[http://ceaseval.eu/publications/34\\_SecondaryMovements.pdf](http://ceaseval.eu/publications/34_SecondaryMovements.pdf)> accessed 5 March 2025.

<sup>13</sup> *ibid.*

<sup>14</sup> As holders of a valid residence permit, beneficiaries of international protection are allowed to ‘move freely within the territories of the Contracting Parties for a maximum period of three months’. The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders art 21.

<sup>15</sup> 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) art 33.

<sup>16</sup> The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders art 21.

<sup>17</sup> Silvia Aru, ‘I Had No Idea That Europe Had Internal Borders: Migrants’ “Secondary Movements” before the EU Internal Border Regime’ (2022) 40 *Environment and Planning C: Politics and Space* 1421, 1425.

<sup>18</sup> Judah (n1) 201.

border controls and police checks in border areas can facilitate the enforcement of these restrictions.<sup>19</sup>

Therefore, secondary movements, that is, the unauthorised mobility of asylum seekers and refugees within the EU,<sup>20</sup> are often considered ‘a source of tension between border governance and migrant agency’.<sup>21</sup> However, we suggest that the law plays a more ambiguous role: not only does it impede crossing of the Union’s internal borders irregularly, but it also, under certain circumstances, sanctions it.

Under Dublin III Regulation, the responsibility of a Member State to examine an asylum application based on the first-entry rule ceases ‘12 months after the date on which the irregular border crossing took place’<sup>22</sup> or after a continuous stay in another Member State for at least five months.<sup>23</sup> Moreover, a failure to transfer usually results in an assumption of responsibility by that Member State.<sup>24</sup> Therefore, the Dublin III Regulation itself appears to incentivise secondary movements. If migrants get caught, they are likely to be transferred. If they manage to evade law enforcement, however, they stand a chance of lodging an asylum application in their preferred destination. Importantly, a return decision that can lead to deportation cannot be issued against asylum seekers and refugees.<sup>25</sup> Therefore, ‘the Dubliner “experience” manifests itself as an interplay between legality and illegality, whereby obtaining papers in one country while “illegally” living in another, at the very least, provides a guarantee against deportation “back home”’.<sup>26</sup>

Secondary movements illustrate that EU law makes the migrants’ journeys more complex and fragmented without stopping them.<sup>27</sup> Instead, it directs their movement to the most dangerous crossing points,<sup>28</sup> like le Col de l’Échelle – ‘*They are not allowed to travel freely in Europe. So they’re trying to cross the mountains.*’<sup>29</sup> Thus, the environment itself is ‘produced and mobilized as an active factor in the complex assemblages of border enforcement, giving place to spatialized forms of slow violence’.<sup>30</sup> The migrants’ perseverance, however, demonstrates the failure of the logic animating the EU migration regime, which treats people on the move as objects to be managed rather than subjects capable of decision-making and resistance.<sup>31</sup> These elements are not captured in a classical analysis of law; to be fully understood, they

<sup>19</sup> 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 (Schengen Borders Code) (codification) 2016 arts 25–35 and 23.

<sup>20</sup> ‘Secondary Movement of Migrants - European Commission’ <[https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/secondary-movement-migrants\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/secondary-movement-migrants_en)> accessed 6 March 2025.

<sup>21</sup> Aru (n 18) 1423.

<sup>22</sup> 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) art 13(1).

<sup>23</sup> *ibid.* 13(2).

<sup>24</sup> Thym (n 4) 364.

<sup>25</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals 2008 art 6(2).

<sup>26</sup> Fiorenza Picozza, ‘Dubliners: Unthinking Displacement, Illegality, and Refugeeness within Europe’s Geographies of Asylum’ in Nicholas De Genova (ed), *The Borders of Europe: Autonomy of Migration, Tactics of Bordering* (Duke University Press 2017) 236.

<sup>27</sup> Aru (n 18) 1431.

<sup>28</sup> Polly Pallister-Wilkins, ‘Whitescapes: A Posthumanist Political Ecology of Alpine Migrant (Im)Mobility’ (2022) 92 *Political Geography* 102517.

<sup>29</sup> Judah (n1) 201.

<sup>30</sup> Estela Schindel, ‘Death by “Nature”: The European Border Regime and the Spatial Production of Slow Violence’ (2022) 40 *Environment and Planning C: Politics and Space* 428, 430.

<sup>31</sup> Aru (n 18) 1425.

need to be examined from a spatial perspective, which we will do in the second part of this paper.

### **The Facilitation Directive and the criminalisation of humanitarian assistance**

Just as the movement of refugees and asylum seekers towards France is influenced by EU law, the fact that Simone cannot rescue them without bringing them back to the Italian side of the border is also conditioned by the European legal framework.

Indeed, there is a thin line between the rescue of a humanitarian nature at the border and the definition of facilitation of illegal entry of migrants, which is criminalised under EU law. In that sense, the Facilitation Directive provides in Article 1 that Member States shall take criminal measures against persons who assist third-country nationals in entering their national territory.<sup>32</sup> In principle, under the current regime, Simone would benefit from the humanitarian assistance exception that exists in the Directive.<sup>33</sup> However, in the new proposal for a Facilitation Directive issued in 2023, such a humanitarian exception has been removed and replaced by conditions under which criminal liability can be established: in cases involving a financial benefit or the likelihood of causing serious harm to the person.<sup>34</sup> This generalisation of the criminalisation of assistance in crossing borders is in line with the recent Opinion of Advocate General Richard de la Tour in the *Kinsa* case. He takes the view that criminalisation should apply to 'all acts by which a person knowingly, consciously and deliberately assists in the unauthorised crossing of the border of a Member State fall within the scope of that provision, *irrespective of that person's motives*'.<sup>35</sup>

According to the proposal's preamble, 'it is not the purpose of this Directive to criminalise [...] humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations'.<sup>36</sup> However, removing an express humanitarian assistance exception would create legal uncertainty for humanitarian assistance at the border, especially in establishing that such rescue complies with legal obligations.<sup>37</sup> This is even more so in the context embedded in the multiplication of laws criminalising assistance to migration at the national level.<sup>38</sup>

To avoid the risk of becoming a facilitator of illegal entry under EU law and the criminal law consequences that come with it, rescuers thus adapt their practice and carefully circumscribe their rescue to the territory of a single Member State. After receiving a distress call, Simone and the rescue team swiftly cross the political border - nothing more than a stone post marked with the letters F for France and I for Italy. For them, and despite their snowmobiles, the real challenge is the mountain itself. They know it is '*one of the most dangerous passes*'.<sup>39</sup> However, upon encountering the African men, EU law reconfigures the meanings attached to people and space. The presence of migrants/asylum seekers causes the legal border to

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<sup>32</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence art 1(1).

<sup>33</sup> *ibid.* art 1(2).

<sup>34</sup> Proposal for a Directive laying down minimum rules to prevent and counter the facilitation of unauthorized entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM/2023/755 final.

<sup>35</sup> CJEU, Opinion of Advocate General Richard de la Tour of 7 November 2024 in the *Kinsa* case, case C-460/23, par. 40, emphasis added.

<sup>36</sup> Proposal COM/2023/755 final, preamble par. 7.

<sup>37</sup> The case of Cédric Herrou in France, whose benefit of the humanitarian exception in first instance was denied in appeal, and then finally accepted in last instance, is a perfect example of such legal uncertainty surrounding the application of criminalization of facilitation laws to humanitarian rescuers: Cour de cassation, chambre criminelle, Judgment n° 2923 of 12 December 2018.

<sup>38</sup> See for instance the Italian law n. 286 of 1998, art. 12 of which criminalizes assistance to migrants, or more recently the Hungarian law of 20 June 2018 criminalizing any legal or volunteer help to asylum seekers, refugees and migrants (Act IV of 2018).

<sup>39</sup> Judah (n1) 199.

materialise even for the Union citizens, who risk facilitating irregular migration: ‘*France, they said, we want France. The rescuer shouted back “We can’t take you to France”*’.<sup>40</sup> As a result, the African men choose to carry on: ‘*“We are going to try and make it to France” “Whether you follow us or not”*’.<sup>41</sup> As the rescuers watch them plough through the snow, it becomes evident that humanitarian assistance stops at the border, contributing to ‘the political production of exposure to the elements’.<sup>42</sup>

### 3. The geographical border

#### The geographies of space: law, nature, culture, people

In the legal analysis of the border, the mainstream methodology privileges a doctrinal approach. It is the study of the primary sources, of the textual materials that are at the centre of the analysis. However, as we have seen until now, this method reveals the limits and the tension of law at the border. As already observed, the interplay between legality and illegality demonstrates the alternance of migration law: on the one hand, as a mobility-blocking status, and on the other as a mobility-enabling status. These uncertainties mark some failures of law enforcement in redirecting migrants’ routes without stopping them. This is because the border is not just a text to be studied, but a geographical reality. In this sense, our case study directs the methodology to a spatial analysis of law at the border. Simone’s personal thoughts reveal an intimate, emotional narration of his encounter with the migrants and of his relationship with the mountains. We do know that EU law shapes geographies, for example, by giving meaning to a territory. A mountain is more than a landscape feature; it is a border. For EU citizens, a border means nothing more than a change of language. For them, a border is invisible under Article 21 TFEU. For a third-country national, the fact that a mountain is a border means that that border materialises under the Dublin III Regulation, the Asylum Procedure Directive, and the Qualification Directive. This is one of the many aspects in which law shapes the territory and the border, making it visible or invisible.

However, if law shapes the border space, the actual form of that space remains unchanged. This is easier to understand if we take a map and look at Le Col de l’Echelle. What we see are lines that define, divide, and shape. But these lines do not exist in the reality of space. In that realm, a mountain is a mountain: it has a height, flora, and fauna. It is alive, as landslides and melting glaciers change it.<sup>43</sup>

Moreover, as Simone’s life shows us, a mountain is also a cultural place. Related to this, mountains and their valleys show ways of living, memories, imaginaries beyond the bi-dimensional aspect of that line that we see in a map, or beyond the textual dimension of the law. In this sense, the spatial dimension attends to the geographies of space we just mentioned, showing spatial structures in relation to law as well.

This is clear in our case study where Simone lives his personal understanding of the mountain, and what the realisation of the legal dimension that belongs to “his” mountains reveals to him. However, at the same time, his point of view and the spatial structure he inhabits and knows give the space another meaning, one the law often misses. Legal geography shows how space isn’t a fixed scenario, and how, instead, it influences law as well. In this sense, paying attention to how territories have been formed through material formations – such as geological layers of sediment and rock – also means paying attention to the kind of law this geographical dimension creates. Moreover, the spaces shaped by these laws are reflected in society. How

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<sup>40</sup> *ibid.* 207.

<sup>41</sup> *ibid.* 209.

<sup>42</sup> Schindel (n 31) 430.

<sup>43</sup> Marco Ferreri, Elisa Pasqual, Andrea Bagnato, ‘A Moving Border. *Alpine Cartographie of Climate Change*, Columbia University Press, 2018.

cultural studies and legal consciousness reveal that it is not just about what the law *is*, but about what the law *does*, which affects the perception of law in our everyday lives. Therefore, our spatial analysis uses Simone's story as a vignette to see the border not just as a normative and procedural dimension, but also as a place of political and identitarian struggle, not indifferent to cultural or geological stratifications. This spatial analysis serves as a critical lens to make visible the tensions that law itself fails to resolve at the border.

**The personal narrative: 'Mountains rising over him. That was what made his heartbeat faster every time'**

Territory and geography most often determine our relationships with law, nature, and other people. Therefore, there are places that strongly shape how we understand concepts and dualities such as legality-illegality, wild-urban, nature-human, and us-them. For Simone, volunteering for the Piedmont rescue crew for years, the mountains are not just a line on the map; there is more: *'Mountains rising over him, wrapped in thick woods; blackish, brown and green, like the hair on an enormous animal. That was what made his heart beat faster every time.'*<sup>44</sup>

Simone's geography comes from his everyday experience, from how he feels in relation to a place. Mountains for him are many things; they are beautiful but dangerous, they are ordinary but exceptional, and they are witness to time passing by. Talking about le Col de l'Echelle, he would say:

One of those places you really felt it: how many centuries had passed through the Alps. Hannibal's elephants. Lost Napoleonic soldiers. Smugglers in between the wars. Like a fly in the amber, that past was even in its name – il Colle della Scala, or le Col de l'Echelle. In both Italian or French: the Pass of the Ladder.<sup>45</sup>

Leaning on this last passage, the linguistic nuance does not go unnoticed. It is not just *le Col de l'Echelle*, but also *Il Colle della Scala* because the Alps have indeed many "faces". This is because mountains are natural borders. Mountains become, in this sense, border symbols, like other symbols we find in space to orient us in the geography of places, such as signs, gates, different paint colours, and walls. Therefore, they also define sovereignty, powers, and competences. Mountains, thus, are a symbol of different geographies: there is a more intimate geography – Simone's relationship with nature, his sense of belonging, and historical memories – on one hand, and a broader geography – the legal border, political power, economic influence – on the other. Thinking law spatially can lead us to different understandings of law, its infrastructures, and its functions, and to offer alternatives and critical ways of seeing, making, and enforcing law. Moreover, space offers the dimension that law doesn't see: the form, the stories, the emotions, the dead bodies, as Simone tells us.

**Thinking law spatially: 'he started to see clothes hanging from branches on the side of the path'**

In law, the symbols of borders are found in norms, directives, treaties, and regulations, sometimes based on opposing narratives. We already saw that for European citizens, the right to free movement under Article 21 TFEU<sup>46</sup> makes borders almost disappear. In contrast, Directive 2008/115/EC<sup>47</sup> makes it more "visible" under the notion of illegal crossing. European law, in this sense, shapes how borders must be perceived and regulated. This paradox is one

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<sup>44</sup> Judah (n1), 198.

<sup>45</sup> Judah (n1), 199.

<sup>46</sup> Consolidated version of the Treaty on the Functioning of the European Union 2012 art 21(1).

<sup>47</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals 2008 art 6(2).

of the most striking also in Simone's story, where there is a specific moment when the way he looks at the mountains changes the dualities completely: us-them, legal-illegal become clear:

He started to see clothes - fleeces, hoodies, whole puffers, tossed into the snow - hanging from branches on the side of the path. Human tracks going in circles. Or a pair of shoes, or just one Nike, flipped up there on the path. Simone didn't think anything at first. Then he started to see them. They are refugees, or something like that, they told him at the bar. They are asylum seekers, so they can't work in Italy until they are approved.<sup>48</sup>

In this framework, the space Simone is looking at becomes more complex than a mere landscape. He is not just a rescuer anymore; the law starts to materialise. The migrants become asylum seekers, the mountain becomes the border, and Simone himself could become a facilitator of irregular migration. This is how EU law shapes borders and their movement. Simone guides us in a transition of meaning through his spatial narrative. Therefore, space, by adding a new dimension to law, contributes to unpacking another legal narrative. Law gives meaning to the mountain; it makes it a legal border with socio-economic significance, triggering questions about illegal crossing, facilitator, and asylum seeker status. Space, in this sense, links these two ways of reasoning. Law becomes visible in border signals, walls, checkpoints, stones, mountains, infrastructures, and dead bodies. Thinking spatially is another way of dealing with tensions and contradictions within the law and other actors, sometimes revealing some unexpected paradoxes within the law itself. Space offers a privileged view of the physicality of law when embedded in landscape and objects<sup>49</sup>, and to its everyday operations and perception<sup>50</sup>. Law is not only a normative and procedural framework; it also reflects spatial arrangements.

### **The space of the everyday: 'it was something he hardly thought of, the border'**

Spatial representation of borders, for instance, on the maps, foregrounds their legal, social, and economic meaning, while obscuring their materiality and cultural significance. The case study of Le Col de l'Echelle illustrates that the Alps are not only palpably material, for instance, in their exposition to climate change, but also embody histories, ways of living, and cultural narratives.

The material approach in legal geography focuses on how law is embedded in physical spaces, objects, and landscapes, but it also pushes for these spatial narratives to be embedded in law. Several scholars have contributed to this perspective, often drawing from legal geography, science and technology studies (STS), and materialist philosophy.<sup>51</sup> In recent years, it has become more present in EU law.<sup>52</sup> This spatial approach to EU law could help address border regulation from a critical and philosophical perspective, unpacking some

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<sup>48</sup> Judah (n1), 201.

<sup>49</sup> See Alain Pottage, Marta Mundy, *Law, anthropology, and the constitution of the social: making person and things*, Cambridge University Press (2004); Nichole Graham, Margaret Davies & Lee Godden, 'Broadening Law's Context: Materiality in Socio-Legal Research' (2017) 26 Griffith L Rev 480; Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawspace, Atmosphere* (Routledge 2015).

<sup>50</sup> See Eslava L, 'Istanbul Vignettes: Observing the Everyday Operation of International Law' (2014) 2 London Review of International Law 3; Davina Cooper, *Everyday Utopias. The Conceptual Life of Promising Spaces*, Duke University Press (2013).

<sup>51</sup> See Latour B, 'Scientific Objects and Legal Objectivity' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology, and the Constitution of the Social* (1st edn, Cambridge University Press 2004) <[https://www.cambridge.org/core/product/identifier/CBO9780511493751A009/type/book\\_part](https://www.cambridge.org/core/product/identifier/CBO9780511493751A009/type/book_part)>; Nicholas Blomley, David Delaney & Richard T Ford (a cura di), *The Legal Geographies Reader: Law, Power and Space* (Blackwell Publishers 2001); Pottage A, 'Introduction: The Fabrication of Persons and Things' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology, and the Constitution of the Social* (1st edn, Cambridge University Press 2004) <[https://www.cambridge.org/core/product/identifier/CBO9780511493751A007/type/book\\_part](https://www.cambridge.org/core/product/identifier/CBO9780511493751A007/type/book_part)>.

<sup>52</sup> See De Witte F, 'Here Be Dragons: Legal Geography and EU Law' (2022) 1 European Law Open 113; Azoulaï L, 'Living with EU Law' (2022) 1 European Law Open 140.

inherent paradoxes. Law is more than just a system of norms and procedures; it also embodies spatial structures and the stories that shape them, like ours.

While he drove back home, his hand trembled: *'it was something he hardly thought of, the border. Invisible to him [...]*'.<sup>53</sup> The spatial dimension of law is not just how EU law shapes and gives meaning to a symbol, a sign, a mountain, or a person. For example, in our case, EU law constructs different categories of people as objects: the rescuer and the migrants. Instead, the spatial dimension allows us to see the real form of the border, its true nature, and engage with some ambiguous aspects of EU law, especially those related to secondary movements.<sup>54</sup> Indeed, in this real form, people are not objects, but subjects. This is when the lines we see on maps become real forms: mountains with snow, dangers, height, and paths. Within these forms, many other critical aspects of the EU law can be unpacked. In our case study, one is more evident and relates to the struggles of asylum seekers and the EU law that shapes their paths. The colonial routes and their critical aspects. The attention to everyday law, as explained through Simone's vignette, showed how space can trigger a critical understanding of law's limits and contradictions. Through Simone's material point of view, we see how legal consciousness operates when it comes to space. The signs of the migrants, and their dead bodies, make the border real and suggest other narratives. One of these is the colonial border.

#### 4. The colonial border

For Simone, the border disappears not only because of his EU citizenship but also because of his presumed whiteness, socio-economic status, and enthusiasm for the outdoors: *It was a world where most of what he did was pleasure. The click of the camera on a rare bird. The thrill when flakes started to swirl. His notebook in cold hand in the glades.*<sup>55</sup> According to Pallister-Wilkins, outdoor activities, such as hiking or skiing, that utilise the landscape naturalise the presence of white bodies in the borderscape.<sup>56</sup> Bachelierie's research illustrates this point well. In the course of her ethnographic research on the French-Italian border, she observed how 'people who had the stereotypical attitudes of "tourists" (moving around in the middle of the day, in the middle of the village, having a drink out in the open, wearing sportswear, hiking boots, a ski suit, skis or snowboard) where not stopped by the police'.<sup>57</sup> Her research shows that while 'light-skinned people on the move (Kurds, Arabs, Kabyles, Afghans, Kosovars) who played the role of a "tourist" managed to escape control', this strategy has not worked for many black Africans.<sup>58</sup> Importantly, she notes how black French citizens were also stopped by the police.<sup>59</sup> Therefore, in practice, being able to pass as a white tourist could even be more important than one's legal status. As these bordering practices reinforce racial and class hierarchies in this section, we interrogate the colonial origins of the border.

While drivers of migration are highly complex and interdependent,<sup>60</sup> anthropological research exploring migrants' motivations to leave Italy suggests that networks of family and friends are more important than inefficient bureaucracy and reception systems, or the lack of employment and settlement opportunities.<sup>61</sup> This indicates that 'migration processes tend to become partly self-perpetuating, with "pioneers" venturing to new destinations that may be embedded over

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<sup>53</sup> Judah (n1), 209.

<sup>54</sup> On this paper see notes: Aru (18) and Pallister-Wilkins (29).

<sup>55</sup> Ben Judah, *This Is Europe: The Way We Live Now* (Picador 2024).

<sup>56</sup> Polly Pallister-Wilkins, 'Whitescapes: A Posthumanist Political Ecology of Alpine Migrant (Im)Mobility' (2022) 92 *Political Geography* 102517, 11.

<sup>57</sup> Sarah Bachelierie, 'Chasing Down Foreigners at the French-Italian Border (Hautes-Alpes) as a Matter of Social and Racial Policing' [2020] *Journal of Alpine Research* | *Revue de géographie alpine* para 16.

<sup>58</sup> *ibid* 17.

<sup>59</sup> *ibid* 14.

<sup>60</sup> Thym (n 4) 101.

<sup>61</sup> Aru (n 18) 1428.

time'.<sup>62</sup> France, with many residents whose families migrated to the metropole from the former colonies, bears 'testimony to earlier episodes of feedback loops between pioneers and followers'.<sup>63</sup> It is perhaps no coincidence that the migrants in the story come from Mali and Guinea,<sup>64</sup> former French colonies.

To the extent that the European social infrastructure, including welfare, healthcare, and transport, as well as cultural and educational institutions, has been financed using colonial spoils,<sup>65</sup> causing persistent global wealth disparity,<sup>66</sup> such postcolonial migration flows, including asylum seekers and refugees,<sup>67</sup> could be regarded as an attempt by those marked by colonial legacy to access resources and opportunities they have been deprived of.<sup>68</sup> Thus, migration law looms as the extension of the empire, a tool for continued dispossession.<sup>69</sup>

Moreover, the EU migration regime employs colonial techniques of power, such as othering and ordering.<sup>70</sup> While the former refers to a process by which certain social groups are construed as intrinsically different or alien, the latter concerns the imposition of a taxonomy in which categorisation is far from neutral.<sup>71</sup> For instance, the 2022 study by Sachseder, Stachowitsch, and Binder, involving 'an in-depth discourse-analytical reading of Frontex's Annual Risk Analysis Reports (RARs) between 2010 and 2020',<sup>72</sup> reveals three main themes embedded in the institutional discourse that serve racialising, gendering, and, ultimately, othering migrants. Firstly, migrants, often portrayed as young males linked to the notions of 'criminality, fraud, welfare overstretch, and violence'.<sup>73</sup> Secondly, migrants are presented as 'the unknown' to be categorised, ordered, and managed, with a view to distinguishing between the desirable legal mobility and the undesirable irregular migration.<sup>74</sup> Thirdly, countries of origin and destination are arranged in a spatial hierarchy, where the former are portrayed as 'space of lawlessness, chaos, and violence',<sup>75</sup> linking their citizens to the notions of criminality, terrorism, and economic migration.<sup>76</sup> This is but an example of an othering discourse within the EU that has contributed to the 'emergence of highly technologized border regimes designed to make Europe's boundaries (which have become porous or have even vanished for European citizens) impermeable for Europe's undesired "others"'.<sup>77</sup> Thus, as observed above, the ability to traverse EU borders rests on one's legal status. Importantly, these legal categories 'have been historically produced out of the processes of decolonisation associated

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<sup>62</sup> Thym (n 4) 101.

<sup>63</sup> *ibid.*

<sup>64</sup> Judah (n1) 203 and 207.

<sup>65</sup> El-Enany makes this argument in the British context, but it can be applied to other European colonial empires. See, Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (1st edn, Manchester University Press 2020).

<sup>66</sup> *ibid.* 1–2.

<sup>67</sup> Satvinder S Juss, 'The Post-Colonial Refugee, Dublin II, and the End of Non-Refoulement' (2013) 20 *International Journal on Minority and Group Rights* 307.

<sup>68</sup> El-Enany (n 66) 17.

<sup>69</sup> *ibid.*

<sup>70</sup> Julia Sachseder, Saskia Stachowitsch and Clemens Binder, 'Gender, Race, and Crisis-Driven Institutional Growth: Discourses of "Migration Crisis" and the Expansion of Frontex' (2022) 48 *Journal of Ethnic and Migration Studies* 4670.

<sup>71</sup> Othering, particularly in terms of the civilised-primitive dichotomy, propelled imperial and colonial expansion. Under early modern notions of natural law, indigenous cultures and societies were deficient, justifying the notion of European trusteeship and civilising mission. By the 19th century, a legal hierarchy, distinguishing sovereign European states from indigenous societies with no legal personality and no territorial claim, had been firmly embedded in international law. See Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly* 739.

<sup>72</sup> Sachseder, Stachowitsch and Binder (n 71) 4672.

<sup>73</sup> *ibid.* 4679.

<sup>74</sup> *ibid.* 4681.

<sup>75</sup> *ibid.* 4683.

<sup>76</sup> *ibid.*

<sup>77</sup> Frank Schulze-Engler, 'Irritating Europe' in Graham Huggan (ed), *Oxford Handbook of Postcolonial Studies* (Oxford University Press 2013).

with earlier forms of European colonialism,<sup>78</sup> demonstrating the colonial governmentality of the EU migration regime.<sup>79</sup>

Finally, the process of othering and ordering legitimises violence against people on the move. Based on their ethnographic research in Calais and at the border between Croatia and Bosnia and Herzegovina, Isakjee and others demonstrate different forms of violence sustaining the EU borders.<sup>80</sup> They contrast the 'violence of inaction',<sup>81</sup> involving restricting access to basic services like food, healthcare, and shelter, with explicit violence, including beatings, inflicted at the EU external borders.<sup>82</sup> These kinds of dynamics are also present in the current case study. As demonstrated above, the EU migration regime, by seeking to criminalise humanitarian assistance, incorporates landscape features like Le Col de l'Echelle directly into the border enforcement mechanisms and outsources the violence to nature. Thereby, it obscures the violence at play and maintains the façade of European liberalism.<sup>83</sup>

Colonial legacies haunt the EU migration regime and, especially, border enforcement practices. In this context, the Alpine borderscape becomes a 'white space',<sup>84</sup> that is, 'a space reserved for the middle and upper classes, which in the context of structural social inequality, comprises light-skinned people, whose presence is construed as "normal"'.<sup>85</sup> This can contribute to the understanding of why Simone experiences the border so radically differently to many people on the move.

## 5. Conclusion

In conclusion, this article began with a legal analysis of the law at the border in our Col de l'Echelle case study. We have shown that each protagonist in the story can be assigned to a legal category, which conditions his/her relationship to the border. Simone can freely cross the border as an EU citizen. Yet, as a potential facilitator of migration, he needs to refrain from helping the men to avoid being criminalised under EU law. The men, on the other hand, cannot legally cross the border because their status under EU law confines them to the territory of a single Member State. EU law, however, fails to stop their movement, instead making it more fragmented and dangerous. These categorisations were supported by Simone's narration. His testimony makes clear the transition: from a bucolic view of the mountains to a deadly path for asylum seekers. This realisation suggested a more in-depth study of the concept of the border. In our case study, the mountains appear as both a natural and legal border, a political space and an intimate place, a legal or an illegal space. Based on this duality, we built a methodology which draws on geography, law, anthropology and colonial studies, revealing the different meanings of the border (legal, geographical, colonial). Understanding this complexity shows how these different definitions can lead to a critical analysis of EU law at the border.<sup>86</sup> Furthermore, by presenting its more ambiguous role, we challenge the traditional view that the EU migration law inherently conflicts with migrants' agency.

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<sup>78</sup> Gurminder K Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism' (2017) 23 *European Law Journal* 395, 10.

<sup>79</sup> Catarina Kinnvall, 'The Postcolonial Has Moved into Europe: Bordering, Security and Ethno-Cultural Belonging' (2016) 54 *JCMS: Journal of Common Market Studies* 152, 157.

<sup>80</sup> Arshad Isakjee and others, 'Liberal Violence and the Racial Borders of the European Union' (2020) 52 *Antipode* 1751.

<sup>81</sup> Thom Davies, Arshad Isakjee and Surindar Dhese, 'Violent Inaction: The Necropolitical Experience of Refugees in Europe' (2017) 49 *Antipode* 1263.

<sup>82</sup> Isakjee and others (n 81) 1768.

<sup>83</sup> *ibid.* 1769.

<sup>84</sup> Bachellerie (n 3); Pallister-Wilkins (n 2); More generally on the concept of 'white space', see Elijah Anderson, "'The White Space'" (2015) 1 *Sociology of Race and Ethnicity* 10.

<sup>85</sup> Bachellerie (n 3) para 12.

<sup>86</sup> Picozza (n 27) 253.

# Everyday Dystopia: EU Migration Governance and its Normalisation – Reading Briançon

by Karla Žeravčić\*

## 1. Introduction

Up until the end of slavery and the liberation of former colonies, freedom of movement was the dominant legal framework for international migration.<sup>1</sup> After that, the right of states to control the entry of non-nationals into their territories became one of the cornerstones of international law.<sup>2</sup> These power dynamics, established during colonial times, are both evidenced and entrenched in the actions of the EU and its Member States (MSs), who seek to prevent people on the move from reaching European borders – under any circumstances, even at the cost of human lives.

In Ben Judah's book,<sup>3</sup> two chapters<sup>4</sup> address what is today referred to as 'irregular' border crossings. However, *Briançon* is the only chapter told from the perspective of those most affected by the EU's migration policies.<sup>5</sup> Brico and his migration journey are central to this narrative. Brico is a man from Côte d'Ivoire who made the difficult choice to leave his hometown, Abidjan, with his wife, Blandi, his daughter, Noa, and his son, Kris, with the hope of reaching Europe.

In *Briançon*, law is omnipresent – it is woven into the very fabric of the story. From the moment Brico and his family leave Côte d'Ivoire, to their crossing the Nigerian-Libyan border under bags of trash, to their traversing the Mediterranean on a dinghy, up until the last pages of the Chapter. In line with these events, the Chapter compels us to question how such practices, horrendous migratory circumstances and journeys have become normalised in everyday life – in Europe and beyond.

This piece consists of two parts. The first reflects on some elements of Brico's journey as a lens through which to understand how EU migration policy impacts people far beyond the EU's territorial boundaries. The second examines how these practices have come to be normalised and asks what this tells us about law, power, and accountability.

## 2. The Law

Briançon, the title of this chapter, is a small town in France, close to the Italian border. The town, though not resonating with many the way other French cities do, still is at the centre of much migratory discourse in France, but the EU as well.<sup>6</sup> Nonetheless, Brico's life does not start here but rather in Côte d'Ivoire, where he resides with his wife and two children. However, the majority of the chapter takes place in Libya, from where Brico and his family are trying to reach Europe. Their goal for a better life is seen as a nuisance to European and EU leaders. As such, the EU and its MSs have spent the last decade cooperating with third countries in order to curb the number of people reaching their borders.

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<sup>1</sup> Karin De Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights' (2021) 39(4), 291-307 *Netherlands Quarterly of Human Rights* 293-296.

<sup>2</sup> Karin De Vries and Thomas Spijkerboer, 291; Ayalet Shachar, *Severing the Gordian Knot of Sovereignty and Migration Control* (2024) 118, 188-192 *American Journal of International Law*, 190.

<sup>3</sup> Ben Judah, *This is Europe: The Way We Live Now* (Pan Macmillan 2023).

<sup>4</sup> The other one being *Le Col de l'Échelle* (p198)

<sup>5</sup> Ben Judah, *This is Europe*

<sup>6</sup> See for example Dider Fassin and Anne-Claire Defossez, *L'Exil, Toujours Recommencé* (Éditions du Seuil 2024).

*Brico's life takes a turn for the worse when he loses the confidence of his former employer, an undisclosed gangster. In desperation, Brico and his family decide to travel to Niger, hoping to start anew. However, the situation in Niger was even more dire. "I just couldn't stay in Niger," Brico said, "I knew I wasn't going to be able to work." Not long after arriving in Niger, Brico gets in contact with a smuggler that promises a simple route to Libya and then to Europe.*

*"Desert. Boat. Europe."*

Many international migrants from sub-Saharan Africa who want to reach North Africa must travel through Niger. In most instances, that included passing through the northern region of Niger and its main city, Agadez.<sup>7</sup> This led to the emergence of local economic opportunities linked to migration.<sup>8</sup> The 'smuggling business' involved large parts of the population of northern Niger in various jobs, such as transporting and hosting people on the move and selling essential goods (e.g. water, food, clothing). However, since 2015, the EU has been pursuing security-related policies towards the Nigerien government, resulting in the adoption of the Nigerien "Law against Illegal Migrant Smuggling" (Anti-smuggling law) in the same year. The Anti-smuggling law criminalised aiding international migrations from reaching Libya or Algeria from northern Niger.<sup>9</sup> This Anti-smuggling law and the *de facto* externalisation of European border enforcement have created extensive harm in the region.<sup>10</sup> Under the Emergency Trust Fund for Africa, the EU promised to provide alternative work for Nigeriens participating in the smuggling business,<sup>11</sup> but this promise was left unfulfilled, leaving many Nigeriens without any income.<sup>12</sup>

Rather than disappearing, the lucrative smuggling business went underground,<sup>13</sup> where the anti-smuggling law primarily affected low-level facilitators such as drivers and guides rather than influential businessmen involved in larger smuggling networks.<sup>14</sup> This situation not only impacted the local population but also exacerbated the dangerous conditions faced by people on the move. Prior to the law, smuggler transport through the desert happened in an organised manner in escorted convoys moving over well-travelled routes.<sup>15</sup> However, with increased border control, drivers were forced to take more remote and perilous routes through the

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<sup>7</sup> Mattea Weihe, Lea Müller-Funk and Mounkaila Abdou, 'How EU Pressure Hampers Circular Migration between Niger and Libya' (German Institute for Global and Area Studies) p4; Marco Simoncelli, 'Agadez has Begun to Live Again: Migrants and Smugglers are Returning after Niger Repealed its Anti-migration Law' (*Al Jazeera*, 12 April 2024) <<https://www.aljazeera.com/features/longform/2024/4/12/agadez-nigers-gateway-to-the-sahara-finds-new-life-in-the-migrant-trade>>

<sup>8</sup> Lucia Bird, 'Human Smuggling in Africa: The Creation of a New Criminalised Economy' (ENACT, 2020) Continental Report 04, p45;

<sup>9</sup> Sophia Stile, 'The Criminalization of Mobility in Niger: The Case of Law 2015-36' (*ASILE*, November 2023) <<https://www.asileproject.eu/the-criminalization-of-mobility-in-niger-the-case-of-law-2015-36/>>; Christian Putsch, 'The EU's Deal to Stop Migration Through Niger Failed. A People Smuggler Explains Why' (*NZZ*, 23 April 2024) <<https://www.nzz.ch/english/a-human-smuggler-in-niger-on-why-migration-is-surging-ld.1827362>>

<sup>10</sup> Colleen Moser, 'The Adverse Effects of Niger's Anti-Smuggling Law' 64 *Forced Migration Review* <<https://www.fmreview.org/issue64/moser/>>; Mayeni Jones, 'Sahara Migrant Smuggling: Double-edge sword of Overturning Niger's Ban' (*BBC*, 31 December 2023) <<https://www.bbc.com/news/world-africa-67771597>>

<sup>11</sup> Colleen Moser, 'The Adverse Effects of Niger's Anti-Smuggling Law' 64 *Forced Migration Review* <<https://www.fmreview.org/issue64/moser/>>

<sup>12</sup> Sophia Stile, 'The Criminalization of Mobility in Niger: The Case of Law 2015-36' (*ASILE*, November 2023) <<https://www.asileproject.eu/the-criminalization-of-mobility-in-niger-the-case-of-law-2015-36/>>; Mattea Weihe, Lea Müller-Funk and Mounkaila Abdou, 'How EU Pressure Hampers Circular Migration between Niger and Libya' (German Institute for Global and Area Studies) p6; Marco Simoncelli, 'Agadez has Begun to Live Again: Migrants and Smugglers are Returning after Niger Repealed its Anti-migration Law' (*Al Jazeera*, 12 April 2024) <<https://www.aljazeera.com/features/longform/2024/4/12/agadez-nigers-gateway-to-the-sahara-finds-new-life-in-the-migrant-trade>>

<sup>13</sup> <https://mixedmigration.org/the-criminalization-of-mobility-in-niger-the-case-of-law-2015-36/>

<sup>14</sup> Ekaterina (Katia) Golovko and Laurens Willeme, 'Niger's Repeal of the 2015/36 Anti-Smuggling Law' (*Clingendael*, 8 August 2024) <<https://www.clingendael.org/publication/nigers-repeal-201536-anti-smuggling-law>>

<sup>15</sup> Mattea Weihe, Lea Müller-Funk and Mounkaila Abdou, 'How EU Pressure Hampers Circular Migration between Niger and Libya' (German Institute for Global and Area Studies); <https://mixedmigration.org/the-criminalization-of-mobility-in-niger-the-case-of-law-2015-36/>

desert, leading to higher rates of people on the move dying as the drivers were abandoning passengers behind to avoid arrests.<sup>16</sup> Additionally, prices for transportation rose, with even soldiers participating in the extortion of people on the move in exchange for a “security escort”.<sup>17</sup>

*“You see bodies in the desert,” Brico observes, “You see them, and you see pickup, half sunk into dunes, You see men, who have turned into white bones. You see death everywhere.”*

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*‘Libya... I had to get there. Back then they were doing nothing to stop the people-smuggling. Africans were crossing into Europe. There had been a war there and there was nobody in charge.’*

Libya is a country separated from Italy by a mere 15 hundred kilometres, making it a prime departure point for people on the move trying to reach Europe.<sup>18</sup> Thus, it comes as no surprise that the EU and its MSs have responded to the arrival of people on the move, crossing the central Mediterranean, by cooperating with Libyan authorities to stop departures and ensure that people rescued and intercepted at sea would be disembarked in Libya. This cooperation with Libya is not a new phenomenon; it has existed even before the fall of Gadaffi’s regime in 2011.<sup>19</sup> However, in the last decade, the security-driven policy has been pursued with more vigour than ever.

Through soft law,<sup>20</sup> the EU and individual MS have signed multiple agreements with Libya, with one of the most important ones being the *‘Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic of 2 February 2017’*<sup>21</sup> (MOU). The MOU laid down the legal foundations for measures aimed at closing off the Central Mediterranean Route.<sup>22</sup> The MOU was signed between the former Italian Prime Minister, Paolo Gentiloni, and the former Prime Minister of the Government of National Accord of Libya, Fayeze al-Serraj. While the latter is recognised as the ‘sole legitimate government of Libya’ by the UN, the African Union, the EU and most of its MS, the Government is not in control of the entirety of the Libyan territory.<sup>23</sup> Meaning that there are other players that need to participate in order for the EU to achieve its goals; this includes tribal leaders in the south of Libya and Khalifa Haftar, the leader of the Libyan National Army, who controls the east of Libya.

<sup>16</sup> Lucia Bird, ‘Human Smuggling in Africa: The Creation of a New Criminalised Economy’ (ENACT, 2020) Continental Report 04, p46; Mattea Weihe, Lea Müller-Funk and Mounkaila Abdou, ‘How EU Pressure Hampers Circular Migration between Niger and Libya’ (German Institute for Global and Area Studies) p6;

<sup>17</sup> <https://www.nzz.ch/english/a-human-smuggler-in-niger-on-why-migration-is-surging-ld.1827362>

<sup>18</sup> Agnese Pacciardi and Joakim Berndtsson, ‘EU Border Externalisation and Security Outsourcing: Exploring the Migration Industry in Libya’ (2022) 48 Journal of Ethnic and Migration Studies, p4015.

<sup>19</sup> See ‘The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?’

<sup>20</sup> Juan Santos Vara, ‘Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU’ in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Elgar Publishing, 2019)

<sup>21</sup> Memorandum of Understanding on Cooperation in the Fields of Development, the Fight Against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders Between the State of Libya and the Italian Republic, <[https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf)>

<sup>22</sup> Marina Mancini, ‘Italy’s New Migration Control Policy: Stemming the Flow of Migrations from Libya without Regard for their Human Rights’ (2017) 27 The Italian Yearbook of International Law, p260.

<sup>23</sup> Marina Mancini, ‘Italy’s New Migration Control Policy: Stemming the Flow of Migrations from Libya without Regard for their Human Rights’ (2017) 27 The Italian Yearbook of International Law, p260.

The EU's strategy in Libya, including the MOU, consists of financially supporting the development of Libyan regions affected by migration,<sup>24</sup> funding reception centres, providing technical and technological support to Libyan institutions,<sup>25</sup> as well as training for Libyan personnel (e.g. reception centres personnel, border and coast guards).

The MOU consists of one article that states that both parties need to apply the said agreement with "respect of the international obligations and the human rights agreements to which the two Countries are parties".<sup>26</sup> However, Libya is not a party to either the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol, though it has ratified the 1969 African Union "Convention governing the Specific Aspects of Refugee Problems in Africa". Unfortunately, the African Union Refugee Convention has not been transposed into national law. Specifically, the main Libyan legislation governing migration criminalises any irregular entry, stay, or departure while making no distinction between different categories of people on the move (e.g. refugees, victims of trafficking, migrants).<sup>27</sup>

The MOU was signed for a period of three years with the possibility of extension by a tacit agreement for a further three-year period. Notwithstanding the various reports documenting human rights abuses inflicted on people on the move, the MOU has been prolonged for two additional three-year periods since its signing in 2017. Consequently, there is no formal guarantee for the respect for human rights of people on the move in Libya, and the EU chooses to turn a blind eye.

The section above focused on the specific MOU agreement; the following section will use information gathered from the ground to present the effects of the EU-Libya cooperation.

*Upon reaching Libya, they are smuggled across the border, hidden under trash bags in a dumpster and later car trunks, only to be seized by Libyan soldiers. The soldiers detain them and take them to a detention camp. In the camp, Brico's wife is subjected to sexual violence, and people are sold into slavery. The soldiers separate the men and the women. Brico's family is divided, and he is left with his young son. With the mercy of one of the soldiers, Brico was able to flee the slave camps with his son, leaving his wife and daughter to an unknown fate.*

Upon entering Libya, people on the move are hunted down by armed groups, militias or soldiers. If caught, they are brought to detention facilities where they are held in "abysmal, overcrowded and unsanitary conditions".<sup>28</sup> In detention centres managed either by governmental institutions or by armed groups, people on the move can be held captive for indefinite periods of time without any possibility of challenging the lawfulness of the detention.<sup>29</sup> According to international organisations and NGOs, like the Human Rights Watch, conditions in detention centres include poor quality food and water, which has led to malnutrition, lack of adequate healthcare,<sup>30</sup> and "disturbing accounts of violence by guards, including beating, whippings, and use of electric shocks."<sup>31</sup> While being held captive, people

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<sup>24</sup> MOU art 1(b)

<sup>25</sup> MOU Art 1(c)

<sup>26</sup> MOU art 5

<sup>27</sup> Mattea Weihe, Lea Müller-Funk and Mounkaila Abdou, 'How EU Pressure Hampers Circular Migration between Niger and Libya' (German Institute for Global and Area Studies) p3.

<sup>28</sup> 'Lybia: Nightmarish Detention for Asylum Seekers' (*Human Rights Watch*, 21 January 2019) <<https://www.hrw.org/news/2019/01/21/libya-nightmarish-detention-migrants-asylum-seekers>> accessed 2 June 2025.

<sup>29</sup> Marina Mancini, 'Italy's New Migration Control Policy: Stemming the Flow of Migrations from Libya without Regard for their Human Rights' (2017) 27 *The Italian Yearbook of International Law*, p263.

<sup>30</sup> 'Migrants Face Extreme Violence and Exclusion from Healthcare in Libya' (*Medecins Sans Frontieres*, 12 February 2025) <<https://www.msf.org/libya-migrants-face-extreme-violence-and-exclusion-healthcare>>

<sup>31</sup> 'No Escape From Hell. EU Policies Contribute to Abuse of Migrants in Libya' (*Human Rights Watch*, 21 January 2019) <<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>>; 'Refugees and Migrants Fleeing Sexual Violence, Abuse and Exploitation in Libya' (Amnesty International, 1 July

on the move are extorted for money by their guards, where their relatives have to pay ransoms in order to stop the torture or for their releases.<sup>32</sup> Moreover, people detained stated that meals would fall down to one piece of bread per day and that they only had to drink toilet water.<sup>33</sup> As of March 2025, Libya has 23 detention facilities in use, with many more not in current use or are undocumented unofficial facilities.<sup>34</sup> According to eyewitnesses, the undocumented and/or unofficial facilities can even be unfinished houses in the desert.<sup>35</sup> Children are also not exempt from abuse,<sup>36</sup> while women and girls face sexual violence.<sup>37</sup> According to testimonies collected by Amnesty International, women are sexually assaulted either by “smugglers, traffickers or members of armed groups”.<sup>38</sup> In one of the detention centres, where only women and children are held, women reported how they were subject to “strip searches, intimate body searches, beatings, sexual assault and rape”.<sup>39</sup>

*After fleeing the detention camp, Brico and his son make their way to Tripoli and connect with another network of smugglers who promise to transport them across the Mediterranean. However, the journey across the sea is equally treacherous. They are herded onto lifeboats packed with people, including pregnant women and young children, all of whom are forced to stand due to the lack of space. The overcrowded and unstable vessel barely holds together as they drift across the Mediterranean. After an unknown time at sea, they are finally rescued by the Italian coast guard, who transport them to safety in Italy.*

In the absence of safe and legal routes to Europe, for many, the only available path is crossing the Mediterranean Sea. Taking pride in the decrease of arrivals on the EU shores and in the purported mission of stopping deaths that occur while crossing what is considered to be the deadliest migration route in the world.<sup>40</sup> The EU celebrates its partnership with Libya as a success, looking at the decrease in arrivals to EU shores. In reality, the smaller numbers of arrivals do not reflect the numbers of those departing Libya, those intercepted at sea by the Libyan authorities or the lives lost at sea. To make things worse, in 2017, the Italian Government, with the full backing of the Commission, presented a code of conduct to regulate the activity of NGOs active in search and rescue operations in the Mediterranean.<sup>41</sup> The signatories commit themselves, amongst others, not to enter Libyan waters unless “there is

2016) <<https://www.amnesty.org/en/latest/press-release/2016/07/refugees-and-migrants-fleeing-sexual-violence-abuse-and-exploitation-in-libya/>>

<sup>32</sup> Martino Reviglio, ‘Externalizing Migration Management through Soft Law: The case of the Memorandum Understanding between Libya and Italy’ (2020) 20 Global Jurist, p8; ‘Italy-Libya Agreement: Five Years of EU-sponsored abuse in Libya and the central Mediterranean’ (*Medecins Sans Frontieres*, 2 February 2022) <<https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean>>

<sup>33</sup> Andrea Monras, ‘Hundreds of People Require Port of Safety After Multiple Rescues from Central Mediterranean’ (*Medecins Sans Frontieres*, 25 January 2022) <<https://www.msf.org/hundreds-people-require-port-safety-after-multiple-rescues-central-mediterranean-sea>>

<sup>34</sup> ‘Libya’ (*Global Detention Project*) <<https://www.globaldetentionproject.org/countries/africa/libya#country-report>>

<sup>35</sup> ‘Italy-Libya Agreement: Five Years of EU-sponsored abuse in Libya and the central Mediterranean’ (*Medecins Sans Frontieres*, 2 February 2022) <<https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean>>

<sup>36</sup> ‘No Escape From Hell. EU Policies Contribute to Abuse of Migrants in Libya’ (*Human Rights Watch*, 21 January 2019) <<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>>

<sup>37</sup> Marina Mancini, ‘Italy’s New Migration Control Policy: Stemming the Flow of Migrations from Libya without Regard for their Human Rights’ (2017) 27 The Italian Yearbook of International Law, p264.; Sara Cincurova, ‘Women Rescued at Sea Reveal Scale of Alleged Libya Abuses’ (*The New Humanitarian*, 27 July 2021) <<https://www.thenewhumanitarian.org/news-feature/2021/7/27/women-rescued-at-sea-reveal-scale-of-alleged-libya-abuses>>

<sup>38</sup> ‘Refugees and Migrants Fleeing Sexual Violence, Abuse and Exploitation in Libya’ (Amnesty International, 1 July 2016) <<https://www.amnesty.org/en/latest/press-release/2016/07/refugees-and-migrants-fleeing-sexual-violence-abuse-and-exploitation-in-libya/>>

<sup>39</sup> ‘People are Beaten, Sexually Abused and killed in Libyan Detention Centres’ (*Medecins Sans Frontieres*, 6 December 2023) <<https://www.msf.org/people-are-beaten-sexually-abused-and-killed-libyan-detention-centres>>

<sup>40</sup> ‘Mediterranean Shipwreck Sounds Alarm for Lifesaving Action’ (*IOM*, 19 December 2023) <<https://www.iom.int/news/mediterranean-shipwreck-sounds-alarm-lifesaving-action>>

<sup>41</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_17\\_1882](https://ec.europa.eu/commission/presscorner/detail/en/ip_17_1882)

an evident danger to human life at sea”.<sup>42</sup> Failure to abide by the code may entail the refusal to authorise the disembarkation of people on the move in Italian ports.<sup>43</sup> As pointed out by Cusumano, this code of conduct “compromises NGOs’ ability to conduct humanitarian relief at sea free of political interference”.<sup>44</sup>

The EU’s agreement with Libya, the MOU, enables the Libyan Coast Guard to intercept people on the move at sea, after which they take them back to Libya for arbitrary detention. People on the move rescued or intercepted at sea are often victims of abuse committed by the Libyan Coast Guard. The same Coast Guard collude with smugglers by allowing boats with people on the move to depart or even escorting them during the initial part of the journey in return for payment.<sup>45</sup>

While the CJEU has never had the opportunity to question the validity of the MOU or the interceptions of boats at sea, the ECtHR has addressed the issue.<sup>46</sup> In *Hirsi Jamaa and others v Italy*,<sup>47</sup> the ECtHR determined that Italy breached Article 3 of the ECHR by intercepting people on the move at sea and forcing them back to Libya, where they faced the risk of human rights abuses. The ECtHR is not the sole court that found Italy’s practices and its policies in violation of human rights. In 2019, the Tribunal of Trapani ruled that the MOU was unlawful as it was not ratified by the Italian National Parliament. Moreover, it found that the agreement did not respect binding commitments under the international law of the sea and violated fundamental human rights.<sup>48</sup> More recently, the Italian Court of Cassation held Italy accountable for collective expulsions to Libya.<sup>49</sup> Specifically, returning people on the move back to a dangerous third country was contrary to Italy’s Constitution and its international commitments under human rights law and the international law of the sea.<sup>50</sup>

*Brico and his son are placed in a refugee camp in Torino, where they find a temporary respite. However, conditions in the camp are harsh, with limited resources and overcrowding. Brico decides to continue his journey to France in search for a better life for him and his son. The story ends at the French-Italian border, where Brico, holding his breath and hoping for a stroke of luck, manages to slip past a border guard who fails to notice his lack of valid documents.*

### 3. The Normalisation of Violence

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<sup>42</sup> Code of Conduct for NGOs Involved in Migrants’ Rescue Operations at Sea <<https://www.statewatch.org/media/documents/news/2017/jul/italy-eu-sar-code-of-conduct.pdf>>

<sup>43</sup> Eugenio Cusumano, ‘Straightjacketing Migrant Rescues? The Code of Conduct on Maritime NGOs’ (2019) 24(1), 106-114 *Mediterranean Politics* <<https://doi.org/10.1080/13629395.2017.1381400>>

<sup>44</sup> Eugenio Cusumano, ‘Straightjacketing Migrant Rescues? The Code of Conduct on Maritime NGOs’ (2019) 24(1), 106-114 *Mediterranean Politics* <<https://doi.org/10.1080/13629395.2017.1381400>>

<sup>45</sup> Marina Mancini, ‘Italy’s New Migration Control Policy: Stemming the Flow of Migrations from Libya without Regard for their Human Rights’ (2017) 27 *The Italian Yearbook of International Law*, p264; Martino Reviglio, ‘Externalizing Migration Management through Soft Law: The case of the Memorandum Understanding between Libya and Italy’ (2020) 20 *Global Jurist*, p8.

<sup>46</sup> Chiara Scissa, ‘The Role of Courts in the Era of EU Externalization Policies: A Focus on Libya, Tunisia, and Niger’ (*Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 19 July 2024) <<https://rli.blogs.sas.ac.uk/2024/07/19/the-role-of-courts-in-the-era-of-eu-externalization-policies-a-focus-on-libya-tunisia-and-niger/>>

<sup>47</sup> Case *Hirsi Jamaa and Others v Italy* [2012] App no. 27765/09

<sup>48</sup> ‘Italy: Court of Trapani Rules That Those Rescued on Vos Thalassa Acted in Self-Defence in Opposing Libyan Orders to Disembark’ (*European Database of Asylum Law*, 23 May 2019) <<https://www.asylumlawdatabase.eu/en/content/italy-court-trapani-rules-those-rescued-vos-thalassa-acted-self-defence-opposing-libyan>>

<sup>49</sup> Chiara Scissa, ‘The Role of Courts in the Era of EU Externalization Policies: A Focus on Libya, Tunisia, and Niger’ (*Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 19 July 2024) <<https://rli.blogs.sas.ac.uk/2024/07/19/the-role-of-courts-in-the-era-of-eu-externalization-policies-a-focus-on-libya-tunisia-and-niger/>>

<sup>50</sup> ‘Italy’s Top Court: Handing over Migrants to Libyan coast Guards is Illegal’ (*InfoMigrants*, 20 February 2024) <<https://www.infomigrants.net/en/post/55310/italys-top-court-handing-over-migrants-to-libyan-coast-guards-is-illegal>>

As Floris de Witte noted in his article *'Is this Europe?'*, Judah deliberately chooses to represent the 'ordinary European'.<sup>51</sup> In that context, Brico's chapter stands out. Yet it remains unclear whether the 'ordinary' in Brico's life refers to the fact that there are thousands like him who have endured unimaginable suffering to reach Europe (which is undoubtedly true), or whether it signals how we have come to see such experiences as normal, routine, and unremarkable.

*Dead people appear, who haven't been killed by anybody. Who truly kills them? The dinghy-captain, another wretched person who undertakes the journey as well? The law? Rather, it seems like a horror story in which the culprit fails to appear.*<sup>52</sup>

This haunting observation, from a visual account by Nieves García Benito in 2003, still resonates more than two decades later. The "culprit that fails to appear" captures the deep lack of accountability for the perilous journeys many are forced to take, and for the countless lives lost along the way. It could refer to the absence of a single entity to blame – or, conversely, to our collective complicity in a system that evades responsibility. To borrow Frances Webber's words, 'death by policy'<sup>53</sup> aptly encapsulates the situation: regardless of who strands a dinghy at sea or pulls the trigger, EU law and policy are instrumental in creating this systemic violence.

As analysed in the first part of this piece, the EU's external migration policy relies on agreements with third countries to manage migration. These agreements are part of a long-standing tradition of treating migration as a matter of border security.<sup>54</sup> The result is a set of preventive mechanisms: deterring departures, intercepting journeys at sea, and containing those who do arrive.<sup>55</sup>

Yet, such mechanisms, I argue, would likely be far less effective if they were not also normalised in everyday European life. Interestingly, both migration and Holocaust research identify a common thread in the normalisation of atrocities: *dehumanisation*.<sup>56</sup>

Dehumanisation is especially acute when people on the move do not fit the profile of "persons who have long been legally recognised and documented as real, bona fide political refugees with a well-founded fear of persecution".<sup>57</sup> Instead, they are categorised as 'economic migrants', often deemed 'unworthy' of protection. The term "economic migrant" has been used to define anyone and everyone who does not fall under the very narrow interpretation of a person fleeing persecution. With that, their movement is deemed voluntary and primarily motivated by the desire for a better life. Brico and his family fall into this category. Their reasons for flight, compounded by Brico's ambiguous past, lead to their classification as undeserving. EU law and policy disregard the colonial histories from which many of these individuals emerge – histories in which former colonies were systematically impoverished, rendered unstable for profit, and now subjected to neoliberal conditionalities and military interventions.<sup>58</sup>

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<sup>51</sup> Floris de Witte, 'Is This Europe?' *European Law Open* (forthcoming) 1.

<sup>52</sup> Nieves García Benito, 'Nothing is True, Nor is it a Lie' (*Statewatch News*, 21 July 2023) <[www.statewatch.org/news/2003/jul/21spain.htm](http://www.statewatch.org/news/2003/jul/21spain.htm)> accessed 28 May 2025.

<sup>53</sup> Frances Webber, 'The War on Migration' in P Hillyard, C Pantazis, S Tombs and D Gordon (eds) *Beyond Criminology: Taking Harm Seriously* (Pluto Press 2004) 33.

<sup>54</sup> Vicki Squire, *Europe's Migration Crisis: Border Deaths and Human Dignity* (Cambridge University Press 2020) 27.

<sup>55</sup> *Ibid.*, 44.

<sup>56</sup> *Ibid.* 76-102; Leanne Weber, 'Knowing-and-et-not-knowing about European Border Deaths' (2010) 15(2), 35-57 *Australian Journal of Human Rights*, 43.

<sup>57</sup> *Ibid.*, 87.

<sup>58</sup> Ida Danewid, 'White Innocence in the Black Mediterranean: Hospitality and the Erasure of History' (2017) 38(7), 1674-1689 *Third World Quarterly*, 1680; Karin De Vries and Thomas Spijkerboer (n 1) 306.

Europe, first as empires and now as the EU, has long been able to shape the terms of mobility: who may move, where, why, and how. As formal empires dissolved, the newly universalised model of the nation-state was accompanied by the legal principle that each State exercises exclusive authority over entry and exit from its territory.<sup>59</sup> This reconfiguration did not neutralise earlier power relations. Rather, control over mobility continues to be shaped by the fact that States are not equal in practice.<sup>60</sup> Through law – including the doctrine of sovereignty – European States construct hierarchies of deservingness, recognising some people as more worthy of protection than others. Yet such hierarchies only operate for those who manage to reach European soil. In practice, the overarching objective remains the prevention of migration itself.

Judah's text itself contains examples of how this dystopian policy landscape becomes normalised. When Brico's wife and daughter disappear, they are never mentioned again. Is this Judah's own normalisation of the journey's dangers? Was he sparing Brico the pain of revisiting his loss – are we witnessing Brico's own internalisation of suffering? Perhaps it reflects how we, too, move on swiftly from these tragedies, without demanding accountability or change.

The EU's practices are also steeped in orientalist tropes – portraying Europe as civilised, and those outside as savage and dangerous.<sup>61</sup> Furthermore, its self-proclaimed 'humanitarianism' becomes an act of grace in the face of uncontrollable circumstances – whether the sea, smugglers, or even the migrants themselves – thus shifting the blame away from the EU's own policies.<sup>62</sup> What appears as compassion is often a veil for the erosion of the right to asylum.

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Returning to the “culprit that fails to appear”: how often have the EU, its institutions, or its Member States been held truly accountable? In 2021 and 2022, two pivotal cases were brought before the General Court of the CJEU – *WS and Others v Frontex*<sup>63</sup> and *Hamoudi v Frontex*<sup>64</sup> – marking the first compensation claims against Frontex since its establishment in 2004. In both, vulnerable individuals alleged harm caused by Frontex operations. The power imbalance was stark.<sup>65</sup> In *WS*, the General Court found no direct causal link between Frontex's conduct and the harm suffered; in *Hamoudi*, the General Court found it “manifestly lacked any foundation in law”, moreover, that all the evidence presented was “manifestly insufficient to demonstrate conclusively that [Hamoudi] was present at and involved in the alleged incident”.<sup>66</sup>

Both judgments were appealed before the Grand Chamber and, at the time of writing, the Court of Justice has delivered its rulings. In both instances, it largely rejected the legal interpretations adopted at first instance and referred the cases back to the General Court, leaving their fate once again to the lower court. While these decisions were welcomed in light of the broader state of EU asylum and migration law, they ultimately did little more than uphold

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<sup>59</sup> E Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) Stanford Law Review 1509.

<sup>60</sup> Thomas Spijkerboer, 'International Migration Law and Coloniality' (Verfassungsblog, 28 January 2022) <<https://verfassungsblog.de/international-migration-law-and-coloniality/>> accessed 26 February 2026.

<sup>61</sup> Vicki Squire, *Europe's Migration Crisis: Border Deaths and Human Dignity* (Cambridge University Press 2020) 26.

<sup>62</sup> Leanne Weber, 'Knowing-and-et-not-knowing about European Border Deaths' (2010) 15(2), 35-57 Australian Journal of Human Rights, 49.

<sup>63</sup> Case T-136/22 *Hamoudi v Frontex* [2023] ECLI:EU:T:2023:821; Appeal Case C-136/24 P.

<sup>64</sup> Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492; Appeal Case C-679/23 P.

<sup>65</sup> See Agostina Pirrello, 'Tilting the Scales: The Burden of Proof When Power Wears an EU Uniform' (Verfassungsblog, 15 May 2025) <<https://verfassungsblog.de/tilting-the-scales/>> accessed 30 May 2025.

<sup>66</sup> *Hamoudi* para 62 and 40 and 41

the rule of law.<sup>67</sup> Nothing in these cases addresses the underlying structural problems that allow such violations to recur, nor do they guarantee success in similar actions.<sup>68</sup> Notably, even this achievement required years of litigation and highly resourced legal teams.

In contrast to the CJEU's more restrained engagement, the ECtHR has made certain advances – though without producing systemic change. Indeed, it could be argued that its trajectory has been increasingly regressive. Besides the mentioned *Hirsi Jamaa and Others v Italy* case, in 2025, the ECtHR ruled in several migrant related cases.<sup>69</sup> In the cases *A.R.E. v Greece* and *G.R.J. v Greece*, the ECtHR acknowledged Greece's long-standing systematic practice of violent pushbacks.<sup>70</sup> And while the ECtHR also acknowledged the difficulty in proving pushbacks,<sup>71</sup> it still maintained a high threshold for evidence in individual instances of pushbacks, with the clarification that a systemic practice alone does not constitute evidence of an individual incident.<sup>72</sup>

Another 2025 judgment, among the most anticipated, left a particularly bitter aftertaste. *S.S. and Others v Italy*,<sup>73</sup> pending since 2018, had raised expectations that the Strasbourg Court would confirm that States cannot evade their ECHR obligations by concluding bilateral agreements on extraterritorialised border control with non-member States. Nevertheless, it found that Italy exercised neither *ratione loci* nor *ratione personae* jurisdiction and considered irrelevant the Libyan coastguard's heavy reliance on Italian material support.<sup>74</sup> In doing so, the ECtHR effectively accepted that States may seek to wash their hands of Convention obligations by transferring operational responsibilities to non-signatory States while continuing to finance and enable their actions.<sup>75</sup>

The *S.S. and Others* judgment was delivered at a moment of acute political pressure on the ECtHR. It is fair to say that establishing jurisdiction in *S.S. and Others* was always an uphill

<sup>67</sup> See Catharina Ziebritzki, 'With Great Power Comes Great Responsibility: What W.S. et al and Hamoudi vs Frontex Mark a Turning Point' (Verfassungsblog, 4 January 2026) <<https://verfassungsblog.de/w-s-et-al-and-hamoudi-vs-frontex/>> accessed 26 February 2026. Lea Schubert, 'Asylum Seekers as Vulnerable Applicants – The CJEU's Approach to Causation and Evidence in the Frontex Appeal Judgments' (European Law Blog, 8 January 2026) <<https://www.europeanlawblog.eu/pub/16zd10nh/release/1>> accessed 26 February 2026. Agostina Pirrello and Salvo Nicolosi, 'The Luxembourg Showdown: Access to Justice in Light of the Grand Chamber's Rulings in Hamoudi and WS and Others v. Frontex' (Eurojus.it, 2 January 2026) <<https://rivista.eurojus.it/the-luxembourg-showdown-access-to-justice-in-light-of-the-grand-chambers-ruling-in-hamoudi-and-ws-and-others-v-frontex/>> accessed 26 February 2026.

<sup>68</sup> For contrary opinions see Antje Kunst, 'Frontex before the EU Courts: Damage, Causation, and Liability under Article 340(2) TFEU' (EU Law Analysis, 5 January 2026) <<http://eulawanalysis.blogspot.com/2026/01/frontex-before-eu-courts-damage.html>> accessed 26 February 2026. Georgios Athanasiou, 'Frontex under Scrutiny: Hamoudi's Burden Shifting Precedent and its Implications for FM v Frontex' (Verfassungsblog, 13 February 2026) <<https://verfassungsblog.de/hamoudis-burden-shifting-precedent-and-its-implications-for-fm-v-frontex/>> accessed 26 February 2026.

<sup>69</sup> GRJ v Greece App no 15067/21 (ECtHR, 7 January 2025); ARE v Greece App no 15783/21 (ECtHR, 7 January 2025); AC v France App no 15457/20 (ECtHR, 16 January 2025). Some future pushback cases include COCG and Others v Lithuania App no 17764/22 (ECtHR), RA and Others v Poland App no 42120/21 (ECtHR) and HMM and Others v Latvia App no 42165/21 (ECtHR).

<sup>70</sup> ARE para 226-229; GRJ para 187-190

<sup>71</sup> ARE para 31 and 266; GRJ para 18 and 207

<sup>72</sup> ARE para 217 and GRJ para 182; See Isabel Kienzle and Melina Riemer, 'Feeble Recognition of a Systematic Pushback Practice: The Latest ECtHR Rulings on Greek Pushbacks Cases' (Verfassungsblog, 30 January 2025) <<https://verfassungsblog.de/pushbacks-echr-greece-turkiye/>> accessed 30 May 2025.

<sup>73</sup> SS and Others v Italy App no 21660/18 (ECtHR, 12 June 2025).

<sup>74</sup> SS and Others paras 93-93, 98 and 108.

<sup>75</sup> For more detailed analysis on the case see: Itamar Mann, 'S.S. and Others v. Italy: Killing by Omission, Confirmed by Design' (EJIL:Talk!, 19 June 2025) <<https://www.ejiltalk.org/s-s-and-others-v-italy-killing-by-omission-confirmed-by-design/>> accessed 26 February 2026. Lena Riemer, 'Inadmissibility Decision in S.S. and others v. Italy: A Missed Opportunity in Migration Control Externalization' (ECHR Blog, 17 June 2025) <<https://www.echrblog.com/2025/06/ecthr-inadmissibility-decision-in-ss.html>> accessed 26 February 2026. Thomas Spijkerboer, 'Disneyland Strasbourg: S.S. and Others v. Italy' (Strasbourg Observers, 9 July 2025) <<https://strasbourgobservers.com/2025/07/09/disneyland-strasbourg-s-s-and-others-v-italy/>> accessed 26 February 2026.

battle; this difficulty was compounded by a political climate hostile to any perceived expansion of the Convention's reach. Indeed, nine governments – including Italy and Denmark – had previously addressed an open letter to the Strasbourg Court, criticising what they regarded as an overly expansive interpretation of the ECHR in migration matters.<sup>76</sup>

Taken together, the jurisprudence of both courts reflects a recurring oscillation between the promise of accountability and its repeated frustration. While the cases discussed concern pushbacks and deportations at the EU's maritime and land borders, they point to a broader problem: persistent violations of fundamental rights and the absence of effective accountability. These violations arise not only from the direct conduct of EU institutions and Member States, but also from practices enabled through the financial and operational support provided to so-called “partner” countries. Raising the question of whether the EU's impunity and its outsourcing agreements will ultimately erode access to justice and rights for people on the move.<sup>77</sup>

#### **4. Reflections: *Briançon* and the *European Law of Everyday***

This project, *European Law of Everyday*, aims to illuminate how law shapes the everyday lives of those in Judah's *This Is Europe*, and to ask whether law is disconnected from the lived realities it governs. Although many of Judah's stories are untold in mainstream European discourse, *Briançon* is an exception. Using such migratory journeys – whether in fiction, non-fiction, or academia – is not new. The real question is: *to what end* are these stories used?

In Didier Fassin and Anne-Claire Defossez's work,<sup>78</sup> they write that the experience recounted in the Prologue – ironically also about crossing the French-Italian border to Briançon – is just one of many stories that could reach the same conclusion. Violence, in this context, is not the exception, but the rule.<sup>79</sup>

Brico and his son crossing on the first attempt contrasts sharply with Fassin's account of a family who made three attempts. But this is no happy ending. Brico has lost so much along the way – his wife, his daughter, and a part of himself. This chapter elicits a sigh of relief, a moment of empathy, but also deep sorrow for what has been lost.

NGOs across Europe have worked tirelessly to “acknowledge and mourn those who die avoidable deaths at Europe's borders, and to assert their value and humanity”.<sup>80</sup> And yet, as some scholars argue, even accurate body counts may not be enough to provoke a serious reconsideration of EU migration policy.<sup>81</sup> Mere awareness of border deaths or devastating tragedies do not guarantee concern. However, the rehumanisation that has been the goal of many projects thus far seems to yield no effect either. Then, when do we cross the line between raising awareness and commodifying trauma? When do these stories become *trauma porn*, consumed by privileged audiences from a safe distance?<sup>82</sup>

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<sup>76</sup> See Lena Riemer and Lorenzo Acconciamezza, ‘From “Original Intentions” to “Unforeseeable Change of Circumstances”: The 2025 Escalation of Pressure Towards the ECtHR’ (EJIL: Talk!, 5 January 2026) <<https://www.ejiltalk.org/fromoriginalintentionstounforeseeablechangeofcircumstances/>> accessed 26 February 2026.

<sup>77</sup> See inter alia Mariana Gkliati, Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law (2024) 9(1), 69-86 European Papers 71.

<sup>78</sup> Didier Fassin and Anne-Claire Defossez, *L'Exil, Toujours Recommencé* (Éditions du Seuil 2024).

<sup>79</sup> Ibid, 15 and 16.

<sup>80</sup> Leanne Weber, ‘Knowing-and-et-not-knowing about European Border Deaths’ (2010) 15(2), 35-57 Australian Journal of Human Rights, 50.

<sup>81</sup> E.g. Thomas Spijkerboer, ‘The Human Costs of Border Control’ (2007) 9, 127-139 European Journal of Migration Law.

<sup>82</sup> Allen Meek, *Trauma and Media: Theories, Histories and Images* (Routledge 2010) 31.

The concept of trauma porn, first explored in relation to anti-Black violence,<sup>83</sup> is now being extended to other contexts – such as the suffering of Palestinians, I would argue, people on the move as well. Through *The New Humanitarian*, Luma Makari recounted the feeling, during the Beirut explosion, of many Lebanese people seeing their most traumatic moments shared around social media for everyone to consume.<sup>84</sup> Urging the question: if the structural conditions remain unchanged, do these experiences become mere content that we consume, feel enraged by, and then swiftly forget – precisely because such violence has been normalised? Or using the words of bell hooks, being increasingly exposed to violent imagery through our daily lives makes us “less likely to respond to them with moral outrage or concern”.<sup>85</sup>

So, how long can these individuals continue to give us their stories? And how long can we continue to use their names, their journeys, and their pain without giving something back?

These questions resonate deeply with the aims of the *EU Law of Everyday* project. As mentioned earlier, many of the experiences captured in Judah’s book offer insight into lives that remain largely invisible to the broader European public. Take, for example, the Chapter *Storkow*, which illustrates the life of a Syrian man, Aboud, who works a precarious job as an Amazon delivery driver, while taking care of his wife, who suffers from depression. Stories like these challenge dominant narratives and invite us to see what is often hidden. As researchers, we question our own usage of someone’s lived experience for our own means. I am no exception to this. *Briançon*, regrettably, could have been the chapter of any other person on the move who reached or attempted to reach Europe. The systemic violence of borders and EU migration policy spares no one.

This piece sets out to use someone else’s words and experiences to make an explicit connection with the EU’s dystopian migration regime so that there would be no doubt that the EU is, indeed, “the culprit that fails to appear”. Yet I grapple with the unsettling reality that, in order for these injustices to be recognised as real, and for people to acknowledge the harm caused by the EU and its Member States, the suffering must be personalised – given a name, a face, a narrative arc. Both in my use and Judah’s, Brico’s life and journey are mobilised to provoke empathy. But Brico is not a perfect victim and he need not be for his life to have value.

The everyday reality remains: sovereignty and borders are prioritised above human rights. And so, we must ask – *not just as academics* – can our imaginations stretch far enough to conceive of a different future? However, taking Weber’s words one more time, “the main barrier to recognising the full implications of the structural violence associated with border controls is the system of state sovereignty itself”.<sup>86</sup> Therefore, bringing us full circle, back to the colonial foundations that gave rise to the prevailing norm in international law: the sovereign state’s right to decide who may, and who may not, enter its territory.

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<sup>83</sup> Tina Charisma, ‘Trauma Porn and the Commercialisation of Black Pain’ (*TMRW Magazine*, 2022) <<https://tmrwmagazine.com/index.php/en/news/trauma-pornand-the-commercialisation-of-black-pain>>; Danielle M Taylor, ‘From Lynching to Livestreams: Trauma Porn and the Historic Trivializing of Black Death’ *Richmond Journal of Law and Technology* <<https://jolt.richmond.edu/2020/10/14/the-revolution-should-be-cautiously-televized/>>.

<sup>84</sup> Luma Makari, ‘Trauma Porn and the Commodification of Lebanon’s Tragedy’ (*The New Humanitarian*, 25 January 2022) <<https://www.thenewhumanitarian.org/opinion/first-person/2022/1/25/trauma-porn-commodification-of-Lebanon-tragedy>>

<sup>85</sup> bell hooks, *All About Love: New Visions* (William Morrow Paperbacks 2018) 57.

<sup>86</sup> Leanne Weber, ‘Knowing-and-et-not-knowing about European Border Deaths’ (2010) 15(2), 35-57 *Australian Journal of Human Rights*, 53.

# Beyond a Queer H(e)aven. Reading EU Law through Haidar's Story

by Karla Žeravčić\* and Davide Tomaselli\*\*

## 1. The story

*Berlin* is a story about a queer life. It is a story about Haidar, a young Syrian gay man who flees his home in search of a place where he can be both happy and queer. It is the story of Haidar finding all the queer joy he was looking for in Berlin, Germany, Europe.

*Berlin* is a story of stark divides. On the Eastern shores of the Mediterranean, *Berlin* tells of a homophobic Syria, an unwelcoming family, a repressive society, and a toxic relationship with a partner, Rami, who is stranded in Turkey, hopelessly pursuing his own path to Europe. Far away from this dark 'Orient', in the heart of Europe, *Berlin* is about the queerness that Berlin's club scene offers. It is about Phillip, Haidar's online pen-friend who generously helps him pay his student visa fees to reach Germany. It is about a queer nightlife that offers the spaces and the people to explore unbounded queerness. It is, eventually, about Haidar being joyful in his queerness, experimenting with his sexuality and identity, building a renewed sense of self night after night, and finally feeling free.

*Berlin* is a story full of intense emotions. Negative and then positive emotions that mark Haidar's story step by step, in a *glissando* of joy and liberation that traces Haidar's geographical shift from Syria through Beirut to Berlin, Germany, Europe.

Sitting between the folds of *Berlin* is EU law, moulding Haidar's chances and hopes along his path to Germany. EU law, however, also works in the shadows of this story, making choices for Rami, who is stranded in Turkey, and for countless others navigating (im)possible paths towards joy and liberation. While reading *Berlin*, we asked ourselves: where is the law in Haidar's story? How is the law structuring Haidar's life? To what extent does *Berlin* lead us to read law from a certain point of view, or to what extent does EU law make us read *Berlin* in a different light? Beyond the queer joy of Berlin's nightlife, as EU legal scholars we set ourselves the task of uncovering the untold workings of the law in Europe, and of Europe through its law, through (or despite?) the eyes of *Berlin*, alongside Haidar's very own story of queer life (and the joy that it sparks in us, fellow queers).

## 2. If only it were that easy to get a visa: On two very different paths to Europe

This chapter unintentionally reveals two starkly different migration pathways for queer individuals seeking to enter the EU. On the one hand, Haidar's journey to Germany is facilitated by a student visa, while on the other, his ex-boyfriend endures a perilous route through Turkey to reach Greece.

Haidar's ex-boyfriend, Rami, is mentioned only briefly and cast in a somewhat villainous light due to his actions towards Haidar. At first glance, their respective journeys to Europe appear to represent opposing struggles and distinct facets of EU law. Yet, upon closer examination, they are in fact two sides of the same coin. What separates individuals like Haidar from those like Rami often comes down to little more than money and chance.

In her book, Fiorenza Picozza reflects on the intersections between different legal statuses – such as visa holders and asylum seekers – and how, to many white Europeans, all migrants are often simplistically categorised as 'refugees'.<sup>1</sup> In some cases, even those holding student

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visas must cross borders irregularly to enter the EU.<sup>2</sup> In other cases, visa holders may end up applying for asylum or facing deportation if they fail to maintain the required financial minimum in their bank accounts.<sup>3</sup>

While one pathway may appear to offer a safer and more legitimate alternative to the dangerous journey across borders, both ultimately serve the same political purpose: allowing only the 'chosen few' into the EU. This section, therefore, examines these seemingly contrasting migration experiences which, at their core, expose the same underlying inaccessibility embedded within the EU's migration regime. We will then analyse the extent to which the story of *Berlin* lets us peek into some tensions that riddle through the field of migration and asylum, especially concerning the State's prerogative to police its borders by allowing only a qualified few in and the difficult relationship between the legal regimes of refugee law and human rights law when it comes to their differing scopes of application and thresholds of protection in the case of asylum seekers and refugees. In this regard, we will argue that EU migration and asylum law pacifies these tensions in two ways. First, by attaching political semantics to the legal triage happening at the borders, namely promoting a certain European 'way of life' and reinstating the urgent need for the securitisation of territories and public spaces. Second, by recasting a divide between progressive, homophile European member states and conservative, homophobic countries of origin in order to balance off the difficult encounter between refugee law and human rights law. We will then conclude, in the last paragraph, by reflecting on the methodological implications of these considerations, and especially by questioning the potentials and risks of a law of the everyday approach.

Let us start from the very first element of our analysis: what is the difference between reaching Europe as a student visa holder or an irregular migrant seeking asylum?

According to Directive 2016/801 (Directive for Researchers and Students),<sup>4</sup> a person can study in the EU if they have: (a) a valid travel document, including, if necessary, a visa and residence permit; (b) parental approval, if the applicant is a minor; (c) comprehensive health insurance; (d) proof of payment for handling the application, if required by the Member State (MS); and (e) sufficient financial resources to support themselves without relying on state assistance.<sup>5</sup> In addition to these general requirements, students must also provide evidence of acceptance by a higher education institution.<sup>6</sup> If all conditions are met, the MS has to issue a student residence permit, as stated by the CJEU in *Ben Alaya*.<sup>7</sup>

However, residence permit applications can be rejected if there are grounds related to the existence of a threat to public policy, public security or public health. Therefore, the question arises: what – or rather, who – is deemed a 'threat'? In *Fahimian*,<sup>8</sup> the CJEU ruled that national authorities have wide discretion in assessing whether an individual poses even a potential threat to public security.<sup>9</sup> Any decision to refuse a residence permit must be duly justified, leaving national courts responsible for verifying the factual and legal basis of such decisions.<sup>10</sup>

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<sup>1</sup> Fiorenza Picozza, *The Coloniality of Asylum* (Rowman & Littlefield 2021) 114-116.

<sup>2</sup> *ibid*, 107 and 111.

<sup>3</sup> *ibid*, 112 and 115-116.

<sup>4</sup> Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2021] OJ L 132.

<sup>5</sup> Directive (EU) 2016/801, Art 7.

<sup>6</sup> *ibid*, Art 11.

<sup>7</sup> Case C-491/13, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland* (2014) ECLI:EU:C:2014:2187; See Marco Borraccetti, Third Country Nationals and the Court of Justice of the EU: 2014 Case-Law' (ERA Forum, 2015) 581.

<sup>8</sup> Case C-544/15, *Sahar Fahimian v Bundesrepublik Deutschland* (2017) ECLI:EU:C:2017:255.

<sup>9</sup> *ibid*, paras 41-42.

<sup>10</sup> *ibid*, paras 43-44.

Unfortunately, as pointed out by Eisele, this broad discretion may “trigger potential for arbitrariness and lack of legal certainty”.<sup>11</sup>

While the Directive for Researchers and Students, as well as the case *Konsul Rzeczypospolitej Polskiej w N.*,<sup>12</sup> establish that MSs must guarantee an effective legal remedy when a study visa is refused,<sup>13</sup> the reality is more complex.<sup>14</sup> Given the extensive discretion granted to national authorities, appealing a negative decision in court becomes a daunting challenge – especially for third-country nationals, who may face language barriers and lack familiarity with the host country’s legal system.<sup>15</sup>

Finally, the financial burden of studying in the EU cannot be overlooked, including the costs associated with visa applications. These fees vary between MSs – for instance, Finland charges €300 for online processing, while France charges €60.<sup>16</sup> However, the true cost of these fees depends on an applicant’s country of origin and average income, making access to education in the EU an unevenly distributed privilege.<sup>17</sup>

While some third-country nationals, like Haidar, are able to access legal migration routes to the EU through frameworks such as student visas, others face greater obstacles. This is particularly true for those seeking asylum on the grounds of sexual orientation or gender identity, where the burden of proof is far heavier and the discretion granted to national authorities even broader.<sup>18</sup>

To be granted asylum, queer refugees must prove to national authorities that they are queer, that they have a well-founded fear of persecution based on their sexual orientation or gender identity, and that their country of origin is unwilling or unable to offer protection.<sup>19</sup> While EU migration and asylum law acknowledges queer refugees,<sup>20</sup> the assessment of credibility, which is highly problematic, remains at the heart of the asylum process for queer asylum seekers. As a result, queer individuals must ‘prove’ their queerness to state authorities that often apply heteronormative standards that are shaped by Western understanding of LGBTI identities: asylum authorities take the experiences of white, middle-class, Western gay men

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<sup>11</sup> Katharina Eisele, ‘Public security and admission to the EU of foreign students: Fahimian’ (2018) 55, 279-294 *Kluwe Law International*, 293.

<sup>12</sup> Case C-949/19, *M.A. v Konsul Rzeczypospolitej Polskiej w N* (2021) ECLI:EU:C:2021:186.

<sup>13</sup> *ibid*, para 48.

<sup>14</sup> See Anna Kosinska, ‘The role of the CJEU in the strengthening of the participation of third-country nationals in academic life in the EU. Analysis of the ruling of the CJEU in case M.A. versus Consul of the Republic of Poland in N’ (2021) 4(88), 91-106 *Studia Prawnicze Kul*.

<sup>15</sup> *ibid*, 104.

<sup>16</sup> ‘Coming to the European Union’ (European Commission) <[https://immigration-portal.ec.europa.eu/index\\_en](https://immigration-portal.ec.europa.eu/index_en)> accessed 20 May 2025.

<sup>17</sup> Ettore Recchi, Emanuel Deutschmann, Lorenzo Gabrielli and Nodira Kholmatova, ‘Assessing Visa Costs on a Global Scale’ (Robert Schuman Centre for Advanced Studies – Migration Policy Centre, EUI 2020) Working Papers RSCAS 2020/18.

<sup>18</sup> The discretion is broader not because of any legal provisions or case law but of non-legal factors that influence the assessment such as conceptions of queer individuals.

<sup>19</sup> Johannes Lukas Gartner, ‘(In)credibly Queer: Sexuality-based Asylum in the European Union’ (Humanity in Action, February 2015) <[https://www.humanityinaction.org/knowledge\\_detail/incredibly-queer-sexuality-based-asylum-in-the-european-union/](https://www.humanityinaction.org/knowledge_detail/incredibly-queer-sexuality-based-asylum-in-the-european-union/)>

<sup>20</sup> For example, Article 10(d) of the Qualification Directive; see also the CJEU jurisprudence, Case C-148/13, *A and Others v Staatssecretaris van Veiligheid en Justitie* (2014) ECLI:EU:C:2014:2406; Joined Cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* (2013) ECLI:EU:C:2013:720).

as the default standard and use them as a benchmark to assess non-European asylum seekers.<sup>21</sup>

For national authorities, credibility assessments have largely focused on sexual practices.<sup>22</sup> In Czechia, before 2011, immigration officials used phallometric testing, a procedure in which queer asylum seekers were hooked up to machines that measured their physical arousal when exposed to heterosexual and homosexual pornography.<sup>23</sup> More commonly, asylum seekers are subjected to intrusive questioning about their sexual experiences with people of the same sex. Furthermore, proving queerness is often so challenging that some asylum seekers feel compelled to submit photographic or video evidence of themselves engaging in same-sex intimate acts or even perform stereotypes to make their stories more believable.<sup>24</sup> These assumptions reduce sexual orientation and gender identity to purely sexual and behavioural aspects – an approach never applied to heterosexual asylum seekers.

Before credibility assessments became a central practice in the EU, courts and national authorities often required queer refugees to conceal their identity in their home countries to avoid persecution – a practice known as ‘discretion reasoning’.<sup>25</sup> However, in 2010, a UK judge argued that only those who ‘live openly’ as ‘practising homosexuals’ could be considered as belonging to a particular social group.<sup>26</sup> This creates a paradox: queer individuals were expected to suppress their identity ‘for their own safety’ while also being required to publicly disclose intimate details of their lives to prove their queerness. The contradiction becomes even more complicated when considering the asylum process itself—applicants must demonstrate that they are being actively persecuted. In other words, the mere existence of anti-queer laws<sup>27</sup> or societal hostility in their country of origin is not enough; they must provide evidence of a well-founded fear of persecution.

While queer asylum claims are increasingly recognised in the EU, the process remains entrenched in heteronormative and Eurocentric assumptions.<sup>28</sup> Empirical research, for example, has documented how credibility assessments in queer cases are influenced by culturally Western conceptions of what it means to be LGBTI, stereotypes about LGBTI’s people common behaviours, preferences, appearances, as well as experiences of stigma, marginalisation, and shame.<sup>29</sup> It can be further noted that the Court of Justice of the European

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<sup>21</sup> Jasmine Dawson and Paula Gerber, ‘Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?’ (2017) 29(2), 292-322 *International Journal of Refugee Law* 305.

<sup>22</sup> This is no longer possible in the EU, but it was common practice until the 2010s. See *A* (n20); Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal* (2018) ECLI:EU:C:2017:739. Case *F*, in particular, concerns the admissibility of an expert’s report and projective personality tests to assess the existence of a specific ground upon which international protection can be sought, namely sexual orientation.

<sup>23</sup> ‘UNHCR’s Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on persecution due to Sexual Orientation’ (2011) UNHCR, 1.

<sup>24</sup> Sabine Jansen, ‘Credibility, or How to Assess the Sexual Orientation of an Asylum Seeker?’ (EDAL Conference 2014: Reflections on the Current Application of the EU Asylum Acquis Workshop Sexual Orientation, Gender Identity and Human Dignity) 2.

<sup>25</sup> See more on this *infra* (text to nn 65-70).

<sup>26</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, (2010) UKSC 31, United Kingdom: Supreme Court, 7 July 2010, para 82; see Christian Klesse, ‘On the Government of Bisexual Bodies: Asylum Case Law and the Biopolitics of Bisexual Erasure’ in Richard CM Mole (ed), *Queer Migration and Asylum in Europe* (UCL Press 2021) 122.

<sup>27</sup> See *A* (n 20).

<sup>28</sup> See Keith E McNeal and Sarah French Brennan, ‘Between Homonationalism and Islamophobia: Comparing Queer Caribbean and Muslim Asylum-Seeking in/to the Netherlands’ in Richard CM Mole (ed), *Queer Migration and Asylum in Europe* (UCL Press 2021); Richard CM Mole, ‘Homonationalism: Resisting Nationalist Co-optation of Sexual Diversity’ (2017) 20(5-6), 660-662 *Sexualities*.

<sup>29</sup> Thomas Spijkerboer and Sabine Jansen, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU* (Coc Nederland/VU University Amsterdam 2011) 57–60; Carmelo Danisi and others,

Union has not fully ruled out the influence of stereotypes in the assessment of queer cases: in its *A, B, C* case the Court only stated that a credibility assessment should not be *only* based on stereotypes.<sup>30</sup> Moreover, many queer refugees have had limited opportunities to articulate their sexual or gender identity before – let alone their intimate experiences – making credibility assessment even more daunting.

In a system where one's queerness must be 'tested' to be believed,<sup>31</sup> it is no surprise that queer individuals may take time to disclose their sexual orientation or gender identity, particularly in environments that could endanger them or lead to ostracisation among fellow people on the move.<sup>32</sup> The EU asylum system appears to be increasingly accepting of queer refugees – yet this acceptance remains conditional on their ability to conform to rigid, heteronormative, and Eurocentric ideals of queerness.<sup>33</sup>

### 3. The EU as a Queer H(e)aven?

The image of the EU as a champion of LGBTI rights has made Europe an attractive destination for many queer individuals.<sup>34</sup> However, the lived reality for queer individuals, especially migrants, refugees and asylum seekers, often stands in stark contrast to this narrative. Even if queer individuals do not migrate to the EU to escape persecution, queer migrants often discover that the EU is not as welcoming as it likes to present itself.<sup>35</sup> Across the Union, right-wing and anti-gender rhetoric is on the rise.<sup>36</sup> Poland passed 'LGBT-free zone' resolutions in 2020<sup>37</sup> and in 2025, Hungary banned Pride.<sup>38</sup> Yet, anti-queer sentiment is not confined to

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*Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity* (Springer 2021) 285–316.

<sup>30</sup> See *A* (n 20) para 62.

<sup>31</sup> Sabine Jansen, 'Credibility, or How to Assess the Sexual Orientation of an Asylum Seeker?' (n24) 1.

<sup>32</sup> Keith E McNeal and Sarah French Brennan (n28) 177.

<sup>33</sup> This text mostly focused on the issues gay men face in the asylum process, as most of the scholarly work and jurisprudence tackles that as well. For more information on other queer groups see: Christian Klesse, 'On the Government of Bisexual Bodies: Asylum Case Law and the Biopolitics of Bisexual Erasure' in Richard CM Mole (ed), *Queer Migration and Asylum in Europe* (UCL Press 2021); Sarah Singer, 'How Much of a Lesbian are you? Experiences of LGBT asylum seekers in immigration detention in the UK' in Richard CM Mole (ed), *Queer Migration and Asylum in Europe* (UCL Press 2021); Jaclyn Gross, 'Neither Here nor There: The bisexual Struggle for American Asylum' (2018) 69(3), 985-1008 *Hastings Law Journal*; Rachel Lewis, 'Deportable Subjects: Lesbians and Political Asylum' (2013) 25(3), 174-194 *Feminist Formations*; Chiara Scissa and Elisabeth Cuocco, 'Reality is not binary: Spotlighting the existing gaps in the EU and Italian asylum system for trans applicants' <[https://www.sogica.org/wp-content/uploads/2020/08/Session-3\\_SOGICA-ScissaCuocco-Final-2.pdf](https://www.sogica.org/wp-content/uploads/2020/08/Session-3_SOGICA-ScissaCuocco-Final-2.pdf)>; Yvon van der Pijl, Brenda C Oude Breuil, Lene Swetzer, Marilena Drymioti and Marjolein Goderie "'We Do Not Matter": Transgender Migrants/Refugees in the Dutch Asylum System' (2018) 5(1), 1-11 *Violence and Gender* <<http://doi.org/10.1089/vio.2017.0009>>; Amandine Le Bellec, 'Shifting equality from the margins: the Common European Asylum System and the making of trans rights in the European Union' (2023) 8(2), 1-18 *European Journal of Politics and Gender* <[10.1332/25151088Y2023D000000013](https://doi.org/10.1332/25151088Y2023D000000013)>; and Mariza Avgeri, 'Trans\*it: Transgender and gender nonconforming asylum claimants' narratives in Greece' (2021) 26(1-2) *Sexualities* <<https://doi.org/10.1177/13634607211013278>>.

<sup>34</sup> Richard CM Mole, 'Introduction: Queering Migration and Asylum' in Richard CM Mole (ed), *Queer Migration and Asylum in Europe* (UCL Press 2021) 1; Philip M Ayoub and David Paternotte, *LGBT Activism and the Making of Europe: A Rainbow Europe?* (Palgrave Macmillan 2014) 12.

<sup>35</sup> Richard CM Mole (n34) 2.

<sup>36</sup> Camille Ogoti, 'Can Europe Resist the Anti-LGBT policies of hate?' (*Euro News*, 6 February 2024) <<https://www.euronews.com/2024/02/06/can-europe-resist-the-anti-lgbt-politics-of-hate>>.

<sup>37</sup> Una Hajdari, 'Could Poland's Controversial LGBT-Free Zones Finally be Consigned to History?' (*Euro News*, 21 July 2023) <<https://www.euronews.com/2023/07/21/could-polands-controversial-lgbt-free-zones-finally-be-consigned-to-history>>; Claudia Zygmunt, 'Polish Activists Win Cases Against 'LGBT-Free Zones'' (*Human Rights Watch*, 8 May 2023) <<https://www.hrw.org/news/2023/05/08/polish-activists-win-cases-against-lgbt-free-zones>>.

<sup>38</sup> Peter Dlhopolec, Edit Inotai, Jules Eisencheter and Claudia Ciobanu, 'Democracy Digest: Hungary Bans Pride as Orban Promises Spring Clean-Up of -Stinkbugs' (*Balkan Insight*, 21 March 2025) <<https://balkaninsight.com/2025/03/21/democracy-digest-hungary-bans-pride-as-orban-promises-spring-clean-up-of-stinkbugs/>>; Cristian González Cabrera, 'Hungary Bans LGBT Pride Event: EU Commission Should Take

these so-called 'troublemakers' of the EU – it is widespread across Europe, manifesting in hate, violence, and discrimination, particularly targeting trans and gender-diverse people.<sup>39</sup>

The Trans Murder Monitoring, which has tracked the murders of trans and gender-diverse individuals globally since 2009, reports that since 2008, 102 trans and gender-diverse people have been murdered in the EU with an additional 83 in non-EU European countries.<sup>40</sup> Italy alone accounts for 49 of these cases. In 2023, 45% of trans murder victims in Europe were migrants,<sup>41</sup> and on a global scale, 93% of trans people murdered in 2024 were Black or Brown.<sup>42</sup> These reports expose the deep intersection between racism, xenophobia, homo- and transphobia as well as anti-immigration rhetoric across Europe.

This reality further challenges the idea of 'rainbow maps'<sup>43</sup> that depict Western European countries such as France, the UK, and Spain as 'green lights' or queer-friendly havens, where violence against LGBTI individuals is either ignored or dismissed as isolated incidents rather than as part of systemic structures of oppression.<sup>44</sup> The EU's – or more precisely, Western Europe's – portrayal as a queer 'safe space' has also contributed to an East-West divide, where non-EU and Eastern EU states are labelled 'homophobic' and 'backwards', while Western Europe is framed as 'modern' and 'civilised'.<sup>45</sup> This dynamic is particularly evident in the treatment of Muslim minorities in Western Europe, who are often scapegoated in discussions of homophobia.<sup>46</sup>

The lived experience of queer individuals across the EU is far more complex than the utopian image projected to the outside world. While legal protection and social acceptance have improved over the years,<sup>47</sup> many queer individuals continue to face discrimination, harassment and violence. Public spaces remain unsafe for many, with queer people fearing to hold hands with their partners,<sup>48</sup> and workplace<sup>49</sup> and healthcare discrimination<sup>50</sup> persisting as major barriers. Socioeconomic inequalities,<sup>51</sup> homelessness,<sup>52</sup> and lack of adequate support networks further exacerbate these challenges.

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Legal Action to Protect Rights to Free Assembly, Expression' (*Human Rights Watch*, 20 March 2025) <<https://www.hrw.org/news/2025/03/20/hungary-bans-lgbt-pride-events>>.

<sup>39</sup> 'Harassment and Violence Against LGBTIQ People on the Rise' (*EU Agency for Fundamental Rights*, 14 May 2024) <<https://fra.europa.eu/en/news/2024/harassment-and-violence-against-lgbtqi-people-rise>>; 'Annual Review' (ILGA Europe 2024) <<https://www.ilga-europe.org/report/annual-review-2024/>>.

<sup>40</sup> 'Trans Murder Monitoring – Absolute numbers (2008 - Sept 2024)' (*Trans Respect*) <<https://transrespect.org/en/map/trans-murder-monitoring/>> accessed 20 May 2025.

<sup>41</sup> 'Trans Murder Monitoring 2023 Global Update' (*Trans Respect*, 13 November 2023) <<https://transrespect.org/en/trans-murder-monitoring-2023/>> accessed 20 May 2025.

<sup>42</sup> 'Will the cycle of violence ever end? TGEU's Trans Murder Monitoring project crosses 5,000 cases' (*Trans Respect*, 13 November 2024) <<https://tgeu.org/will-the-cycle-of-violence-ever-end-tgeus-trans-murder-monitoring-project-crosses-5000-cases/>> accessed 20 May 2025.

<sup>43</sup> 'Rainbow Map' (*ILGA Europe*) <<https://rainbowmap.ilga-europe.org>> accessed 20 May 2025.

<sup>44</sup> Francesca Romana Ammaturo and Koen Slootmaeckers, 'The Politics of Rainbow Maps' (*LSE Blogs*, 28 May 2020) <<https://blogs.lse.ac.uk/gender/2020/05/28/the-politics-of-rainbow-maps/>>.

<sup>45</sup> Philip M Ayoub and David Paternotte (n34) 14-15.

<sup>46</sup> Philip M Ayoub and David Paternotte (n34) 15.

<sup>47</sup> 'LGBTIQ Equality Strategy 2020-2025' (European Commission) <[https://commission.europa.eu/document/download/5100c375-87e8-40e3-85b5-1adc5f556d6d\\_en?filename=lgbtiq\\_strategy\\_2020-2025\\_en.pdf](https://commission.europa.eu/document/download/5100c375-87e8-40e3-85b5-1adc5f556d6d_en?filename=lgbtiq_strategy_2020-2025_en.pdf)> 3.

<sup>48</sup> 'LGBTIQ Equality at a Crossroads: Progress and Challenges' (EU Agency for Fundamental Rights 2024) <<https://fra.europa.eu/en/publication/2024/lgbtiq-equality-crossroads-progress-and-challenges>>, 17; While the figure is smaller than in 2019, it still remains over 50%.

<sup>49</sup> *ibid*, 39.

<sup>50</sup> *ibid*, 18.

<sup>51</sup> *ibid*, 40.

<sup>52</sup> *ibid*, 23.

Depicting the EU and Western Europe as a 'queer haven' creates an unrealistic image that silences the violent realities faced by many, particularly those on the margins. Queer migrants, asylum seekers, and refugees—especially trans and gender-diverse individuals—are disproportionately exposed to multiple and intersecting forms of abuse, exclusion, and hate crime. These individuals are at high risk as they navigate a cultural, societal, and political environment increasingly shaped by xenophobic, racist, and right-wing rhetoric. Their lived experiences stand in stark contrast to the polished narrative of 'the queer haven'.<sup>53</sup>

#### **4. Law, the politics of the border, and the construction of otherness**

Building on the previous paragraphs, it is possible to see how Haidar's story lets us readers peak into a very partial angle of reality, one that, we could say, narrates a queer self-fulfilment in ideal/stylised conditions. Indeed, *Berlin* sidelines other Haidars' stories, stories that are deeply affected by Europe's border management, externalisation, and violence, as well as seriously influenced by all the other structural conditions that, both socially and legally, invest queer subjects' experiences in Europe, at least the Europe that lives outside Berlin, its clubs, and its gay bars: the Europe that taints its pristine imagine of a queer h(e)aven.

In any case, we would like to suggest that there is more to focus on beyond a description of what is going on in Europe besides *Berlin*, besides this particular instance of queer life. We think there is some further unpacking to do concerning the ways in which the focus on this story, the prevalence of this European-enabled liberatory narrative reinforces a very specific way of conceiving of Europe and its relationship to otherness, inside as well as outside its borders.

While reading *Berlin*, we are drawn, as European citizens and legal scholars, to feed into a well-known script of the EU as a project of empowerment, leading European people out of the darkness of nationalism towards a continent of peace and prosperity.<sup>54</sup> *Berlin* made us wonder: whose peace and prosperity? What are the costs of empowerment? Who bears them? Put differently: what is the politics that we sense behind *Berlin*'s EU law? Is it really that queer?

Taking stock of previous reflections on the stakes of the two different legal frameworks – visas for students and international protection – we argue that it is possible to read *Berlin* in the broader framework of migrations towards Europe clashing with the States', and the EU's, right to exclude (certain) non-citizens from their territories. From this point of view, at least two dimensions determine the chances of other (less lucky) Haidars of safely entering Europe and finally leaving their own story of liberation. First, in both the case of student visas and international protection, the EU and its Member States retain the prerogative to police their borders by deploying legal tools that justify, both politically and morally, the (violent) exclusion of many by foregrounding the inclusion of a select few.<sup>55</sup> These few may be selected through

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<sup>53</sup> Kaja Simmen, 'No more whitewashing – the harsh realities of transphobic trends across Europe: The importance of listening to migrants, asylum seekers and refugees on the margin' (*RFSL Malmö*, 10 January 2024) <<https://malmo.rfsl.se/en/areas-of-work/newcomers-malmo/no-more-whitewashing-the-harsh-realities-of-transphobic-trends-across-europe-theimportance-of-listening-to-migrants-asylum-seekers-and-refugees-on-the-margin/>>.

<sup>54</sup> For a reflection on empowerment as an EU tool to distract from the lack of emancipation, see Alexander Somek, 'Europe: From Emancipation to Empowerment' (2013) No. 60/2013 LSE 'Europe in Question' Discussion Paper Series.

<sup>55</sup> In this sense, see for example UNHCR's own investment in the differentiation between refugees and migrants to uphold a fair system of trimming between those who deserve protection and those who can be kept outside national borders: Adrian Edwards, 'UNHCR Viewpoint: "Refugee" or "Migrant" – Which Is Right?' (*UNHCR Hong Kong*, 27 August 2015) <<https://www.unhcr.org/hk/en/1088-unhcr-viewpoint-refugee-or-migrant-which-is-right-2.html>> accessed 27 March 2025; Erika Feller, 'Refugees Are Not Migrants' (2005) 24 *Refugee Survey Quarterly* 27.

the legal technique of the public security exception<sup>56</sup> or the legal procedure of the refugee status determination.<sup>57</sup> Second, especially in the case of queer applicants for international protection, two different legal frameworks – international human rights law and international refugee law and their European counterparts as codified in the instruments of the Common European Asylum System – face a difficult encounter: how can law save its legitimacy when these two frameworks accord differing levels of protection to different subjects based on their nationality even when, as it is especially clear in queer cases, the distinction between human rights violations on the one side and risks of persecution on the other is not that clear-cut? How can law be deemed impartial and objective when different legal frameworks are coupled with different subjects whose life conditions, *mutatis mutandis*, are not always that different?<sup>58</sup>

In dialogue with the rich literature on queer asylum in Europe,<sup>59</sup> we submit that the tensions produced in these two dimensions are pacified through law via a double move. On the one hand, the inclusion of the qualified few, typical of the State's prerogative to police the porosity of its borders, is not only defended, but also put to profit by virtue of a selection operated according to criteria that feed into politically-oriented narratives. These consist of, first and foremost, the empowering promise of the European way of life for (only a specific kind of) queer subjectivities, as well as the necessity to have the State engaged in a constant operation of securitisation of territories and public spaces. On the other hand, the makeshift, unsolved balance between human rights and refugee law frameworks is shielded by a reiterated othering discourse that reads third countries only through the lenses of homophobia, regression, religious fundamentalism, discrimination, and violence, while styling EU States as defenders of queerness and EU territories as empowering spaces.

Two examples speak clearly in this direction. Both Thomas Spijkerboer and Francesca Romana Ammaturo have analysed the legal discourses of the Court of Justice of the European Union and the European Court of Human Rights by paying attention to the (undue?) differentiations that occur when interpreting the scope of human rights protection when dealing with European citizens or non-citizens. In particular, Spijkerboer has retraced such incongruences in the Courts' discourses as far as the criminalisation of homosexuality and the assessment of a person's sexual or gender identity as criteria for the recognition of refugee status are concerned.<sup>60</sup> Similarly, Ammaturo<sup>61</sup> has found that the ECtHR's Article 8 case law

<sup>56</sup> See supra, *Fahimian* (n 8).

<sup>57</sup> A legal procedure whose ostensibly objective and neutral character is challenged by historical accounts that unveil its continuous evolution following varying political interests: Cf. Rebecca Hamlin, *Crossing: How We Label and React to People on the Move* (Stanford University Press 2021); Katy Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection' (2013) 1 *Migration Studies* 4.

<sup>58</sup> For a contribution dealing with this difficult encounter and advancing some criteria to mediate it see: James C Hathaway and Jason M Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *New York University Journal of International Law and Politics* 315. More generally, on the relationship between the two legal frameworks, international human rights law and international refugee law, see: Janna Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (Cambridge University Press 2021). Concerning the "European asylum dilemma" that arises from this juncture, see: Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 *Law and Critique* 221.

<sup>59</sup> Cf. as a representative sample: Danisi and others (n29); Spijkerboer and Jansen (n29); Arzu Güler, Maryna Shevtsova and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (Springer International Publishing 2019).

<sup>60</sup> Spijkerboer (n58). In particular, the author compares and contrasts the ECtHR *Norris v Ireland* and *Dudgeon v UK* cases with the CJEU *X, Y, and Z* case concerning the first issue and the ECtHR *Van Kuck v Germany* with the CJEU *A, B, and C* cases concerning the second (*Norris v. Ireland* App No 10581/83 (ECtHR, 26 October 1998); *Dudgeon v. United Kingdom* App No 7525/76 (ECtHR, 22 October 1981); Joined Cases *X and Others* (n20); *Van Kuck v Germany* App No 35968/97 (ECtHR, 12 September 2003); Joined Cases *A* (n20).

<sup>61</sup> Francesca Romana Ammaturo, 'The "Pink Agenda": Questioning and Challenging European Homonationalist Sexual Citizenship' (2015) 49 *Sociology* (Oxford) 1151.

dealing with LGBTI rights<sup>62</sup> does not sit well with a series of Article 3 cases<sup>63</sup> in which no violation is found for some gay asylum seekers facing return to their countries of origin, Iran and Libya. Namely, it can be argued that, faced with similar human rights violations or risks thereof, the Court applied different standards in the two sets of cases, hence not providing gay asylum seekers with the same protection that had already been accorded in previous cases to gay citizens of member states of the Council of Europe under the lower threshold of the right to private and family life.

To the extent that, according to the authors, the Courts' intervention is somehow shaped and influenced by the more or less explicit qualification of non-EU countries of origin as othered spaces singled out for their homophobic nature, we agree that, in these cases, Courts are (also) making politics with law, and more specifically they are feeding into a homonationalist<sup>64</sup> agenda, i.e. reinforcing a homophile "us" (the West, or Europe in this case) in opposition to a homophobic "them" (the East, or countries of origin in this case). Accordingly, such an agenda not only serves European political interests, such as those mentioned above, namely the promotion of a certain European "way of life" and the justification for the constant need for securitisation of territories and public spaces. On the contrary, it also reinforces the legal system of asylum and migration to the extent that, on the one hand, it substantiates the differentiation between the deserving, included few and the unqualified, excluded many and, on the other hand, it stabilises the persistent tension between the refugee law and human rights law regimes by constructing a divide that justifies their differing scopes and levels of protection.

A second example can be found in the consequences of a relatively recent legal evolution. So-called discretion reasoning,<sup>65</sup> indicating the set of judicial techniques deployed by judges in asylum cases to deny refugee status on the ground that the applicant can conceal the elements that engender their risk of persecution, has been substantially ruled out in most jurisdictions following two important cases of the UK Supreme Court<sup>66</sup> and the Australian High Court<sup>67</sup> and in the EU following CJEU *X, Y, and Z*<sup>68</sup> case.<sup>69</sup> While this evolution should be welcomed warmly, Jenni Millbank has warned against a further transition from a discretion to a credibility regime. In other words, according to the author, asylum decision makers, being deprived of discretion reasoning as the technique used to refuse refugee status based on the claim that applicants can control their behaviour in a way that excludes them from the persecutor's gaze and thus saves them from persecution, now turn to the new technique of credibility that allows them to condition the recognition of refugee status not really on the concealment of certain traits of the applicants' identities, but rather on the modalities in which the applicants manifest, perform, and more generally live their persecuted characteristics.<sup>70</sup>

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<sup>62</sup> *Dudgeon v. United Kingdom* (n 60); *Norris v. Ireland* (n 60); *Modinos v. Cyprus* App No 15070/89 (ECtHR, 22 April 1993).

<sup>63</sup> *F. v the United Kingdom* App No 17431/03 (ECtHR, 22 June 2004); *I.I.N. v the Netherlands* App No 2035/04 (ECtHR, 20 December 2004); *M.E. v Sweden* App No 71398/12 (ECtHR, 26 June 2014).

<sup>64</sup> Cf. Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007). The term homonationalism was first coined by Jasbir Puar and refers to the assimilation of portions of the LGBT community into the (militarised, imperial) national project, eminently by establishing clear divides between the Nation and the Other along sexed and gendered faultlines traced by the (ostensible) presence or lack of protection of LGBT rights.

<sup>65</sup> Cf. *supra* (text to n 25).

<sup>66</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (n26).

<sup>67</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, (2003) HCA 71, Australia: High Court, 9 December 2003

<sup>68</sup> *Supra* (n 20).

<sup>69</sup> For a fully-fledged treatise on discretion reasoning see: Wessels (n58).

<sup>70</sup> Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391.

Empirical studies conducted across the EU<sup>71</sup> have not only confirmed the presence of this shift from discretion to credibility, but they have also fleshed out the ways in which this transition was made so that stricter credibility assessment are systematically moulded on Western understandings of gender and sexuality. Such heightened requirements, eventually, tend to impose the opposite of discretion, engendering some sort of visibility reasoning that filters and flattens queer subjectivities, once again, according to homonationalist interests.<sup>72</sup>

These two examples, by letting us read bits and pieces of homonationalist politics through the untold story of *Berlin*'s EU law, cogently present new issues to the agenda of our engagement with this story. Reading about Haidar made us think about Rami as well as all the other people on the move whose paths are hardened, twisted, broken (or sometimes facilitated) by EU law. Reading about Haidar also made us think about what we, as European citizens and European legal scholars, were led to think about when exposed to his individual story. It made us think about what kind of EU law we were immediately drawn to read into his own personal European experience. Eventually, reading beyond Haidar's story, we took some time to recollect the other side, the darker one of EU law in other Haidars' lives, and so we tried to reflect on the reasons why we are used to foregrounding queer stories like *Berlin* and, relatedly, on who else is paying the costs of this prospective artifice. These are all the motives why, while making a deliberate effort to read something in *Berlin* that transcends our genuine, friendly queer joy for Haidar's blossoming, we are left with many open questions: first and foremost, and beyond any rhetoric, would Haidar be alive today? Would he have survived the war in Syria and the bombs in Lebanon? And what about Rami, would he be alive today? Would he have survived the perils of sea and the cruelty of Europe's externalised borders? And then, how can we account for and re-tell stories like Haidar's while not being oblivious to the broader contexts? Is telling a story such as *Berlin* a risk-free activity? What kind of politics is it fostering, or what kind of legal intervention is it not displaying? In sum, what are the risks, stakes, and caveats that legal scholars should be mindful of when reading this story? What should they make of it? We believe these questions cannot but trigger essential methodological reflections.

## 5. Some methodological reflections

We started our collective reading of "This is Europe" with a specific aim in mind: to read the law of Europe in the everyday life of its people. With this disposition, we approached *Berlin* and the narration of Haidar's life. Looking back at the reflections that we shared in this piece, however, we are left wondering: was it really Haidar's everyday life that we read about in *Berlin*? If this were indeed the case, what should we really understand as *everyday life* and, most importantly, its law?

Recalling that in *Berlin* we almost exclusively learnt about Haidar's European experience through his nightly life in queer clubs, we acknowledged that we accessed only some selected aspects of Haidar's life: we read a story that someone else wrote about someone else. A story that, supposedly, was both originally shared and then narrated for different purposes than the ones that moved us as readers and scholars. In this light, we ask: should Haidar's story be taken as representative? Was it made to be a trigger to generate critical, ethical thinking? If it was not, but we think that we can turn it into one through our legal readings, how are we supposed to do so?

Before proceeding, we should also take the time to reflect on the ethical implications of working with *Berlin* as well as the other stories of "This is Europe". We read a deeply emotional story. One that personally touched us and made us empathetic. Precisely by virtue of this, we are, yet again, left with more questions than answers: who are we to work with Haidar's story?

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<sup>71</sup> Danisi and others (n 29); Spijkerboer and Jansen (n 29).

<sup>72</sup> Cf. on this: Massimo Prearo, 'The Moral Politics of LGBTI Asylum: How the State Deals with the SOGI Framework' (2021) 34 Journal of Refugee Studies 1454.

What drove Haidar to tell his story in the first place? Is it okay for us to turn his testimony into 'our source'? Should we first learn more about how the story came to light, how was it mediated and under what conditions? Would this be, in any case, enough for us to draw legal considerations on the European law of everyday life? Or, more importantly, how can we meaningfully build on this story to develop a critique of EU law without, at the same time, devaluing Haidar's experience and testimony?

While fleshing out these concerns, we realised that they transcend the boundaries of ethics by raising methodological questions. The methodology we were looking for through our collective reading exercise of "This is Europe" was one able to indicate us the way to do EU legal scholarship (or law?) in a novel way, one that would reconnect EU law to its society.<sup>73</sup> Taking stock of the questions that we have raised, we wonder now: what society are we talking about? If it is true that the EU is a deeply ideational project<sup>74</sup> and that EU law is both an institutional language and a grammar for social conflict,<sup>75</sup> does 'a society' already exist in the mind of EU law? Would it be the society we are looking for, or rather its ideal and normative reflection, the one that makes EU law's society disconnected from 'the true one'? And if this were the case, how do we access 'the true one'?

Considering the novelty of the methodology we are looking for, we can suppose that this is somehow close to empirical/ethnographical approaches to law, but not quite the same; it is somehow close to critical legal approaches, but not quite the same; it is also somehow close to sociolegal research and the concept of legal consciousness, but, yet again, it is not quite the same. The new methodology we have been trying to read into *Berlin* and other stories of Europe should equip us with a point of view that is internal to the law, it should provide us with social rationalisations<sup>76</sup> that, at once, come from the law and bring it closer to our alienated, fragmented, polarised societ(ies)y.<sup>77</sup>

And yet, as we learned with *Berlin*, Haidar's instance of everyday life seemed to redirect us towards an image of law working behind the scenes to support liberation. Only re-casting our gaze beyond Haidar and beyond *Berlin* in the wake of a sense of critical engagement, we came to retrieve a different vision of the law of Europe. What, or better whose everyday life are we talking about then? And most importantly, why are we talking about it?

This question brings us to our last move in this methodological reflection. We think that, when trying to read law in everyday life, we should pay attention to the (more or less explicit) normative commitments underlying this operation. When we say that we want to 'do law' in a novel way, that "EU law's authority is increasingly dependent on the way in which it is experienced",<sup>78</sup> or that what we are looking for is a law "where Europeans' existential and social concerns may be expressed and integrated without, however, yielding to radical identity claims prone to regression and fragmentation",<sup>79</sup> are we envisioning a 'simply' diagnostic intervention? One that is interested in understanding what law does to society, how it sits with it? Or are we somehow tapping back into the "lawyer's law"<sup>80</sup> to find a new way to make the

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<sup>73</sup> Loïc Azoulay, 'Reconnecting EU Legal Studies to European Societies' [2024] *Verfassungsblog* <<https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/>> accessed 28 March 2025.

<sup>74</sup> Päivi Johanna Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?' (2022) 1 *European Law Open* 60, 84.

<sup>75</sup> Loïc Azoulay, 'The Law of European Society' (2022) 59 *Common Market Law Review* 203, 210.

<sup>76</sup> Cf. Neuvonen (n 74).

<sup>77</sup> Azoulay (n 75) 207.

<sup>78</sup> Floris De Witte, 'Is this Europe?' *European Law Open* (forthcoming 2025).

<sup>79</sup> Azoulay (n 75) 213.

<sup>80</sup> Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 29.

law make sense, to re-harness its normative superpower, assuming that this will also do good to society?

In conclusion, still grappling with the potential of the everyday, we would limit ourselves to two considerations that, we think, we cannot escape while finding a way to move forward. First, our engagement with the law of everyday life should not shy away from, but directly face the fact that, in the first place, law was not conceived as a companion of contexts and stories, but rather conjured as a force of generalisation and formalisation. Second, our engagement with the law of everyday life should not shy away from, but directly face the fact that we are allowing ourselves, as privileged scholars, to speak *for* someone else's everyday.

Besides these caveats, and out of respect for the great discussions that *Berlin* and other stories sparked, we would like to wrap up with, why not, another open question: is there more to this story than great heuristic value and triggering potential?

# Free to Move, Bound to Injustice: Sexual Exploitation, Sex Work, and Law from Latvia to Europe

by Alex Schuster\* and Davide Tomaselli\*\*

## 1. Nora's Story

The seventh chapter of Judah's book tells the story of Nora, a young girl from the Latvian city of Liepāja.<sup>1</sup> After being awarded a scholarship to study in Italy, Nora faces a dilemma as the travel expenses are not covered, and her family cannot afford the costs of the journey. Seeing no other solution, once she turns sixteen, Nora accepts the job offer of a scam company: while she signed up for moderating chat rooms on friendship, fashion, marriage, and dating, she ends up prostituting herself online, providing cam shows in return for money. The harsh socio-economic reality surrounding her makes her quickly realise how much money she can earn: enough money not only to save for her trip, but even to provide her family with additional funds. As time passes, Nora increasingly loses her inhibitions. She begins to intimately engage with her customers and subjugates herself to more extreme online abuse, insults and degradation. The chapter ends with Nora having collected enough money to finally move to Italy.

Nora's story is one filled with hardship, despair, and abuse, but also her journey to seek better opportunities elsewhere. While constantly touching on this topic, yet never explicitly mentioned, the story deep down is a powerful reflection of social (in)justice and inequality. As far as Nora's chapter is concerned, in particular, inequality is encountered in the lack of fairness in wealth distribution within the EU, which subsequently creates unequal opportunities and privileges among those living within the Union.

Nora's decision – although difficult to qualify as one of free will – to put herself in this precarious, exploitative and abusive position as a minor is indeed driven by the need to earn money, to move abroad and to escape these deeply unjust social conditions that surround her. It follows that this paper, at its core, will address the question of whether the law is positioned in a way that it can make a difference in Nora's life or whether the underlying components of social injustice traversing her story suffocate the law's transformative intervention. It is in this vein that we will turn to the question of the role that law plays (or could play?) between the redress of individual wrongs on the one side and the subversion of systems of oppression on the other. While we will not aim at providing a full-rounded answer to this query, we will start by grounding ourselves in the context of the story to investigate how EU law fares when it comes to this difficult relationship between individual and structural and its ensuing transformative potential.

In three parts, we will first address how we understand the story and why we frame it in light of violence, abuse and a holistic perspective of gendered oppression and sex work. Second, we will analyse the role that national and European law play in the story, focusing on the ways in which they influence Nora's life while acknowledging her lived experience and everyday struggles. Finally, we will zoom out from the legal framework to tackle the entanglement of more systematic and structural issues underlying Nora's trajectory and to eventually draw some reflections on the meaning and implications of our legal engagement with the everyday.

In particular, we will argue that the liberal understandings of gendered oppression and sex work underpinned by EU law actually risk impeding the interventions that are needed to overcome structural injustice and social inequalities. In this sense, we will submit that we cannot understand

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<sup>1</sup> This chapter is based on the seventh chapter 'Liepāja' from Ben Judah, *This is Europe: The Way We Live Now* (Picador 2023).

the EU's normative role in the field of sex work and violence against women if we do not deconstruct how the EU itself (re)produces the material conditions through which its citizens unequally participate in its integration project. Finally, we will reflect on the kind of perspective that is encouraged by a focus on the everyday, the contrasted relationship between the individual and structural dimensions, and the pivotal role of emotions in the narration of everyday life. On this basis, we will conclude that in order for us, lawyers and legal scholars, to work with the law of the everyday, it is first necessary to critically investigate the normative underpinnings of this move.

## 2. Not an Easy Framing: From Nora's Story of Violence and Abuse, Through Sex Work, to Visions of (In)Justice<sup>2</sup>

*Liepaja* is, undoubtedly, a story of violence, abuse, and exploitation. Nora's<sup>3</sup> tragic experience as a minor being exposed to the market of online sex chats in a way that is evidently distant from any conception of prior, informed, and free consent cannot be downplayed. At the same time, however, two considerations complicate the framing of this story as far as its legal apprehension in the context of the European Union (EU) is concerned.

First, the European, cross-border dimension of Nora's ambitions and troubles adds a significant layer to this story. On the side of ambitions, Europe can be found in Nora's story through her desire to pursue education in another Member State. Clearly, taking into consideration Nora's plans and desires, and the role they have in shaping the context that eventually drives her towards cam shows, should not be understood as a justification for the violence and abuse she is a victim of. Equally, the fact that Nora keeps on performing this activity because she is determined to earn enough money to buy her tickets to Italy and help her family can in no way be accepted as proof that she freely and consciously chose to engage in the provision of online sexual services. That is why it is necessary to acknowledge that Europe can also be found, on the side of troubles, in the exploitative, violent virtual space of the online chats that Nora inhabits. Or better, considering how the online exploitation and violence do not stop at Europe's geographical boundaries and stretch beyond (physical) borders across the world, Europe is challenged in Nora's story to the extent that it is presented with a reality check: its empowering *tale* and *telos* are met with global systems of oppression and transnational chains of material inequalities. Reading Europe in Nora's story, then, should work as an invitation to engage in a legal reading that neither settles for the sole identification of violence, exploitation, and abuse nor flattens any distancing from such identification on a troublesome justification of these forms of oppression. Such reference should equally broker an understanding of *Liepaja* as one example of the complex interactions between the liberal promises of the EU project of integration, ranging from the possibility of freely choosing one's path to the availability of pursuing them by freely moving across the continent, and existing systems of power and inequality, ranging from capitalist to patriarchal structures, taking sexed and gendered shapes as it happens in this case of online sexual abuse.

Second, distinguishing sex work from gendered violence and exploitation is no easy feat. This could probably hold true from different scholarly and feminist perspectives and for different reasons. In this sense, it is true that, among feminists and feminist scholars who have engaged with these matters, one can trace quite contrasting, at times opposite, positions. Some feminists, for example, understand sex as nothing but the substantiation of male domination, while others

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<sup>2</sup> We would like to emphasise the importance of this paragraph to us and show our deep gratitude to our colleagues for the discussions that we had. Adopting a different framing, such as that of sex work, without motivating the choice and apparently dismissing the violent, exploitative, and abusive nature of *Liepaja* would not have captured the full meaning of what we would like to say and would have limited this story to selective angles.

<sup>3</sup> We would like to clarify that we will use the name Nora across this piece as a way of giving a name to many women's stories. We do not wish to individualise the rich resonances of *Liepaja* nor limit our analysis to the specific life circumstances of *Liepaja*'s Nora. More broadly, concerning the problematic side of using this intimate story as a source in an academic environment, please refer to our last paragraph on methodological reflections.

read the dynamics of sexuality as distinguished and partially autonomous from gendered hierarchies.<sup>4</sup>For the purposes of this short contribution, we would like to stress the fact that a proper understanding of sex work, gendered oppression, and social injustice would be hampered by legal interpretations that reduce any remunerated form of sexual service to an instance of violence, exploitation, and eventually male domination. The same would apply, on the contrary, by simply juxtaposing the remunerated exchange of sexual services to other forms of work without problematising sex work's position in a broader system of gendered oppression.

Bearing these considerations in mind, we consider that, in order to legally read *Liepaja*, we cannot derogate from a critical engagement with the harmful consequences of work in a capitalist economy and sex in a patriarchal society. In this sense, by framing Nora's story in the context of injustice and inequality, we will be able to both make sense of her struggles and avoid the risk of reading violence and abuse 'only' as emotional resources to be used to empathise with her individual condition. Additionally, an explicit focus on sex work will also allow us to address its persisting and excessive stigmatisation, leading to sex workers' marginalisation and their treatment as second-class citizens.<sup>5</sup> Stigmatising sex work not only dehumanises individuals but also perpetuates systems of inequality and injustice. Challenging that stigma is crucial to building a more just and compassionate society.

What we want to show is that this particular case highlights the close connection between the underlying conditions of social inequality and injustice on the one side, and Nora's subjugation to violence and exploitation on the other. Against this connection, we ask: where does the law stand?

### 3. The Law of Liepaja and Beyond

Sex work is legal and highly regulated in Latvia. Yet the country faces significant public health and human rights challenges that further stigmatise sex workers and leave them in a vulnerable and precarious situation.<sup>6</sup> For instance, in 2016, around 22% of sex workers in the country were living with HIV, which is one of the highest rates among EU member states.<sup>7</sup> Moreover, human trafficking is a pressing issue in Latvia, often involving minors, fuelling the overall problem of child prostitution across the country.<sup>8</sup> We suggest that these realities raise a pressing question:

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<sup>4</sup> See on this, for example, the stark difference between Catherine MacKinnon and Gayle Rubin: Catharine A MacKinnon, 'Prostitution and Civil Rights Symposium Prostitution: From Academia to Activism' (1993) 1 Michigan Journal of Gender & Law 13; Catharine A MacKinnon, 'Trafficking, Prostitution, and Inequality' (2011) 46 Harvard Civil Rights Civil Liberties Law Review 271; Gayle Rubin, 'The Traffic in Women' in Rayna R Reiter (ed), *Toward an Anthropology of Women* (Monthly Review Press 1975); Gayle S Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Peter Aggleton and Richard Parker (eds), *Culture, Society And Sexuality* (Routledge 1998).

<sup>5</sup> See, for instance, Cecilia Benoit, Bill McCarthy, and Mikael Jansson, 'Occupational Stigma and Mental Health: Discrimination and Depression among Front-Line Service Workers' (2015) 41(2) Canadian Public Policy 61; Alice Orcheston, 'Precarious or Protected? Evaluating Work Quality in the Legal Sex Industry' (2016) 21(4) Sociological Research Online 173; Tamara Reynish end others, 'Barriers and Enablers to Sex Workers' Uptake of Mental Healthcare: a Systematic Literature Review' (2021) 18 Sexuality Research and Social Policy 184; Laura Martín-Romo, Francisco Sanmartín and Judith Velasco 'Invisible and stigmatized: A systematic review of mental health and risk factors among sex workers' (2023) 148(3) Acta Psychiatrica Scandinavica 255.

<sup>6</sup> Ministru kabineta 2008. gada 22. janvāra noteikumi Nr. 32 "Prostitūcijas ierobežošanas noteikumi". Latvijas Vēstnesis, 14, 25.01.2008; Andrea Di Nicola, 'The differing EU Member States' regulations on prostitution and their cross-border implications on women's rights', Study requested by the FEMM committee (European Parliament 2021) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/695394/IPOL\\_STU\(2021\)695394\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/695394/IPOL_STU(2021)695394_EN.pdf)> accessed 9 July 2025, 19.

<sup>7</sup> Marita van de Laar and others, 'Country mission Latvia: HIV, sexually transmitted infections and hepatitis B and C', European Centre for Disease Prevention and Control Mission report 26–30 September 2011 <[hiv-sti-hepatitis-latvia-country-mission.pdf](http://hiv-sti-hepatitis-latvia-country-mission.pdf)>; 'Number of new HIV cases in Latvia down in 2016' (*The Baltic Course*, 17 March 2017) <[https://www.baltic-course.com/eng/markets\\_and\\_companies/?doc=128393](https://www.baltic-course.com/eng/markets_and_companies/?doc=128393)> accessed 9 July 2025; 'Latvia' (UNAIDS) <<https://www.unaids.org/en/regionscountries/countries/latvia>> accessed 9 July 2025.

<sup>8</sup> 'Latvia', 2017 Trafficking in Persons Report, Office to Monitor and Combat Trafficking in Persons, US Department of State <<https://web.archive.org/web/20170703181334/https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271224.htm>> accessed 9 July 2025; Farida Mussayeva and others, 'Republic of Latvia',

Would an outright prohibition or a tight regulation of sex work in Latvia make a difference for Nora's life? We argue that it would probably not: the structural injustice and socio-economic inequalities shaping her reality would remain drastically unaddressed. Can Europe and its law change this picture?

If we follow Nora's ambitions beyond Latvia towards Italy and her (formal) possibility of moving freely, the EU legal context that we find is not entirely reassuring. While the EU does not have a specific competence to legislate in the field of sex work, its regulation remains highly contested, producing a strikingly fragmented legal puzzle across the EU member states. Roughly half of the member states support liberal policies that decriminalise, or even legalise and regulate, sex work, while the other half adopts a more conservative approach, which often results in an outright prohibition of sex work.<sup>9</sup> The EU can only intervene on these matters when they intersect with fields in which it has the competence to legislate.<sup>10</sup> And yet, a broad analysis of the EU's approach to sex work/prostitution reveals quite an inconsistent picture. While we have no space here for a thorough examination, we can submit some preliminary observations concerning some fallacies affecting the EU understanding of the connections between sex work, gendered oppression, and social injustice.

Taking the Court of Justice of the European Union (CJEU) as a starting point, the relatively small amount of cases dealing with sex work and the sex/porn industry, more generally, are somewhat dated.<sup>11</sup> The case law shows that the Court has avoided moral and ethical questions, relying instead on market-based reasoning.<sup>12</sup> While it is certainly commendable that the Court did not rely on morality to construe its argumentation, it is also true that a purely market-based reasoning could imply serious limitations as soon as concerns of sex, gender, and justice are raised, and excludes those not caught by free movement provisions.<sup>13</sup> Such an approach overlooks the personal trajectories of the parties involved, does not fully encompass the underlying reality, and often only parenthetically touches upon questions of fundamental rights.

Likewise, it is appropriate to note that, while surely in a different institutional context, the European Court of Human Rights (ECtHR) has recently and similarly dodged a more direct

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2017 Global Monitoring status of action against sexual exploitation of children (ECPAT International) <<https://web.archive.org/web/20190614230213/http://www.childcentre.info/projects/abused/latvia/dbaFile14535.html>> accessed 9 July 2025; 'Latvia' Global Organized Crime Index 2023 (Global Initiative against organized crime) <[https://ocindex.net/assets/downloads/2023/english/ocindex\\_profile\\_latvia\\_2023.pdf](https://ocindex.net/assets/downloads/2023/english/ocindex_profile_latvia_2023.pdf)> accessed 9 July 2025.

<sup>9</sup> For a more detailed analysis of the various regulatory models of sex work across Europe see Andrea Di Nicola, 'The Differing EU Member States' Regulations on Prostitution and Their Cross-Border Implications on Women's Right' (2021) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/695394/IPOL\\_STU\(2021\)695394\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/695394/IPOL_STU(2021)695394_EN.pdf)> accessed 2025.

<sup>10</sup> The European Parliament, for instance, has already intervened twice by adopting two resolutions: European Parliament resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI)) 2014; European Parliament resolution of 14 September 2023 on the regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women's rights (2022/2139(INI)) C/2024/1767 2023.

<sup>11</sup> See Case C-34/79 *Regina* [1979] EU:C:1979:295; Joined cases C-115/81 and C-116/81 *Rezguia Adoui* [1982] EU:C:1982:183; Case C-121/85 *Conegate* [1986] EU:C:1986:114; Case C-363/89 *Danielle Roux* [1991] EU:C:1991:41; Case C-268/99 *Aldona* [2001] EU:C:2001:616.

<sup>12</sup> Cf. Uladzislau Belavusau, 'EU Sexual Citizenship: Sex Beyond the Internal Market' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 428 ff.

<sup>13</sup> A rich feminist literature in the EU legal studies already showed decades ago how the construction of the EU market should be critically read through the lens of sex and gender in order to understand the extent to which the institution of the market reproduces and reinforces patriarchal systems of oppression (Helen Fenwick and Tamara K Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice' (1995) 32 Common market law review 443; Tamara K Hervey and David O'Keeffe (eds), *Sex Equality Law in the European Union* (1st edition, Wiley 1996); Jo Shaw, 'Law, Gender and the Internal Market' in Tamara Hervey and David O'Keeffe (eds), *Sex Equality in the European Union* (Wiley 1996); Jo Shaw, 'Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order' (2000) 7 Journal of European Public Policy 406.). It should be acknowledged, nevertheless, that this position is not unanimously shared. Some authors, like Uladzislau Belavusau, have clearly linked the EU's empowering potential to its market-driven normativity (Belavusau (n)).

engagement with the complex interpretation of human rights standards in the case of sex work by relinquishing the assessment of French sex workers' rights to France's margin of appreciation.<sup>14</sup> In its ruling, in particular, the ECtHR, faced with a petition from 261 sex workers and 20 associations,<sup>15</sup> upheld the French ban on any paid sexual activities, also in the case of consenting adults, and found no violation of the right to private life under article 8 ECHR. Taking stock of the approaches of these two courts, a concern takes shape: what is missing from the legal language that we use to talk about sex work, exploitation, violence, and gender oppression?

A brief analysis of EU legislation further reveals that existing instruments, while increasingly addressing the breadth of issues raised by Nora's story, fall short of satisfactorily tackling the underlying structures and relations that produce the conditions for the nexus between sex work, violence and women's oppression to persist.

On the one hand, EU consumer protection law appears to be blind to sex workers' conditions of vulnerability and their special position compared to other service providers, as demonstrated by Lyn Tjon Soei Len in the context of women voluntarily offering sexual services.<sup>16</sup> On the other hand, looking at legislative instruments adopted within the field of judicial cooperation in criminal matters,<sup>17</sup> it should be noted that, while fostering an ever-rising attention to these issues, the directives' distinctively liberal approach entails at least three points for critique and potential improvement.

First, all legislative instruments, while unmistakably framing the issue in terms of systematic discrimination and violence against certain groups and, in this case, against women, focus their intervention at the individual level and sideline the structural dimension. Second, while constrained by the lack of Treaty competence, it still holds true that the aforementioned liberal approach envisions criminalisation as a solution to prostitution and promotes the protection and support of the victims. However, such an approach falls short of explicitly addressing the need to subvert the root causes of the systemic oppression at issue in order to bring transformation about..<sup>18</sup> Third, all the Directives under examination are fundamentally constructed around a concept of consent whose substance, however, is seldom problematised: what is the meaning of a liberal understanding of consent, hence fundamentally premised on subjects' autonomous and free expression of will, when dealing with structural phenomena, such as women's oppression and their effects, like violence, abuse, and exploitation?

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<sup>14</sup> *M.a Et Autres v France*, App No 63664/19, 64450/19, 24387/20, 24391/20, 24393/20 (ECtHR, 25 July 2024).

<sup>15</sup> 'European Court Upholds French Law Penalising Clients of Sex Workers' (*euronews*, 26 July 2024) available at <<https://www.euronews.com/2024/07/25/european-rights-court-upholds-french-law-penalising-clients-of-sex-workers>> accessed 9 July 2025.

<sup>16</sup> Lyn KL Tjon Soei Len, 'Consumer Protection, Sexual Services and Vulnerability: Exploring Social Justice in European Contract Law' (2015) 11 *European Review of Contract Law* 127. While it tackles a single field of EU law and it limits the analysis to a specific example of voluntary, non-exploitative sex work, Tjon Soei Len's intervention is particularly relevant. Namely, it unveils how the construction of the 'vulnerable' consumer to be protected by EU consumer law can actually hamper sex workers' rights and autonomy if it stays blind to their conditions of vulnerabilities as providers of sexual services to (in the great majority of cases) male clients who actually benefit from a privileged, gendered power position.

<sup>17</sup> We specifically make reference to: Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA OJ L 335 2011; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315 2012; Directive EU of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence PE/33/2024/REV/1 OJ L, 2024/1385 2024. While, as stated, these three directives pertain to the field of judicial cooperation in criminal matters since they are all adopted under Articles 82(2) and 83(1) TFUE, it is interesting to note that the aims of these legislative acts reach way beyond this specific field of EU competence.

<sup>18</sup> One should refer to the rich literature of abolitionist feminism to expand on this matter, see first and foremost Angela Y Davis and others, *Abolition. Feminism. Now.* (2022).

Continuing along these lines, suppose the liberal concept of consent can be deemed limited when faced with the challenge of structural oppression.<sup>19</sup> In that light, how are the EU legislative instruments intervening against sexual abuse and exploitation of children, violence against women, and for the protection of victims' rights? Once again, we propose that there is a problem with EU law, one that becomes evident in cases such as Nora's as soon as we ask ourselves: What difference would EU law make in Nora's life? To what extent would education against stereotypes, the prevention of abuse and exploitation against children, and public support for victims, to name a few, eventually impact Nora's possibilities to make meaningful choices for herself?

Keeping these questions in mind, we do not think we can find satisfactory answers by turning the focus to soft law. The European Parliament (EP) has intervened on the issue of sex work/prostitution with two resolutions, one in 2014 and another in 2023.<sup>20</sup> As far as the proposal of a blanket criminalisation of prostitution<sup>21</sup> is concerned, the two resolutions do not differ. True, the EP has clarified that the fight against violence, exploitation, forced prostitution and other forms of remunerated sexual services includes the rebuttal of stereotypes and the marginalisation of women performing such activities.<sup>22</sup> Nevertheless, the EP's approach can be understood as limited from at least two points of view.

First, to the extent that the EP more or less explicitly conflates prostitution with forced prostitution and associates both activities with instances of exploitation incompatible with human dignity and fundamental rights, one can retrace in the resolutions a specific moralising discourse.<sup>23</sup> This is reinforced by the EP's view that any paid sexual act is inherently objectifying and excludes any possibility that consent in these cases can be meaningfully given since retribution is involved.

Second, precisely by building on the EP's interpretation of the power-sensitive notion of consent<sup>24</sup> as well as on the EP's understanding of prostitution not only as an individual act but as a profit-oriented system (a market),<sup>25</sup> the two resolutions fall short of critically understanding the co-constitutive relation that binds gender hierarchies, sex, work, market economy, and prostitution together. While the EP appears to be significantly more sensitive to conceptions of (intersectional) (in)justice in its later resolution,<sup>26</sup> it retains a latent understanding of prostitution as, essentially, the problematic site where gender oppression is chiefly engendered and the 'outside' (economic) system as the empowering site where exploited women can pursue their life trajectories.<sup>27</sup>

Problematically, we believe, the EP resolutions do not recognise prostitution as *another* site of gender oppression, sex work as *another* form of work in a profit-oriented and gendered market economy, as well as consent as a nuanced, structurally-shaped condition whose determination

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<sup>19</sup> On non-consent-based visions of sexual justice see for example Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (2019).

<sup>20</sup> See *supra* (n 10).

<sup>21</sup> Differently from the terminology that we have adopted along this piece, prostitution is the word preferred to sex work by the European Parliament.

<sup>22</sup> It goes without saying, women are not the only subjects engaging in sex work. However, they are not only the most represented gender, but they are also performing it in a different power relations and from a different position in a broader structure of gendered oppression. These two EP resolutions, also for these reasons, focus on female prostitution.

<sup>23</sup> We do not refer to morality in a strictly philosophical sense, but rather to signal that, even though the Parliament's approach is largely enriched by statistics and data, it is still predominantly inspired by value-driven considerations about the degrading nature of prostitution *per se*.

<sup>24</sup> European Parliament resolution of 14 September 2023 (n ) paras C, 11.

<sup>25</sup> European Parliament resolution of 26 February 2014 (n ) para I; European Parliament resolution of 14 September 2023 (n ) para 8.

<sup>26</sup> European Parliament resolution of 14 September 2023 (n ) paras M, P, U, V, 23.

<sup>27</sup> *ibid* para 38.

encounters *another* challenging site in the context of sex work and prostitution. In the same way, the EP does not qualify what stands ‘outside’ of prostitution – society and more specifically the job market – as part of the same system that produces exploitative and violent forms of work, both of sexual and non-sexual nature.<sup>28</sup>

This framing, we argue, is not “just” a fallacy that could be solved if the EP offered clear alternatives. On the contrary, by understanding prostitution as an issue to be addressed with legal means not by virtue of the gendered and exploitative nature of broader capitalist relations of production, but rather because of the sexual, degrading nature of the remunerated activity per se, EU law risks leaving Nora and many other Europeans without materially transformative solutions. Failing to counter the structural and intersectional nature of the systems of oppression surfacing in *Liepaja* – from capitalism to patriarchy –, EU law ends up re-entrenching them in the lived realities of Europeans.

#### **4. The Social and the Market: Reading (In)Justice in Freedom of Movement**

Taking stock of the fallacies that we identified in the ways that EU law deals with sex work, exploitation, violence, gender hierarchies, and justice, what happens when we turn back to *Liepaja* and we ask ourselves once again: how could EU law make a difference for Nora? Trying to plunge into the seriousness and the materiality that an answer to such a question requires, we believe that a few sentences should be spent on the socio-economic dimension of EU law more generally. Indeed, the inequalities that the free movement provisions bring about have been discussed extensively in academic research.<sup>29</sup> Notably, it is argued that the internal market is mainly open to economically active individuals with sufficient resources.<sup>30</sup> Resources, thereby, should not only be understood in an economic or monetary way, as Nora’s story shows. Resources can often also be a lack of language skills, or other aspects that could potentially hinder an eventual move to another Union member state. While those who have employment, or simply have enough resources, can enjoy a privileged status under EU law and can benefit from free movement provisions under articles 45-62 TFEU and Directive 2004/38, those who fall outside those categories, such as Nora, are almost excluded from benefitting from EU free movement provisions in the first place. This underlines, again, that the individual is seen as a market category, regulated by free movement provisions within an integrative economic project.

Within the realm of free movement of persons, however, earlier rulings, such as *Baumbast*, originally opened up a more progressive and inclusive application of free movement provisions.<sup>31</sup> This case conceived of the idea of free movement as closely connected to the individual, based on their fundamental status of EU citizenship. The Court turned the concept of EU citizenship

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<sup>28</sup> This is probably why the EP can rather generally talk about ensuring “sufficiently financed, easily accessible, high-quality *exit programmes and pathways out*” or adopting “support measures that help people leave prostitution in order to *build the life they want*” (European Parliament resolution of 14 September 2023 on the regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women’s rights (European Parliament resolution of 2023 (n 11) para 38 italics ours). It is even more reasonable to reach similar conclusions by observing how the EP, back in 2014, could draw national authorities’ attention “to the impact of the economic downturn on the growing number of women and under-age females, including migrant women, forced to enter prostitution” (European Parliament resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality (European Parliament resolution of 2014 (n ) para 44 italics ours).

<sup>29</sup> E. Spaventa “Earned Citizenship: Understanding Union Citizenship through its Scope” in D Kochenov (ed) *Citizenship and Federalism in the European Union: the Role of Rights* (Cambridge University Press 2017); C. O’Brien “Civis capitalist sum: class as the new guiding principle of EU free movement rights” (2016) CMLRev 937; N. Nic Shuibhne “Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?” in D Kochenov (ed) *Citizenship and Federalism in the European Union: the Role of Rights* (Cambridge University Press 2017); N. Nic Shuibhne “Limits rising, duties ascending: the changing legal shape of union citizenship” (2015) CMLRev 889.

<sup>30</sup> F. Strumia “Supranational citizenship’s enablers. Free movement from the perspective of home Member States” (2020) ELRev 407; D. Thym “The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens” (2015) CMLRev 17.

<sup>31</sup> Case C-413/99 *Baumbast* [2002] EU:C:2002:493.

into a fundamental status through which the individual was enabled to freely move around within the Union.<sup>32</sup> However, with the introduction of Directive 2004/38, the Court in *Dano* or *Alimanovic* and later case law reaffirmed a more literal interpretation of the law, even reverting from the idea of a supranational notion of citizenship.<sup>33</sup> Instead, the CJEU required proof of existing links between the Union citizen on the move and the labour market, thereby moving towards a notion of market citizenship. The idea is simple: either one fulfils the conditions set out in the Treaties and secondary legislation, such as Directive 2004/38, or one does not benefit from those rights that Union citizenship foresees. EU law subsequently creates an exclusionary effect, leaving many EU citizens less well-off than those who are more resourceful and can benefit from the free movement provisions. Those families, such as Nora's, subsequently struggle to benefit from EU law in the first place, as their lack of resources fuels the underlying injustice.

It should be mentioned that students generally benefit from slightly better conditions that transcend the mere economic notion of free movement. According to article 7(1)(c) of Directive 2004/38, students merely need to 'declare' that they or their family members have sufficient resources if they are enrolled in a university. Thus, Nora can move to Italy to pursue education there without proving she is resourceful. However, while free movement under EU law usually comes with legal protections against discrimination and the right to equal treatment, important exceptions apply to students. Students can, in fact, be discriminated against, and member states can exempt foreign students from student grants under article 24(2) of Directive 2004/38 and as confirmed by the court in *Förster*.<sup>34</sup> So, while EU law formally allows Nora to move to Italy to pick up her studies there, it materially excludes her from this opportunity as she simply does not have the resources to move to Italy and could be excluded from receiving additional financial support.

Finally, this is not to say that the design of free movement more generally is the cause of Nora's experience, or that the pursuit of education in Italy justifies Nora's drift into abuse, exploitation and violence. Instead, we would like to emphasise that there can only be partial and unsatisfactory answers to Nora's story, also from a legal point of view. Part of the puzzle, which arguably fuels, at least, the underlying issue of social (in)justice, is indeed the design of the free movement of persons. The divide between economically active citizens and those who are not is a factor that should therefore not be left out when discussing this chapter. Particularly, if EU law often only benefits those who have previously 'activated' their rights by making use of the EU's market freedoms. And this is even more apparent if we reiterate that sex work and gendered oppression cannot be understood without their embeddedness in social injustice and inequalities: we cannot understand the EU's regulatory intervention in the field of sex work and violence against women if we do not deconstruct how the EU also builds the (unequal) material conditions for its citizens to participate in the integration project.

## 5. Reflection on Method

In this short piece, we have decided to take Nora's story as a starting point to reflect on how Europe and its law face sex in relation to violence, exploitation, gender hierarchies, and work. This perspective led us from the individual level of Nora's story to some of the structural dimensions engendered by EU law's shaping of the conditions of (in)justice across the Union.

<sup>32</sup> For instance, Case C-85/96 *Martínez Sala* [1998] EU:C:1998:217; Case C-184/99 *Grzelczyk* [2001] EU:C:2001:458; Case C-209/03 *Bidar* [2005] EU:C:2005:169; See further: E. Spaventa "From Gebhard to Carpenter: towards a (non) economic European Constitution" (2004) CMLRev 743; D. Kramer "From worker to self-entrepreneur: the transformation of homo economicus and the freedom of movement in the European Union" (2017) ELJ 172.

<sup>33</sup> Case C-333/13 *Dano* [2014] EU:C:2014:2358; Case C-67/14 *Alimanovic* [2015] EU:C:2015:597. See further, N. Nic Shuibhne "'What I tell you three times is true': lawful residence and equal treatment after *Dano*" (2016) MJ 908; N. Nic Shuibhne "Limits rising, duties ascending: the changing legal shape of union citizenship" (2015) CMLRev 889; C. O'Brien "Civis capitalist sum: class as the new guiding principle of EU free movement rights" (2016) CMLRev 937; E. Spaventa "Earned Citizenship: Understanding Union Citizenship through its Scope" in D. Kochenov (ed) *Citizenship and Federalism in the European Union: the Role of Rights* (Cambridge University Press 2017); D. Thym "The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens" (2015) CMLRev 17.

<sup>34</sup> Case C-158/07 *Förster* [2008] EU:C:2008:630.

Relatedly, we retraced a series of fallacies and criticalities in EU law as far as the framing of sex work/prostitution and sexual exploitation/gender-based violence and the construction of the freedom of movement are concerned.

We took some time to reflect on the implications of all these considerations on the way that we navigated Nora's story, as well as the methodology that we could envision to read and understand the law in everyday life. On this note, we would like to conclude with three preliminary thoughts on methods.

The first point that we would like to raise concerns perspective. As we mentioned, we read Nora's story first and foremost as a source of inspiration, as one possible gateway to pierce through the intricacies of the everyday life of Europeans and the law regulating it. This also means that we did not rely on Nora's story as a stand-alone source of our scholarly intervention. This would entail certain risks or, at least, require certain precautions. If we read *Liepaja* together with *Budapest*, this becomes clearer: why was Nora's story picked to represent the experience of many girls and women facing sexual violence and exploitation? And why was Ibrahim's story picked to represent certain men's experience with sex and the porn industry? Are these stories supposed to be representative at all? Accepting these stories as sources, we fear, bears the risk of turning more or less explicit narrative choices (and their power-influenced genealogies) into covert methodological biases.

Choosing to work with the story as a first 'perspective provider', as we tried to do, partially bypasses these risks, while at the same time reinstating a related concern: Is there a possibility that our structural analysis will be nonetheless biased if the material it is built upon is strictly linked to the everyday life dimension? At the very introduction of this piece, we motivated our perspective shift from the individual to the structural. Reflecting on the concern that we just fleshed out, now we turn to focus on the limitations we could encounter when aiming for the structural while working with the everyday.

More specifically, we ask ourselves where the everyday, or Nora's story, leads us to the extent that what we look for, as far as this collective project is concerned, relates to how the law participates in the constitution and regulation of this very reality. Building on the previous point, we see a distinctive resonance between the interpretative horizon fostered by everyday life and an understanding of the law and its effects, which is more contingent and diagnostic than structural and transformative. In other words, we argue that an everyday life focus, as prompted by our understanding of stories such as *Liepaja*, facilitates the apprehension of individual vulnerability and life strategies – with or notwithstanding the law – while sidelining the structural nature of the law's intervention in the very constitution of forms of vulnerability, precarity,<sup>35</sup> as well as the conditions of possibility of resistance.<sup>36</sup> And yet, can the individual and the structural be generatively reconnected? We believe this can be done in two ways. First, the individual can offer a grounded access to understanding the law's structural role in shaping oppression. Second, the everyday can be a source of intra-critique: the unfinished re-casting of deconstructive efforts that save the structural from essentialisation. The third and last point we would like to raise relates to the two previous ones inasmuch as they factor emotions and affects in their methodological framings differently. While reading between the lines of *Liepaja*, a story built around Nora's intense, at times traumatic and tragic emotions, we wondered what the meaning of our exposure to such intimate material was. Ethically, we asked ourselves what kind of responsibility such exposure demanded from our working with Nora's everyday life.

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<sup>35</sup> See on this Judith Butler distinguishing *precariousness* as a shared human condition from *precarity* as a differential distribution of vulnerability traced by power relations and hierarchies (Judith Butler, *Frames of War: When Is Life Grievable?* (Verso 2016)).

<sup>36</sup> While this point is by no means meant to subordinate the first aspect to the second, it does wish to stress the importance of the acknowledgement of their distance, both in terms of position towards the law and posture in relation to the impact of scholarly interventions. In this sense, the second aspect more closely resembles a "classic" understanding of critical legal approaches in their concern to understand law's distributive effects and structural entanglements with power relations.

Methodologically, we questioned the role emotions should play in our inquiry into the law's presence in Nora's life. Moving between individual experiences and structural forces, we stress the importance of recognising the distinct aims and potential of engaging with each dimension. Building on this, we advocate for a careful approach to narrated emotions, especially when they inform knowledge production that moves beyond empathy toward deeper, more critical (re)interpretations. This caution is particularly pertinent for legal scholarship. An intellectual engagement with law must account for its normative and constitutive role in shaping reality. Therefore, legal readings of everyday life cannot uncritically rely on the narration of intimate emotions without risking erasing how such emotions and their representation are co-constituted by power structures and legal forms. In other words, empathy is political. Interrogating the politics of emotion sharpens our understanding of how power and hierarchy shape not only what we feel, let it be pity, sorrow, contempt or tenderness, but how and why those feelings emerge. Working with the law thus requires recognising that its effects extend beyond individual emotional contexts, reaching into the normative realm of generality and formality. For legal scholars engaging with affect, this means responding to a pressing methodological imperative – to remain attuned to the political underpinnings of emotions and thus to avoid confusing complicity with solidarity.

Rounding up these three points on methods, we would like to conclude by advancing some final ideas about ways forward. No such concluding thought could do without acknowledging that *Liepaja* cogently pushed us to shift our sight and re-orient our scholarly and legal intervention towards the law in its context, bodies, and materiality. At the same time, we have shared our concerns regarding some possible limitations of a legal apprehension of everyday life to the extent that the perspective of the enquiry, the choice of the analytical dimension, and the posture towards intimate, narrated emotions are concerned. What avenues are then left to prompt meaningful legal engagements with the dimension of the everyday? First, we would reiterate that any such avenues should be clearly framed by the normative boundaries of our scholarly intervention: why are we reading the law in the everyday? What is our position towards the law? Why and how the law should be concerned with the everyday? Should the law be involved with the 'everyday' life of individuals, or should there be aspects of the everyday that remain untouched by the law? Second, we propose to enrich our analyses by adding to materials such as *Liepaja*, e.g. literary products narrating *individual* stories, other *social* 'sources', i.e. different media, political, activist outputs articulating *collective* claims, demands, or discursive practices. We believe that such sources would strengthen our interventions to the extent that they autonomously articulate what kind of normative (dis)engagement with the law they expect, aim, or call for. We believe that French sex workers' claims before the European Court of Human Rights,<sup>37</sup> Belgian sex workers' struggle for access to social security and welfare,<sup>38</sup> and Italian sex workers' collective organisation against criminalisation and for social transformation are all good examples of productive sites to start from.

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<sup>37</sup> The outcome of this case was eventually unsuccessful from the point of view of the claimants since the Court upheld the French law under review, see *M.a Et Autres v France* (n ).

<sup>38</sup> Jennifer Rankin, 'Belgium's Sex Workers Win Maternity Pay and Pension Rights in World First' *The Guardian* (1 December 2024) <<https://www.theguardian.com/world/2024/dec/01/belgium-sex-workers-win-maternity-pay-and-pension-rights-in-world-first>> accessed 2025.

# Ibrahim, the Law and the EU's Internal Market of Pornography

by Renan Bodin\*, Johannes Müller\*\* and Alex Schuster\*\*\*

## 1. Introduction

This paper draws upon the story of Ibrahim, a Syrian-born porn actor living in Europe. Ibrahim first arrived in Europe as an asylum seeker following the Syrian civil war. He was then shunted between several countries before ending up in Germany, where he was granted asylum. After years of uncertainty, he decided to pursue his dream of becoming a pornographic actor. Thanks to a video shot in Budapest, he apparently gained significant notoriety in the industry and propelled his career among the big names in his profession. In Ben Judah's chapter, Ibrahim reveals himself by discussing his past and his outlook on the future.

This contribution aims to demonstrate that Ibrahim's experience, as narrated in 'This is Europe'<sup>1</sup>, offers a unique lens through which to examine broader issues: the internal contradictions of the European project between fostering economic integration and promoting social well-being, and the difficult regulation of human bodies and pornography within the European legal framework. Thinking from the point of view of a lived life, rather than the law and its system, opens space for reflection on the interaction between EU Law and the lives lived under it.<sup>2</sup> This approach has some obvious limits and methodological pitfalls, as also discussed in this volume's introduction by Azoulai and Meakin. Ibrahim is not a case study in the sense of a targeted, methodologically sound selection from a broader range of cases. Furthermore, studying a particular case and life through the account of a professional storyteller has obvious limitations. The author's subjectivity necessarily shapes how the story is told. As a matter of fact, Ibrahim presented himself very differently in other interviews.<sup>3</sup> This does not render the study of his particular situation as depicted by Ben Judah pointless. The unique nature of his journey, sometimes ignored, sometimes shaped by European law, makes the study of the interactions between his life and the legal framework worth pursuing.

Taking this into consideration, the first part examines Ibrahim's trajectory. From a precarious asylum seeker to a transnational pornographic superstar, his path echoes archetypes of success rooted in masculine, capitalist fantasies. The second part examines how the current law of the internal market structures and regulates Ibrahim's life and professional activity.

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<sup>1</sup> Ben Judah, *This Is Europe* (Palgrave Macmillan 2023).

<sup>2</sup> Loïc Azoulai, 'Reconnecting EU Legal Studies to European Societies' on *Verfassungsblog* (19 March 2024) <https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/> accessed 12 February 2026, Loïc Azoulai, 'The Law of European Society' (2022) 59 *Common Market Law Review*.

<sup>3</sup> See: 'Mit 12 kam er nach Deutschland – heute ist Antonio Porno-Millionär', *Focus Online* (12 September 2023) [https://www.focus.de/panorama/welt/fuenf-filme-pro-woche-2012-kam-er-nach-deutschland-heute-ist-antonio-porno-millionaer\\_id\\_24369967.html](https://www.focus.de/panorama/welt/fuenf-filme-pro-woche-2012-kam-er-nach-deutschland-heute-ist-antonio-porno-millionaer_id_24369967.html) accessed 12 February 2026; 'Antonio, 19, Is a Syrian Refugee and Porn Actor Hoping to Change Perceptions of Refugees', *The Local Sweden* (28 October 2016) <https://www.thelocal.se/20161028/i-used-my-body-to-show-that-the-syrian-body-can-make-love-not-only-die> accessed 12 February 2026; 'Meet the Arab Superstar Antonio Suleiman', *Yahoo Style* (15 April 2021) <https://sg.style.yahoo.com/meet-arab-superstar-antonio-suleiman-071119570.html> accessed 12 February 2026.

## 2. Ibrahim's Story: From Precarious Asylum Seeker to Transnational Porn Superstar

### *Ibrahim, a Capitalist Icon*

*"In this country, you gotta make the money first. Then when you get the money, you get the power. Then when you get the power, then you get the women."*

Brian de Palma (dir), *Scarface*.

*"Maybe it will come one day, maybe it will come. Women. Money. Sex."*

Ben Judah, p.96

The ugly side of the American dream was beautifully captured in Brian De Palma's 1983 adaptation of *Scarface*.<sup>4</sup> The film follows the trajectory of Tony Montana, a migrant who arrives in the United States penniless but, through risk-taking, hard work and ambition, rises to the top of the social pyramid by becoming a drug kingpin. In Ben Judah's chapter, Ibrahim is not portrayed as capable of committing the countless acts of cruelty for which Tony Montana is infamous in the film *Scarface*. However, his story seems to echo this iconic figure of American cinema.

One key way this connection emerges is through the shared masculine perspective that shapes the narration of both stories. The women in *Scarface*<sup>5</sup> and the Budapest chapter are objectified and exist only through the eyes of the main character. While in the beginning Stefanie, his first German girlfriend<sup>6</sup> and Ryan, who lent him money and helped him start in the porn industry,<sup>7</sup> still appear as real people, later in the story, the women he sleeps with do not have names. Each of them appears as one of the hundreds who shoot videos with him, which he classifies according to nationality.<sup>8</sup> In this regard, one picture in the chapter is particularly telling. It shows five women sitting with their backs to the camera, all looking at him and listening as he provides what appear to be instructions.<sup>9</sup> This type of representation largely mirrors the dominant model in X-rated movies, emphasising a strong, sometimes even violent male figure, which is precisely the type of content produced by Ibrahim in this chapter.<sup>10</sup>

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<sup>4</sup> Brian De Palma (dir), *Scarface* (Universal Pictures 1983).

<sup>5</sup> Katie Madonna Lee, 'The Gender Ideology of *Scarface*' (2018) *New Views on Gender* 41–45.

<sup>6</sup> Ben Judah, page 98.

<sup>7</sup> Ben Judah, page 110.

<sup>8</sup> Ben Judah, page 89–91.

<sup>9</sup> Ben Judah, page 90.

<sup>10</sup> We are referring notably to the Arab king scene as described in Ben Judah page 106, in which Ibrahim's character is depicted as owning a slave. The production of this type of content is directly influenced by a bias towards male-centered content and a nudge of platforms' algorithms towards extreme scenes, see Iain Overton, 'Who Truly Profits from Porn', *Byline Times* (7 February 2025) <https://bylinetimes.com/2025/02/07/who-truly-profits-from-porn/> accessed 19 July 2025. One cannot generalise from the kind of pornography Ibrahim produces to the whole medium which is very diverse. The production of what has been qualified as feminist pornographic content attests to a desire among consumers and content producers to challenge the dominant view of this industry. However, this new type of content has been analysed in the literature as also reproducing certain gender stereotypes: see, Lea Katharina Reiss and Sara Dahlman, '"I Need You inside of Me": Gendered Organizing of Feminist Pornography' (2024) 31 *Organization* 780. There is an extremely rich literature on the relationship between pornography and feminism and philosophy more largely. Since this essay focuses on Ibrahim's story as portrayed by Ben Judah and on Union law, this text can only point to this literature for further discussion: see, for example: Eleanor Wilkinson, 'The Diverse Economies of Online Pornography: From Paranoid Readings to Post-Capitalist Futures' (2017) 20 *Sexualities* 981; Mari Mikkola, *Pornography: A Philosophical Introduction* (1st edn, Oxford University Press 2019), especially "Chapter 5, Pornographic Knowledge and Sexual Objectification"; and Rebecca Saunders, *Bodies of Work: The Labour of Sex in the Digital Age* (1st ed. 2020., Palgrave Macmillan 2020).

Moreover, Ibrahim's and Tony's trajectories share many characteristics. They both started at the bottom of the socioeconomic ladder and climbed to the top. They both had to leave their country of origin and requested asylum in a Western country. They both share a capitalist dream built on power, in which money and sex are thoroughly intertwined. Finally, both characters have a deep connection to their professional occupations, which defines who they are and how they present themselves to the world.

These two protagonists seem cut from the same cloth in the way they are described. Both characters are depicted more as archetypal figures of modern capitalism than as men. While the author of *Scarface* is known,<sup>11</sup> the identity of the person behind Ibrahim's script remains uncertain. Ibrahim may have decided to describe his journey through a prism shaped by his fantasies and imagination. Alternatively, Ben Judah may have taken up Ibrahim's life story to challenge European society's taboos and ambiguities, as Oliver Stone and Brian De Palma had done before him on the other side of the Atlantic. These two hypotheses clearly show the need to consider this testimony for what it is: a subjective view of a complex situation. Taking this into account, Ibrahim's experience of pornography will therefore be discussed and critically analysed in the following part.

### ***Pornography as Identity, Labour, and Fantasy in Ibrahim's Story***

Pornography is depicted as having a significant and ambiguous influence on Ibrahim's life. The chapter describes his career as the driving force behind his professional and personal success, as well as, perhaps paradoxically, a source of suffering and loneliness.

#### *The Bright Side of Pornography: The European Dream*

*"Those guys, fucking. The ones on his phone.*

*They have that, he'd think, they have all the fame and leisure they want. All they do is fuck and fly around the world to pools and studio and they don't wash oily kebab dishes".*

Ben Judah, p.102.

Pornography is not just a job for Ibrahim. It is his place in society, his pride and his masculinity. In the story presented to us, the chapter begins with the precariousness and rejection he faces upon his arrival in Europe.<sup>12</sup> His professional activity then acts as a springboard, enabling him to escape a difficult existence and attain a life of luxury.

In his conversation with Ben Judah, the actor emphasises how much this work has made him join the ranks of the winners of the European capitalist system. He is not just wealthy. He is also powerful and can escape the restrictions that others are subject to. His freedom is not only sexual. His liberty to come and go as he pleases seems to know no boundaries. With this comes endless possibilities. So many places, previously off-limits to him when German society saw him as nothing more than a penniless Syrian, are now open to him. Now he is partying in the most exclusive clubs, travelling to European countries that are most welcoming to pornography, or those that were most lenient when it comes to COVID-19 restrictions.<sup>13</sup> This account of the events recalls a certain imagery of self-determination and agency for the erotic content producers, sometimes amplified by pop culture<sup>14</sup>, that is further underlined by the way

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<sup>11</sup> The script of 1983 *Scarface* was written by Oliver Stone.

<sup>12</sup> Notably, Ben Judah, page 96-97.

<sup>13</sup> Ben Judah, page 91-92 « When there were COVID problems, there he'd fly back to Spain'.

<sup>14</sup> Notably and among other occurrences, in the remix by Beyoncé of *Savage* by Megan Thee Stallion, see Megan Thee Stallion (ft Beyoncé), 'Savage Remix' <https://genius.com/Megan-thee-stallion-savage-remix-lyrics> accessed 13 July 2025.

Ibrahim presents his colleagues in the industry as highly motivated people, either by money or by sex.<sup>15</sup>

However, there is a downside to this perceived positive aspect, which shines through in the moments when Ibrahim mentions his mental health and emotions. The fulfilment of Ibrahim's wish is depicted as having adverse side effects, and a dark side of pornography is unveiled both implicitly and explicitly in Ben Judah's description of this lifestyle.

### *The Dark Side of Pornography: Precarity, Addiction and Alienation*

"[H]e'd be thinking about it already, he was always thinking about it"

Ben Judah, Ibrahim, p. 87.

Pornography is the centre of Ibrahim's universe. It has become such a significant part of who he is and how he relates to the world that he appears now estranged from himself. Ibrahim does not appear to have complete autonomy throughout his life but rather seems to be determined by his addictions and obsessions, and, for a significant part of the chapter, his economic insecurity, making him subject to the forces of producers and platforms to survive. In that sense, his story is one of alienation.

Socially, his only identity at the end of the chapter is the one he has built up through his career. His family and friends abandoned him because of his profession, which went against their morals.<sup>16</sup> Ibrahim's case in this regard reveals how some sex workers suffer from social stigma due to their profession.<sup>17</sup> It also shows how negative racial stereotypes perpetuated by the porn industry can hurt the populations in question, as he describes how some Syrians in Germany felt humiliated by his problematic representation of an 'Arab King'.<sup>18</sup> It is worth noting that racial prejudices are not only in the content produced by Ibrahim, but they are also integrated into his representation of the world, as shown by the way he classifies women according to their nationalities.<sup>19</sup> These stereotypes in and outside the scene echo how the porn industry plays on categorising bodies into archetypal racial, physical, and behavioural categories.<sup>20</sup>

Economically, the pornographic world affected him through its extreme precariousness. Throughout much of the chapter, he oscillates between elation over a shaky success and anxiety about the future, at least until the moment his independent activity becomes successful.<sup>21</sup> In this regard, Ibrahim's account reveals a frequently overlooked truth: the only consistent way to retain a substantial share of the income generated by such activity is to own and operate one's own platform.<sup>22</sup> In this regard, the actors in this story, whether actresses in scenes with him<sup>23</sup> or himself during his first shoots,<sup>24</sup> appear not to benefit from any legal protection through formal contracts. He also seems to take advantage of the apparent lack of

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<sup>15</sup> Ben Judah, page 89.

<sup>16</sup> Ben Judah, page 108

<sup>17</sup> This stigma, beyond its social existence, has sometimes been analysed in the literature as stemming from inadequate regulatory frameworks, especially for migrants like Ibrahim, see: Alexandra Oliveira et al., 'Understanding the Impact of EU Prostitution Policies on Sex Workers: A Mixed Study Systematic Review' (2023) 20(4) *Sexuality Research and Social Policy* 1448-1468.

<sup>18</sup> Ben Judah, page 106-108

<sup>19</sup> Ben Judah, page 89

<sup>20</sup> Rebecca Saunders *Bodies of Work: The Labour of Sex in the Digital Age* (1st ed. 2020., Palgrave Macmillan 2020), p.58.

<sup>21</sup> Ben Judah, page 112-114

<sup>22</sup> See on this notably, Brittany Palatchie, Alice Beban and Tracey Nicholls, 'Structural Violence of Platform Capitalism: A Case Study of Online Sex Workers' Experiences' (2025) 61(2) *Journal of Sociology* 339.

<sup>23</sup> Ben Judah, page 113-114,

<sup>24</sup> Ben Judah, page 104-105

social protection that pervades his sector of activity, as his choice of shooting his first scene as a producer in Hungary is not random.<sup>25</sup> Indeed, this country's legal, social and economic conditions made it 'the capital of Europorn', as he puts it,<sup>26</sup> for decades in Europe.<sup>27</sup>

Personally, pornography has taken over many aspects of his daily life, similarly to an addiction.<sup>28</sup> His fame comes with an obsession with the ratings of his videos, which accompany him daily.<sup>29</sup> To his admission, producing his content is the only pleasure he has.<sup>30</sup> While he recognises the artificiality of both his professional world and his life, he admits that he prefers having sex in front of the camera to doing it in private.<sup>31</sup> To understand how adult entertainment has become such an important part of Ibrahim's life, it is essential to understand the place it holds in his psyche. Pornography has been with him for a long time. He is described as having been a long-time consumer since his teenage years,<sup>32</sup> as are many young people in Europe.<sup>33</sup> The long-term consumption of this type of content may have had psychological consequences, which Ibrahim seems to be facing in this chapter. Notably, the obsessive and addictive episodes around sex he describes may very well have links with pornography.<sup>34</sup> The prevalence of this type of content among teenagers has also been described as having potentially deleterious effects on gender equality.<sup>35</sup> The cause of this runs deeper than this type of media alone. Pornography "plays an important role in reproducing and refashioning the power relations [that are already] encoded in the economic and cultural fabric of many societies".<sup>36</sup> Since Ibrahim used to be one of these teenagers passionate about the videos he watched online<sup>37</sup>, it is possible to wonder whether the aforementioned gradual objectification and disappearance of women's names during the chapter reveals a form of sexism induced by both his past as a consumer and his present professional practice.

On this issue of gender-based violence, it is essential to insist on the fact that Ibrahim's experience of the 'dark side of pornography' is not the same as that which his female colleagues might experience. They are exposed to additional risks that do not appear in this testimony, as it observes the industry through Ibrahim's gaze. In this regard, the multiplication of criminal

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<sup>25</sup> Ben Judah, page 110 .

<sup>26</sup> Ben Judah, page 110

<sup>27</sup> Gergely Csányi, Fanni Dés and Anikó Gregor, 'Pornification as Westernization on the Semi-Periphery: The History of the Hungarian "Porn Boom" in the 1990s' (2024) 27(1–2) *Sexualities* 306-329. <https://doi.org/10.1177/13634607221092651>.

<sup>28</sup> Ben Judah, page 89. Ibrahim mentions notably that without sex, "*He started to feel crazy, like he was in some kind of withdrawal*".

<sup>29</sup> Ben Judah, page 91

<sup>30</sup> Ben Judah, page 91, to his own admission, "I really need another hobby, you know, not just sex".

<sup>31</sup> Ben Judah, page 89 and page 91

<sup>32</sup> Ben Judah, page 102

<sup>33</sup> In 2021, for example, a cross-sectional study in six European Countries on exposure of teenagers between 14 and 17 years old to pornography showed that 58.8% of teenagers reported exposure to such content in the last 12 months, with 42% of those exposed to such content weekly. See in that regard, Elisabeth K Andrie, et al., 'Adolescents' Online Pornography Exposure and Its Relationship to Sociodemographic and Psychopathological Correlates: A Cross-Sectional Study in Six European Countries' (2021) 8(10) *Children* 925.

<sup>34</sup> As it is being discussed in the literature see: Dane Mauer-Vakil and Anees Bahji, 'The Addictive Nature of Compulsive Sexual Behaviours and Problematic Online Pornography Consumption: A Review' (2020) 11(3) *Canadian Journal of Addiction* 42.

<sup>35</sup> See among others Berta Aznar-Martínez, et al., 'Pornography and Gender-Based Violence: Two Neglected Topics in Sexuality Education. A Systematic Review' (2024) 25(2) *Sex Education* 256., more generally, Parliamentary Assembly of the Council of Europe, 'Res 2412 (2021), 'Gender aspects and human rights implication of pornography' [https://pace.coe.int/en/files/29579/html?\\_\\_cf\\_chl\\_tk=M3UQdQGDCVE0rTTVteRERzBunsG2qN6haE3C7Vcce50-1752441167-1.0.1-1-EachbyQxKZV3zl.drb1Ks5bFoT8MeNATN1L9C9s4uNB0](https://pace.coe.int/en/files/29579/html?__cf_chl_tk=M3UQdQGDCVE0rTTVteRERzBunsG2qN6haE3C7Vcce50-1752441167-1.0.1-1-EachbyQxKZV3zl.drb1Ks5bFoT8MeNATN1L9C9s4uNB0) accessed 13 July 2025.

<sup>36</sup> Peter Fleming, Sara Louise Muhr and Masoud Shadnam, 'The Business of Pornography: Contributions from Organization Studies—Introduction to the Special Section' (2024) 31 *Organization* 741, 745.

<sup>37</sup> Ben Judah, page 102

cases linked to the production of this content, notably of human trafficking<sup>38</sup> and rapes<sup>39</sup>, has raised significant concerns regarding the well-being of actresses.<sup>40</sup>

Ibrahim's narrated story – where desire, work, addiction, and identity blur – raises fundamental questions on the institutional frameworks that shape, reward, and often fail to comprehend such trajectories. The following section will explain how the European legal framework fails to understand and integrate life paths like Ibrahim's, as well as those of other actors and actresses who do not have a face in Ibrahim's story.

### 3. Ibrahim and EU Law

The following section will elaborate on the relationship between Ibrahim and EU law and explore how legal frameworks materially shape the everyday lives of individuals. Focusing on the case of Ibrahim, this section asks how the law changes the conditions people are in and whether it reinforces specific structures of exclusion. Ibrahim's story illustrates how legal classification, rather than personal capacity, feelings, or identity, often becomes a central element in shaping individuals' lived experiences, ranging from inclusion to exclusion in everyday life. In other words, legal status often determines access to rights, resources, and social participation. The central question, therefore, is not necessarily what the law says, but rather what effects it has on individual trajectories.

Furthermore, this section will zoom in on the relationship between EU law and Ibrahim's profession in the porn industry, which has become the centre of his life. Here, the EU's internal market law provides a legal framework for Ibrahim to produce and share videos across borders and thus enabling his economic activity to run smoothly. Yet, his story shows how the pornographic industry has significant societal and cultural effects that go way beyond the economic dimension. While the Union seeks to address these effects through new regulatory approaches to the digital internal market, important blind spots remain.

#### ***Law as Status: From Exclusion to Inclusion***

An essential dimension to Ibrahim's story is the exclusionary and inclusionary effect that law, ranging from national to international and EU law, has on him. While the first part of the story talks about Ibrahim's status as a person on the move, subjected to a range of duties and limited rights, the second part of the story revolves around him being able to benefit from national, international and EU law as he was granted asylum, or was recognised as a refugee, and later acquired a German passport.<sup>41</sup> His journey illustrates how legal status can significantly shape a person's rights, opportunities, and ability to participate in and integrate into society.

On the one hand, as a person on the move and later as an asylum seeker, Ibrahim's life is heavily regulated by law in EU member states. International law applies through the Geneva

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<sup>38</sup> See the website of the project End Slavery Now, 'The Relationship Between Porn and Human Trafficking' <http://endslaverynow.org/blog/articles/the-relationship-between-porn-and-human-trafficking/> accessed 2 April 2025

<sup>39</sup> The multiple twists and turns in the FrenchBukkake case are particularly striking in this regard. See, Aurélien Defer, 'French Bukkake: la justice française condamne Google dans une affaire de référencement de vidéos de viols', *Le Monde* (6 November 2024) [https://www.lemonde.fr/pixels/article/2024/11/06/french-bukkake-la-justice-francaise-condamne-google-dans-une-affaire-de-referencement-de-videos-de-viols\\_6380149\\_4408996.html](https://www.lemonde.fr/pixels/article/2024/11/06/french-bukkake-la-justice-francaise-condamne-google-dans-une-affaire-de-referencement-de-videos-de-viols_6380149_4408996.html) accessed 2 April 2025.

<sup>40</sup> A recent report by the French Senate is particularly noteworthy on this subject. See, Sénat, *Porno : l'enfer du décor*, Rapport d'information n° 900 (2021–2022) (27 September 2022) <https://www.senat.fr/notice-rapport/2021/r21-900-1-notice.html> accessed 2 April 2025.

<sup>41</sup> Ben Judah, page 93; It is important to mention that publicly available information does not provide for a conclusive picture as to whether he was recognised as a refugee under international law (Geneva Convention), was granted asylum according to § 25, para. 1 of the German Residence Act, or received the status of subsidiary protection under § 4 para. 1 Asylum Act. Nonetheless, for the sake of our reasoning, i.e. law is an essential determinant factor for his trajectory, the argument we are advancing applies to all those different statuses – either a status excludes a person from society, or it can enable inclusion.

Conventions;<sup>42</sup> EU law also applies, for instance, through the Dublin Regulations;<sup>43</sup> and national law further regulates the rights and duties of those individuals.<sup>44</sup> This status as a person on the move means limited rights for Ibrahim, limited movement, and limited (or no) possibilities to work.<sup>45</sup> Ultimately, this leaves him in a precarious, vulnerable position, excluding him from many aspects of everyday life and from the possibility of fully integrating into society. The law effectively shaped his daily life by determining where he had to live, what he could (not) do, requiring him to navigate bureaucratic processes, and requiring him to report to the migration authorities.<sup>46</sup>

Conversely, his status and situation turned upside down once he was granted status as either a refugee or an asylee, or fell under subsidiary protection. This status enabled him to take up work<sup>47</sup>, travel around and partake in everyday life. A particular turning point for Ibrahim was his subsequent travel to Budapest, where he shot his first successful and widely watched video.<sup>48</sup> The mere change in the legal status attached to Ibrahim opened up possibilities, rights, and opportunities previously not open to him. This included his ability to move freely within the European Union, making his professional endeavours possible in the first place. He made use of those rights and later found his own way of participating in society. The law, which had previously confined him to the margins, now, alongside other factors, served as a means of self-realisation and the pursuit of his capitalist dreams.

Acquiring German citizenship attached another status to Ibrahim, resulting in the possibility of deriving additional rights from EU law and participation in the everyday life of German and European society. With citizenship, Ibrahim became entitled to the rights enshrined in EU law, including those under articles 18–22 TFEU, which grant EU citizens the right to move and reside freely within the territory of the member states. This status offered him something more challenging to quantify in legal terms. Citizenship provided him with some form of psychological safety and permanence, in the sense that he did not have to fear expulsion, the revocation of his legal status, or sudden changes in asylum policy.<sup>49</sup> While structural dimensions of racism and xenophobia continued to influence and shape the material conditions of his everyday life, citizenship brought him closer to reclaiming some form of ordinary life.

Law thus morphed from an exclusionary force to an inclusionary one. Instead of being excluded from vast parts of everyday life because the law attaches a precarious and vulnerable status, he could do what he wanted. Ibrahim's story highlights the profound impact of a legal status on a person's lived experience. Law, irrespective of the individual's view of it or any normative stance, assigns a legal status that can either enable or constrain. For Ibrahim, EU and national asylum laws initially constrained his freedoms. Yet, once he was reclassified, the same legal systems opened doors that had previously been shut. The only difference was the legal status attached to him. Ibrahim's life was shaped in part by the legal categories imposed upon him, often with little regard for his individual qualities or desires. While individual trajectories, backgrounds, and choices certainly play a role, Ibrahim's case illustrates how legal categorisation can become an influential force in determining one's access to rights and

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<sup>42</sup> Convention relating to the Status of Refugees Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

<sup>43</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council 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 [2013] OJL180/31.

<sup>44</sup> For instance, Asylgesetz in der Fassung der Bekanntmachung vom 2. September 2008 (BGBl. I S. 1798), das zuletzt durch Artikel 1 des Gesetzes vom 22. Dezember 2025 (BGBl. 2025 I Nr. 364).

<sup>45</sup> Aufenthaltsgestattung' (*Informationsverbund Asyl & Migration*, January 2026) <<https://www.asyl.net/themen/aufenthaltsrecht/sonstiger-aufenthalt/aufenthalts-gestattung>>.

<sup>46</sup> Ben Judah, page 110.

<sup>47</sup> On the role of sex workers in pornography as representing *labor* and their relationship to the user, see further sections 2.2 and 2.3 of this paper.

<sup>48</sup> Ben Judah, page 96-101.

<sup>49</sup> Ben Judah, page 93.

opportunities. In this way, the legal status can act as a powerful structuring element of inclusion and exclusion in society and everyday life, with material and emotional consequences.

In this way, law does not only appear to be merely a set of rules. Rather, it becomes a lived infrastructure, in which the tension between the individual desires, needs, emotions and feelings on the one hand, and the set of rules which the law creates, on the other hand, shapes the social interactions, the environmental conditions or even the sense of time of everyday life. The tension between these categories consequently shapes the lived experience of Ibrahim and anyone regulated predominantly by the legal status attached to them. Ibrahim's story, therefore, powerfully demonstrates how the same legal categories and norms affect people differently. One could argue that the law even *produces* people in specific ways by attaching status or category. Law, among many other factors, can then be understood as the condition of the possible.

### ***Ibrahim, pornography and the EU Internal Market***

Ibrahim's trajectory exemplifies how legal status not only opens access to rights but also situates individuals within larger legal and economic systems, especially the European Union's internal market. His ability to move, work, and establish a business across the Union territory is not simply the result of being granted asylum or citizenship, but also of the EU's broader legal architecture. In particular, the rights that come with EU citizenship and the freedoms embedded in the internal market have enabled him to chart a path that would otherwise have been inaccessible.

To better understand how Ibrahim benefited from this legal framework, it is necessary to zoom in on the legal provisions that enable mobility, access, and entrepreneurship within the EU. The EU legal framework, while empowering in some respects, also reveals significant limitations in addressing the complexity and precarity of lived experiences, especially in marginalised or stigmatised industries like pornography.<sup>50</sup>

Historically, EU law has been shaped by the idea of free movement as a means to complete the internal market. This vision, embedded in the Treaties, aimed at creating interdependence among member states to pool resources, build shared institutions, and make war materially impossible. While this economic and peace-driven logic laid the foundation of European integration, it can be argued that the idea of free movement and market integration does not capture what the European integration project has evolved into. It is not only about economic integration, but also about its individual trajectories and the protection of fundamental rights. There is virtually no policy field or area of everyday life in which EU law does not play a role. While effective in promoting integration, EU law arguably does not adequately reflect the lived experiences of individuals, particularly in circumstances outside the market context.

Ibrahim's story reflects this tension well. While he benefits from the economic freedoms that the internal market provides him, particularly the free movement of services, establishment and persons, the 'dark side' of pornography as elaborated on above is barely captured by the regulatory framework. Ibrahim can move freely within the Union territory, can shoot his videos in various countries, and can subsequently set up his company. Even more so, Ibrahim uses this freedom to move in search of the best regulatory conditions. He chooses the least restrictive COVID-19 measures and those laws that are most favourable for his work. In this sense, Ibrahim becomes an entrepreneur of his legal mobility, leveraging the rights afforded by EU citizenship to build a career that would otherwise have remained inaccessible to him.

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<sup>50</sup> Benedetta Barchielli et al, 'Exploring the Interplay of problematic pornography use, sexism, and rape myth acceptance: An Italian cross-sectional study' (2024) 10(13) *Heliyon*; Georgina Voss, *Stigma and the Shaping of the Pornography Industry* (Routledge 2015); Rebecca Rose Nocella, 'The stigma around porn work: inhibiting the enforcement of health and safety regulations' (2025) 12(3) *Porn Studies* 411.

Peter Fleming, Sara Louise Muhr and Masourd Shadnam, 'The Business of Pornography: Contributions from Organization Studies—Introduction to the Special Section' (2024) 31 *Organization* 741.

In this context, his EU citizenship and free movement rights, as set out in articles 18-22 TFEU, are particularly important, as they enable him to move and reside freely within the EU. Subsequently, he benefits from equal treatment and non-discrimination to stay and work in other host states across the Union territory. What is crucial for his job as a porn actor and producer is the set of rights he receives under the free movement of services in article 52 TFEU and subsequent secondary law. These provisions enable Ibrahim to work as a self-employed person across the EU.

Another layer of the internal market is its digital dimension, which enables him to publish his content online, making it immediately accessible to consumers across the Union.<sup>51</sup> EU law shapes the platforms that structure this industry and, by extension, the conditions under which Ibrahim works. Internal market law provides a legal framework for these platforms and thus influences Ibrahim's life. For instance, in a case on the taxation of OnlyFans,<sup>52</sup> a platform where sex workers sell content via subscriptions or one-off payments, the Court of Justice applied VAT law in a way that ensures the financial infrastructure of the platform operates across the EU. Notably, the Court addressed the technicalities of taxation without evaluating the nature of the content itself. Indeed, its focus in this case is to adapt Union VAT law to the new digital dimension of the internal market.<sup>53</sup> This shows how EU law can ensure a legal framework for the financial infrastructure necessary for the industry Ibrahim is part of, while ignoring its social dimensions. In another, still pending Case<sup>54</sup>, the question is whether a French law on the criminal liability for distributing pornographic content to minors infringes the E-Commerce Directive.<sup>55</sup> This directive specifies that, in principle, member states may not restrict the freedom to provide information society services from another member state. The case exemplifies how, for now, Union law has abolished the obstacles that prevent Ibrahim and other content producers from sharing their videos across borders within the internal market. Looking at his life through the law on the digital internal market, Ibrahim is mostly visible as one of the millions of service providers in a new platform economy for which Union law smooths out big and small regulatory issues.

However, this story of empowerment and opportunities also reveals various blind spots in the current EU legal framework. What finds less traction in the EU's legal system are various aspects that go beyond its mere economic activities, especially those identified above as the "dark side" of the pornographic industry. While there is an internal market for porn, there is no harmonisation of it across the European Union.<sup>56</sup> There is little protection for sex workers or porn actors under many national labour laws, which often do not recognise them as "workers" entitled to social security, healthcare, or labour protections.<sup>57</sup> The OnlyFans taxation case illustrates this tension well. While the platform is at the centre of an ongoing public debate on

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<sup>51</sup> According to Article 24 (2) of the Digital Service Act (Regulation (EU) 2022/2065) providers of online platform must report every six months the number of monthly active users. The platform XVideos alone reports between 80 and 150 million monthly users in 2023/24. The exact number is a contentious topic between different porn platforms and the Commission. Accordingly, they account for four out of the 18 platforms designated as very large online platforms by the Commission under the Digital Service act, because they fulfil the threshold of 45 million average users monthly; see article 33(4) of the Digital Services Act; all designated very large online platforms to date can be found here: <https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses>.

<sup>52</sup> Judgment of the Court (Grand Chamber) of 28 February 2023, Fenix International Limited v Commissioners for Her Majesty's Revenue and Customs, Case C-695/20.

<sup>53</sup> This becomes clear in the opinion of the Advocate General who stresses that the question of taxation of Onlyfans '[...]is of particular significance given the growing influence of online platforms in the economy and the role played by such platforms in the collection of VAT, which raises a good many considerations', see Opinion of Advocate General Rantos, Case C-695/20, Fenix International v Commissioners for Her Majesty's Revenue and Customs, para. 3.

<sup>54</sup> Case C-188/24 WebGroup Czech Republic and NKL Associates [2024].

<sup>55</sup> See Art. 3(2) Directive 31/2000/EC.

<sup>56</sup> Christian Person, Steffen Hurka and Christoph Knill, 'Opposite Trends in the Regulation of Pornography? Policy Differentiation and Policy Convergence Across 26 Countries Between 1960 and 2010' (2016) 53(7) The Journal of Sex Research 860; Annick Masselot, 'Reframing the EU concept of worker: Can sex-workers be workers?' (Conference Contribution, 22nd International Conference of Europeanists, Paris, 8-10 July 2015).

<sup>57</sup> Ibid.

the tension between agency and protection of online sex workers,<sup>58</sup> with notably Sweden banning the purchase of online sexual acts,<sup>59</sup> the Union's traditional internal market law only 'sees' the issue of the correct taxation of the activity.

Ibrahim's story, therefore, is one of both empowerment and constraint. EU law opens doors and creates mobility, yet it also leaves out significant aspects of everyday life. His journey is a reminder that the freedoms of the internal market are not neutral. They are deeply intertwined with both the possibilities and the blind spots of European legal and social frameworks. Broader ethical, social or labour concerns remain largely invisible, highlighting the limits of a legal system primarily designed to facilitate economic integration rather than protect the complex realities of individual lives.

### ***Ibrahim and the EU's new approach to the platform economy***

In recent years, EU law has begun to grasp the importance of the societal effects of the platform economy.<sup>60</sup> One of the major instruments in this context is the Digital Services Act (DSA),<sup>61</sup> according to which very large online platforms must assess and mitigate risk with a systemic character, considering social and cultural factors.<sup>62</sup> The DSA's categories of systemic risk include the "actual or foreseeable negative effects concerning gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being".<sup>63</sup> One could think that this might be the entryway into Union law of some of the adverse effects of online pornography and its industry, visible in Ibrahim's story. Yet, for now, the EU's strategy towards such very large online platforms for pornographic content seems to be mainly focused on the protection of minors. This is, for example, stressed in the Commission's communication on the designation of three of the major platforms for pornographic content in the Union.<sup>64</sup> In addition, in May 2025, the Commission opened formal proceedings under the DSA against the very large online platforms Pornhub, Stripchat, XNXX, and XVideos to ensure the safeguarding of minors.<sup>65</sup> The goal seems to be to ensure that these platforms have an age verification mechanism to access pornographic content, for which the

<sup>58</sup> Glamour UK, 'Why Are We Shaming Bonnie Blue and Lily Phillips, but Not the Masked Men Queueing up to Have Sex with Them?', 24 January 2025 <<https://www.glamourmagazine.co.uk/article/bonnie-blue-lily-phillips-sex-shaming>> accessed 21 July 2025.

<sup>59</sup> Euractiv, Sweden bans buying OnlyFans content, 20 May 2025, <<https://www.euractiv.com/section/tech/news/sweden-bans-paid-online-sexual-acts-in-law-targeting-platforms-like-onlyfans/>> accessed 19 July 2025; see also: Joyce, Thomas: *Sweden, Sex Work, Screens: The Criminalisation of Online Sex Work and Article 8 of the ECHR*, *VerfBlog*, 2025/7/22, <<https://verfassungsblog.de/sweden-sex-work-screens/>>, accessed 20 July 2025.

<sup>60</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). The first recital of the DSA states that "[i]nformation society services [...] have become an essential part of the Union's economy and the daily life of Union citizens."

<sup>61</sup> See Art. 34 and 35 DSA and Mateus Correia de Carvalho, It will be what we want it to be: sociotechnical and contested systemic risk at the core of the EU's regulation of platforms' AI systems, 16 (2025) JIPITEC 35, p. 36-37.

<sup>62</sup> Mateus Correia de Carvalho, It will be what we want it to be: sociotechnical and contested systemic risk at the core of the EU's regulation of platforms' AI systems, 16 (2025) JIPITEC 35, p. 43.

<sup>63</sup> See Article 34(1)(d) DSA. See also Recital (83) of the DSA: "A fourth category of risks stems from similar concerns relating to the design, functioning or use, including through manipulation, of very large online platforms and of very large online search engines with an actual or foreseeable negative effect on the protection of public health, minors and serious negative consequences to a person's physical and mental well-being, or on gender-based violence."

<sup>64</sup> European Commission, Press release, 20 December 2023, Commission designates second set of Very Large Online Platforms under the Digital Services Act, <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6763](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6763)>, accessed 28 July 2025.

<sup>65</sup> European Commission, Press release, 27 May 2025, Commission opens investigations to safeguard minors from pornographic content under the Digital Services Act, <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_1339](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1339)>, accessed 28 July 2025.

Commission is currently developing an age-verification app<sup>66</sup> and which is also part of the guidelines on protecting minors online under the Digital Services Act.<sup>67</sup>

Returning to Ibrahim's story, the focus on protecting minors, while indeed a worthy goal, does not reflect all the struggles presented to us stemming from his activity. In theory, there would be legal avenues to make those struggles more visible in Union law. Yet, for the moment, the Union seems to focus on the adverse effects on minors, which are more tangible and have been widely agreed on politically. It has been argued before, that the risk-based approach used in the DSA relies on identifying and assessing such more quantifiable forms of risks.<sup>68</sup> Especially in regard to AI, this approach means that the EU struggles "to fully capture less quantifiable and intangible AI risks [...] whose perceptions are contestable and highly subjective."<sup>69</sup> The same appears to be true for risks stemming from the major platforms for pornographic content in the Union's internal market and their algorithms. The risks of harm from gender-based violence and severe negative consequences to the person's mental well-being fall under that second category of less quantifiable and intangible risk, as assessing them becomes increasingly subjective, and the link between harm and cause might be less easy to establish. Yet, as we can see in the chapter, Ibrahim's changing view of women, the influence of the industry on what kind of sex he films, his struggle with addiction and the creeping emptiness his activity in the sector leaves him with, are quite real. Thus, even with the new approach in Union law that seeks to consider the societal effects and impacts on individuals of the platform economy, these other risks of the pornographic industry, which is an integral part of that platform economy, do not, for now, pass the filter of the internal market's regulatory instruments.

## 4. Conclusion

*"The world is fake"*

Ben Judah, Ibrahim, p. 91

One thing jumps out when reflecting on how Union law engages with Ibrahim throughout his story: the law that most profoundly impacted him is economic. In the end, Ibrahim's story is an internal market story. It is about using the freedoms of movement and service to make a profit in the platform economy while being subject to the Union's tax provisions and its regulatory framework for the digital internal market. He moves like a fish in the Union's internal market's "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" (Art. 26(2) TFEU). This is the law that enables him to fulfil his European Dream from marginalised migrant to wealthy, economically successful businessman EU law primarily acknowledges this economic side of his story. Ibrahim is a service provider, a citizen exercising fundamental freedoms, and a content producer in one part of the internal market's platform economy.

Yet, the story is much richer than this. Ibrahim appears, on the one hand, as a somewhat cynical man, disenchanted with Germany, who let go of his former dreams of becoming an artist. He realised at one point in his life that, from his perspective, money and sex are all that count in Europe. The small episodes of affection with his first girlfriend, Stefanie, and with Ryan, who

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<sup>66</sup> See Joint press release of Jul 14, 2025: Commission presents guidelines and age verification app prototype for a safer online space for children, accessible here: <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_1820](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1820)>, accessed 28 July 2025.

<sup>67</sup> The guidelines are currently at a draft status and will ultimately be adopted under Article 28(4) of the DSA, the draft guidelines are publicly available under are publicly available under <<https://digital-strategy.ec.europa.eu/en/library/commission-seeks-feedback-guidelines-protection-minors-online-under-digital-services-act>>.

<sup>68</sup> Mateus Correia de Carvalho, It will be what we want it to be: sociotechnical and contested systemic risk at the core of the EU's regulation of platforms' AI systems, 16 (2025) JIPITEC 35, p. 37 and 48.

<sup>69</sup> Mateus Correia de Carvalho, It will be what we want it to be: sociotechnical and contested systemic risk at the core of the EU's regulation of platforms' AI systems, 16 (2025) JIPITEC 35, p. 37.

made his career possible in the first place, seem long forgotten by the end of the story. On the contrary, he is plagued by a sense of futility and a certain emptiness, which shines through in his account of his obsession with sex and numbers in the digital sphere. However, whilst this is a central part of Ibrahim's reality, this other part is not recognised by Union law. Fundamental freedoms and tax laws are not made to capture this darker side of the story; instead, they focus on providing a functioning legal framework to keep the internal market machine running. The DSA, which at least in theory was thought to address such risks of the platform economy, falls short in practice and approaches pornography mainly through the lens of the protection of minors. This is a goal worthy of pursuing, of course. Yet focusing only on this risk overlooks many of the struggles we encounter in Ibrahim's story. The alienation, addiction and perspective on sex portrayed in Ibrahim's content fly under the radar of this approach. There is no way to know how much of the story is tainted by Ben Judah's narrative. Nonetheless, presuming the story is more or less accurate, thinking about what little of it can be seen in Union law is quite striking.

One could argue that Union law, like all law, cannot consider all lived experiences. It must reduce complexity to function, reducing lives to categories like service providers or consumers and filtering out the lived experience in the process. Otherwise, it could not provide a coherent and reliable *system* in a chaotic world.<sup>70</sup> Nevertheless, observing how little of this life is reflected in the Union's legal system should lead to reflection on the law's blindness to much of the lives lived under it.

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<sup>70</sup> The most famous and influential account of this is, of course, Luhmann's functional system theory, see Luhmann Niklas, *Rechtssoziologie* (2., erw Aufl, Westdeutscher Verlag 1983) and Alex Skinner, Hans Joas and Wolfgang Knöbl, 'Niklas Luhmann's Radicalization of Functionalism' in: *Social Theory: Twenty Introductory Lectures* (Cambridge University Press 2009).

# The Truck Driver from Baloga: Driving Through Time and Space

by Mikael Ruukel\*

## 1. Introduction

In the second chapter, *Baloga*, of Ben Judah's *This is Europe*, the Romanian truck driver Ionut discovers his cargo has been stolen while he's been sleeping in his truck. Despite language barriers, he tries to report the theft to the French police, but feels like he is being treated as a second-class European by the officers.

Throughout the chapter, we follow Ionut in his reflections on his life choices, the dangers and risks in his job—both from traffic accidents and the threat of being robbed—the stressful nature of his work, and also –somewhat incongruously – his criticism of the behaviour of people from the eastern parts of Europe.

The experience of being looked down upon, treated unequally and without respect as an "Eastern European" recurs in several contexts throughout the chapter. For example, when Ionut is assigned a dirty and disgusting truck cabin, when, for financial reasons, he avoids safer parking areas for overnight stays, and when, during his free time, he walks the streets of Paris and feels that everything there is expensive and out of reach.

Another recurring theme is his reflections on life as a long-distance truck driver on EU roads (pre-Brexit). It is the story of driving a heavy vehicle while being so tired that he becomes a danger to himself and others, of the stress of reaching the destination and delivering the cargo on time, of the conditions for sleeping, cooking, eating, and attending to basic physical needs at parking areas along the motorways, of being away from family and dear ones for long periods and what that means for relationships.

Later in the story, it is told how Ionut meets Cami, his current partner. They were truck drivers already before they met, and they started driving, working, and living together in the same truck.

Although the story largely focuses on hardships, it should also be emphasised that not everything is tragic and dark. There is joy and warmth in the description of driving the truck through the Alps, in organising a spontaneous birthday party with colleagues, and in the fact that Ionut and Cami have and care for each other.

While the story is relatively detailed in some parts, there is much about their working and personal conditions that we can only guess at. As far as possible, I have for this essay tried to avoid speculation and assumptions, and based the analysis that follows on the information that can be drawn from their story. However, it has been unavoidable to draw some conclusions from the untold.

Without judging or diminishing, it can still be stated that life as a long-distance truck driver comes with a cost. That price includes increased health risks<sup>1</sup> and, in many cases, a social cost. Both Cami and Ionut were divorced when they met. At least in Ionut's case, his divorce was due to his job and the time he spent away from home.

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<sup>1</sup> Crizzle, Alexander et al. 2017. Health and wellness of long-haul truck and bus drivers: A systematic literature review and directions for future research. *Journal of Transport & Health*. 7.

Therefore, in this paper, my aim is not to draw conclusions about the positive or negative impact of the relevant legal rules. I do not believe this is necessary or even appropriate, since this paper is about Ionut's and Cami's perspectives on the law, not mine.

I can imagine how they may have an ambivalent relationship to having their working hours and rest periods regulated in detail: That they might see it as necessary for ensuring proper rest and safe driving, while at the same time feeling frustrated by the rigidity and lack of flexibility. For example, perhaps there are times when they would prefer to drive a longer shift to get home earlier and sleep in their own bed. Nonetheless, I cannot know more than what is conveyed in the story, and I will strive not to put words in their mouths.

## 2. Some Starting Points for a (European) Law of the Everyday Perspective

What does “the European Law of the Everyday” mean to me? In his inspiring article “*Is this Europe?*”<sup>2</sup>, Floris de Witte sets out to find and construct a new approach to research on European law and how it affects “ordinary people.” This ambition is, in itself, not new—it has occupied socio-legal scholars for decades. What appears refreshing about de Witte's article, however, is how he formulates a perspective shift.

The perspective De Witte advocates is certainly “bottom-up,” but it would be an oversimplification to leave it at that. De Witte also argues that the focus should be on what EU law actually does, rather than what it says it does: “*how it shapes, renders and is mediated by the bio-physical, spatial, infrastructural, or cultural reality upon which it acts.*”<sup>3</sup>

Kymäläinen describes how what is intriguing to her in everyday law is the ordinariness, and how law makes its presence felt in this ordinary everyday.<sup>4</sup> This approach corresponds well with how I understand and find my interest in the law of the everyday. In the context of the chapter about the truck driver from Baloga, my interest is not primarily on how the law is written or how it should be interpreted by a courts or authorities, but rather on how it appears to Ionut, Cami and their colleagues, how it affects their lives, and how they adapt their everyday working lives to it. In other words, I strive to look from the perspective of Ionut and Cami, while looking through the scholarly lens.

Ben Judah's book aims to depict diverse European lives. Still, as Irina Muñoz Ibarra notes, it presents a narrow, cropped image that excludes non-migrant Black, Indigenous, and People of Colour (BiPOC).<sup>5</sup> The chapter *Baloga* confirms this heavily restricted perspective. Few or no non-migrant BiPOC appear in the chapter, and if they do, they are described instead in terms of nationality. In other respects as well, the picture presented in *Baloga* is severely limited. Despite their widespread presence in the European road haulage sector,<sup>6</sup> there are no drivers who are third-country nationals appearing in the text.

Even when it comes to workplace relationships—with colleagues, employers, or supervisors—the perspectives remain individual. What is described are the individual's problems and the individual's stress. Collective aspects appear only in a private context, between Cami and Ionut, or between Ionut and his friends and colleagues, but not in relation to the dynamics of the employment relationship with managers and employers.

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<sup>2</sup> de Witte, Floris. 2025. *Is this Europe? EU law's rendering of European society*. European Law Open. (Pending publication.)

<sup>3</sup> de Witte, n.2. p.6.

<sup>4</sup> Kymäläinen, Päivi. 2024. *Legal Geography I: Everyday Law*. Progress in Human Geography, vol. 48, no. 3, p.353.

<sup>5</sup> Muñoz Ibarra, Irina. 2025. *Introduction: Is this colourblind Europe?* (Pending publication.)

<sup>6</sup> Baranska, Paulina and Séverine Picard. 2023. *Third-country Drivers in European Road Transport*. European Transport Workers Federation. pp.9-10.

Although the selection of study subjects (i.e., the content of Ben Judah's book) can be criticised, for this essay I have chosen to base my analysis on what has been presented as the material for studying, rather than what has been omitted. This delimitation may seem insufficiently critical, but in this case, I believe it best aligns with my approach of adopting Ionut and Cami's everyday perspective.

### 3. Spatial and Temporal Dimensions

My reflection and analysis of this chapter have been inspired by the works of Iossa<sup>7</sup>, Iossa & Selberg<sup>8</sup>, and Rocca & Deverson<sup>9</sup>, where they apply spatial and temporal dimensions as a lens for analysing worker mobility.<sup>10</sup> However, with my interpretation of "law of the everyday" perspective, I will adopt a somewhat different perspective than the just-mentioned sources of inspiration. In contrast to theirs, my perspective is not that of the legislator or legal practitioner, but will strive for a kind of bottom-up perspective—one that considers how the daily life of the individuals in the story, Cami and Ionut, is profoundly shaped by the law.

Iossa finds that the posted worker is legally constructed and defined through the simultaneous workings of both a spatial and a temporal scale, and how spatial and temporal elements are at the core of the EU regulatory framework for cross-border posted work.<sup>11</sup> However, regarding long-distance cross-border road transport, there are additional layers of spatial-temporal elements provided by the combination of specific rules on the posting of workers who are drivers in the road transport sector, road haulage and cabotage, and driver working and resting times (altogether these rules are referred to as the "Mobility Package", see below section 5).<sup>12</sup> These additional layers provide further reasons why this lens can offer interesting perspectives on the story of the truck drivers from Baloga.

As I will show below, time and space are decisive for which rules become applicable and what restrictions apply to the mobility of drivers and vehicles. The mirror image of this is that the same time and space can be navigated by transport undertakings to use vehicles and drivers in the most economically beneficial way possible. This includes navigating the rules of the Mobility Package, often related to driving at specific times in specific geographical areas, combined with applying timely precision in accordance with the needs and demands in the value chains. In this way, the questions of when and where Ionut and Cami live their everyday working lives seem to become mere "side effects" in this balancing act.

Since I have chosen to focus on the rules of the Mobility Package specifically, for this essay, I will not devote particular attention to all aspects of labour law that may apply to the drivers'

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<sup>7</sup> Iossa, Andrea. 2022. 'This Is Not a Posted Worker' – Short-Term Cross-Border Mobility of Logistics Workers and Spatio-Temporal Dimensions of Exploitation in the EU: Evidence from the Case Law of the Court of Justice. *European Law Open*, vol. 1, no. 3.

<sup>8</sup> Iossa, Andrea, and Niklas Selberg. 2022. Socio-Legal Aspects of Labour Market Segmentation in the Agri-Food Sector in Sweden: Spatio-Temporal Dimensions. *European Journal of Migration and Law*, vol. 24, no. 2.

<sup>9</sup> Rocca, Marco, and Audrey Deverson. Time and Labour Markets in the Regulation of Temporary Labour Migration in the European Union. *Italian Labour Law E-Journal*, vol. 17, no. 1.

<sup>10</sup> This lens is related to the concepts "legal geography" and "chronotopes of law", which have been described, among others, by Persdotter, Maria, and Andrea Iossa. 2022. *On Legal Geography as an Analytical Toolbox for EU Legal Studies*. *European Law Open*; Iossa, Andrea, and Maria Persdotter. 2021. *Cross-Border Social Dumping as a 'Game of Jurisdiction' – Towards a Legal Geography of Labour Relations in the EU Internal Market*. *Journal of Common Market Studies*, vol. 59, no. 5.; de Witte, Floris. *Here Be Dragons: Legal Geography and EU Law*. *European Law Open*, vol. 1, no. 1., and n.7 and 8.

<sup>11</sup> Iossa, n.7, p.674.

<sup>12</sup> The story of the chapter occurs just before and during the outbreak of the Covid pandemic in 2020. At that point, the current rules of the Mobility Package were not in force. However, in this work, I will base my analysis on the legislation as it stands today (spring 2025), which will mean that the description is not fully legally accurate. Since the story of Ionut and Cami is primarily used as an illustration and not as a legal case, I do not consider this to be a problem for my analysis.

situation—for example, questions concerning work environment, pay, or rights to consultation and information.

#### 4. Logistics in a Highly Competitive Social Market Economy

The Baloga chapter, as I read it, is a story of two people who are small but very concrete cogs in a larger system: the *highly competitive social market economy* of the European Union, and that is where this essay will find one of its legal anchoring points. The other anchoring point is in the Mobility Package as the legal framework which is likely to have the most significant influence on their everyday working lives.

These two anchoring points should be understood as operating on different "levels", both in their actual formal form of legislative acts, but also in their levels of abstraction. Nonetheless, even though the Mobility Package puts into action the balancing of social and competition aspects, both anchoring points have concrete implications for the experience of everyday law in the Baloga chapter.

According to the Treaty on European Union, Article 3(3), one of the union's objectives is to be a "*highly competitive social market economy*". Each of these five words can be discussed and dissected for its meaning, both individually and in combination with the others, and the concept may have different interpretations depending on the national or academic context.<sup>13</sup> For this purpose, I will use the term in its most basic literal sense: an economy based on market principles that balances the goal of being highly competitive with the need to address certain social needs.<sup>14</sup>

At the heart of this highly competitive market economy lies "*the science of organizing the circulation of goods, materials, and people to reduce costs and increase profit*", i.e. logistics. The Commission has summarised the importance of the EU's transport system as "*essential to the smooth movement of goods, people, and services – the essential and underlying freedoms of the single market*."<sup>15</sup>

Business developments in recent decades have led to an increase in the development of production and value chains, greater specialisation to improve efficiency, exploit labour cost differentials, and reduce the costly need to keep goods stored on shelves. Iossa summarises the significance of logistics as "*the faster a product moves, the more profit it generates*."<sup>16</sup>

An additional aspect of logistics is that it not only enables profiting from labour cost differentials between countries in the *production* of goods or components of goods. Cross-border transport also makes it possible to take advantage of differentials in the cost of labour for transport and logistics services.

#### 5. Balancing Social and Competitive: The Content of the Mobility Package

The term "Mobility Package" usually refers only to the EU legislation on road transport that was adopted in 2020,<sup>17</sup> which amends or specifies already existing legislation in this area. However,

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<sup>13</sup> Smejkal, Vaclav, and Stanislav Šaroch. 2015. *EU as a Highly Competitive Social Market Economy –Goal, Options, and Reality*. Review of Economic Perspectives. 14. 2015.

<sup>14</sup> For discussion and examples of such social aspects, see C-201/15 *Iraklis*, para. 76, 77 and the joined cases C-541-555/20 *Lithuania et al.* (Mobility Package).

<sup>15</sup> Communication from the European Commission: Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another. Brussels, 27.10.2010 COM(2010) 608 final. p.11.

<sup>16</sup> Iossa, n.7, p.671.

<sup>17</sup> Regulation (EU) 2020/1054 of 15 July 2020 amending Regulation (EC) No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs; Regulation (EU) 2020/1055 of 15

for the purposes of this essay, I have also included the pre-existing legislation and I use the term for the whole body of legislation.<sup>18</sup>

The Mobility Package consists of three different but related areas of regulation. Two of these areas concern the conditions under which the driver performs work (working/resting time and posting), while the third (cabotage) concerns how the vehicle is used.

The purpose of the Mobility Package, both the 2020 legislation and earlier measures, is summarized as aiming to create a road transport sector that is “safe, efficient and socially accountable”, and that ensures improved working conditions for drivers, undistorted and fair competition between operators, and road safety for all road users through rules that are “clear, proportionate, fit for purpose, and easy to apply and to enforce.”<sup>19</sup> The rules also aim to take into account that employees are generally the weaker party in the employment relationship, and therefore aim to prevent situations where employers restrict drivers’ rights or dissuade them from claiming those rights.<sup>20</sup>

With my ambition to take an everyday law perspective in this essay, I will provide only a very brief summary of the substantive rules that apply to international road transport. What I consider to be most important in this context is how the rules are presented and perceived by Ionut and Cami, and how their everyday working lives are impacted. Therefore, I will in a later part of this section put some of the rules of the Mobility Package in relation to their story.

For the everyday law perspective, rather than giving a detailed presentation on the legislation, I find it more relevant to consider how the rules are presented, for example, by the European Labour Authority in their leaflets. These leaflets are available in 35 different languages and are directed specifically at the drivers concerned. They aim to explain the various rules on working and rest time, posting, and cabotage in a correct while easily accessible way.<sup>21</sup> In my opinion, these leaflets provide a rich illustration not only of how the complex body of rules is presented, but also of the multiple temporal and spatial elements involved.

### *Working and Resting Time.*

A driver is only permitted to work and drive for a certain number of hours per day and week. Drivers have the right to breaks during work, as well as a specified amount of rest per day and per week. This regulatory system specifies when the driver must take breaks, how long they must be, alternative calculation methods, and when the driver is entitled to return home.

### *Posting of Workers.*

These rules determine which employment conditions apply during the period when work is performed in another member state. Whether a driver is legally considered posted or not is determined by the strength of the links between the driver’s work and the member state where the employer is established or the (host) member state where the work is carried out. Should the worker be legally considered “posted” and should certain specified conditions, such as

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July 2020 amending Regulations (EC) No 1071/2009, (EC) No 1072/2009 and (EU) No 1024/2012 with a view to adapting them to developments in the road transport sector; [Directive \(EU\) 2020/1057 of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation \(EU\) No 1024/2012.](#)

<sup>18</sup> Besides those mentioned in n.17, also: Directive 92/106/EC and Directive 2018/957.

<sup>19</sup> Recitals 1, 6, and 36 Reg. 2020/1054; recital 6 Reg. 2020/1055; Recital 1, 3 and 7 Dir. 2020/1057.

<sup>20</sup> Joined cases C-541-555/20 *Lithuania et al (Mobility Package)* para. 174 and 524.

<sup>21</sup> [https://www.ela.europa.eu/sites/default/files/2022-08/Driving\\_and\\_Resting\\_Times\\_English.pdf](https://www.ela.europa.eu/sites/default/files/2022-08/Driving_and_Resting_Times_English.pdf) and [https://www.ela.europa.eu/sites/default/files/2022-08/Posting\\_of\\_Drivers\\_English.pdf](https://www.ela.europa.eu/sites/default/files/2022-08/Posting_of_Drivers_English.pdf). Information on cabotage provided by the European Commission: [https://transport.ec.europa.eu/transport-modes/road/mobility-package-i/market-rules/rules-cabotage-applicable-21-february-2022\\_en](https://transport.ec.europa.eu/transport-modes/road/mobility-package-i/market-rules/rules-cabotage-applicable-21-february-2022_en). All retrieved 2025-05-16.

wages and remuneration, be more favourable in the host member state, those conditions must apply during the period of the posting.

### *Cabotage*

In the EU law context, cabotage refers to situations where domestic road transport within one member state is carried out by a vehicle of a transport undertaking that is registered in another member state.<sup>22</sup> Cabotage is permitted under certain conditions within the EU, but there are restrictions, primarily aimed at ensuring fair competition for transport sectors in member states where wages and other costs are higher.<sup>23</sup>

For a cabotage operation to be permitted, the foreign vehicle must enter the member state with the purpose of delivering an international load. Once that load has been unloaded, the vehicle is permitted to carry out up to three cabotage operations within seven days. After that, the vehicle must leave the member state. After such a cabotage period, a four-day “cooling-off” period is required, during which the haulier cannot carry out new cabotage operations with the same vehicle within the same member state.

## **6. Mobility Rules Applied to Baloga**

In the following, I will try to illustrate how the rules of the Mobility Package may impact the workdays of Ionut and Cami. Their story gives us only few details about how or where they drive, while we know that they are out on the road for several weeks, sometimes months, at a time. Ionut describes how they drive nine hours per day.<sup>24</sup> The rules on working and rest time apply to the individual driver, whereas the cabotage regulations concern the use of the vehicle. This means that there can be incentives to create highly complex logistical schedules in order to extract maximum profit from both the vehicle and the driver (or drivers).

For the driver, the interplay between rules for the individual and for the vehicle also has personal implications: if the vehicle is used for cabotage operations, the driver is considered to be posted and thereby subject to other rules regarding pay and working conditions.<sup>25</sup> The determining factors include whether the international transport involves the member state in which the employer is established, or whether it solely takes place in other member states. We are told that Ionut and Cami are away on assignment for long stretches of time and that they drive in parts of Europe that are far from Romania. Whether all of their transport routes start or end in Romania is not made clear.

Driving nine hours per day before shifting<sup>26</sup> corresponds with the typically maximum allowed driving time. Twice a week, it is permitted to exceed this limit and drive for up to ten hours per day.<sup>27</sup> As Ionut explains, they are off-duty at the same time for only a few hours each day (“*you’re left with less than five hours where you’ve got to wash, eat and sleep*”).<sup>28</sup>

The maximum allowed driving time is 56 hours per week, but no more than 90 hours may be driven over any two-week period.<sup>29</sup> This means that a week with the maximum allowable driving time must be followed by a lighter week. At the same time, they are not permitted to drive more

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<sup>22</sup> <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Cabotage>. Retrieved 2025-05-16.

<sup>23</sup> Recital 8, Reg. 2020/1055.

<sup>24</sup> Judah, Ben. 2023. *This Is Europe : The Way We Live Now*. Picador. p.30.

<sup>25</sup> The driver will also be considered posted if conducting “cross trade operations”, i.e. international transports which do not involve the member state where the employer is established, however these rules do not take into account the movements of the vehicle, only the driver.

<sup>26</sup> Judah, n.24, p.30.

<sup>27</sup> Article 6(1), Reg. (EC)561/2006 and Reg. 2020/1054.

<sup>28</sup> Judah, n.24, p.30.

<sup>29</sup> Article 6(2) and (3), Reg. (EC)561/2006 and Reg. 2020/1054.

than 4.5 hours without having at least a 45-minute break.<sup>30</sup> Since the other driver must normally take 11 hours, but under certain circumstances at least 9 hours, of uninterrupted daily rest, the vehicle likely has to be stationed during that time. However, the daily rest period can also be split into one uninterrupted period of 3 hours and another of 9 hours.<sup>31</sup> In that case, they could possibly alternate and pass over the wheel during breaks, but the vehicle would then need to stay parked for a longer period later, when both drivers' periods of daily rest overlap.

In addition, both drivers have the right and obligation to take at least 45 consecutive hours of weekly rest.<sup>32</sup> This rest period can not be taken in the vehicle; instead, the employer is required to pay for and provide suitable accommodation with adequate sleeping and sanitary facilities.<sup>33</sup> At least every third or fourth week, the driver has the right to, for the weekly rest, return either to their place of residence or to the employer's operational centre in its member state of establishment.<sup>34</sup>

Ionut expresses an economic inferiority compared to Western Europeans (*"Maybe if I were a German driver and paid like one I could afford to stop in one of those car parks"; "He might be in Stuttgart but he was still on a Cluj salary"*).<sup>35</sup> In legal terms, this issue is also affected by the EU's rules on posting of workers, and a key factor is where and how the driver carries out their work. If Ionut's work, either in whole or in part, meets the definitions for being considered a posted worker, then he would instead be entitled to a German salary while posted in Germany.

Since this essay discusses the relationship between the highly competitive market economy and social aspects, it should also be noted that the legislation within the Mobility Package includes additional rules that may be directly relevant to this relationship. Transport undertakings are prohibited from applying any forms of driver pay calculation based on distance travelled, speed of delivery, or the amount of goods carried, if such pay schemes encourage drivers to violate rules on road safety.<sup>36</sup> Similarly, there is a legal obligation for transport undertakings to organise their operations in such a way that their drivers can perform their work while complying with the rules governing working hours and rest periods.<sup>37</sup>

## **7. The Spatial and Temporal Dimensions in Baloga**

Although the temporal and spatial aspects are fundamental to the Baloga story, they are not clearly expressed in more than just a few sentences. Much more is conveyed implicitly. I have focused on situations where time and space are used to balance the requirements in Article 3(3) TEU, or become a source of exclusion and inferiority.

The story provides some examples of how demands are expressed:

Pile-ups. Coordinators yelling. Phoning him. Orders: More, fast, get to the depot. Superiors giving him a piece of their mind: Too late, too slow, Sprechen Sie Deutsch? Get there faster. Fleshy-faced men who never cared about you and only about how much money they were making out of the company. Ionut would only nod<sup>38</sup> and of how rules are broken to ease the stress and satisfy those demands: "His shift stretching out. Not the official nine: but ten, eleven, twelve hours."<sup>39</sup>

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<sup>30</sup> Article 7, Reg. (EC)561/2006 and Reg. 2020/1054.

<sup>31</sup> Article 8, Reg. (EC)561/2006 and Reg. 2020/1054.

<sup>32</sup> Article 4(h), Reg. (EC) 561/2006 and Reg. 2020/1054.

<sup>33</sup> Article 8(8), Reg. (EC) 561/2006 and Reg. 2020/1054.

<sup>34</sup> Article 8(8a), Reg. (EC) 561/2006 and Reg. 2020/1054.

<sup>35</sup> Judah, n.24, p.21.

<sup>36</sup> Article 10(1), Reg. 561/2006 and Reg. 2020/1054.

<sup>37</sup> Article 10(2), Reg. 561/2006 and Reg. 2020/1054.

<sup>38</sup> Judah, n.24, p.20.

<sup>39</sup> Judah, n.24, p.21.

The “feeling of stress and always being in a hurry” particularly in combination with complying with rules, as described by Ionut, illustrates the underlying dimension of time and space: the necessity of getting somewhere within a specific time, preferably as quickly as possible. Certain limitations are imposed on this “as quickly as possible”: some are, of course, purely physical limits to how fast matter can move under given circumstances, while others are legally defined: speed limits and rules on driving and rest times. Regarding legal restrictions, responsibility can fall on the transport undertaking (the employer) and the individual driver.

When Ionut drove, she would sleep; nine hours at the wheel and then they’d switch over. Then he would try and sleep as Cami drove. [...] The truck was often still for less than five hours a night. It felt like snatches: what they had together.[...] “It’s relentless. It’s continuous. It’s one day like this after another.” [...] “Our daily work stretches up to almost twenty hours, nine hours each, out of which you’re left with less than five hours where you’ve got to wash, eat and sleep in the end. For months... We’re mocked and made fun of with such conditions, treated like sub-humans.”<sup>40</sup>

The reason why Ionut and Cami began working together in the same truck is not explained in the story, but there can be both social and economic reasons. Instead of being separated for long periods while working, they can spend much of their time together. A truck that is on the move for as many hours as possible is more economically profitable: the rules on driving and resting times apply to drivers, not to vehicles. We are, however, not provided information about the basis for their pay calculation, and whether they, or only their employer, have economic incentives for the vehicle to stay parked for as few hours as possible.

The feeling of inferiority and being treated worse as an Eastern European likely has multiple explanations rooted in 20th-century history, economics, and outright racist attitudes. Nevertheless, even in this case, there are certain connections to time and space. One of the “structural elements” behind the EU’s free movement is to enable companies to take advantage of differentials in labour costs between member states.<sup>41</sup> However, drivers who are classified as “posted workers” are entitled to the same pay and compensation as drivers in the member state where the work is carried out.

Ionut’s statement—“*He might be in Stuttgart but he was still on a Cluj salary*”—was made before the Mobility Package came into force. But even now, with the updated rules on posting, there are still many boxes that must be ticked before a driver will be legally recognised as a “posted worker.” Almost all of these boxes relate to where the driver is driving and during which times,<sup>42</sup> something that can be controlled by the employer through how they plan transport routes and exercise their prerogative to direct the work.

Should the driver’s assignments be organised and carried out in such a way, highly depending on when and where, that the rules on posting of workers become applicable, then additional temporal-spatial elements come into play: provided that the driver does not perform their posted work in the same country throughout the entire pay calculation period (monthly wage, weekly wage, etc.), the wage will vary depending on where and for how long the driver is posted. For example, one can imagine that a driver can be posted in more than one member state during the same pay calculation period, or that the work is performed partly as posted and partly as non-posted. Where and when the work is performed would thus make a very tangible difference to the worker’s private economy. And in the same way, these differences in pay would give the employer, through their managerial prerogative, room to organise the work, again based on temporal and spatial factors, so that the cost of labour becomes as advantageous as possible for the employer.

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<sup>40</sup> Judah, n.24, p.30.

<sup>41</sup> Iossa & Persdotter, p.1087.

<sup>42</sup> Article 1, Dir. (EU) 2020/1057.

## 8. Concluding Remarks

The fundamental principle in Article 3(3) of the TEU, the balance between social needs and competitiveness within the framework of a market economy, says nothing about the level of detail required or that this balance must be achieved through the temporal and spatial dimensions. This regulation design has been added further downstream in the process of putting these words into action.

There are significant economic values to be extracted from transport and logistics. These meet and conflict with the values of worker protection, protection of citizens and society (particularly in traffic), and fair competition.<sup>43</sup> To balance this conflict of interests, the regulatory model chosen by EU legislators has been to enact detailed and comprehensive rules, which have the potential to significantly intrude into the everyday working lives of the workers concerned.

The everyday experience of law for a truck driver from Baloga is therefore likely to be ambiguous. It offers protection from the most raw forms of exploitative forces of a highly competitive market economy and the logic of logistics, but at the cost of a rigorous body of detailed legislation that meticulously specifies when and where the driver or vehicle must move or remain stationary.

From this, certain fundamental priorities of the EU lawmaker can be discerned. First, the fundamental premise that market interests serve as the baseline, from which worker-protective exceptions and derogations may be granted. Second, the prioritisation of a protective method, relying on detailed, comprehensive, and potentially intrusive rules, that significantly intervenes in the everyday working lives of these workers.

The protection of drivers in long-distance road transport is commendable for all the reasons outlined above. The aim of this essay has not been to question the urgency or legitimacy of these goals, but rather, from the perspective of everyday law, to highlight how such regulations affect the daily working lives of drivers.

The logistics sector, including road transport, is a highly distinctive part of the labour market. This distinctiveness stems partly from the sector's central role in production and distribution, and partly from the fact that its workforce is highly mobile due to the nature of the sector.<sup>44</sup> As a result, flowing from these particular factors, the sector inherently contains strong spatial and temporal dimensions.

The legislator aims to increase the level of control over this sector, and does so by adding further layers, through protective legislation in the Mobility Package, introducing additional spatial and temporal elements. A sector of the labour market that is already distinctive thus becomes even more so.

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<sup>43</sup> Recitals 1, 6, and 36, Reg. 2020/1054; Recital 6, Reg. 2020/1055; Recital 1, 3 and 7, Dir. 2020/1057.

<sup>44</sup> This is highlighted in Directive 2020/1057, recitals 1 and 7, and by the Court in the joined cases C-541–555/20 *Lithuania et al. (Mobility Package)*.

# Invisible Struggles: Migrant Women, Everyday Vulnerability and EU Law

by Narin Nosrati\*

The everyday is not universal. Some everyday lives are structured by precarity, exploitation, and exclusion. Migrants, particularly migrant women, experience an everyday that remains largely invisible to many in Europe, even within dominant legal frameworks. This legal invisibility functions not as a gap or oversight, but as a systemic feature of European migration and labour law. Using the story of Nazneen, a migrant Afghan woman portrayed in Ben Judah's book *This is Europe*,<sup>1</sup> this paper sheds light on how legal regimes in Europe produce invisibility at the intersection of migration, labour, and gender. Nazneen's experiences of restricted movement, informal employment, gender-based risks, and institutional abandonment do not fall outside the law, but are shaped by it. Her struggle is a product of how law is structured to recognise certain subjects and exclude others. This raises the question: Whose lives does law recognise and protect and whose does it ignore?

Europe, in its legal imagination, is a space of ordered mobility, protected labour, and human rights. It offers its citizens an area of freedom, security and justice. But Nazneen's reality is taking place in a parallel Europe, that her story reveals: A Europe built on containment, invisibility, and precarious survival for those who do not fit into legal categories. European law continues to conceptualise legal subjects in abstract, neutral and individualist terms, disregarding the unequal ways in which its effects are distributed across lines of gender, race, status, and class. Nazneen's story therefore amplifies the crucial need for a rethinking of how we approach law itself.

While working on this project, I found myself torn between two possible goals: to seek visibility for the invisible within prevailing frameworks or to overcome the politics of recognition, as they always bear a risk of invisibility for certain individuals.<sup>2</sup> In that sense, Martha A. Fineman's vulnerability approach<sup>3</sup> has the potential to encourage a more inclusive thinking beyond existing categories. In the sections that follow, I turn to Nazneen's story to trace the specific mechanisms of invisibility in migration and labour law, highlight the gender dimension that runs throughout the story and question the priorities within the European legal order. I then explore Fineman's approach, which begins with shared human vulnerability and the institutional responsibilities it entails to ultimately envision an EU Law of the everyday that is feminist, intersectional, inclusive, and centres humans' needs.

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<sup>1</sup> Ben Judah, *This is Europe: The Way We Live Now* (2023) 487.

<sup>2</sup> "Sometimes the very unrecognizability of the other brings about a crisis in the norms that govern recognition. If and when, in an effort to confer or to receive a recognition that fails again and again, I call into question the normative horizon within which recognition takes place, this questioning is part of the desire for recognition, a desire that can find no satisfaction, and whose unsatisfiability establishes a critical point of departure for the interrogation of available norms." Judith Butler, *Giving an account of oneself* (1st edn, Fordham Univ. Press 2008) 24.

<sup>3</sup> Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1.

## 1. The Legal Construction of Invisibility

Feminist legal theorists have long challenged the claim that law is neutral or objective.<sup>4</sup> Carol Smart argued that law exercises a form of *epistemic power*.<sup>5</sup> It determines which experiences can be understood as legal harm, and which cannot. Kimberle Crenshaw and Angela P. Harris critique the way legal feminism often centres a universalised figure of woman, warning that this homogenisation risks silencing racialised and marginalised women whose experiences do not fit dominant narratives of gendered harm.<sup>6</sup> In both cases, invisibility is produced by the law's tendency to reduce complexity into recognisable forms. Invisibility functions as active erasure of lived realities through narrow categories, neutral language, "gender essentialism"<sup>7</sup> etc. This process is particularly evident in recognition-based approaches that rely on the visibility and intelligibility of identities or harms to justify legal protection. A woman may be protected from gender discrimination only if she can clearly demonstrate that her experience falls within predefined legal categories of harm. A refugee may be eligible for asylum only if their persecution fits accepted narratives, often tied to political or religious identity, rather than gendered insecurity or economic survival.<sup>8</sup> As Judith Butler has argued, legal frameworks tend to protect only those lives that are already deemed "recognisable" within dominant political and legal imaginaries.<sup>9</sup> The limits of recognition thus lie in its conditional logic. To receive protection, one must first be seen. To be seen, one must conform to what the law recognises. What the law recognises is often shaped by structures of power. This logic not only excludes those who do not fit legal categories, it also pressures individuals to frame their experiences in ways that fit them and may erase key aspects of their reality.<sup>10</sup>

Understanding how law constructs invisibility and shedding light on those affected, requires moving beyond formal legal texts and examining the everyday spaces where legal exclusions are lived: refugee camps, agricultural labour sites, informal housing, border zones. These are not spaces outside the law, they are deeply shaped by it. Yet the people who inhabit them often remain legally unrecognised, or are only partially visible to institutions, as subjects of control rather than protection.

## 2. Everyday Borders, Disposable Labour, and Gendered Risks in the EU

### Restricted Mobility and the European Asylum System

European law constructs borders through legal architectures that govern who may move, who must stay, and under what conditions lives are made liveable. These "everyday borders" are

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<sup>4</sup> Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and human rights* (Collected courses of the Academy of European Law vol 12.2, Repr. Oxford University Press 2006); the law's claim to be objective and a neutral voice might ultimately be authoritarian, see Peter Goodrich, 'Historical Aspects of Legal Interpretation' (1986) 61(3) IND LJ 331, 333 ("the legal concept of interpretation is theological in its derivation and that it is unjustifiably authoritarian in its practice"); Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum; Angela P. Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42(3) SLR 581, 583.

<sup>5</sup> Carol Smart, *Feminism and the Power of Law* (1989) – The idea of epistemic power is present throughout the book.

<sup>6</sup> Crenshaw (n 4); Harris (n 4), 585.

<sup>7</sup> Harris (n 4), 585.

<sup>8</sup> Jaqueline R Castel, 'Rape, Sexual Assault and the Meaning of Persecution' (1992) 4(1) Int 39, 40; Sunny Kim, 'Gender-related persecution: A legal analysis of gender bias in asylum law' (1994) 2 American University Journal of Gender and the Law 107, 119; Despite the political implications of gender-related issues, see Alexia Tizzano, 'Why doesn't she seek International Protection in the European Union' (2022) 54(2) N.Y.U. J. Int'l L. & Pol. 559, 602-603.

<sup>9</sup> Judith Butler, *Frames of War: When is Life Grievable?* (1st edn, Verso 2009) 31–32.

<sup>10</sup> Charles Taylor, *Multiculturalism and "the politics of recognition": An essay* (Princeton Univ. Press 1992) 43; e.g. in feminist and queer asylum cases, the way in which courts assess persecution can lead to the reproduction of cultural stereotypes and the process of othering, which can influence applicants, see Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29(2) Law Critique 221, 222–223; Narin Nosrati and Davide Tomaselli, 'Whose Values?' [2025] Verfassungsblog <https://verfassungsblog.de/ecj-western-values-gender/>.

felt most in the daily experiences of those whose legal status renders them vulnerable. The restricted mobility is a result of the Common European Asylum System (CEAS), under the Dublin Regime that ultimately forces migrants into informal economies and precarious living conditions rather than enabling them to move toward safer, more sustainable futures. Nazneen being stuck in Greece is more than a logistical inconvenience: It exposes her to harm, dependency on informal networks, and affects her access to safety. A key element of the Dublin Regulation,<sup>11</sup> a cornerstone of the CEAS, is the First Entry Rule that assigns the responsibility for processing protection claims to the country where an asylum seeker first enters the EU.<sup>12</sup> The need for a clear responsibility-allocation mechanism under the Dublin System leads to disadvantages of Member States at the EU's external borders,<sup>13</sup> but moreover, to the disadvantage of asylum seekers that are detained in the first country they enter. The flaws of the Dublin Regulation have been discussed extensively by legal scholars.<sup>14</sup> But it is not only impractical or a matter of solidarity between Member States. Foremost, it is questionable in terms of human rights.<sup>15</sup> Despite the EU Member States' commitment to the European Convention of Human Rights, the CEAS structurally produces conditions that amount to *de facto* human rights violations,<sup>16</sup> e.g. pushbacks at external borders,<sup>17</sup> unsafe housing/degrading living conditions,<sup>18</sup> collective and violent expulsion,<sup>19</sup> and illegal detention.<sup>20</sup> The current system leads to precarious situations at the EU's external borders, dangerous alternative routes and does not acknowledge the needs of asylum seekers. For this reason, the UNCHR considers it "wholly inappropriate to derive any responsibility for considering an asylum application from the fact that the applicant has been merely present in the territory of a Member State. Mere presence in a territory is often the result of fortuitous circumstances and does not imply the existence of any meaningful link or connection."<sup>21</sup>

## Labour and Exploitation in the Agricultural Sector

Judah's story in Evia reveals another frontier of legal invisibility: the realm of labour. Although EU law has developed to protect mobile workers within the Union, it has not done enough to ensure that unfree labour on which entire sectors, e.g. the agriculture, depend is rendered

<sup>11</sup> 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) 29 June 2013.

<sup>12</sup> Gaia Lott, 'The Dublin Convention and the Introduction of the 'First Entry Rule' in the Allocation of Asylum Seekers in Europe' (2023) 32(3) Contemporary European History 459.

<sup>13</sup> DG Migration and Home Affairs, 'Evaluation of the Implementation of the Dublin III Regulation – Final Report' (2016).

<sup>14</sup> Ashley Binetti Armstrong, 'You Shall Not Pass! How the Dublin System Fueled Fortress Europe' [2020] Chicago Journal of International Law 332; Susan Fratzke, Not Adding Up: 'The Fading Promise of Europe's Dublin System' [2015], Migration Policy Institute Europe; Blanca Garcés-Masareñas, 'Why Dublin "Doesn't Work"' [2015], Internacionales CIDOB <[Why Dublin "Doesn't Work"](#)>. Marit Bugge, 'Obedience and Dehumanization: Placing the Dublin Regulation within a Historical Context' (2019) 4(1) Journal of Human Rights and Social Work 91, 93.

<sup>15</sup> Binetti Armstrong (n 14), 365; Darja Zaviršek, 'The humanitarian crisis of migration versus the crisis of humanitarianism: current dimensions and challenges for social work practice' (2017) 36(3) Social Work Education 231; Bugge (n 14), 96–97.

<sup>16</sup> Amnesty International Report, The Human Cost of Fortress Europe (2014), <[The Human Cost of Fortress Europe: Human Rights Violations at Europe's Borders - Amnesty International Ireland](#)>.

<sup>17</sup> *A.R.E. v. Greece* (2025) 15783/21 (European Court of Human Rights) – suspecting systemic pushback practices by Greek authorities at the Greek-Turkish border.

<sup>18</sup> *M.S.S. v. Belgium and Greece* (2011) 30696/09 (European Court of Human Rights) – holding that returning an asylum seeker to Greece under Dublin violated Article 3 ECHR due to degrading conditions; *A.D. v. Greece* (2023) 55363/19 (European Court of Human Rights).

<sup>19</sup> *Hirsi Jamaa and others v. Italy* (2012) 27765/09 (European Court of Human Rights); *R.N. v. Hungary* (2023) 71/18 (European Court of Human Rights); *J.A. and others v. Italy* (2023) 21329/18 (European Court of Human Rights).

<sup>20</sup> *J.A. and others v. Italy* (n 19); *M.M. v. Hungary* (2023) 26819/15 (European Court of Human Rights); *A.C. and M.C. v. France* (2023) 4289/21 (European Court of Human Rights).

<sup>21</sup> UNHCR, 'Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper' (2001) 4 (v).

legally visible.<sup>22</sup> According to estimates from 2021 between 650,000 and 850,000 people were employed as seasonal workers in the agri-food sector.<sup>23</sup> This workforce has become indispensable as the EU agricultural sector experienced a loss of over 1.3 million native workers between 2011 and 2017. These were subsequently replaced with migrant workers. In this regard, Letizia Palumbo, Alessandra Corrado and Anna Triandafyllidou observe that “the employment of migrant workers, often in precarious and exploitative conditions, has become a structural element of the agri-food system in many countries.”<sup>24</sup> This development reflects what they describe as a “rural exodus and demographic decline,” counterbalanced by an influx of migrants to fill the demand for flexible, low-cost labour.<sup>25</sup> Several studies demonstrate the interplay between migration regimes, labour policies, and the restructuring of agricultural production.<sup>26</sup> Palumbo, Corrado and Triandafyllidou summarise: “Stringent migration legislation and policies, together with labour mobility policies and the labour market liberalization process, produce and influence the legal and social situation of vulnerability of migrants, rendering them the temporary, just-in-time and low-cost force required by market functions.”<sup>27</sup> Data from 2018 confirms this systemic precarity: 32% of all employees in the agricultural sector have no written contract of employment, compared with just 5% across the EU-workforce.<sup>28</sup> However, the EU’s legal framework actively facilitates such exploitation. Seasonal employment is governed primarily by the laws of the Member States. While EU citizens enjoy equal rights to nationals through the principle of non-discrimination, non-citizens can be excluded from minimum labour protection.<sup>29</sup> But even EU citizenship itself does not prevent exploitation: seasonal workers from poorer Member States are frequently paid extremely low wages and denied social benefits.<sup>30</sup> This shows that vulnerability is legally produced and distributed across different groups of workers.

## The Role of Gender

Nazneen’s story is marked by a gender-specific dynamic. From the very beginning, her life is shaped by gendered constraints: as an Afghan woman growing up in Iran, she is subjected to a system of state-imposed “gender apartheid” that restricts her rights and mobility.<sup>31</sup> At home, she faces domestic violence, forcing her to flee in search of safety. Yet when she reaches Greece, her gender-based risks continue to determine her life. She avoids the refugee camp

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<sup>22</sup> Letizia Palumbo, Alessandra Corrado and Anna Triandafyllidou, ‘Migrant Labour in the Agri-Food System in Europe: Unpacking the Social and Legal Factors of Exploitation’ (2022) 24(2) *European Journal of Migration and Law* 179, 185; Gülay Toksöz, ‘Informal Labour Markets and the Need for Migrant Workers: The Case of Turkey from a Comparative Perspective’ in Erik Berggren and others (eds), *Irregular Migration, Informal Labour and Community: A Challenge for Europe* (Shaker Publishing 2007) 184 ff.

<sup>23</sup> Manuela Samek Lodovici and others, ‘Revaluation of working conditions and wages for essential workers’ (Luxembourg 2022) 48.

<sup>24</sup> Letizia Palumbo, Alessandra Corrado and Anna Triandafyllidou (n 22), 181.

<sup>25</sup> *ibid* 183.

<sup>26</sup> *ibid* 182; Alessandra Corrado, Carlos de Castro and Domenico Perrotta (eds), *Migration and Agriculture: Mobility and change in the Mediterranean area* (Routledge 2016); Johan F Rye and Karen O’Reilly (eds), *International Labour Migration to Europe’s Rural Regions* (Routledge advances in sociology, Routledge 2020).

<sup>27</sup> Letizia Palumbo, Alessandra Corrado and Anna Triandafyllidou (n 22), 183.

<sup>28</sup> Colin C Williams and Adrian Horodnic, ‘Tackling undeclared work in the agricultural sector’ (2018) 1 <<https://www.ela.europa.eu/sites/default/files/2021-09/%27Tackling%20undeclared%20work%20in%20the%20agricultural%20sector%27%20report.pdf>>.

<sup>29</sup> 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, Directive 2004/38/EC (European Parliament).

<sup>30</sup> Cecilia Bruzelius and Martin Seeleib-Kaiser, ‘Enforcement of Minimum Labor Standards and Institutionalized Exploitation of Seasonal Agricultural Workers in the EU’ in Stefanie Börner and Martin Seeleib-Kaiser (eds), *European Social Policy and the Covid-19 Pandemic: Challenges to National Welfare and EU Policy* (Oxford University Press 2023) 167–168.

<sup>31</sup> Mai Sato, ‘Situation of human rights in the Islamic Republic of Iran: Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran’ (12 May 2025) 2–3; United Nations Human Rights Council, *Iran’s proposed hijab law could amount to “gender apartheid”: UN experts* (2023).

because it is unsafe for women, a space marked by sexual violence and institutional neglect.<sup>32</sup> She therefore accepts work at the olive factory only to encounter exploitation under the guise of protection. Her placement on a “women-only production line” suggests a gendered division of labour that acknowledges risk, but offers no rights, protections, or stability. Gender thus structures both her vulnerability and her choices: the camps is unsafe because she is a woman; the factory can exploit her because she is a woman; and the law remains blind to both.

Migration law and labour law are deeply interconnected fields of gendered regulation.<sup>33</sup> Reports by the OECD and the UN have documented that migrant women face intersecting forms of discrimination, rooted in systemic racism, sexism, and structural inequality. These include racial abuse, gender-based violence, unequal labour conditions, limited access to health services, and criminalisation.<sup>34</sup> A study for the European Parliament stresses that reception and integration policies cannot be gender-neutral, because women face gender-specific vulnerabilities in both asylum and labour context.<sup>35</sup> Similarly, the Committee on the Elimination and Discrimination against Women (CEDAW) insists that female migration must be analysed in terms of gender inequality, gender labour markets, and the feminisation of poverty and exploitation.<sup>36</sup>

Despite legal commitments<sup>37</sup> to gender mainstreaming in EU policy, asylum law remains largely gender-blind in its implementation, particularly regarding mobility rights and secondary movements. As Elaine Weiner and Heather MacRae argue, gender mainstreaming was initially envisioned as a transformative project, embedding a gender perspective “in all policies, at all levels and at all stages”<sup>38</sup> to reshape the status quo.<sup>39</sup> However, its transformative potential has failed to materialise, particularly in core policy areas of the EU.<sup>40</sup> The fears of violence and harassment are well-documented experiences of women in migration contexts.<sup>41</sup> Still these forms of gendered violence often remain invisible because legal frameworks continue to treat migrants as gender-neutral subjects, despite women making up 52% of migrants arriving in Europe,<sup>42</sup> despite distinct risks faced by women in transit and settlement, and despite overwhelming evidence, with reports estimating that up to 90% of women along the Mediterranean route experience gender-based violence.<sup>43</sup> A historical analysis reveals that the

<sup>32</sup> Ben Judah (n 1), 490.

<sup>33</sup> Sandra Fredman, *Human rights transformed: Positive rights and positive duties* (1. publ, Oxford Univ. Press 2008).

<sup>34</sup> Organization for Security and Co-operation in Europe (OSCE), ‘Guide on Gender-Sensitive Labour Migration Policies’ (2009); UN Women, ‘Racially marginalized migrant women: Human rights abuses at the intersection of race, gender, and migration’ (2022); UN Women, ‘Gender on the Move: Working on the migration-development nexus from a gender perspective’ (2013).

<sup>35</sup> Silvia Sansonetti, ‘Female refugees and asylum seekers: the issue of integration’ (2016) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL\\_STU\(2016\)556929\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL_STU(2016)556929_EN.pdf)>.

<sup>36</sup> CEDAW, ‘General recommendation No. 26 on women migrant workers’ (2008) 5.

<sup>37</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) 1 August 2014, The Istanbul Convention.

<sup>38</sup> Council of Europe, ‘Gender mainstreaming: Conceptual framework, methodology and presentation of good practices’ (1998) 15.

<sup>39</sup> Directorate-General for Employment, Social Affairs and Equal Opportunities, ‘Manual for Gender Mainstreaming: Employment, Social Inclusion and Social Protection Policies’ (Office for Official Publications of the European Communities 2008) 11.

<sup>40</sup> Elaine Weiner and Heather MacRae, ‘The persistent invisibility of gender in EU policy: Introduction’ (2014) 18 *EoP*, 4-6, 11.

<sup>41</sup> UN Human Rights Council Working Group, ‘Visit to Greece - Report of the Working Group on discrimination against women and girls: A/HRC/44/51/Add.1’ (2020) 15; UN Women, ‘Racially marginalized migrant women: Human rights abuses at the intersection of race, gender, and migration’ (n 34); UN Women, ‘Migration experiences of people with diverse SOGIESC’ (2023); UN Department of Economic and Social Affairs, ‘The Progress on the Sustainable Development Goals: The Gender Snapshot 2024’ (2024).

<sup>42</sup> UN, International Migrant Stock 2024 <<https://www.un.org/development/desa/pd/content/international-migrant-stock>>.

<sup>43</sup> IOM, MMC and UNJCR, ‘On this journey, no one cares if you live or die: Abuse, protection and justice along routes between East and West Africa and Africa’s Mediterranean Coast – Volume 2’ <<https://www.unhcr.org/media/journey-no-one-cares-if-you-live-or-die-abuse-protection-and-justice-along-routes-between-1>>; UNHCR, *UNHCR warns of devastating spike in risk of gender-based violence for women and girls forced to flee* (2024).

right to asylum has been shaped by a male-centric paradigm, particularly in the post-second world war era and during the cold war period.<sup>44</sup> It is therefore not neutral<sup>45</sup> and without a deeper reflection it will remain incapable of addressing gender-specific needs and vulnerabilities.<sup>46</sup>

Yet, there are normative and legal foundations for reimagining a more gender-responsive approach. The Istanbul Convention requires states to recognise gender-based violence as grounds for asylum under the Geneva Convention.<sup>47</sup> The judgment on Afghan women by the CJEU in October 2024<sup>48</sup> marks an important step, acknowledging gender-specific persecution. Moreover, proposals to restructure the EU asylum system exist, including the replacement of the Dublin System with a model based on the best interest of the individual, which shows that more ethical and efficient approaches are possible.<sup>49</sup>

Gender is not merely a secondary feature of migration and labour regimes, but a key factor influencing vulnerability and exclusion. The persistence of gender-blindness in law is a structural failure and becomes a form of violence.

### **What This Says About Europe**

The logic of invisibility that shapes Nazneen's everyday extends beyond her individual case and reflects deeper tensions within the European legal order. In the free market, goods move freely across borders, protected and regulated by EU law. Law enables the movement of capital and commodities, while restricting and criminalising human mobility. In this way, European law silently endorses the economic structures that rely on undocumented, underpaid, and unprotected labour. The question arises: Does Europe benefit from Nazneen's exploitation? Or more provocatively, is its economy designed by law to function because people like her are available, but invisible? As the UN report *Gender on the Move* observes: "The resultant enormous increase in irregular migration has been beneficial for multiple sectors of the economy of destination countries, which have come to rely on the availability of cheap and 'flexible' labor, easily exploitable and deprived of legal protection."<sup>50</sup>

Women like Nazneen occupy the bottom rung of a legal and economic hierarchy that governs migration and labour: at the top are highly skilled professionals, legally recruited and welcome, while at the very base are undocumented migrants, which is the largest and most vulnerable group.<sup>51</sup> Especially women are overrepresented in precarious sectors and more exposed to abuse.<sup>52</sup> The wildfire scene in Ben Judah's chapter Evia makes this hierarchy tangible. When the factory owner instructs Nazneen to save the boxes first,<sup>53</sup> the message is: her life is less valuable than the product of her labour. A rights-based approach might treat this as an issue of labour inspection or non-compliance. But a vulnerability-based approach questions why

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<sup>44</sup> Heather L Johnson, 'Click to Donate: visual images, constructing victims and imagining the female refugee' (2011) 32(6) *Third World Quarterly* 1015, 1020; Alexander Betts, Gil Loescher and James Milner, *UNHCR: The politics and practice of refugee protection* (Routledge global institutions series vol 62, Second edition, Routledge 2012) 11, 20.

<sup>45</sup> Sunny Kim, 'Gender-related persecution: A legal analysis of gender bias in asylum law' (1994) 2 *American University Journal of Gender and the Law* 107, 112; Ulrike Krause, 'Flucht und Frauen: Reflexionen des Forschungsstandes' in Schahrzad Farrokhzad, Karin Scherschel and Melanie Schmitt (eds), *Geflüchtete Frauen: Analysen - Lebenssituationen - Angebotsstrukturen* (Interkulturelle Studien. Springer VS 2022) 25.

<sup>46</sup> Study for the European Parliament by Silvia Sansonetti, 'Female refugees and asylum seekers: the issue of integration' (2016) 10.

<sup>47</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) 1 August 2014, The Istanbul Convention Article 60.

<sup>48</sup> CJEU, C-608/22, C-609/22, 4.10.2024.

<sup>49</sup> Binetti Armstrong (n 14), 379; Blanca Garcés-Mascareñas (n 14); PRO ASYL et. al. 'For a free choice of host country in the EU: Respecting refugees' interests' (2015) <[https://www.proasyl.de/wp-content/uploads/2015/12/PRO\\_ASYL\\_Memorandum\\_free\\_choice\\_english\\_June\\_2015.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Memorandum_free_choice_english_June_2015.pdf)>.

<sup>50</sup> UN Women, 'Gender on the Move' (n 34).

<sup>51</sup> Bruzelius and Seeleib-Kaiser (n 30) 167.

<sup>52</sup> UN Women, 'Gender on the Move' (n 34) 179.

<sup>53</sup> Ben Judah (n 1) 500.

such arrangements are legally possible in the first place, why safety and dignity are conditioned on legal status and why European economies are permitted to thrive on invisibilised labour.

Moreover, gender is a factor in vulnerability across all areas examined. This indicates that a fundamental reorientation of European law is necessary, one that treats gender equality as a structural concern. Yet such a shift is difficult to achieve within a legal and political system whose foundations lie in economic integration. The EU was established to build a common market, and its legal frameworks continue to prioritise market efficiency, competitiveness, and mobility of capital. Human rights and gender equality have often been folded into market logic rather than pursued as independent goals. Which is the reason “efficient gender equality measures fall under the EU’s primary goal: the focus remains on economic growth and competitiveness, which has trumped gender equality measures” as Weiner and MacRae observe.<sup>54</sup> Taking gendered vulnerability seriously therefore requires moving beyond a market-centric rationality and placing lived realities at the centre of legal thought.

### 3. Overcoming Legal Invisibility: From Recognition to Responsibility

In traditional legal, political and sociological thinking, the intuitive way to address legal invisibility would be expanding recognition. If certain identities or harms are invisible in law, we must make them visible by including them in the framework of rights and protections. Recognition, in this sense, appears to be the natural remedy to invisibility and the logical route to equality. However, recognition alone does not dismantle injustice. The belief in law’s neutrality and claim to universality can itself become part of the problem. Edward A. Purcell Jr. demonstrates this in the context of so-called “colorblind” laws in the United States, where neutrality masks structural inequality and allows the law to reproduce injustice while appearing impartial.<sup>55</sup> More fundamentally recognition-based approaches carry an internal risk. Multicultural and identity-based legal frameworks often presuppose already constituted subjects, which means that those who live outside of normative categories remain unrecognised or unprotected. Legal visibility is conditioned upon fitting into existing social and political norms. Butler warns that when those norms are unable to absorb certain lives they become not just exclusive but violent.<sup>56</sup> Charles Taylor emphasises this in his work on recognition and multiculturalism. According to him “our identity is partly shaped by recognition or its absence, often by the misrecognition of others [...]. Nonrecognition or misrecognition can inflict harm, can be a form of oppression.”<sup>57</sup> Taylor warns against essentialism. Recognition must not be based on rigid group identities. It must be open to internal diversity and complexity, otherwise it simply replaces invisibility with a new form of categorisation.<sup>58</sup>

What could a different approach look like? Butler suggests a more sensitive form of recognition, that is rooted in shared precariousness instead of identity. All lives are precarious, while some are more exposed due to political or social structures.<sup>59</sup> While Butler does not abandon recognition, her shift toward precariousness opens a path toward a broader, more universal basis for legal responsibility. Fineman’s vulnerability theory proposes a more radical reorientation, a post-identity legal framework.<sup>60</sup> According to her the promise of equality must not be conditioned upon any belonging to any identity category, nor should it be confined to only certain spaces and institutions.<sup>61</sup> Fineman argues that the liberal legal subject, the autonomous, self-sufficient individual should be replaced with the vulnerable subject, since all human beings are vulnerable. It should be seen as a universal and constant condition of

<sup>54</sup> Weiner and MacRae (n 40), 4.

<sup>55</sup> Edward A Purcell Jr. ‘Race and the Law: The Visible and the Invisible’ (2021) 66(2) NY L Sch L Rev 141.

<sup>56</sup> Butler, *Frames of War* (n 9) 6-7.

<sup>57</sup> Taylor (n 10) 25-26.

<sup>58</sup> *ibid* 43.

<sup>59</sup> Butler, *Frames of War* (n 9) 25-32.

<sup>60</sup> Albertson Fineman (n 3).

<sup>61</sup> *ibid* 23.

embodied life; a structural reality that law must start from. Her approach rejects recognition as a basis for equality. In her view, equality must be based not on what group you belong to, but on the states responsibility to build institutions that foster resilience and respond to shared human needs. This also means rethinking institutions themselves. According to Fineman, the state must still become actively responsive, not by enforcing formal equality but by designing systems that anticipate and respond to human interdependence.<sup>62</sup>

Nazneen's story illustrates this need. Her exclusion is a matter of non-recognition and the result of institutional abandonment. A vulnerability approach would shift the question from *who is she* and *does she fit into a legal category* to *what does she need*, and *how do our legal and institutional structures respond to that?* Recognition might be a necessary first step to counter invisibility. However, what is further required is a shift from recognition to responsibility, from seeing to acting, from identifying subjects to redesigning systems to fulfil every human being's needs.

## 4. Toward a Feminist Law of the Everyday

### Seeing the Invisible

A feminist law of the everyday begins with the lived realities of those made invisible by law and draws from feminist epistemologies which challenge whose knowledge counts, who gets to define harm, justice or relevance. It is aware that law is shaped by structures of power, that it organises visibility and invisibility. This approach refuses the traditional separation between citizen/non-citizen, public/private, formal/informal, law/life. It insists that refugee camps, domestic work, gender-based risks, informal housing, and survival labour are all legal spaces. A feminist law of the everyday approach raises the question: *What is being experienced that the law does not see and how can law be made accountable to that reality?*

### Rethinking the Legal Subject

Central to this reorientation is a critique of the liberal legal subject. Instead of regarding the subject as autonomous, a feminist law of the everyday focuses on the embedded subject, which is situated within social, economic, and political structures,<sup>63</sup> and is defined by vulnerability, and *relationality*.<sup>64</sup> The case of Nazneen illustrates this: Her reality cannot be attributed to "bad choices" or her as an autonomous subject failing to comply with rules. She is embedded in a system that denies her legal status, disregards her gender-specific risks, and exploits her labour while withholding essential protection. The precarity experienced by the subject is systemic in nature and not a personal concern.

### Centering Responsibility

"Is it only as an I, that is, as an individual, that I am responsible? Could it be that [...] who I am is bound with others in necessary ways? Am I even thinkable without that world of others?"<sup>65</sup>

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<sup>62</sup> *ibid* 13.

<sup>63</sup> Dependend on institutions (healthcare, housing, asylum, work permits, etc.), affected by social norms (e.g., gender roles, migration policies), constrained by material and legal structures (e.g., status, documents, borders).

<sup>64</sup> Relationality opposes concepts of persons as autonomous, self-centred individuals. Christine M Koggel, Ami Harbin and Jennifer J Llewellyn, 'Feminist relational theory' (2022) 18(1) *Journal of Global Ethics* 1.

<sup>65</sup> Butler, *Frames of War* (n 9) 35.

A feminist law of the everyday extends to the concept of *relational responsibility*.<sup>66</sup> This acknowledges that responsibility is shaped by social structures, institutional norms and relationships; consequently by networks of dependence, benefit, and proximity.<sup>67</sup> Furthermore, responsibility must be exercised on a global scale, in a manner that is non-imperialist and characterised by solidarity.<sup>68</sup> Applied to asylum law, for instance, this would mean allocating responsibility not according to geography and first-entry, but according to solidarity, and connection, considering individuals' needs and vulnerabilities, as well as the differentiated institutional capacities of Member States. It would consider the correlation between actions of European citizens, governments and institutions, and the underlying reasons for individuals to seek refuge.<sup>69</sup> Moreover, this reorientation renders the economic structures that depend on unfree labour visible, thereby imposing obligations not only on states but also on employers and market actors.

### Shifting to a Feminist Legal Imagination

In essence, a feminist law of the everyday entails a paradigm shift. It challenges us to reimagine law itself, from passive recognition to active responsibility, from formal equality to structural accountability. It calls upon legal scholars, judges, legislators and practitioners to adopt a different approach: to give voice to marginalised perspectives, to acknowledge the law's complicity in erasure and to allow the realities of the most vulnerable to redefine what justice means in Europe.

## 5. Conclusion

Ben Judah's chapter Evia demonstrates the intersectionality of migration, labour, gender and socio-economic challenges. It ultimately suggests that a box of olives may be more valuable than the life of an undocumented migrant. Their labour is indispensable, yet they remain outside the legal system. The European economy benefits from these structures, relying on a pool of "flexible" workers who are necessary but denied protection. This contradiction reveals that the law does not fail to recognise these realities; it relies on their invisibility. A feminist law of the everyday calls for making these realities visible and to reimagine a Europe that takes responsibility for the vulnerabilities on which it depends.

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<sup>66</sup> Serene Ong and Julian Savulescu, 'Relational Responsibility: Bringing the Wider Social Environment into the Analysis' [2025] ABR 1.

<sup>67</sup> *ibid* 2.

<sup>68</sup> Butler, *Frames of War* (n 9) 37.

<sup>69</sup> Jorma Heier, 'Relationale Verantwortung: Vergangenheitszugewandte und zukunftsbezogene Sorge' in Elisabeth Conradi and Frans Vosman (eds), *Praxis der Achtsamkeit: Schlüsselbegriffe der Care-Ethik* (Campus Verlag 2016) 384.

# **Not Just Refugees: A Law of the Everyday Reading of the Storkow Story**

by Tereza Kanova\*

## **Foreword**

This paper is based on a case study from Ben Judah's book 'This is Europe: The way we live now'. In it, the author describes the everyday of a family of refugees from Syria living in Storkow, Germany, called Aboud and Laila. Their story is the starting point for the present paper which examines how law constructs everyday realities of the people of Europe and what this says about Europe. It is important to clarify that as someone with no contact with any primary sources, I make no claims on behalf of Aboud or Laila.

During the law of the everyday seminar, there was one remark by a colleague of mine which struck me – she questioned the ethics of engaging in this sort of discursive analysis of someone else's actual lived reality. My reflections on the matter are twofold. The first regards the privacy and autonomy of the individuals whose stories are being told. In the author's note, Ben Judah states that he has changed names and other identifying details where relevant for security purposes. Moreover, he has given the individuals editorial control over the draft pre-publication. For these reasons, I believe their autonomy in this literary representation has been safeguarded, and their consent has been comprehensive. The second ethical reflection is that this paper engages with a piece of literature. The author of the book makes no claim to objectivity – these are stories, experiences, perspectives on reality. The process of publishing the book, as an editorialized narrative device, creates a disconnect between the version of a life in Europe I interact with and the protagonist's lived reality. Taking the above into consideration, I move forward with this work with a sincere commitment to approaching it with responsibility and integrity.

For this and many other penetrating contributions, I am deeply grateful to my colleagues at the 'Law of the Everyday' seminar, to the organizers – prof. Loic Azoulay, Dr. Jack Meakin, and Irina Muñoz Ibarra, to Dr. Marc Steiert for his thoughtful redaction work, as well as my colleague Tim Ellemann for the enjoyable brainstorming sessions and research support.

## **1. Introduction**

The Storkow chapter of Ben Judah's book 'This is Europe: The Way We Live Now' presents a rich and complex picture of interwoven legal, political, and economic threads that construct the protagonists' reality. It is a story which leaves a strong lingering sense of helplessness and injustice in the reader. The starting point of writing this paper was the question "where is the law in this story". The answer is that there are at least three different areas of social law present upon a more careful read. Yet, it remains in the backdrop of the action – it does not quite situate, explain, nor define the story. As such, the question I aim to answer is why.

In this paper, I aim to make the argument that the law acts in three starkly contrasting but also interrelated ways – the law simultaneously supports them, harms them, and pushes them into the margins. There is a certain incoherence, a disconnect, when the law is faced with situations of intersectionality. In simpler terms, the law, frankly, misses the bigger picture.

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In the next section, I recount the narrative and position the protagonists within their particular and nuanced context. Then, in section three I introduce Martha Fineman's vulnerability theory in order to analyse their specific situation of vulnerability, demonstrating that their intersectionality is the key to understanding it. In section four, I uncover the legal and normative regimes which underpin their everyday life with a focus on the way in which they reinforce the protagonists' exploitation and isolation and then in section five, I conclude.

## 2. Positionality

In the Storkow chapter, Ben Judah portrays the everyday reality of a married couple of Syrian refugees – Aboud and Laila – living in Germany. Their everyday life is recounted through the perspective of Aboud – following his workday as a delivery driver for Amazon while narrating what their situation is and how it came about.

A few years before the pandemic, Aboud and Laila flee Syria to avoid political persecution. After a perilous and traumatic journey, they reach the German border just in time and initially stay with Laila's cousin in Mannheim where they also get married. Soon after, they go to the *Ausländerburo* which enrolls them in an integration programme and allocates them to the quiet, all-German town of Storkow for what the author calls 'absorption'.

Laila's experience in German society drastically differs from the supposed tenets of *Willkommenskultur*. She faces belittling comments, Islamophobia, and overarching discrimination, all at the hands of the very same structures in place to ensure their integration. Her own host family asks whether she knows what a toilet is and how to use it. The people from the church who hand out free food to refugees warn her about all the terrorists who attend the mosque. At a refugee-centered art exhibition, she feels like she herself is the exhibit of a refugee for Germans to stare at. The hypocrisy she notes in the attitude of people around her is also echoed by Aboud's remark about German society, which he finds to be characterized by inescapable social stratification. He notes that although 'Berlin is full of crime', the Germans 'don't want to know it's happening'.

Laila is also severely depressed and unable to work, so she receives social benefits by the state. She also recently became pregnant which worsened her depression and sense of alienation. For all these reasons, she has been struggling to adjust to their new way of life. Since Laila's benefits are conditional on the overall income of the family, Aboud feels like he has no choice but to work off the radar. He starts working as an informal delivery driver for Amazon through a subcontracting scheme. This employment arrangement puts him in a very precarious position, as his income fluctuates significantly, it is often delayed, and he does not have social security or traffic insurance. A few months ago, when he caused an accident, they withheld approximately half of his monthly salary to pay for the damages. Aboud is an informal migrant worker, who is the sole breadwinner for his disabled pregnant wife.

Another contributing factor to his alienation is that his work is monitored by an algorithm imposed by Amazon. For Aboud, 'the App' is his hostile companion on the road – keeping track of his packages, his route, and his timeliness. It subjects him to constant pressure and surveillance – if he takes a detour or a break, the aggressive pinging notifications start ringing and trigger a stress response. His occupation as a platform worker exacerbates his pre-existent vulnerability and social isolation.

This reflection of the strands that construct Aboud and Laila's reality paint a sombre picture of Germany, where their everyday life is marked by systemic injustice and alienation. I argue that the law here reinforces many of the relevant factors which construct this injustice. A top-down perspective on the legal system would miss how these aspects work together to perpetuate the position of marginalized people. Flipping the perspective and employing a bottom-up lens to this story is the only way to identify the shortcomings in intersecting legal regimes – and this is where the law of the everyday comes in.

### **3. Vulnerability and intersectionality**

In unpacking what makes Aboud and Laila's position so precarious, Fineman's vulnerability theory<sup>1</sup> provides a useful reference point to make sense of it. According to her theory, all individuals are universally at an inherent state of vulnerability. What they differ from one another in, however, are their levels of resilience to this innate vulnerability. Resilience may include a wide range of resources. Fineman broadly introduces five main types,<sup>2</sup> although the list remains open-ended: physical, human, social, ecological, and existential. More concretely, these may include economic assets, education, relationships, contacts, institutional standing, etc. For example, their relationships are sources for care, support and cooperation, while their economic situation provides them a safety net against social risks and work incapacitation. Speaking the language and being able to secure a student loan or relying on family financially, may allow someone to improve their skills and have a more successful career. According to Fineman, social policymaking should have at its centre the vulnerable subject and their needs for resources of resilience.<sup>3</sup>

Aboud and Laila's story has one overarching theme, namely that of helplessness. Almost none of Fineman's sources of resilience are present in their lives. Materially, they lost all of their savings during their journey from Syria, their income is inconsistent and they lack the means to build any type of financial safety net. In terms of relationships, they have been separated from Laila's cousin in Mannheim by the government settlement scheme and while Aboud tries to learn the language, he has not become fluent in it, so it is challenging to build connections in Storkow. The language, cultural and religious barriers prove unsurmountable for the couple, which leaves them particularly vulnerable to situations of exploitation. A prime example of this is Aboud's informal working arrangement, which would require financial resources to consult about, language proficiency to address, and institutional standing to remedy. Having a foreign qualification recognised in Germany would require speaking the language or extensive (and expensive) professional counsel. The prospect of a child further reinforces their lack of financial and social safety net. Practicing their religion consolidates their position on the margin of society. Aboud and Laila find themselves entangled in a web of circumstances which come together in a way which causes them extreme vulnerability. At every turn, they face an obstacle. They never get to shake off the label of a 'refugee', of an 'other'.

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<sup>1</sup> Martha Fineman and Jonathan W Fineman (eds), *Vulnerability and the Legal Organization of Work* (Routledge, Taylor & Francis Group 2018) 1–9.

<sup>2</sup> Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133.

<sup>3</sup> Martha Fineman, 'Vulnerability and Social Justice' (2019) 53 Valparaiso University Law Review 341.

#### 4. The law

As an intersectional position, theirs is a uniquely different situation than one which would fall under the auspices of ‘informal work’, or ‘migrant integration’, or ‘mental disability’. On all three of these strands, there is, largely, a consensus that society should help and protect the weaker party – there are separate legal responses rooted in social justice and equality. Labour law, migration law, and social security all share, ideally, this benevolent aim. Yet, it is precisely the conditions for Laila’s social security benefits which Aboud points to as the reason he works informally. The state’s settlement scheme for integrating migrants is what separates Aboud and Laila from their family in Mannheim and what shuns them in a small town with no community. Meanwhile labour law’s loopholes enable the exploitation of Aboud as a platform worker.<sup>4</sup> As such, Aboud’s superior can exercise a large degree of control over the way he carries out his work, while being exempt from most of the burdens that benefit the employee, such as overtime pay, minimum wage, social security, traffic insurance, etc. The application of these legal frameworks together fit together in a way that creates a perfect storm for abuse.

In 2015, Germany temporarily disappplied the Dublin Protocol, thus allowing refugees to enter its territory and seek asylum there. According to the story, Aboud and Laila went through the refugee procedure and got reallocated from Mannheim, which was their first stop in Germany, across the country to Storkow, where they were allocated, isolated away from anyone else in their position. German reception policy is set down by the Asylum Act<sup>5</sup> on the federal level and to the best of my understanding, it was the so-called EASY Distribution System<sup>6</sup> which determined the allocation for refugees across the German states. The criteria for this allocation are based on logistical considerations – each state’s financial capacity and population. The system blurts out a reception state on the basis of the reception capacities, the state of origin, and the family formation of the asylum seekers. At no point are any further details and circumstances of the persons taken into account in this system, nothing that can refine the decision-making process to better address their needs and ensure their wellbeing. In Laila and Aboud’s case, this meant that a system aimed at integration, brought them to further isolation on the other side of the country from their family and away from anyone else from a similar background.

The most charged and overt mention of the legal framework comes when Aboud uncovers the fact that he “wouldn’t be working in the black [...] if it weren’t for the rules”, referring to the social benefits his ill wife receives from the government. There is no sufficient information in the story to conclude with a certainty which type of social security Laila receives but it is likely *Grundsicherung*,<sup>7</sup> or basic income support, which is conditional on the family’s total income. She probably does not qualify for unemployment benefits,<sup>8</sup> because she did not work before and is not capable to be an active job seeker, and the sickness benefits<sup>9</sup> are limited in time. Ordinarily, the social security system is conceptualized as a safety net in case of work incapacity due to health issues or other social risks, but in an intersectional situation such as the one in the story, one of the applicable facets of the law instead pushes Laila and Aboud to the grey area of another – and he has to work under the table.

<sup>4</sup> The story took place before the pandemic. In 2024, an EU Directive aiming to address the labour risks of platform work.

<sup>5</sup> Asylgesetz (AsylG) § 46

<sup>6</sup> Bundesamt für Migration und Flüchtlinge (BAMF), ‘EASY – Erstverteilung der Asylbegehrenden’ (Federal Office for Migration and Refugees)  
<https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/AblaufAsylverfahrens/Erstverteilung/erstverteilung-node.html>

<sup>7</sup> As per SGB XII, Viertes Kapitel

<sup>8</sup> Arbeitslosengeld as per SGB III, see § 16 for the definition of scope of unemployed

<sup>9</sup> Krankengeld as per SGB V, see Zweiter Titel and §44, §46, and especially §48

Working as a delivery driver for Amazon, Aboud actually works for a subcontractor that Amazon engages on an on-demand basis. The subcontractor hires people like Aboud part-time as platform workers – a legally uncertain category at the time which received a lot of legal scrutiny in following years. Currently, platform work in the EU is regulated on both an EU and a national level through the EU Platform Work Directive. This legal act aims at enhancing transparency – it stipulates that workers should be aware of any algorithmic use for decision-making and monitoring and it attempts to enhance the coverage of labour protection, as Member States are obliged to introduce employment status presumptions. However, as regards the informal economy, the crux of the problem lies in the impossibility to enforce any law to that type of workers in the first place. This is because their actual working hours and earnings remain unreported and therefore, they operate within a legal vacuum. By his own account, Aboud drives “paranoid of a scratch into West Berlin”.

In the absence of the law, the account of the everyday reality in the Storkow chapter permits us to identify the non-legal normative framework guiding the life of the protagonists, based on the infrastructure around them. During the day, the App’s nudges, reminders and alarms have a full hold over Aboud’s conduct and emotional state and essentially act as enforcement mechanisms. It reframes the manager-worker relationship by taking it one step further – the managing party is now omnipotent and has full capacity for control, which solidifies the inequality and alienation in Aboud’s everyday. The App, then, has all the markings of a normative framework whose underlying rationale is profit maximization for the subcontractor and by extension, Amazon.

Amazon’s business model is another structure at play imposing a normativity on Aboud and contributing to his exploitation. From their perspective, outsourcing delivery to subcontracting firms on an on-demand basis is a seamless solution to the risk of fluctuating customer demand and of inefficient use of internal resources. This way, they are able to shift the business risks to subcontractors and maximize their own profit. This creates a lot of pressure on the subcontractors and unpredictability for the workers. Yet, since it can be highly profitable for delivery companies to work for Amazon due to the high consumer demand, plenty of companies are willing to partially operate in the shadow sector in order to optimally respond to the uncertainty.<sup>10</sup> They rely on employing people like Aboud who are on the periphery of society, who may not have the resources and knowledge to unionize and defend their rights.<sup>11</sup> These structures prey on people’s pre-existing vulnerability and profit off of them.

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<sup>10</sup> This creates a so-called ‘network of irresponsibility’, as further explained here *Bestellt Und (Aus-)Geliefert - Amazon Und Seine Fahrer | Doku* (Directed by MDR Investigativ, 2021) <[https://www.youtube.com/watch?v=OifPw-nGL\\_0](https://www.youtube.com/watch?v=OifPw-nGL_0)> accessed 31 March 2025.

<sup>11</sup> Amazon are renowned for their anti-union tactics all over the world: <https://www.theguardian.com/technology/2024/feb/08/gmb-accuses-amazon-union-busting-tactics-midlands-warehouses>  
<https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html?searchResultPosition=1>  
<https://www.theguardian.com/us-news/2023/feb/26/amazon-trader-joes-starbucks-anti-union-measures>  
<https://inequality.org/article/union-documentary-amazon-labor/>

The above showcases the ways in which the law consistently fails to support and empower Aboud and Laila as two vulnerable individuals in a very complex position. Instead, the application of one field of law (social security) pushes Aboud on the margins of another field of law (labour law), while a third field of law (migration law) leaves them less resilient and more isolated. There is a palpable mismatch between the welfare aims of these legal regimes and how they affect the life of their subjects in practice because they are not designed with intersectionality in mind. An avid example is the migrant allocation system, which does not even take the personal interests of its subjects into account. A bottom-up analysis also demonstrates that the legal vacuums and gaps are filled with non-legal normative frameworks of profit maximization which further contribute to the exploitation and alienation of the protagonists of the Storkow story.

## 5. Conclusion

This contribution aims to take a “law of the everyday” approach toward one of Ben Judah’s collection of stories of the way we live now in Europe. Starting from the account of Aboud and Laila’s life in Germany and against the backdrop of Fineman’s vulnerability theory, I have sought to uncover the legal regimes which construct their life and deconstruct how they actually impact them. Two very important conclusions follow – one, that it is the law itself which pushes them to the margins of the *law*, and two, that the law also pushes them to the margins of *society*. Some of the reasons identified above include the lack of an intersectional lens in the laws, the non-consideration of the interests of the legal subjects in the application of the law, and the profit-driven normative frameworks which occupy the spaces where the law falls short.

Reinforcing the welfare objectives of the social law can not happen without returning the individual subject and their needs and intersectional situation at the centre, as illustrated by Aboud and Laila. They don’t neatly fall within just one category – be it a non-German, or a Muslim, or a political refugee, or a disabled person, or an informal worker, or a platform worker, and that is precisely what keeps them on the periphery. The legal framework provides nearly no explanatory or remedial value to the protagonists. Most incentives and forces in play indeed upkeep the status quo. This story is an illustration of how social law fails to achieve its goals because of an overreliance on compartmentalization and categorization. Aboud and Laila’s lives are marked by the law’s application, its misapplication, and its nonapplication, which all contribute to their isolation and subsequent vulnerability. While intersectionality has gained prominence as a major consideration in discrimination law, its usefulness for addressing complex situations does not end there. In order to meaningfully equip individuals with resilience, policymaking requires a dynamic intersectional lens, which takes into account the composite layers of their unique vulnerability.

# Against the Tide: Law, Illegality and the Everyday in Corrubedo

by Anna D'Agostino\*, Lukas Schaupp\*\*, Hubert Sitnik\*\*\*

## 1. Introduction

On June 13<sup>th</sup>, 2025, on the eve of the 2025 UN Ocean Conference in Nice, Arnoldo Andre Tinoco, Minister of Foreign Affairs of Costa Rica and one of the conference hosts, concluded that over '100 high level representatives expressed their commitment towards the health and the governance of the Ocean'.<sup>1</sup> Indeed, the conference marked a historic step towards the ratification of the Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) Agreement, with the number of ratifying countries reaching fifty.<sup>2</sup> With just ten more ratifications needed for the Agreement to enter into force, momentum is building around its core pillars: the sustainable use of marine genetic resources, mandatory environmental impact assessments, the promotion of capacity-building and technology transfer and, perhaps most importantly, the establishment of marine protected areas in international waters.<sup>3</sup> The upbeat mood and light spirit at the conference masked the twenty years of contentious negotiations, much of which revolved around financial burden-sharing and the potential economic implications of establishing such protected areas in international waters.<sup>4</sup>

Such contestation hardly comes as a surprise. Both oceans and seas have long sustained the livelihoods of coastal communities and, with the advent of large-scale industrial fishing, also assumed greater economic relevance for many regions. The imperative to secure the long-term prosperity of these communities and business models, as well as to preserve marine biodiversity, has over time prompted the development of legal instruments that extend beyond national jurisdictions. The inherently transboundary nature of marine governance has spurred the development of various legal instruments to regulate fisheries and manage marine resources in the name of sustainability, economic coordination, and exploitation. While national and regional authorities retain relevant competences for implementation and enforcement, fisheries and marine governance are largely shaped by international and European legal instruments, most notably the European Union's Common Fisheries Policy (CFP).

While these frameworks are negotiated at the transnational level, their implementation has socio-economic effects at the local level – effects that are not only distributional but also existential. Legal and policy shifts reshape the everyday life of those who live with and off the sea, restructuring traditional practices and livelihoods in ways that may create more opportunities or deepen instability and social exclusion. These dynamics are often obscured by a technocratic mode of environmental governance in which decisions are treated as expert-driven and apolitical. Limits are set – ostensibly to protect ecological systems – but these limits are frequently contested, bypassed, or unevenly enforced. Yet they still produce tangible effects

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<sup>1</sup> *Closing Press Conference - 2025 UN Ocean Conference (Nice, France) | UN Web TV* (2025) <<https://webtv.un.org/en/asset/k14/k144kj6l4p>> accessed 15 July 2025.

<sup>2</sup> 'Agreement on Marine Biological Diversity of Areas beyond National Jurisdiction' (2023) <<https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf>> accessed 15 July 2025.

<sup>3</sup> *ibid.*

<sup>4</sup> Rachel Tiller and others, 'Shake It Off: Negotiations Suspended, but Hope Simmering, after a Lack of Consensus at the Fifth Intergovernmental Conference on Biodiversity beyond National Jurisdiction' (2023) 148 *Marine Policy* 105457.

on the everyday realities of certain social groups whose voices and knowledge are often excluded from policymaking.

This paper explores these dynamics through the case of Graña, a former fisherman from the town of Corrubedo in Galicia, whose story is recounted in Ben Judah's book. Graña's experience invites us to interrogate the role of law in the everyday life of fishing communities, and the extent to which these lived realities are acknowledged or overlooked within the transnational legal framework of the EU. Many of the problems that arise at the level of everyday experience in Corrubedo reflect deeper structural tensions in EU law, particularly the unresolved question of how the principle of subsidiarity, as enshrined in Article 5(3) TEU, is to be operationalised, an ongoing debate that lies at the heart of numerous disconnects and forms of alienation within EU governance, both in Corrubedo and beyond. In this spirit, we critically examine the Common Fisheries Policy (CFP) and the EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing (IUU Regulation), highlighting their disconnect from the complex social and ecological contexts they seek to regulate. This disconnection, we argue, contributes to Graña's sense of alienation.<sup>5</sup>

Naturally, the consequences of other types of policies, such as those that promote tourism, should not be overlooked, as they may contribute to serious social issues, such as gentrification, that are conducive to Graña's sense of alienation. In the end, the everyday is the result of different tensions. Nevertheless, this study focuses on an important aspect: the potential creation of barriers to the practice of a once-existing livelihood, i.e., small-scale fishing. The aim of this paper is to show that transnational environmental governance ought to broaden the plurality of voices and experiences included in decision-making. Without this, political agency risks being reduced to the individual management of tragic questions imposed by top-down regulations.

## 2. Graña's story and tragic questions

Graña is a fisherman in the Spanish town of Corrubedo. Legal frameworks regulate his profession as a fisherman, shape his opportunities, and ultimately determine his fate. At the same time, these structures fail to provide him with stability or a lasting sense of belonging. Once a member of a traditional fishing community, Graña witnesses the transformation of Corrubedo from a village centred on small-scale fishing into a site increasingly dominated by tourism and foreign investment. As the economic and social fabric of his hometown shifts, Graña finds himself increasingly disconnected from his surroundings. Despite his estrangement, he continues to rely on the sea for work – it is the only life he knows. It is also these jobs on fishing vessels that take him to distant regions of the world, far from Spain's shores.

During one such job in Thailand, Graña is offered a position overseeing the engines of the *Kunlun*. Initially tasked with maintenance work while the ship remains at anchor, he soon learns that the *Kunlun* forms part of a fleet engaged in illegal, unreported and unregulated (IUU) fishing. The ship is set to depart for the waters surrounding Antarctica, targeting Patagonian toothfish.

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<sup>5</sup> Päivi Neuvonen critiques the use of alienation in EU legal scholarship for its often essentialist and under-theorised application. She advocates a dialectical method of critique, drawing on Rahel Jaeggi's non-essentialist conception of alienation as a deficient relation to one's actions and world. Jaeggi reconceives alienation as a deficient mode of relating (what she terms 'relationlessness') that both arises from and sustains anonymous, dominating structures (pp. 19–20, 24–25). In this view, alienation entails forms of structural heteronomy, where objectified social relations take on a life of their own, confronting individuals as external and uncontrollable forces. 'The things, situations, facts, to which we have no relation when alienated do not seem indifferent to us without consequence. They dominate us in and through this relation of indifference.' Neuvonen extends this insight to a critique of EU law, arguing that overcoming alienation requires legal and institutional conditions that enable self-determination, without falling into paternalistic or perfectionist models. Rahel Jaeggi on the other hand develops one possible theory of alienation. See: Päivi Johanna Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?' (2022) 1 European Law Open 60; Rahel Jaeggi, *Alienation* (Frederick Neuhouser and Alan E Smith (trs), Frederick Neuhouser (ed), Columbia University Press 2014).

Aware of the risk and illegality, Graña's hesitation does not last long. He decides to roll the dice and join the undertaking as chief engineer, because the prospect of making serious money outweighs returning home to Corrubedo.

As the vessel travels south, the ship's legal identity is obscured: its name is painted over, a flag of convenience is raised, and radio silence is maintained. Upon arrival in Antarctic waters, large-scale fishing begins. Before long, the operation is disrupted by the appearance of a law enforcement vessel of an undisclosed jurisdiction on the radar. The peripety changes the paradigm of the journey. What had started as a chase for money becomes a prolonged pursuit of safety as the *Kunlun* attempts to flee. The pursuit stretches for months, and the crew grows increasingly tense and fatigued.

Eventually, the enforcement vessel abandons the chase. Having just narrowly escaped, the *Kunlun* resumes fishing before beginning its return journey. As they head back, they attempt to further obscure the ship's identity. This, however, remains unsuccessful. The authorities are already positioned in port, waiting for the ship to return. As legal action against the crew is initiated, Graña attempts to take his own life. He survives and returns to Spain, where he is brought to court. Ultimately, he is fined 3,000 € for environmental crimes with no further charges brought against him. No longer able or willing to return to sea, Graña spends the rest of his life in Corrubedo.

Graña's life, like any life, is made of choices. In everyday life, we constantly address practical questions: '*What should I/we do?*'. Most of these are 'obvious questions': '*What is better than something else?*', reflecting a utilitarian framework that draws a prescriptive direction from weighing the gains and losses that the consequences of a certain action entail. Yet, in some instances, we are confronted with a tragic question: '*Are any of the alternatives available to us free from serious moral errors?*'. Cost-benefit analysis, which underpins much of modern legal and economic thinking, helps us answer obvious questions but does not help us either pose or answer the tragic questions. If anything, it suggests that such questions do not exist. By contrast, Martha Nussbaum convincingly argues that some costs have a particular nature; they are bad in a particular way.<sup>6</sup> Nonetheless, institutions often obscure the presence of such tragedies and leave citizens to bear such costs.<sup>7</sup> In this context, law itself becomes yet another factor to be weighed in a cost-benefit analysis by citizens.<sup>8</sup> We consider whether EU law itself contributes to opening up not only obvious questions for Graña but also tragic ones.<sup>9</sup> We will argue that while EU legal discourse does not entirely overlook the tragedies at the heart of this story,<sup>10</sup> nonetheless, the regulatory responses that ensue – quota negotiations, administrative sanctions, or Fisheries Local Action Groups (FLAGs) certification processes – often exacerbate rather than resolve these overlapping issues. As a result, fishermen face a few choices: reinventing their practice, themselves, or reinventing legality. In the end, it comes down to a fundamental

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<sup>6</sup> Martha C Nussbaum, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis' (2000) 29 *The Journal of Legal Studies* 1005.

<sup>7</sup> Where social policy gets absorbed by economic policy, tragedies become the pretext for creating new markets rather than acknowledging their moral and existential dimension. As Alexander Somek writes, 'Where social policy gets absorbed by economic policy, tragedies become the pretext for creating new markets rather than acknowledging their moral and existential dimension.' See: Alexander Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (Oxford University Press 2011) 30.

<sup>8</sup> Exemplative is Graña's calculus vis-à-vis legality (i.e. competitive pay v. fine or criminal conviction for illegal fishing in Antarctica).

<sup>9</sup> Martha C Nussbaum, *Il valore aggiunto della filosofia. Tra etica ed economia* (Alice Napolione and Oreste Tolone trs, Morcelliana).

<sup>10</sup> As Symes and Phillipson write: 'It is certainly not the case that social objectives have disappeared altogether from the rhetoric of fisheries policy. Rather they have been downgraded and made increasingly opaque. Their meaning and application have been changed to suit the political mores of neo-liberal thinking and accommodate the new prerogatives of sustainable development.' See: David Symes and Jeremy Phillipson, 'Whatever Became of Social Objectives in Fisheries Policy?' (2009) 95 *Fisheries Research* 1.

question: what does it mean to live within (or against) the law when transnational legal frameworks fail to account for lived realities?<sup>11</sup>

### 3. The Common Fisheries Policy (CFP)

This kind of economic thinking, which foregrounds practical questions while obscuring tragic questions, appears to be firmly embedded in EU law, as evidenced by the development of the CFP. The 1958 Treaty of Rome did not provide a legal basis for a standalone fisheries policy.<sup>12</sup> Instead, fisheries products, as agricultural products, were covered by the Common Agricultural Policy (CAP).<sup>13</sup> Nevertheless, the first structural and market regulations in the fisheries sector were introduced in 1970.<sup>14</sup> Therefore, the 1992 Treaty of Maastricht recognised this *de facto* expansion of competences by adding ‘common policy in the sphere of (...) fisheries’ to the list of Community activities,<sup>15</sup> separating it from the CAP. The next major steps expanding the legal framework for the CFP, under the 2007 Treaty of Lisbon, involved the establishment of fisheries as an area of shared competence between the EU and the Member States, the consolidation of the ‘conservation of marine biological resources’ as an exclusive competence of the EU, and the establishment of the ‘co-decision between Council and the European Parliament as the ordinary legislative procedure’.<sup>16</sup>

Although the CFP was separated from the CAP, neither the 1992 Treaty of Maastricht nor the 2007 Lisbon Treaty outlined fisheries-specific objectives.<sup>17</sup> Instead, the CFP inherited those of the CAP.<sup>18</sup> They, however, do not seem appropriate for the fishing context.<sup>19</sup> For instance, increasing productivity in the short-term, in the form of enhancing capacity, will result in overfishing, threatening long-term productivity.<sup>20</sup>

Already in the 1970s, and despite severe depletion, the CFP was rather focused on distributing fishing rights than addressing overfishing.<sup>21</sup> Recognising the infeasibility of geographical distribution,<sup>22</sup> the CFP has been founded on the principle of equal access for EU vessels to all EU waters.<sup>23</sup> CFP objectives outlined in the treaties, having survived in the same form since the 1958 Treaty of Rome, remain silent on environmental outcomes.<sup>24</sup> Therefore, the CFP sustainability agenda has been developed through secondary legislation, resulting in lower normative standing.

Sustainability became a part of the CFP in 1983 when the Council established ‘a Community system for the conservation and management of fishery resources’,<sup>25</sup> aiming to protect fishing

<sup>11</sup> See more broadly: Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).

<sup>12</sup> Ernesto Penas Lado, *The Common Fisheries Policy: The Quest for Sustainability* (1st edn, Wiley 2016) 13–14.

<sup>13</sup> Art. 38(1), Treaty establishing the European Economic Community 1958 (295 UNTS 2).

<sup>14</sup> Regulation 2141/70 laying down a common structural policy for the fishing industry [OJ L 236]; Regulation 2142/70 on the common organisation of the market in fishery products 1970 [OJ L 236].

<sup>15</sup> See the changes under Art. G(B)(3), Treaty of the European Union 1993 (1757 UNTS 3).

<sup>16</sup> Lado (n 12) 16.

<sup>17</sup> *ibid* 14.

<sup>18</sup> Art. 38(1) TFEU.

<sup>19</sup> Lado (n 12) 14.

<sup>20</sup> *ibid* 14–15.

<sup>21</sup> Des Christy, Edwin BP de Jong and Luuk Knippenberg, ‘The Conundrum of Sustainable Fishery: Fishers’ Experiences of the Exclusionary Processes of the EU Common Fisheries Policy’ (2024) 164 *Marine Policy* 5.

<sup>22</sup> *ibid* 2.

<sup>23</sup> Art. 5(1), Regulation 1380/2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC 2013 [OJ L 354].

<sup>24</sup> Art. 39(1) TFEU.

<sup>25</sup> Regulation 170/83 establishing a Community system for the conservation and management of fishery resources 1983 [OJ L 24].

grounds and balance the conservation of marine biological resources with their exploitation on a lasting basis in appropriate social conditions.<sup>26</sup> This system involved fixing total allowable catches (TACs),<sup>27</sup> distributing them among the Member States through national quotas,<sup>28</sup> and setting technical parameters of the fishing gear.<sup>29</sup>

The 2013 CFP reform appears to have prioritised environmental sustainability.<sup>30</sup> The 2013 Fishing Regulation's primary objective is the long-term environmental sustainability of fishing activities,<sup>31</sup> introducing for the first time<sup>32</sup> a quantifiable target of achieving the maximum sustainable yield exploitation rate by 2015.<sup>33</sup> To this end, it also imposes a landing obligation<sup>34</sup> and provides a well-equipped regulatory toolbox aimed at conservation.<sup>35</sup> Nevertheless, TACs, national quotas, and gear regulations remain central to CFP.<sup>36</sup>

Thus, the sustainability arm of the CFP espouses a certain tragic worldview: Hardin's famous 'Tragedy of the Commons'.<sup>37</sup> This logic justifies turning commons into catch quotas and catch quotas into commodities, assuming that this will resolve the moral dilemma of resource governance. This approach suffers from two shortcomings. Firstly, fishing opportunities, including TAC percentage shares, are distributed among Member States through national quotas, which are then allocated to national fleets.<sup>38</sup> In addition to their questionable ability to address a common resource dilemma like overfishing, quotas 'tend to restrict access in an increasingly unequal manner'.<sup>39</sup> This is because their transferability and marketability allow for 'accumulation, speculation, and even monopolization'.<sup>40</sup> Thus, they 'often exacerbate issues of exclusion, arbitrariness, fairness, and socio-economic inequality'.<sup>41</sup> Secondly, historically, TACs have been 'set consistently at levels that exceed biological sustainability',<sup>42</sup> making them 'ill-suited to respond to the serious conservation challenges facing the EU'.<sup>43</sup> According to the Commission,<sup>44</sup> this has changed, as the 2013 Fishing Regulation mandates that fishing opportunities, including TACs, must be set at a level allowing for the restoration and maintenance

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<sup>26</sup> *ibid.* Art. 1.

<sup>27</sup> *ibid.* Art. 3.

<sup>28</sup> *ibid.* Art. 4.

<sup>29</sup> Regulation 171/83 laying down certain technical measures for the conservation of fishery resources 1983 [OJ L 24].

<sup>30</sup> Jill Wakefield, *Reforming the Common Fisheries Policy* (Edward Elgar Publishing 2016) 68.

<sup>31</sup> Art. 2(1), Regulation 1380/2013 (n 23).

<sup>32</sup> Wakefield (n 30) 70.

<sup>33</sup> Art. 2(2), Regulation 1380/2013 (n 23).

<sup>34</sup> *ibid.* Art. 15(1).

<sup>35</sup> This toolbox *inter alia* consists of: adopting multiannual plans (MAPs), setting targets for the conservation and sustainable exploitation of fish stocks, fixing and allocating fishing opportunities, adapting fleet capacity, incentivising selective fishing to reduce unwanted catches, and introducing technical measures concerning the fishing gear. See, *ibid.* Art. 7(1).

<sup>36</sup> Lado (n 12).

<sup>37</sup> As Hardin writes: '[T]he inherently logic of the commons remorselessly generates tragedy. As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd [...] the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. [...] Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited." See, Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243, 1244.

<sup>38</sup> Arts. 16(1) and 16(6) of Regulation 1380/2013 (n 23).

<sup>39</sup> Christy, de Jong and Knippenberg (n 21) 2.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> Wakefield (n 30) 75.

<sup>43</sup> *ibid.*

<sup>44</sup> European Commission, First report on the implementation of the multiannual plans for the North Sea and Western Waters and the fisheries exploiting those stocks and on the delegation of powers conferred to the Commission by these multiannual plans and by the Deep-Sea Access Regulation 2024 [COM(2024) 406 final].

of fish stocks above levels producing the maximum sustainable yield and in compliance with targets and timeframes set by multiannual plans.<sup>45</sup>

Arguably, it matters not only that the tragedy is not obscured (as in, complex issues are not assumed to need a merely technical fix), but also that the underlying assumptions are accurate. Hardin's thesis has been empirically challenged, most notably by Nobel laureate Elinor Ostrom,<sup>46</sup> who showed that communities can successfully govern common resources without centralised control or market mechanisms.<sup>47</sup> The disconnect of EU law from everyday life may also stem from the opaque nature of decision-making at the transnational level. For instance, fishing quotas are largely determined behind closed doors at the Council of the EU, often disregarding both scientific advice<sup>48</sup> and the voices of affected communities. Yet these instruments do not land in a socio-cultural and 'normative' vacuum.<sup>49</sup> Legal frameworks interact with existing traditions and cultural practices; however, the assumption is that people will not resist top-down changes, even when these transform their everyday.

An ethnographic study of the CFP's effect on North Shields, a historic fishing town in northern England, reveals several exclusionary processes.<sup>50</sup> The 1983 national quotas were based on historical catches between 1973 and 1978.<sup>51</sup> However, geopolitical events such as the 'cod wars' and the 1973 oil crisis reduced British catches in the reference period, resulting in a lower-than-expected national quota.<sup>52</sup> Due to the principle of relative stability,<sup>53</sup> these quotas have remained mostly unchanged.<sup>54</sup> In response, the UK expanded its licensing framework and introduced decommissioning schemes for fishing vessels, detaching licenses from boats.<sup>55</sup> This resulted in the emergence of the so-called fireside/armchair fishers, who, while no longer fishing themselves, would rent their licences to those still active in the profession.<sup>56</sup> These policies have had several exclusionary effects. Firstly, as licences became a valuable commodity, newcomers struggled to obtain them at a reasonable price.<sup>57</sup> Secondly, the decommissioning programmes benefited only the vessel owners, not the crew.<sup>58</sup> Thirdly, the rigorous enforcement of the national quota contributed to fishers leaving the profession.<sup>59</sup>

The OECD has acknowledged the need to tailor the law to accommodate traditional practices and special exemptions in small-scale fisheries rules.<sup>60</sup> Such rules are often embedded in

<sup>45</sup> Art 16(4), Regulation 1380/2013 (n 23).

<sup>46</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).

<sup>47</sup> For example, small-scale fisheries in the South of France have been sustaining shared resources through collective governance since the Middle Ages. They have elected representatives in an organisation called the *Prud'homie de pêche* and entrusted this organisation (akin to an industrial tribunal) with the task of regulating their fishery. See: Luc van Hoof, Ellen Hoefnagel and Jan Willem van der Schans, 'Sharing Responsibilities in Fisheries Management' (2005) <<https://edepot.wur.nl/22283>> accessed 15 July 2025.

<sup>48</sup> 'Fishing Quotas: How EU Governments Are Destroying Europe's Seas' (*Investigate Europe*, 13 May 2021) <<https://www.investigate-europe.eu/posts/fishing-quotas-eu-governments-council>> accessed 15 July 2025; 'Fisheries Council: Ministers Still Ignore Science Pushing Some Fish Populations on the Brink of Collapse' (*Seas At Risk*, 12 November 2024) <<https://seas-at-risk.org>> accessed 15 July 2025.

<sup>49</sup> Giacomo Orsini, 'The EU and the Changing Lives of Fishermen. A Study of Lampedusan and Fuerteventurian Fishing Communities' (PhD Thesis, University of Essex 2015).

<sup>50</sup> Christy, de Jong and Knippenberg (n 21) 6–7.

<sup>51</sup> Ellen Hoefnagel, Birgit de Vos and Erik Buisman, 'Quota Swapping, Relative Stability, and Transparency' (2015) 57 *Marine Policy* 111.

<sup>52</sup> Christy, de Jong and Knippenberg (n 21) 6.

<sup>53</sup> Art. 16(1), Regulation 1380/2013 (n 23).

<sup>54</sup> Hoefnagel, de Vos and Buisman (n 51) 111.

<sup>55</sup> Christy, de Jong and Knippenberg (n 21) 6.

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.* 7.

<sup>60</sup> Florian Grisel, 'Miles and Norms in the Fishery of Marseille' in Irus Braverman, *Laws of the Sea* (1st edn, Routledge 2022) 226.

historical and cultural contexts, and failing to account for these specific risks further alienates communities from the law and institutions. Similarly, several plans of action of the UN Food and Agriculture Organisation's (FAO) pledge to encourage participatory governance systems, such as co-management bodies, where fisheries regulations and accompanying socio-economic initiatives can be developed and enforced.<sup>61</sup> EU law has long faced concerns over its legitimacy and its role in (politically) alienating citizens.<sup>62</sup> While EU Treaties grant citizens the right to participate in the Union's democratic life,<sup>63</sup> truly enabling the affected community to exercise public autonomy remains challenging: How can local experiences meaningfully engage with transnational governance while also accounting for a universal dimension? Whose everyday realities should be recognised by the legal framework? Will such recognition reproduce Eurocentric and anthropocentric injustices?

The CFP's Structural Policy has sought to support coastal communities, mostly through industry funding.<sup>64</sup> These financial instruments have gradually incorporated local communities in some aspects of decision-making. The establishment of Fisheries Local Action Groups (FLAGs) is one such community-led local development initiative seeking to increase employment and territorial cohesion in coastal areas.<sup>65</sup> FLAGs were later incorporated into different funds,<sup>66</sup> which reflected a 'shift in strategic focus to the development of a sustainable blue economy',<sup>67</sup> beyond fishing. This transition raises concerns about the marginalisation of small-scale fishers and the communities that depend on them.<sup>68</sup> Thus, FLAGs 'must be wary of simply reinforcing established power structures and existing hierarchies',<sup>69</sup> if they are to fulfil their promise of harnessing the endogenous potential of rural areas.<sup>70</sup>

Spanish law perpetuates the CFP's competing top-down and bottom-up logics. On the conservation side, individual transferable quotas and decommissioning programmes permitting the scrapping of vessels without forfeiting fishing rights were introduced to comply with national quotas.<sup>71</sup> On the development side, in Galicia, where Corrubedo is located, the first FLAGs were activated in 2009, generally benefitting local communities.<sup>72</sup> However, the complex bureaucracy of the system has resulted in the concentration of funds in larger *cofradías de pescadores*, traditional associations of small-scale fishers, and the marginalisation of smaller actors.<sup>73</sup>

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<sup>61</sup> UN Food and Agriculture Organisation, 'FAO's Ministerial Declaration on a Regional Plan of Action for Small-Scale Fisheries in the Mediterranean and the Black Sea' 13, available at <<https://openknowledge.fao.org/server/api/core/bitstreams/2c1b75a9-7183-4948-aa97-998389f3bb/content>> accessed 15 July 2025.

<sup>62</sup> Martijn W Hesselink, 'Alienation Commodification: A Critique of the Role of EU Consumer Law' (2023) 2 European Law Open 405, 406.

<sup>63</sup> By contrast, recommendations on TACs forwarded by the Council's General Secretariat to the national delegations of the member states are stamped as "limité" (limited distribution). In 2020, in response to an action of environmental NGO *ClientEarth* regarding the lack of transparency over the making of TACs, the European Ombudsman condemned the use of "limité" as "almost automatic" in Council practice, finding it symptomatic of the institution's culture of secrecy. See 'Emily O'Reilly, EU Ombudsman: "The Council Should Record the Member States" Positions' (*Investigate Europe*) <<https://www.investigate-europe.eu/posts/emily-oreilly-eu-ombudsman>> accessed 15 July 2025.

<sup>64</sup> Jeremy Phillipson and others, 'Fisheries Local Action Groups, Small-Scale Fisheries and Territorial Development' (2024) 64 *Sociologia Ruralis* 399, 400.

<sup>65</sup> *ibid* 401.

<sup>66</sup> Originating under the European Fisheries Fund, FLAGs were taken up by the European Maritime and Fisheries Fund for the 2014-2020 period and the European Maritime, Fisheries and Aquaculture Fund for the 2021-2027 period. See: *ibid*.

<sup>67</sup> *ibid* 405.

<sup>68</sup> *ibid* 406.

<sup>69</sup> *ibid* 407.

<sup>70</sup> *ibid* 401.

<sup>71</sup> Manuel M Varela-Lafuente, M<sup>a</sup> Dolores Garza-Gil and Juan C Surís-Regueiro, 'Evolution of Management in the Celtic Sea Fishery: Economic Effects on the Galician Fleet' (2019) 167 *Ocean & Coastal Management* 229.

<sup>72</sup> María de los Ángeles Piñeiro-Antelo, Jesús Felicitades-García and Brendan O'Keeffe, 'The FLAG Scheme in the Governance of EU Coastal Areas. The Cases of Ireland and Galicia (Spain)' (2020) 112 *Marine Policy*.

<sup>73</sup> *ibid*.

Therefore, although the CFP's exclusionary effects have not been studied in the Spanish context, it is possible that it has had a similar impact on Corrubedo, pushing some fishers to leave the profession and others, like Graña, to resort to clandestine activities, including IUU fishing.

This aspect of the CFP, potentially fatal for both its objectives of sustainability and economic development of coastal communities, appears to have been overlooked. Importantly, the CFP seems to be operating on the presupposition that commons must be apportioned through quotas and commodified, ideally through market mechanisms. The CFP does not attempt to reintegrate fishers, who, like Graña, operate outside this logic. Rather, it brands them as scapegoats responsible for 'the most serious threats to the sustainable exploitation of living aquatic resources',<sup>74</sup> and penalises them through the notion of IUU fishing.<sup>75</sup>

The CFP addresses IUU fishing through two instruments. While the Control Regulation establishes a general system for 'control, inspection, and enforcement (...) to ensure compliance' with the CFP rules,<sup>76</sup> the IUU Fishing Regulation introduced a specialised system 'to prevent, deter, and eliminate' IUU fishing.<sup>77</sup> Together, they list serious infringements of the CFP.<sup>78</sup> For its part, the IUU Fishing Regulation classifies activities, such as fishing without a valid licence,<sup>79</sup> failure to record and report catch data,<sup>80</sup> or the use of prohibited or non-compliant fishing gear,<sup>81</sup> as serious infringements that give rise to a presumption of engaging in IUU fishing.<sup>82</sup> Such activities shall be punishable by 'effective, proportionate and dissuasive administrative or criminal sanctions'.<sup>83</sup> The IUU Fishing Regulation permits 'a double sanctioning regime'<sup>84</sup> whereby criminal sanctions may be applied in addition to administrative action.<sup>85</sup> Accordingly, Member States have adopted different approaches.

Although the Spanish Criminal Code includes illegal fishing,<sup>86</sup> in practice, administrative law takes precedence. The judgment of the Spanish Supreme Court in *Vidal Armadores* illustrates the difficulty of applying criminal law to IUU fishing.<sup>87</sup> In 2016, a joint operation by the Spanish Police for the Protection of Nature and INTERPOL led to the capture of *Kunlun*, *Songhua*, and *Yong Ding*, vessels engaged in toothfish poaching, and to the indictment of six individuals.<sup>88</sup> The Supreme Court dismissed the criminal charges because 'in order for crimes committed by Spaniards outside Spain on board ships flying flags of convenience to be investigated and prosecuted by Spanish courts, the indispensable condition is either the existence of dual

<sup>74</sup> Regulation 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 2008 [OJ L 286].

<sup>75</sup> Relatedly, see Robert Hale's account of property law as a source of coercion: Robert Hale, 'Coercion and Distribution in a Supposedly Noncoercive State' in David Kennedy and William W Fisher (eds), *The Canon of American Legal Thought* (Princeton University Press 2007).

<sup>76</sup> Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 2009 [OJ L 343].

<sup>77</sup> Art. 1(1), Regulation 1005/2008 (n 75).

<sup>78</sup> See Arts. 42 and 44 *ibid* and Art. 90 of Regulation 1224/2009 (n 76).

<sup>79</sup> Art. 3(1)(a), Regulation 1005/2008 (n 75).

<sup>80</sup> *ibid*. Art. 3(1)(b).

<sup>81</sup> *ibid*. Art. 3(1)(e).

<sup>82</sup> *ibid*. Art. 3(2).

<sup>83</sup> *ibid*. Art. 44(1).

<sup>84</sup> Inma Valeije Álvarez, 'The Prosecution of Fisheries Crime in Spanish Criminal Law: The Impact of European Union Regulations' (2023) 147 *Marine Policy* 2.

<sup>85</sup> Art. 44(3), Regulation 1005/2008 (n 75).

<sup>86</sup> Carlos Teijo, 'Criminal Sanctions and IUU Fishing: The Case of Spain' (2023) 147 *Marine Policy* 105341, 2.

<sup>87</sup> Teresa Fajardo, 'To Criminalise or Not to Criminalise IUU Fishing: The EU's Choice' (2022) 144 *Marine Policy* 7–8.

<sup>88</sup> *ibid* 7.

criminality (i.e., that the crime is also punishable in the state where it is perpetrated) or that it is so provided by an international treaty ratified by Spain'.<sup>89</sup> This was not the case, as the vessels were operating in the high seas and the applicable Convention on the Conservation of Antarctic Marine Living Resources does not impose on the Contracting Parties an obligation to prosecute activities related to the IUU fishing.<sup>90</sup>

However, the judgment did not affect the administrative sanctions imposed on *Vidal Armadores*.<sup>91</sup> This is due to two factors. Firstly, administrative liability attaches not to the act of fishing itself, but to participation in the operation of vessels identified by the relevant regional fisheries management organisation as engaging in IUU fishing, including commercial, corporate, and financial activities.<sup>92</sup> Secondly, defendants in administrative procedure do not, by definition, benefit from safeguards applicable in criminal procedure, such as legality or proportionality.<sup>93</sup> This is problematic, as in Spain, administrative penalties can be more severe than criminal ones.<sup>94</sup> For example, 'the accessory sanctions of the suspension of professional activity or of fishing activities imposed by participation in the exploitation, management and ownership of a vessel recorded in the EU IUU vessel list (...) may add up to 23 years in duration if the owner of the vessel or the captain have directly or indirectly participated in the management or exploitation of several vessels included in the IUU vessel lists'.<sup>95</sup> Hence, they are likely to fall within the scope of criminal law for the purposes of Article 7 of the ECHR.<sup>96</sup> A judgment of the European Court of Human Rights (ECtHR) to this effect, like in the case of *Stevens v Italy*,<sup>97</sup> may lead 'to the revision of a significant number of contentious administrative judgements'.<sup>98</sup> This calls into question whether the Spanish system is proportionate, as required by the IUU Regulation.

#### 4. Transnational localism

An approach that integrates local ecologies and socio-economic specificities, while understanding the issue as transnational, has been termed 'transnational localism'.<sup>99</sup> This approach integrates place-specific approaches within a transnational structure that provides support and recognition. It challenges the assumption that globalisation necessitates uniform global solutions, but also recognises that purely local approaches fail to address the interconnectedness of shared challenges. Approaching *the law of the everyday* through the lens of transnational localism would mean bridging the gap between local autonomy and transnational governance by recognising community-driven legal and governance practices within broader regulatory frameworks. This could offer a potential response to the alienation that arises when legal and political structures fail to reflect the agency and social embeddedness of individuals and communities. In the context of EU law, this can manifest when centralised decision-making disregards the specific socio-cultural and economic contexts in which legal norms operate.

Recognising local governance structures, such as small-scale customary rules that governed fishing before the EU, could mitigate the estrangement felt when law is perceived as external rather than as an expression of collective self-determination. At the same time, transnational localism must navigate a fundamental tension: while it seeks to de-alienate local actors (i.e., by

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<sup>89</sup> Isabel Artime García, 'Spain: A Pioneering Country in the Fight against the Infringement of the International Legal Regime for Fisheries' (2022) 144 Marine Policy 5.

<sup>90</sup> *ibid.*

<sup>91</sup> Fajardo (n 88) 7.

<sup>92</sup> García (n 90) 6.

<sup>93</sup> Álvarez (n 85) 3.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> *Grande Stevens and Others v Italy* [2014] ECtHR 18640/10, 18647/10, 18663/10, 18668/10, 18698/10.

<sup>98</sup> Álvarez (n 85) 3.

<sup>99</sup> Jerneja Penca, 'Transnational Localism: Empowerment through Standard Setting in Small-Scale Fisheries' (2019) 8 Transnational Environmental Law 143.

incorporating their knowledge and practices into transnational legal frameworks), it risks reproducing other forms of exclusion. EU law's claims to universality often overlook the asymmetries of power that emancipate certain groups while alienating others.<sup>100</sup> This approach also speaks of the significance of territory in global governance, upsetting the deeply rooted assumption of the de-territoriality of transnational law.<sup>101</sup>

The challenge, then, is ensuring that transnational localism does not become another form of selective recognition, privileging certain voices (e.g. by deferring to a fixed, idealised notion of community) while marginalising others. In this context, it becomes more a question of whether transnational structures can move beyond mere procedural inclusion toward genuinely redistributing legal and political agency. Perhaps this question is ultimately tied to how the principle of subsidiarity, as enshrined in Article 5(3) TEU, is operationalised – an ongoing debate at the heart of many disconnects and instances of alienation in EU governance, in Corrubedo and beyond.

## 5. Conclusions

Graña's story exemplifies the disconnect between the ambitions of transnational legal frameworks and the concrete lived realities they inevitably regulate. The promise of sustainability, enshrined in instruments like the CFP and reinforced at global gatherings such as the UN Ocean Conference, and the bargaining for economic exploitation frequently appear to conceal deeper fractures caused within affected communities. As we have seen, these fractures are not necessarily merely economic but existential: they cut through the fabric of everyday life, undermining long-standing identities and traditional practices. While the law increasingly concerns itself with the governance of shared resources – biodiversity, the high seas, the atmosphere – it often does so through technocratic instruments that leave little room for contestation, interpretation, or democratic agency at the local level. Graña's trajectory from small-scale fisherman to criminalised actor in a global shadow economy reveals how the everyday becomes entangled with distant legal regimes that fail to recognise the complexity of the situated experience.

What emerges is a form of legal alienation, in which law is no longer experienced as a collective expression of self-rule but as an external force: distant, abstract, and imposed. The everyday, then, becomes the residual space where the costs of governance accumulate, where the burden of reconciling ecological limits, economic survival, and normative disorientation is experienced by individuals like Graña. As a consequence, his story invites us to ask whether the law, in its current configuration, leaves room only for 'obvious' decisions, technically rational, administratively enforceable, politically decontextualised, while sidelining tragic questions that expose conflicting duties and incommensurable values. This does not mean rejecting transnational regulation, but rather embedding it in frameworks that are attentive to local voices, practices, and forms of knowledge. EU law's principle of subsidiarity, if taken seriously, could be a normative starting point for such an approach, allowing law to become not just an external structure to live with or against, but a meaningful part of everyday life.

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<sup>100</sup> Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012); Neuvonen (n 5) 78.

<sup>101</sup> Penca (n 100) 161.

# Where in the World is Europe?

by Timo Zandstra\*

## 1. Introduction: Space, Place, and European Law

Where in the world is Europe? For lawyers trained to see Europe through the eyes of its law, the Treaties are clear: Europe encompasses the territory of its Member States, be it continental or ‘overseas’.<sup>1</sup> The boundaries of Europe are the outer edges of the jurisdictional scope of its laws. Ben Judah, whose book *This is Europe* inspired the contributions to this symposium, ostensibly has a different answer in mind: one in which Europe extends beyond EU territory. In his book, Judah narrates the everyday lives of people living in Europe today. While most of his stories are set inside the EU, one is set in Sabetta, a city on the Yamal peninsula in the Russian Arctic.

My contribution to this symposium uses Ben Judah’s story about everyday life in Sabetta to reflect on the geographical reach of Europe and its laws, both materially and epistemically. To structure my analysis, I draw on scholarship in legal geography, which maps the interaction between space, place, and the law.<sup>2</sup> On the one hand, such scholarship traces ‘where’ law is, by which mechanisms it intervenes in the social production of space, and to what material effect.<sup>3</sup> How does law materialize in the world, take on flesh? How does it shape people’s relationship to place? And how do the spatial contexts to which law applies shape how the law works in practice? On the other hand, it explores how law imagines the spaces on which it acts.<sup>4</sup> To make the world legible and governable, law necessarily simplifies reality. But how does it do so? Who and what does it leave in and out? What are the effects of these inclusions and exclusions?<sup>5</sup>

Legal geography offers useful tools to bring into view how EU law ‘externally’ affects and ‘internally’ frames the realities to which it applies. Doing so might help to interrogate what Loïc Azoulay calls EU law’s ‘reality deficit’, or the gap between the material realities of ‘everyday life’ in Europe and how those realities are framed and re-ordered by EU law.<sup>6</sup> Recent scholarship on EU law, most notably by Floris de Witte, draws extensively on legal geography to critically interrogate how EU law encounters the realities it governs.<sup>7</sup> The geographical scope of ‘EU legal geography’ has however been limited to EU territory, as this is where EU law applies most directly. In this essay, I contribute to these emerging debates by exploring how Europe and its laws spill over the Union’s borders. By ‘Europe’, I mean European society—not as a normative construct, but as a socio-material formation distinct from the EU as an institutional order.<sup>8</sup>

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<sup>1</sup> See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art. 355.

<sup>2</sup> For reasons of clarity, I omit time as an additional dimension of study. Cf. Mariana Valverde, ‘Spacetime in/and Law’ in Simon Stern (ed), *The Oxford Handbook of Law and Humanities* (Oxford University Press 2020).

<sup>3</sup> Notably David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Routledge 2010); Irus Braverman and others (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2014); Gail Lythgoe, *The Rebirth of Territory* (Cambridge University Press 2024). On the social production of space, see Henri Lefebvre, *La Production de l'Espace* (Éditions Anthropos, 1974).

<sup>4</sup> Cf. Floris de Witte, ‘Here Be Dragons: Legal Geography and EU Law’ (2022) 1 *European Law Open* 113, 115.

<sup>5</sup> Floris de Witte, *The Reality of EU Law: Space and Time in European Integration* (Cambridge University Press forthcoming); Floris de Witte, ‘Is this Europe?: EU Law’s Rendering of European Society’ (2025) *European Law Open* 1; Floris de Witte, *Finding Space in EU Law* (2024) 15 *Transnational Legal Theory* 543. On how EU law perpetuates hierarchical structures of inclusion and exclusion, see notably Jennifer Orlando-Salling and Silvia Steininger, ‘Decolonising European Society’ (2026) *European Law Open* 1.

<sup>6</sup> Cf. Loïc Azoulay, ‘Reconnecting EU Legal Studies to European Societies’ [2024] *Verfassungsblog* <<https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/>> accessed 27 March 2024.

<sup>7</sup> See Floris de Witte (2022) (n 5).

<sup>8</sup> Loïc Azoulay, ‘European Society and its Law: EU Law in Light of Social Theory’ (2025) *European Law Open* 1.

This essay argues that the infrastructures, resource flows, and planetary processes that sustain European society extend far beyond the territory of the Union, but that EU law only selectively accounts for these entanglements. The result is a gap between the material geographies through which European society is reproduced and the territorial imagination embedded in EU law. I suggest that what Bruno Latour calls ‘terrestrial thinking’ may help to close this gap. I first introduce Ben Judah’s story about everyday life in Sabetta and argue that it proposes a conception of Europe that includes Sabetta, as Sabetta sustains the material reproduction of European society (and vice versa). Section three traces the effects of EU law in Sabetta and proposes three analytical lenses to trace these effects: Infrastructural Europe, Metabolic Europe, and Planetary Europe. Section four briefly unpacks how entanglements between the EU and Sabetta show up in EU law, and how EU law responds to these entanglements. Section five concludes by proposing to shift beyond thinking about territory to terrestrial thinking to better capture the material and ethical entanglements that connect Europe to the wider world.<sup>9</sup>

The title of this essay echoes a question posed by the historians Charles Bright and Michael Geyer in 2002: ‘Where in the world is America?’. They asked it, they write, to frame a new ‘imagination appropriate for a transnational polity in a global age’.<sup>10</sup> Bright and Geyer’s question helped to inspire this essay, but I return to it because it is no longer 2002. As the historian Dipesh Chakrabarty argues, we currently live in ‘a planetary age’.<sup>11</sup> Climate change and its effects demonstrate that human life unfolds on a planet. Where ‘the global’ points to networks of actors, norms, and processes beyond the conventional institutions, laws, and political geographies of the nation-state, ‘the planetary’ points to entanglements between social and ecological worlds.<sup>12</sup> Bringing such entanglements into view raises new (and old) questions about justice and responsibility in an intra-connected Earth system, one in which Europe is a major economic, geopolitical, and ecological power. These questions are particularly visible in Sabetta.

## 2. Alexey’s Sabetta

The story Ben Judah tells about Sabetta centres on Alexey, a Russian construction worker who moves to Sabetta to work on the construction of a liquified natural gas (‘LNG’) installation. This installation is part of the largest construction project located above the Arctic Circle: the development of Yamal’s gas fields, which contain an estimated 15% of the planet’s natural gas reserves. While located on Russian soil, the Yamal megaproject is also a European project: 20% of the initial investment was provided by French energy major Total, the Belgian Jan De Nul Group dredged the harbour basins, and the Italian bank Intesa Sanpaolo supplied loans.<sup>13</sup>

At Sabetta, natural gas extracted from Yamal’s gas fields is cooled down to  $-162^{\circ}\text{C}$ , which reduces it to less than 1/600th of its original volume and transforms it into a liquid (hence ‘LNG’). It is then loaded onto ships. In the summer months, these ships transport LNG to East-Asian markets via the ‘Northern Route’, which has recently opened up as a consequence of the effects of climate change in the Arctic. In the winter months, when the Northern Route remains frozen

<sup>9</sup> Bruno Latour, *Down to Earth: Politics in the New Climatic Regime* (Polity 2018).

<sup>10</sup> Charles Bright and Michael Geyer, ‘Where in the World is America?’ in Thomas Bender (ed), *Rethinking American History in a Global Age* (University of California Press 2002) 63.

<sup>11</sup> Dipesh Chakrabarty, *The Climate of History in a Planetary Age* (University of Chicago Press 2021).

<sup>12</sup> Cf. Peer Zumbansen, ‘Transnational Law: Theories and Applications’ in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021); Marie-Catherine Petersmann, ‘Sympoietic Thinking and Earth System Law: The Earth, Its Subjects and the Law’ (2021) 9 *Earth System Governance* 100114.

<sup>13</sup> See Znak, ‘Главный газовый проект на Ямале расширяет навигацию. Он получит перевалочную базу в Европе’ (Znak, 7 April 2014) <[https://web.archive.org/web/20210107054742/https://www.znak.com/2014-04-07/glavnyy\\_gazovyy\\_proekt\\_na\\_yamale\\_rasshiroyet\\_navigatsiyu\\_on\\_poluchit\\_perevalochnuyu\\_bazu\\_v\\_evrope](https://web.archive.org/web/20210107054742/https://www.znak.com/2014-04-07/glavnyy_gazovyy_proekt_na_yamale_rasshiroyet_navigatsiyu_on_poluchit_perevalochnuyu_bazu_v_evrope)> accessed 1 March 2026; Offshore Energy, ‘Jan De Nul secures Yamal LNG dredging works in Russia’ (*Offshore Energy*, 7 July 2014) <<https://www.offshore-energy.biz/jan-de-nul-secures-yamal-lng-dredging-works-russia/>> accessed 1 March 2026; Intesa Sanpaolo, ‘Intesa Sanpaolo enters into €750 million finance agreement for Yamal LNG project’ (*Intesa San Paolo*, 8 December 2016) <<https://group.intesasanpaolo.com/en/newsroom/press-releases/2016/12/CNT-05-00000004C80B2>> accessed 1 March 2026.

over, LNG is transported using nuclear-powered ice breakers. First to specialized transshipment terminals in Rotterdam, Antwerp, and Montoir-de-Bretagne. And from there onwards to East Asia or into local energy networks, where it is burned to heat food, homes, and offices.<sup>14</sup> In 2025, 76.1% of global LNG shipments from Sabetta touched down in EU territory.<sup>15</sup>

Ben Judah paints an apocalyptic picture of everyday life in Sabetta. In this picture, Sabetta emerges as a 'sacrifice zone' in which human and ecological harms are concentrated and tolerated for the benefit of economic activity elsewhere, in Moscow or beyond.<sup>16</sup> Judah describes the gruelling working conditions which, a colleague argues, have more in common with the Gulag than a salaried job.<sup>17</sup> Workers are frequently injured and, in one instance, die. He also describes the destructive effects of climate change on Yamal, hastened on by the burning of gas extracted from its gas fields. 'They' – the construction workers – 'were imposing their reality', Judah writes.<sup>18</sup> 'Everything they were doing was changing the seasons'.<sup>19</sup> Grasses and mosses vanish from the landscape.<sup>20</sup> Reindeer die in droves. And the Indigenous Nenet communities whose nomadic forms of life follow the movements and rhythms of Yamal's reindeer are left 'begging for food or fuel in their [reindeer] skins'.<sup>21</sup> Of the Nenet reindeer herders, Judah writes that 'often you can see something in the corner of their eyes. Like they know what you're doing. Like you're destroying something you don't understand.'<sup>22</sup> As Alexey says in the story:

'You step into the tundra and there are carcasses everywhere. You know some herders say the end of the world is here [...] You think about it. Then your mind turns elsewhere'.<sup>23</sup>

Judah's story is about the often shockingly violent process of resource extraction at the peripheries of the world economic system. But it is also about personal transformation. Leaving Sabetta, Alexey speaks with a newfound sense of humility about human life amidst the sublime forces of nature: 'The landscape, it's telling you . . . You're just a guest here.'<sup>24</sup> Once home, Alexey sees the world anew. He looks at 'the trees [...] these green things, everywhere', Judah writes, like he had 'never seen them before [...] these lifeforms that we live with'.<sup>25</sup>

## **Europe in Sabetta, Sabetta in Europe**

Sabetta is located far beyond the territorial borders of the Union. Yet in his story Ben Judah appears to pursue the idea that, materially speaking, it is very much 'in' Europe. In the chapter, Judah provides some indication as to what, to his mind, connects Europe and Sabetta:

'They looked like blood vessels, he thought, the pipelines [...] from Russia [...] his mind kept drifting to big things. Like what this whole system looked like when you finally zoomed out'<sup>26</sup>

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<sup>14</sup> See Ignacio Urbasos Arbeloa, 'Banning Russian LNG Transshipment in European Ports: A Pragmatic and Effective Measure' (Elcano Royal Institute, 14 May 2024) <<https://www.realinstitutoelcano.org/en/commentaries/banning-russian-lng-transshipment-in-european-ports-a-pragmatic-and-effective-measure/>> accessed 1 March 2026

<sup>15</sup> Daniel Boffey, 'EU accused of fuelling Putin's war by importing Russian liquefied natural gas' The Guardian (8 January 2026) <<https://www.theguardian.com/world/2026/jan/08/eu-accused-of-fuelling-putins-war-by-importing-russian-liquefied-natural-gas/>> accessed 1 March 2026.

<sup>16</sup> On the concept of sacrifice zone, see Ryan Juskus, 'Sacrifice Zones: A Genealogy and Analysis of an Environmental Justice Concept' (2023) 15 Environmental Humanities 3.

<sup>17</sup> Ben Judah, *This Is Europe: The Way We Live Now* (Picador 2023), 124.

<sup>18</sup> *ibid.*, 135.

<sup>19</sup> *ibid.*, 132.

<sup>20</sup> This occurs, paradoxically, as a result of increased rainfall in the region.

<sup>21</sup> *ibid.*, 132.

<sup>22</sup> *id.*

<sup>23</sup> *id.*

<sup>24</sup> *ibid.*, 133

<sup>25</sup> *id.*

<sup>26</sup> *ibid.*, 115.

‘By now all of Europe was in Sabetta’.<sup>27</sup>

‘They call it LNG. It’s a critical part of the system [...] The same one that heats your home.’<sup>28</sup>

For Judah, Sabetta is part of Europe because everyday life in Sabetta sustains everyday life in the EU, and vice versa. Much of the LNG produced in Sabetta flows through EU Member States: heating homes, fuelling European industry, and filling the coffers of EU businesses. Conversely, EU-based businesses invest in Sabetta, build installations, dredge basins, and buy LNG. As a major emitter of carbon dioxide (CO<sub>2</sub>), both historically and currently, Europe continues to melt Sabetta’s permafrost, to kill Yamal’s native inhabitants, both human and more-than-human, and to melt its Arctic sea ice.<sup>29</sup> Sabetta, in other words, is Europe’s hinterland.<sup>30</sup> It is not, as territorial borders would have it, cut off from Europe. It is an integral part of Europe’s body.<sup>31</sup> Judah’s story thus emphasizes that Sabetta and the EU are not, as Neil Brenner and Nikos Katsikis put it, ‘historically and geographically’ separate spaces, but ‘coproduced, coevolving moments within the combined, uneven, variegated and crisis-riven world-ecologies of capitalist [development]’.<sup>32</sup>

### 3. EU Law in Sabetta

How does Alexey’s everyday life speak to EU law? At first glance, it does not. At no point does Judah write about law, European or otherwise. And Sabetta and its inhabitants lie clearly beyond the EU’s territorial jurisdiction. But the applicability of the law is distinct from its material effects. EU law may impact everyday life even in places where it does not formally apply, albeit more subtly. The reach of EU law beyond EU borders is extensively explored in literature theorizing the ‘Brussels effect’: the phenomenon by which EU rules become global standards because corporations active in the EU implement the EU’s often more stringent standards across all global operations, or because other legislatures adopt EU rules.<sup>33</sup> While helpful for understanding EU law’s global diffusion, this literature typically focuses on contexts of regulatory competition and pays less attention to the place-based effects of EU law beyond Union territory.<sup>34</sup> In other words, it fails to speak directly to EU law’s effects in Sabetta.

In this section, I propose three analytical lenses for tracing EU law’s material reach beyond Union territory. Each lens focuses on a different set of socio-ecological relations between Europe and places outside the EU: material infrastructures, metabolic flows of energy and materials, and planetary processes linking social and ecological systems. Together these analytical lenses help point towards different scales and mechanisms through which EU law shapes life in Sabetta, if only cursorily. The purpose of these lenses is not to offer definitive answers about the geographical reach of Europe and its laws, but to add to existing scholarship to open up new questions and to encourage more granular, grounded analyses in Sabetta and other contexts.

#### Infrastructural Europe

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<sup>27</sup> *ibid*, 135.

<sup>28</sup> *id*.

<sup>29</sup> See for an overview of historical and current CO<sub>2</sub> emissions Hannah Ritchie and Max Roser, ‘CO<sub>2</sub> emissions’ (*Our World in Data*, 2026) <<https://ourworldindata.org/co2-emissions>> accessed 1 March 2026.

<sup>30</sup> Cf. Neil Brenner and Nikos Katsikis, ‘Operational Landscapes: Hinterlands of the Capitalocene’ (2020) 90 *Architectural Design* 22.

<sup>31</sup> See also notably Maan Barua, ‘Metabolic Geographies: Work, Shifts and Politics’ [2025] *Progress in Human Geography* 03091325241311914.

<sup>32</sup> Brenner and Katsikis (n 30), 27.

<sup>33</sup> Cf. Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

<sup>34</sup> See however Gavin Sullivan and Dimitri Van Den Meerssche, ‘An Infrastructural Brussels Effect: The Translation of EU Law into the UK’s Digital Borders’ (2024) 55 *Computer Law & Security Review* 106057.

A first analytical lens for tracing EU law's role in structuring everyday life in Sabetta centres the infrastructural networks that materially link Sabetta and the EU.<sup>35</sup> 'Infrastructure', or what the historian Dirk van Laak calls the 'lifelines of society', is a notoriously capacious term.<sup>36</sup> In this context, relevant infrastructural networks include the ports, pipelines, and banking systems that connect the EU and Sabetta. Remember that 76.1% of LNG produced in Sabetta is shipped to EU-based ports, where it is transferred or burned to generate energy for EU-based households and industry. Tracing these infrastructures reveals that at least some of the parts that make them up are subject to EU law and have been designed or function in line with its regulatory effects.<sup>37</sup> In a recent string of legislative developments, the EU legislator has also started to more explicitly target infrastructure as a regulatory object of particular concern, often with the objective to 'secure' the infrastructures that are 'critical' to Europe's societal reproduction.<sup>38</sup> When infrastructures generate effects across borders, so too do the laws that shape them.<sup>39</sup>

Two fields of EU law are particularly relevant in this context. One is the EU's corpus of 'global value chain laws'.<sup>40</sup> These laws target corporations active on the internal market and seek to regulate the human rights and environmental impacts of their activities, including those that take place outside EU territory. To the extent that targeted companies construct, operate, or sustain parts of infrastructures that reach beyond the territorial borders of the Union, these laws affect the form, function, and social and ecological impacts of those infrastructures. Another is EU sanctions law. Especially following Russia's invasion of Ukraine, but starting already in 2006 after Russia cut access to LNG to leverage its geopolitical power, the EU has adopted a series of sanction packages seeking to minimise its dependence on fossil fuels imported from Russia.<sup>41</sup> LNG was initially excluded, mostly because several EU countries heavily relied on it for energy security. This January however, and following up on the Commission's earlier REPowerEU Plan, the Parliament and Council adopted a Regulation on phasing out Russian natural gas imports.<sup>42</sup> This Regulation sets out to – by 2027 – block access of Russian-sourced LNG to European energy infrastructures, and to thus cut the infrastructural ties that bind Europe and Sabetta.

## Metabolic Europe

A second approach is to focus on 'metabolic flows', i.e. movements of energy, materials, water, nutrients, and waste, between the EU and Sabetta.<sup>43</sup> The concept of social metabolism uses the analogy of a biological body to capture interactions between societies and societies and nature. It is often attributed to Karl Marx's analysis of the relationship between humans and nature and is central to the field of ecological economics, which studies the distribution of metabolic flows.<sup>44</sup>

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<sup>35</sup> See notably Loïc Azoulay, 'Infrastructural Europe: EU Law and Human Life in Times of the Covid-19 Pandemic' (2020) 66 *Revista de Derecho Comunitario Europeo* 343, 348 ('Being European means living and surviving within and by means of a resilient network of vital infrastructures').

<sup>36</sup> Dirk van Laak, *Lifelines of Our Society: A Global History of Infrastructure* (MIT Press 2023). See also Paul N Edwards, 'Infrastructure and Modernity: Force, Time, and Social Organization in the History of Sociotechnical Systems' in Thomas J Misa, Philip Brey and Andrew Feenberg (eds), *Modernity and Technology* (MIT Press 2002).

<sup>37</sup> Cf. Benedict Kingsbury, 'Infrastructure and InfraReg: On Rousing the International Law "Wizards of Is"' (2019) 8 *Cambridge International Law Journal* 171. On regulation by omission, see also Marc Steiert in this issue.

<sup>38</sup> See notably Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC [2022] OJ L 333/164.

<sup>39</sup> One might call this 'infrastructural extension'. For an account of the effects of EU law in extraterritorial infrastructure projects, see Sullivan and van den Meerssche (n 34).

<sup>40</sup> Cf. Josephine Norris, *EU Global Value Chain Regulation: A Practical Guide* (Hart Publishing 2025); Claire Kilpatrick and Joanne Scott, 'Is the EU's Turn to Sustainable Supply Chains Neo-Colonialist?' (2025) *AEL* 2025/07.

<sup>41</sup> Most recently Council Regulation (EU) 2025/395 of 24 February 2025 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2025] OJ L 395.

<sup>42</sup> *ibid.*

<sup>43</sup> Barua (n 29); Christian Dorninger and others, 'Global Patterns of Ecologically Unequal Exchange: Implications for Sustainability in the 21st Century' (2021) 179 *Ecological Economics* 106824.

<sup>44</sup> *ibid.*

Much like the infrastructures that channel them, metabolic flows between the EU and Sabetta may also at different stages be subject to EU law and affected by its interventions. What distinguishes this approach from the infrastructural is a matter of emphasis. With the infrastructural approach, infrastructures that channel metabolic flows are the primary unit of analysis. With the metabolic approach, the unit of analysis is the flows themselves. Literally and metaphorically, the infrastructural approach follows the pipeline. The metabolic approach follows the LNG, mapping its extraction, transport, and transformation into energy and waste.<sup>45</sup>

Tracing how EU law structures the flow of LNG to and from Sabetta may point to the Sustainable Finance Taxonomy, which classifies the burning of LNG as a 'sustainable' economic activity.<sup>46</sup> The Taxonomy Regulation thereby encourages the extraction, transformation, circulation, and consumption of LNG and the distribution of the resulting waste (CO<sub>2</sub>) to 'sacrifice zones' such as Sabetta, which like many places in the Arctic is disproportionately affected by climate change.<sup>47</sup> It thus routes the metabolic flows that sustain Europe.

## Planetary Europe

A final analytical lens shifts the focus beyond infrastructures and metabolic flows towards how EU law's interventions in the Earth System touch down to affect everyday life in Sabetta. This approach starts from a conception of Europe as embedded in planetary processes and traces how EU law affects these processes.<sup>48</sup> This approach tends to foreground larger, planetary-level geographical scales, but not necessarily.<sup>49</sup> What is distinctive about this approach is a particular sensibility for the interaction between social and natural worlds and an attention to the planetary totality in which these are embedded, though often that totality remains out of reach.<sup>50</sup>

All European laws could be understood as interventions in the Earth System, though some are more impactful than others. Notable examples include legislative initiatives that explicitly pursue the objective of reducing levels of CO<sub>2</sub> in the Earth's atmosphere, such as the European Climate Law, the Emissions Trading Directive, and the Carbon Border Adjustment Mechanism.<sup>51</sup> Initiatives that focus more narrowly on EU territory inadvertently have planetary-scale effects too. The Biodiversity Strategy's plan to plant three billion trees inside the territory of the EU, for example, would affect the carbon cycle of the entire Earth.<sup>52</sup> Also laws that do not explicitly pursue ecological concerns but inadvertently affect the stability of the Earth System, such as laws that set out to stimulate the economic growth of the internal market, can be recognized and analysed as creating planetary-scale effects and to therefore ultimately touch down in Sabetta.<sup>53</sup>

<sup>45</sup> See also Gabriele Hecht, 'Interscalar Vehicles for an African Anthropocene: On Waste, Temporality, and Violence' (2018) 33 *Cultural Anthropology* 109.

<sup>46</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (the Taxonomy Regulation) [2020] OJ L198/13–43.

<sup>47</sup> See Robert Corell, 'Challenges of Climate Change: An Arctic Perspective' (2006) 35 *American Journal of the Human Environment* 148.

<sup>48</sup> See also Petersmann (n 12).

<sup>49</sup> *ibid.* For my present purposes, I foreground planetary-level scales.

<sup>50</sup> See notably Gayatri Spivak, 'Planetarity' (Box 4, WELT) in Barbara Cassin (ed), *Dictionary of Untranslatables* (Princeton University Press 2014); Jessica Lehman, 'Planetary Sea: Oceanography and the Making of the World Ocean' (PhD Thesis, University of Minnesota Twin Cities 2016).

<sup>51</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 [2021] OJ L 243, 9.7.2021 (European Climate Law); Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC [2003] (Emissions Trading Directive); Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130, 16.5.2023 (Carbon Border Adjustment Mechanism).

<sup>52</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy for 2030 – Bringing Nature Back into Our Lives' COM(2020) 380 final (20 May 2020).

<sup>53</sup> See notably Jorge E Viñuales, *The Organisation of the Anthropocene: In Our Hands?* (Brill 2018).

Together, these three analytical lenses help to bring into view how EU law explicitly or implicitly structures the social and material entanglements that shape Europe's effects on Sabetta. These effects complicate the neatly cordoned-off distribution of authority imagined in the conventional Westphalian picture of sovereign territorial states.<sup>54</sup> They are sometimes dramatic, such as with the impending ban on Russian-sourced LNG. But more often EU law's extraterritorial effects are subtle, especially at micro-levels of analysis. Their subtlety, however, does not diminish their significance, particularly as micro-level subtleties add up. The analytical lenses I propose might inspire and direct further analyses of EU law's extraterritorial effects, yet the deeper challenge lies perhaps not in conceptualizing EU law's reach, but in empirically tracing it. Judah's thick description of Sabetta offers a useful starting point, but only one. Many more are needed.

### 3. Sabetta in EU Law

How does EU law encounter everyday life in Sabetta? In the final essay Bruno Latour wrote before his passing in 2022, he argues that 'Europe has long pretended to ignore the material conditions for its reproduction'.<sup>55</sup> Historically, Latour argues, European thought tends to separate 'the world in which we live' from 'the world off which we live'.<sup>56</sup> The effect is to obscure the impacts of Europe's societal reproduction, and to disavow responsibility for these impacts. Yet the two 'worlds', he writes, 'yearn to overlap'.<sup>57</sup> Reality pushes back against their separation:

[W]hat environmental historians used to call "phantom hectares" to designate the extension of a European country that delegates to the outside world and to other peoples the extraction of resources essential to its prosperity, is no longer phantom. These are now perfectly concrete territories that require modifying the very borders of Europe.<sup>58</sup>

There is a clear critical thrust to this argument, as Europe's 'delegation' of resource extraction is far from mutually advantageous. Recent historical accounts of European colonialism emphasize the staggering local social and ecological cost of the colonial resource extraction that fuelled the economic development of the countries that now make up the EU, but such relations of 'unequal ecological exchange' are no relic of the past.<sup>59</sup> A recent paper by Benedikt Bruckner and others, for example, shows that from 1995 to 2019 'large shares' of the environmental pressures and impacts associated with EU-based consumption 'are outsourced to countries and regions outside the EU', particularly neighbouring countries to the East, while more than 85% of the economic benefits stay within the member countries'.<sup>60</sup> It also finds that pressures and impacts induced by EU consumption 'largely decreased within the EU but increased outside its borders'.<sup>61</sup>

#### Territorial Extension

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<sup>54</sup> See also Nikolas Rajkovic, *Off the Map: A Critical Geography of International Law* (Cambridge University Press forthcoming); Daniel Matthews, *Earthbound: The Aesthetics of Sovereignty in the Anthropocene* (Edinburgh University Press 2021).

<sup>55</sup> Bruno Latour, 'Is Europe's Soil Changing Beneath Our Feet?' (2022) Green 85.

<sup>56</sup> Bruno Latour and Nicolaj Schultz, *On the Emergence of an Ecological Class: A Memo* (Polity 2022) 3. This separation is not necessarily ordered along territorial lines, but in the interest of focus I approach it as such.

<sup>57</sup> Latour (n 45).

<sup>58</sup> *Ibid.*, 87.

<sup>59</sup> Notably Corey Ross, *Ecology and Power in the Age of Empire: Europe and the Transformation of the Tropical World* (Oxford University Press 2017); Walter Rodney, *How Europe Underdeveloped Africa* (Bogle-L'Ouverture Publications 1972). For an account that focuses on metabolic flows, see Alf Hornborg, 'Imperial Metabolism: Empire as a Process of Ecologically Unequal Exchange' in Peter Fibiger Bang (ed.), *The Oxford World History of Empire: Volume One: The Imperial Experience* (Oxford University press 2021).

<sup>60</sup> Benedikt Brucher and others, 'Ecologically Unequal Exchanges Driven by EU Consumption' (2023) 6 Nature Sustainability 587, 587.

<sup>61</sup> *Ibid.*

One way in which the EU legislator pushes back against the conceptual separation between the world in which Europeans live and the world *off* which they live, and thus brings Sabetta into view, is by extending the territorial reach of EU law. Joanne Scott notably explores the EU's use of 'territorial extension', whereby the application of EU law is 'triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad'.<sup>62</sup> This technique is central to EU global value chain laws and, most recently, the Sustainability Due Diligence Directive, which applies to economic activity beyond the borders of the Union.<sup>63</sup> Once in force, the Sustainability Due Diligence Directive introduces obligations for some corporations active on the internal market to conduct 'impact assessments' of their operations, including in Sabetta, and to mitigate harms that fit within the environmental and human rights parameters set by the Union legislator and interpreted by the corporations themselves. The entry into force of the Sustainability Due Diligence Directive will hence make it possible for EU law to 'see' Europe's material entanglements beyond Union borders, including in Sabetta, and to redraw the boundaries of 'legal Europe'.

The Sustainability Due Diligence Directive marks a start, but not an end. The scope of this essay does not permit an in-depth analysis of the Directive, only for some cursory observations. First, the scope of the Directive is notoriously limited and leaves little room for local lived experience or for forms of knowledge that do not easily lend themselves to impact assessments.<sup>64</sup> While the Directive requires consultation with affected stakeholders, lived experience appears only as an input into corporate risk management, with corporations controlling knowledge production.<sup>65</sup> As such, the Directive privileges European actors and abstracts away from local lived experience.<sup>66</sup> Yamal's human inhabitants are offered little voice or recognition. Let alone Yamal's reindeer, its flora, its battered soil and dredged seabed. Second, the Directive focuses on specific harms rather than structural patterns in metabolic flows and leaves the latter intact. In other words, it maintains a distinction between Europe's 'inside' and 'outside' and thereby fails to account for the fact that metabolic flows are endemic and not external to Europe's material reproduction.

## Material Contraction

Another regulatory approach used by the EU legislator collapses the world in which Europeans live and the world *off* which they live by reining in Europe's material entanglements.<sup>67</sup> This approach does not seek to extend the reach of EU law such that it becomes more receptive to everyday life in Sabetta, but to reduce Europe's material footprint. While far from ubiquitous, one example is EU climate and biodiversity laws that seek to reduce Europe's planetary footprint, notably in the context of the Climate Law's goal to achieve 'climate neutrality' by 2050.<sup>68</sup> A different example is the Critical Raw Materials Act, which incentivizes 're-shoring' the production of what it labels as 'critical raw materials' to EU territory.<sup>69</sup> This example is less relevant to Sabetta but highly relevant to the Arctic region as a whole, as the Arctic is home to many of the Earth's critical raw materials deposits.<sup>70</sup> Article 5 of the Critical Raw Materials Act sets out to ensure that by 2030

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<sup>62</sup> Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 52 *The American Journal of Comparative Law* 87, 90.

<sup>63</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 2024/1760 (Sustainability Due Diligence Directive). [something about the scope of the directive]

<sup>64</sup> See Luca Tenreira, 'Critical Global Value Chains Laws' (2025) 5 *The Coimbra Journal for Legal Studies* 43.

<sup>65</sup> *ibid.*

<sup>66</sup> See also Debadatta Bose, 'Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law' (2023) 8 *Business and Human Rights Journal* 18.

<sup>67</sup> See also Kilpatrick and Scott (n 42).

<sup>68</sup> European Climate Law (n 53).

<sup>69</sup> Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 [2024] (Critical Raw Materials Act).

<sup>70</sup> See Philip Andrews-Speed, 'Can the Arctic Be a Significant Contributor of Critical Minerals for the Global Energy Transition?' (2025) OIES Paper: SP No. 36.

at least 10% of Europe's annual consumption of critical raw materials is extracted inside Union territory.<sup>71</sup> Yet the rationale for such re-shoring is not primarily concern with the harmful impacts of Europe's resource consumption, but rather with 'security of supply' in the context of geopolitical competition.<sup>72</sup> Re-shoring approaches places such as Sabetta not as sacrifice zones, but as security risks. This approach moreover fails to address the planetary-scale effects of resource extraction, even where it occurs inside the EU.

#### **4. Conclusion: From Territory to Terra?**

This essay explored the geographical reach of Europe and its laws, both materially and epistemically. I argued that Ben Judah's story about Sabetta illustrates that Europe extends far beyond the Union's territorial borders. Infrastructures, metabolic flows, and planetary processes connect Sabetta intimately to European society, even as the city's inhabitants and ecologies remain largely invisible to EU law. Using the analytical lenses of Infrastructural, Metabolic, and Planetary Europe, I showed how EU law's material effects routinely spill over the territorial borders of the Union: sometimes spectacularly, as with the EU's most recent Sanctions Package, but often subtly, through the infrastructural, metabolic, and planetary entanglements that sustain everyday life in Europe. At the same time, EU law often simplifies and abstracts away from these entanglements, producing a 'reality deficit' between legal representations and the material social and ecological impacts of Europe's societal reproduction. I suggested that what this reality deficit does in practice is to obscure the human and ecological impacts of Europe's societal reproduction and to disavow responsibility for these impacts. Regulatory techniques such as territorial extension in global value chain laws reveal impacts beyond EU territory, but only in limited ways. A regulatory focus on 'material contraction' is more productive but remains marginal in EU law. What is needed, I argued, is to move beyond jurisdictional questions to examine the material infrastructures, metabolic flows, and planetary processes that sustain Europe.

Territory remains central to the organisation of legal authority, but it often obscures the material and ethical entanglements that sustain Europe beyond Union borders. In his later writings on the geopolitics of the climate crisis, Bruno Latour calls to replace 'territorial' thinking with 'terrestrial' thinking.<sup>73</sup> Territorial thinking, Latour argues, treats the Earth as a surface divided into bounded political containers and limits legal imagination to human affairs. As Cait Storr puts it, 'territory erases the physical Earth itself, replacing it with an abstract object'.<sup>74</sup> Terrestrial thinking instead starts from situated realities, foregrounds the entanglement of human and more-than-human worlds, and challenges the separation between the world in which we live and the world off which we live. Terrestriality, Latour argues, therefore 'modif[ies] the very definition of the land on which politics take place' and hence requires 'another definition of law and sovereignty, another understanding of how entities overlap'.<sup>75</sup> Thinking terrestrially about Europe and its laws may ground EU law more firmly in the material realities of everyday life in a planetary age. Such thinking might reimagine how EU law approaches the realities it affects, the lives it shapes, and the harms for which it accounts to redraw the borders of 'legal Europe', and to better account for Europe's ethical entanglements on a warming, intra-connected planet.

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<sup>71</sup> *ibid*, art. 5.

<sup>72</sup> *ibid*, Recital 1. See also Thea Riofrancos, 'The Security–Sustainability Nexus: Lithium Onshoring in the Global North' (2023) 23 *Global Environmental Politics* 20).

<sup>73</sup> Bruno Latour and Peter Weibel (eds.), *Critical Zones: The Science and Politics of Landing on Earth* (MIT Press 2020).

<sup>74</sup> Cait Storr, 'Denaturalising the Concept of Territory in International Law' in Usha Natarajan and Julia Dehm, *Locating Nature: Making and Unmaking International Law* (Cambridge University Press 2022), 179.

<sup>75</sup> Bruno Latour and Peter Weibel (n 57), 8 and 227.

# Thinking Infrastructural Europe Through Rotterdam

by Luca Tenreira\*

## 1. Introduction

*"If the Port of Rotterdam is doing well, Europe's economy is doing well."*<sup>1</sup> - Ursula von der Leyen

This statement reads like a mirror image: what we observe in Rotterdam appears as a signal – or a symptom – of Europe's overall condition, in this case, its economic health. This invocation of one of the highest institutional figures of the Union immediately shifts the analysis into a register of concern and inquiry: behind this façade of strength and performance, what does the Port of Rotterdam truly reveal? Indeed, if we take the metaphor seriously – the port as Europe's thermometer – then what Judah's narrative exposes compels us to invert the initial conclusion: if this port indeed reflects the state of Europe, then it is not only its economy that is at stake, but its entire social, human, and environmental fabric. The chapter Ben Judah devotes to Rotterdam, drawn from *This Is Europe* (2023), immerses us in the daily life of a port worker, confronted with the silent brutality of logistical infrastructures.<sup>2</sup> Through immersive storytelling, Judah reveals a Europe defined by flows of goods and the relentless logic of value chains. The port appears here as a dehumanizing machine, exposing both precarity and the absurdities of contemporary life. This narrative – both personal and structural – serves as a point of departure for a broader reflection on infrastructural Europe. What Judah ultimately shows is that, in truth, social Europe is in a state of profound distress.<sup>3</sup> Beneath the efficiency of transit and the seamlessness of supply chains lie precarious lives, absent protections, and normalized vulnerabilities. And more still: if we pay attention to what this story leaves unsaid – its ecological upstream, its waste, its outsourcing, and its 'extra'-European dimensions – then the port becomes an inverted barometer: what flows through it actually conceals what is collapsing elsewhere.

The question then becomes: how can we think infrastructural Europe as close as possible to its concrete effects, its risks, and its invisibilities? This quote sets the stage: it guides our inquiry toward the margins of what 'works' on the surface, in order to uncover the tensions, responsibilities, and mechanisms that escape dominant institutional discourse. It frames the initial claim – thinking with *Everyday Europe* as it presents itself, but also in relation to what it conceals. This piece embraces a resolutely immanent approach: by anchoring itself in a single story, it does not aim to correct or generalize it, but rather to draw from the story itself the conceptual and methodological tools still lacking in European legal studies to investigate and problematize the realities of *everyday Europe* – those concrete, localized, often fragmented experiences that classical approaches struggle to fully grasp.<sup>4</sup>

This text unfolds in three movements. First, it takes Rotterdam as an anchor point – both a material site and an epistemological object – to interrogate what its infrastructures reveal (or fail to reveal) about contemporary Europe. Second, the inquiry seeks to expose the blurring effects produced by infrastructure itself, by tracing the chains of actors, responsibilities, and legal framework that EU Law traditional categories struggle to render visible. Finally, the discussion

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<sup>1</sup> Ursula von der Leyen, President of the European Commission, quoted in *Statement by the President on the Netherlands' plan* (EC Press Corner, 27 September 2022) [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_22\\_5403](https://ec.europa.eu/commission/presscorner/detail/en/statement_22_5403) accessed 14 July 2025.

<sup>2</sup> Ben Judah, *This Is Europe: The Way We Live Now* (Pan Macmillan 2023).

<sup>3</sup> Shared observation at the occasion of the event *Is this Europe ? Conceptualising the Everyday in European Law* (seminar, European University Institute, Florence, 12–13 June 2025) <https://www.eui.eu/events/everyday-europe> accessed 14 July 2025.

<sup>4</sup> On the lack of conceptual tools in EU law : Loïc Azoulai, 'Reconnecting EU Legal Studies to European Societies' (2024) *Verfassungsblog* <https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/>

opens toward a proposition: to sketch the contours of a reflexive law, one capable of embedding itself within the socio-material arrangements it seeks to regulate.

## 2. Seeing Rotterdam: Infrastructures, Materialities, and the Tools of Everyday Europe

To take Rotterdam as a point of departure is to begin with the obviousness of a place. The port – the largest in Europe – is a logistical hub where the endless transit of global goods into the continent is orchestrated. At first glance, it appears to be a success: efficient, connected, powerful. But it is also a site of erasure – of bodies, stories, and vulnerabilities. The voice Judah brings forth, that of an anonymous worker, reveals this dissonance: caught in the frenetic pace of global value chains, he oscillates between cynicism and lucidity, between a residual pride and resignation in the face of what he himself calls “the big machine”.<sup>5</sup> This machine, he knows it from the inside. He understands that it embodies Europe’s logistical ambition – “I’m the start of Europe”.<sup>6</sup> But he also sees what this ambition conceals: the invisibility of raw materials extracted elsewhere, the toxic banality of goods consumed here, the absurdity of an economy where lives are risked to move objects “without value”.<sup>7</sup> The logistical Europe he describes is one that eats “whatever,” consumes endlessly, but forgets what it consumes – and at what cost.<sup>8</sup> Through this singular testimony emerges not only a critique of *ways of producing or consuming*, but also and perhaps more importantly – of *ways of life*.

Yet this story, powerful as it is, offers only one point of entry into infrastructural Europe. To grasp its full implications, we must ask: what remains invisible in this account? The materialities – the containers, harnesses, cranes, thresholds – point to an entire ecology of actors and systems. These include machines, regulatory codes, human rights audits, maritime insurers, supply chain certifiers, and more. In short, Rotterdam becomes a site for a broader investigation on the disconnect between a discourse (institutional, legal), and lived realities (subjective, material). But such an unveiling requires a method. By choosing to treat Rotterdam not only as a site of observation but as an epistemological site, we are compelled to equip ourselves with conceptual tools able to engage the material and relational density of such infrastructures. This is where what recent scholarship has called “thinking infrastructurally” comes into play.<sup>9</sup> This is not merely an attention to built forms or machines, but an approach attuned to the interplay between norms, techniques, material dispositifs, and chains of human and non-human actors in the very making of law.<sup>10</sup>

In many respects, this orientation aligns with the tradition of Science and Technology Studies (STS), a field that has long questioned how science – far from being neutral – is produced within specific social, political, and material contexts. STS has developed powerful tools to describe how expert knowledge, technical instruments, and institutions co-produce normative realities, often made invisible through classical legal lenses that treat law as a formal structure.<sup>11</sup> This shift has

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<sup>5</sup> Ben Judah, *This Is Europe: The Way We Live Now* (Pan Macmillan 2023), chapter 1

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Geoffrey C. Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 1999). And Susan Leigh Star, ‘The Ethnography of Infrastructure’ (1999) 43 *American Behavioral Scientist* 377 <https://doi.org/10.1177/00027649921955326> accessed 14 July 2025.

<sup>10</sup> The starting point of infrastructural thinking in legal thinking can be associated with this work : Kingsbury, B., & Malsley, N. (2021). Infrastructures and laws: publics and publicness. *Annual Review of Law and Social Science*, 17(1), 353-373. Kingsbury, B. (2019). Infrastructure and InfraReg: on rousing the international law ‘Wizards of Is’. *Cambridge International Law Journal*, 8(2), 171-186.

<sup>11</sup> Sheila Jasanoff, ‘The Idiom of Co-production’ in Sheila Jasanoff (ed), *States of Knowledge: The Co-production of Science and the Social Order* (Routledge 2004) 1–12. For a synthetic account of the concept, see: Brice Laurent, ‘Co-production’ in Ulrike Felt and Alan Irwin (eds), *Elgar Encyclopedia of Science and Technology Studies* (Edward Elgar Publishing 2024) 13–23.

helped de-sacralize law, just as STS did with science, by showing that law's actual forms are inseparable from its conditions of production: involving actors and techniques that, when networked, enable us to understand law in action.<sup>12</sup> Applied to legal studies, this perspective invites us to view legal norms not simply as texts or principles, but as situated sociotechnical regimes. In this sense, regulation does not stop at legislative enunciation; it is continuously reshaped in and through its *actants*.<sup>13</sup> This is where the relevance of an infrastructural approach becomes clear: an attention to the often-invisible processes by which law becomes effective in a world of machines, calculations, and logistical chains. These practices do not merely follow the law – they shape it, reinterpret it, perform it.<sup>14</sup>

But such an approach would be incomplete without a focus on subjectivities. Deeply rooted in the tradition of Law and Society, the field of Legal Consciousness Studies (LCS) seeks to understand how individuals perceive, mobilize, or circumvent the law in their daily lives.<sup>15</sup> From this perspective, law is not reducible to institutions; it lives in the stories, gestures, silences, and strategies of those who confront it.<sup>16</sup> It is a mode of worldmaking, of legitimization, of resistance – and sometimes of forgetting.

On closer inspection, LCS and STS as epistemes share a fundamentally common ambition: to decompartmentalize knowledge and unveil discourses to confront them with practices. Both refuse to see law or science as autonomous domains governed by internal, neutral, or closed logics. They treat them instead as situated phenomena, always shaped by social dynamics, power relations, and material arrangements.<sup>17</sup> If LCS reveals how law takes meaning in everyday practices, through forms of legal subjectivation, STS uncovers how that same law is co-produced with technical artifacts, procedures, and infrastructures. In this sense, their alliance is anything but accidental: it allows us to connect lived experience with the material production of normativity.<sup>18</sup> One could say that STS lends a materiality to LCS that it did not always claim, while LCS reminds STS that technical objects only make sense within lived worlds. By bringing these approaches together, we can finally move beyond a rigid division between “grand apparatuses” and “small practices”. Where LCS sometimes stops at the perception or appropriation of law, STS allows us to interrogate what makes that perception possible: which tools, embodied or naturalized knowledges allow one to “see” or “not see” the law? Conversely, STS, often focused on the circuits of technical norm production, gains from LCS's concern with unequal access, authority regimes, and social fractures in the appropriation of norms.<sup>19</sup>

<sup>12</sup> See : Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Polity Press 2009). On the importance of everyday techniques, Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011). For application of such families of theoretical frameworks to law : Emilie Cloatre, ‘Law and ANT (and its Kin): Possibilities, Challenges, and Ways Forward’ (2018) 45 *Journal of Law and Society* 646-663 <https://doi.org/10.1111/jols.12133> accessed 14 July 2025.

<sup>13</sup> Bruno Latour, ‘On Actor-Network Theory: A Few Clarifications plus More on Velcro, or How Not to Simplify Too Much’ (1996) *Soziale Welt* 369. This text – among others – elaborates on the notion of “actants” (or actors) as entities—both human and non-human—that participate in the formation and operation of networks.

<sup>14</sup> For an application of this framework in the context of Rotterdam, see section II.

<sup>15</sup> For an initial account : Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998), then problematized: Susan S. Silbey, ‘After Legal Consciousness’ (2005) *Annual Review of Law and Social Science* 1 323. Silbey reflects critically on the field's trajectory, expressing concern that: “legal consciousness as an analytic concept ... became domesticated within what appear to be policy projects: making specific laws work better for particular groups or interests”. Whereas the 1998 book establishes schemas for how individuals relate to law, the 2005 article critiques the field's loss of critical edge, cautioning against treating legal consciousness solely as micro-level attitudes devoid of structural context.

<sup>16</sup> Jacques Commaille and Stéphanie Lacour, ‘Les Legal Consciousness Studies comme laboratoire d'un régime renouvelé de connaissance sur le droit. Présentation du dossier’ (2018) 100 *Droit et Société* 547.

<sup>17</sup> Virginie Albe and Stéphanie Lacour, “Legal Consciousness Studies” et “Science and Technology Studies”. Croiser des parallèles ?’ (2018) 100 *Droit et Société* 633.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

Together, these approaches offer a reflexive method for re-politicizing and re-socializing law, beyond 'black letter', to examine it in action.<sup>20</sup> This is the framework we now propose to apply to the case of the Port of Rotterdam. We aim to show how the port's infrastructural realities produce both invisible forms of legality and unstable normative configurations – and how a reflexive legal inquiry can render these dynamics visible by connecting actors, technologies, and narratives within a shared critical configuration.

### 3. Unmasking Rotterdam: European Discourse vs. Lived Realities

Logistical labor, as observed in Rotterdam, often operates in a legal grey zone – on the boundary between compliance and vulnerability.<sup>21</sup> The law is invoked or referred to but also bypassed, ignored, or reinterpreted. The story of the port worker illustrates this: legality is a blurry, sometimes distant horizon, always conditioned by the invisible architecture of infrastructure.

The investigation here focuses on one actor never named in the story of the Port of Rotterdam Authority (PoR). It is the entity responsible for managing the port and its industrial zones. The PoR is a mixed-ownership company (Dutch state and City of Rotterdam), employing over 1,100 people and coordinating hundreds of subcontractors.<sup>22</sup> It oversees a vast logistical space – the largest port in Europe and among the top ten globally – through which millions of tons of goods transit daily, from raw materials to everyday consumer products.<sup>23</sup>

The PoR is the entity responsible for ensuring respect of labor rights standards over its employees. It claims to be actively committed to human and labor rights in line with international standards (UNGPs, OECD, ILO). Its *Code of Conduct* and *Human Rights Policy* set out these commitments, covering both internal employees and global supply chains.<sup>24</sup> The company states that it regularly conducts due diligence assessments to identify and prevent human rights risks, particularly in the areas of: workplace safety, wage conditions, non-discrimination, working hours, and the absence of forced or exploitative labor.<sup>25</sup> These assessments are based on analytical frameworks that cross-reference several criteria: severity of risk, likelihood of occurrence, the company's leverage, and strategic priorities.<sup>26</sup> They lead to recommendations, action plans, and monitoring systems. The PoR also reports calling on external experts to support these efforts and produce reports aligned with international frameworks such as the UNGP Reporting Framework.<sup>27</sup>

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<sup>20</sup> Jasanoff, S., & Leclerc, O. (2013). *Le droit et la science en action*, Textes de Sheila Jasanoff traduits de l'anglais (Etats-Unis) et présentés par Olivier Leclerc (p. 210). Dalloz.

<sup>21</sup> Jack Meakin, 'Mobilising Transnational Labour Law in Search of Transformation in Europe' (2024) *Industrial Law Journal* dwae030.

<sup>22</sup> Port of Rotterdam Authority, "Our Organisation" (official website, accessed 14 July 2025) <https://www.portofrotterdam.com/en/about-port-authority/our-organisation>

<sup>23</sup> Port of Rotterdam Authority, *Highlights Annual Report 2024* (Amsterdam 2025) <https://reporting.portofrotterdam.com/external/asset/download/project/f926250a-03f3-0000-1b19-7f2d2f946700/name/Highlights%20Annual%20Report%202024%20Port%20of%20Rotterdam%20Authority.pdf> accessed 14 July 2025.

<sup>24</sup> Port of Rotterdam Authority, *Code of Conduct* (April 2024) <https://www.portofrotterdam.com/sites/default/files/2024-04/code-of-conduct-en.pdf> accessed 14 July 2025.

Port of Rotterdam Authority, *Human Rights Policy* (April 2024) <https://www.portofrotterdam.com/sites/default/files/2024-04/human-rights-policy-en.pdf> accessed 14 July 2025.

<sup>25</sup> "We conduct due diligence to identify, prevent, mitigate and account for how we address adverse human rights impacts." – Human Rights Policy, p. 2 and "We pay particular attention to the following areas: health and safety, fair working conditions (including working hours and wages), freedom of association, prevention of forced and child labour, and non-discrimination." – Human Rights Policy, p. 3

<sup>26</sup> "We assess actual and potential human rights impacts based on their severity and likelihood, as well as the extent to which we can influence outcomes (leverage)." – Human Rights Policy, p. 3

<sup>27</sup> "We use internal audits, expert advice and performance indicators to monitor compliance and progress." – Human Rights Policy, p. 5 and "Our human rights reporting aligns with the UNGP Reporting Framework and is integrated into our broader sustainability reporting." – Human Rights Policy, p. 5

While the Port of Rotterdam articulates a broad commitment to international human rights and labor standards—including explicit references to the UN Guiding Principles on Business and Human Rights, the OECD Guidelines, and ILO conventions – its implementation architecture reveals notable asymmetries between normative aspiration and operational depth.<sup>28</sup> The Port's Human Rights Policy (April 2024) outlines a due diligence system that is described as ongoing and embedded in procurement and risk management processes.<sup>29</sup> However, no audit data or impact results are provided, suggesting a reliance on process-oriented compliance rather than outcome-based accountability. Risk assessment is structured through a prioritization model based on severity, likelihood, and leverage, demonstrating a formally robust approach. Yet, areas such as fair wages, freedom of association, and non-discrimination—while listed as priorities—receive minimal procedural elaboration, indicating that these rights may be more aspirational than operationalized. Stakeholder engagement is framed as conditional (“where appropriate”), and grievance mechanisms are referenced in vague terms, lacking concrete channels or protocols.<sup>30</sup> Monitoring is said to involve internal audits and expert consultations, and reporting is aligned with the UNGP Reporting Framework. However, the absence of disclosed indicators or measurable benchmarks undermines transparency. In sum, while the normative architecture is ambitious and discursively aligned with international best practices, its practical articulation remains uneven, with a reliance on declarative standards over traceable performance metrics.

Despite this impressive apparatus and confirming their declarative aspects only, another reality emerges. On the ground, testimonies such as the one collected by Ben Judah show that working conditions at the port remain precarious: unpredictable hours, physical insecurity, chronic fatigue, constant surveillance.<sup>31</sup> The worker he follows does not directly challenge the PoR's policies, but lives in a world where these policies seem to have little traction. Risks – falls, overwork, isolation, disturbed sleep – are omnipresent. By observing these two levels – the declared level (policies and commitments) and the lived level (on-the-ground experience) – the investigation reveals a kind of dissonance. It is not that the policies are false; it is that they operate on a different level, in a different language, often without real points of contact with actual practices, leading what has been called ‘cosmetic compliance’, which serves corporate interest and thereby reinforce a sense of alienation in this case for the docker.<sup>32</sup> The port is indeed governed by a system of norms, but this system does not always extend to the most exposed links in the value chain. Employees like dockers, often positioned at the margins, remain less visible and less protected.

The challenge, then, is not to deny the existence of legal and compliance mechanisms, but to recognize their limited reach within certain segments of the legal phase, where actors and their practices of implementation interfere. One recent development at the European level offers useful entry points to assess this challenge in practice. The institutionalization of a corporate duty of care, also known as due diligence, through the Corporate Sustainability Due Diligence Directive (CSDDD)<sup>33</sup> aims to give legal weight to human, labor rights and environmental responsibilities

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<sup>28</sup> “The Port of Rotterdam Authority respects internationally recognised human rights, including those expressed in the Universal Declaration of Human Rights, the ILO Core Conventions, the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.” – Port of Rotterdam Human Rights Policy (April 2024), p. 2

<sup>29</sup> “Where risks are identified in supply chains, we take appropriate action, including training, corrective measures, or ending relationships if necessary.” – Code of Conduct, p. 4

<sup>30</sup> “We engage with affected stakeholders or their legitimate representatives, where appropriate, to better understand potential or actual impacts.” – Human Rights Policy, p. 4

<sup>31</sup> The story mentions the following markers : “He’s tense because accidents happen. Not often, but they have. A few times a year, they fall.” The urgency of the port’s operation never sleeps — “You can’t stop working” —the thought haunts him, “Is my security harness disconnected? Is my bag disconnected?”, “It’s difficult to sleep in advance”.

<sup>32</sup> Ingrid Landau, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’ (2019) 20 *MelbJIntL* 221

<sup>33</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760.

across supply chains, transforming these previously soft law frameworks into hard laws.<sup>34</sup> This framework signal two distinct, yet complementary, shifts: one moves toward the formalization of corporate responsibility through binding legal obligations across global value chains; the other targets the credibility of such claims in corporate commitments, by subjecting public claims to standards of evidence and transparency because actionable in front of courts. Each, in its own way, allows us to examine how infrastructural sites like the Port of Rotterdam navigate the tension between declared commitments and the fragmented, often precarious or unstable, realities as perceived and lived on the ground.

The Port of Rotterdam Authority's human rights policy, as outlined in its April 2024 reports, reflects a logic now formalized at the European level through the CSDDD. Adopted in the wake of the Green Deal, this directive aims to regulate global value chains by making it mandatory for certain companies to identify, prevent, mitigate, and remedy human rights and environmental harms across their operations - including with suppliers and subcontractors.<sup>35</sup> The directive lays out clear obligations: to establish a due diligence plan, map out risks, implement monitoring mechanisms, and – crucially – to act accordingly. These requirements apply to large European companies and certain non-European companies operating within the EU. What sets this directive apart from earlier frameworks is its binding nature: due diligence practices, previously voluntary or internally guided by codes such as the PoR's, now become enforceable. They are subject to administrative sanctions and legal action, including by individuals or groups who have suffered harm. In Rotterdam's case, this means that the PoR's internal human rights risk assessments are no longer merely management tools or expressions of 'good faith', mandatory evidence: they can be challenged, scrutinized, and judged in legal terms, and must meet rigorous standards. In other words, the directive does not invent these practices – it institutionalizes what already exists, making these efforts verifiable, opposable, and potentially sanctionable.

There has been already a growing trend in recognizing and sanctioning such cosmetic attitudes regarding corporate commitments to respect human and labor rights. Courts, civil society, and scholars alike are increasingly attentive to "performative compliance" – situations where companies simulate adherence to due diligence standards through managerial tools and self-assessments, while real harms continue unchecked. In recent years, this concern has been legally activated by courts, most notably in the Netherlands, where judges have drawn on companies' own policy documents and international norms to ground a duty of care in landmark decisions like the *Milieudefensie v. Shell* case.<sup>36</sup> There, the court relied on Shell's stated commitments to sustainability and human rights, not only to measure its conduct against evolving legal norms, but to hold the company civilly liable for failing to prevent foreseeable environmental harm. This jurisprudential turn aligns with new modes of judicial reasoning, which comes ex-post and increasingly treats corporate codes of conduct and best practices as binding commitments when assessing liability. These developments underscore that legal responsibility is no longer confined to written statutes alone but is shaped by a regulatory ecology in which civil society actors, local communities, themselves re-produce, re-orientate legal meaning. Ultimately, this growing body of jurisprudence and scholarship points to a transformation of due diligence from a procedural checklist to a substantive expectation: that companies not merely manage risks, but prevent and remedy harm in meaningful ways. This is not only a legal evolution – it is a political reorientation, toward a more grounded and accountable model of corporate responsibility.

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<sup>34</sup> Luca Tenreira, 'Corporate Best Practice from Soft Law to Hard Law: The Case of Corporate Sustainability and Due Diligence Directive (CS3D)' (2024) 2 Int'l Bus LJ 269.

<sup>35</sup> Anna Beckers here

<sup>36</sup> *Milieudefensie et al v Royal Dutch Shell plc* (District Court of The Hague, 26 May 2021) ECLI:NL:RBDHA:2021:5337. For an analysis of the case, see : Fergus Green, 'Shell v Milieudefensie: Sowing the Seeds for Future Climate Litigation against Fossil-Fuel Producers' (2024) *BIICL Climate Law and Litigation Blog* <https://www.biicl.org/blog/95/shell-v-milieudefensie-sowing-the-seeds-for-future-climate-litigation-against-fossil-fuel-producers> accessed 14 July 2025.

This paves the way for a more robust form of accountability – provided, however, that courts are equipped with the expertise needed to assess these practices against the complex realities of logistical chains. Yet the lived experience in Rotterdam reveals the limits of this institutionalization. While the procedures exist on paper, their grounding in the realities of labor remains uncertain and no legal action is taken. The worker followed by Judah operates in a zone where norms are meant to apply – but where they appear to have little effect. This is where law, even armed with new obligations, may fall short: because seeing the norm does not guarantee its impact – especially when it remains disconnected from lived situations.

#### 4. Thinking EU Law in Rotterdam from sites of Resistance

What Rotterdam reveals is not merely a series of gaps between law and reality. It reveals a specific way of regulating life by Europe, in and outside Europe– a dense materiality in which the law is both omnipresent and powerless when it comes to protect, invoked but rarely embodied. In this sense, Rotterdam becomes an invitation to rethink EU law from its margins: not as a body of texts, but as a practice traversed by the disorder of globalization. This observation echoes a growing critique of EU law: its inability to fully engage with the social, material, and affective realities it claims to regulate. As Azoulay points out, EU law often functions within a normative abstraction – technical, rationalized, and self-referential – that neglects precisely the lived experiences it governs.<sup>37</sup> This absence of reality is not simply a lack of empiricism, but a structural refusal to expose itself to the plurality of European forms of life and to reflect them.<sup>38</sup> The result is a legal order that speaks *about* Europe without ever truly speaking *from* Europe – and even less so from the standpoint of those who live it. The paradox is this: EU law tends to detach itself, to become “decontextualized,” rendering invisible the tensions, compromises, and injustices embedded in the concrete infrastructures of integration.

This is also a way of responding to a broader question: what does it mean to think EU law today, if not from what escapes it? Contemporary critical legal theory has increasingly expanded its scope precisely to include these zones of escape. From feminist mobilizations to ecological struggles and disobedience, Indigenous communities to decolonial movements, a growing body of scholarship has sought to theorize *everyday legal life* – not as what lies outside the norm, but as a site of legal production in its own right.<sup>39</sup> These approaches sometimes intersect or differ in their spirit but examine practices of resistance, appropriation, refusal, or subversion, exposing the tensions between imposed normativity and emergent legal subjectivities.<sup>40</sup> What emerges is a law “otherwise” – not embedded in institutional language, but in gestures, strategies, and ordinary refusals.<sup>41</sup>

Such practices are already visible in the context highlighted by Rotterdam. This renewed focus on corporate legal responsibility has not only unfolded through formal legal innovations, such as the EU’s due diligence directive, but also through the bottom-up action taken by civil society and grassroots activism, which plays an increasingly pivotal role in tracking and contesting the real-

<sup>37</sup> Loïc Azoulay, *The Turn to European Society and Its Problems: Connecting EU Law and Social Theory* (EUI Working Paper LAW 2025/09) <https://hdl.handle.net/1814/92977> accessed 14 July 2025.

<sup>38</sup> Loïc Azoulay, ‘Reconnecting EU Legal Studies to European Societies’ (2024) *Verfassungsblog* <https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/> and more recently, Loïc Azoulay, *The Turn to European Society and Its Problems: Connecting EU Law and Social Theory* (EUI Working Paper LAW 2025/09) <https://hdl.handle.net/1814/92977> accessed 14 July 2025.

<sup>39</sup> This ontological and epistemic assumptions of these critical scholarships differ depending on the social context they focus on and the underpinning commitments of the authors, see n(45).

<sup>40</sup> Marie Petersmann, ‘Law Otherwise or Otherwise Laws? (Pre)figurative, (Para)ontological, and (De/re)worlding Practices’ (draft working paper, forthcoming in *Working with the Negative: Critique at the End of the World* (EUP, 2025), on file with author).

<sup>41</sup> *ibid.* Furthermore, a seminar on this topic will happen at EUI in 2026 : Gildelen Aty-Biyo and Luca Tenreira, *Law Otherwise: Troubling the ‘Legal’ with Alternative Modes of Inquiry* (forthcoming seminar, European University Institute, 2026) unpublished syllabus, on file with authors.

world effects of corporate conduct. Across Europe and beyond, a growing ecosystem of activist platforms, investigative journalists, grassroots movements, and worker-led observatories has emerged to act as legal and moral “radars”, keeping watch where institutional oversight remains partial, delayed, or complicit. Initiatives such as the Corporate Human Rights Benchmark, the Business & Human Rights Resource Centre, or OECD Watch operate as transnational monitors – systematically documenting allegations of abuse, gaps in due diligence, and failures in remediation. At the national level, organizations like SOMO (Centre for Research on Multinational Corporations, once again ironically based in the Netherlands) have produced in-depth field reports revealing abusive labor practices and supply chain opacity in major infrastructure and logistics sectors, including Rotterdam.<sup>42</sup> Their work often feeds directly into litigation, legislative lobbying, and consumer mobilization.

Concerns about labour rights in the Port of Rotterdam are further substantiated by the findings of SOMO, which documents how the port’s logistical model relies heavily on outsourced, temporary, and subcontracted labour – especially in logistics, cleaning, and port-adjacent construction.<sup>43</sup> While the Port Authority positions itself as a responsible public-private actor, its human rights and due diligence commitments appear to have limited reach into the precarious segments of its labour ecosystem.<sup>44</sup> Workers employed through third parties often lack equal protections, job security, and access to collective bargaining mechanisms, creating a fragmented field of responsibility in which formal rights may exist, but effective enforcement is elusive.<sup>45</sup> As SOMO notes, this structural reliance on subcontracting leads to a diffusion of legal responsibility and weakens the Port’s ability – or willingness – to monitor compliance with basic labour standards.<sup>46</sup> These findings echo the everyday realities captured by Ben Judah’s narrative: a world of flexible contracts, unpredictable schedules, chronic fatigue, and silent exposure to risk, in which the law is present but unevenly felt.

These efforts help constitute an epistemic counterpower to corporate reporting, making visible what due diligence procedures may fail to detect – or deliberately obscure.<sup>47</sup> Importantly, this resistance does not only document harm but produces legal knowledge. Through naming, mapping, and publicly contesting corporate harm, these actors contribute to the vernacularisation of legal standards – translating abstract rights into tangible expectations and generating pressure for enforcement even before courts intervene. In this way, accountability becomes collective, enacted not only through formal legal institutions, but through dispersed, situated practices of watching, documenting, narrating, and refusing. In the context of the Port of Rotterdam, and the broader logistics infrastructure of Europe, such practices become essential. They provide means to track the invisible circuits of responsibility, to reflect the concerns expressed by the docker in Judah’s story – to see how rights commitments play out not in policy statements, but in night shifts, subcontracting chains, precarious contracts, and silenced injuries. These zones of visibility,

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<sup>42</sup> SOMO, *The Extended Reach of the Port of Rotterdam: Transnational Infrastructure, Fossil Capital and Labour Rights* (SOMO Amsterdam 2020) < <https://www.somo.nl/wp-content/uploads/2020/02/The-extended-reach-of-the-Port-of-Rotterdam.pdf> > accessed 14 July 2025.

<sup>43</sup> “The Port of Rotterdam relies heavily on companies in logistics, cleaning and port-related construction, where many of the workers are employed through subcontractors or temporary employment agencies.” – *The Extended Reach of the Port of Rotterdam*, p. 11 and “The use of flexible contracts and indirect employment relationships makes it more difficult to enforce decent working conditions, especially for workers at the lower end of the value chain.” – *The Extended Reach of the Port of Rotterdam*, p. 11

<sup>44</sup> “There is limited transparency about the conditions under which these workers operate, and their employment situation is not monitored in any systematic way by the port authorities.” – *The Extended Reach of the Port of Rotterdam*, p. 11

<sup>45</sup> “Trade union involvement in outsourced port work is limited, and collective agreements may not cover subcontracted or agency workers.” – *The Extended Reach of the Port of Rotterdam*, p. 12

<sup>46</sup> “The Port Authority plays only a limited role in monitoring the labour standards of private companies operating within its jurisdiction.” – *The Extended Reach of the Port of Rotterdam*, p. 12

<sup>47</sup> Luca Tenreira, ‘Greenwashing Investigated in the Landscape of Global Value Chains’ (2025) *Journal of Environmental Law*, <https://doi.org/10.1093/jel/eqaf018> accessed 14 July 2025.

opened by civil society and allied epistemic actors, thus expand the field from which EU law must be thought and practiced – not only from what escapes it, but from what insists beneath it.

Yet one question remains largely open: what do we do with situations where there is no visible, or a deeply invisibilized contestations, either through institutions or the law itself? What happens when situations of injustice do not lead to mobilization or refusal, but to resignation? Judah's account in Rotterdam is permeated by this silence. The worker he follows does not protest, does not file complaints, does not challenge the established order. He observes, endures, and offers ironic commentaries of its dissatisfaction.<sup>48</sup> And that is precisely what invites reflection: can law be thought from a place of resignation? What does it mean to think law from lived experiences that do not take the form of open opposition, but of withdrawal, exhaustion? In this context, inquiries become essential. They allow us to interrogate the forms of legality that operate in the background: in routines, automatisms, and silences. It is precisely this kind of legal opacity and quiet endurance that many other chapters in this volume take seriously, in varied contexts. From Berlin, where Karla Žeravčić and Davide Tomaselli explore how EU migration law differentially shapes queer lives through overlapping regimes of access and exclusion, to Hatvan, where Sarah Glaser traces how EU law both enables care and produces vulnerability in the intimate infrastructure of illness; from Amsterdam, where Irina Muñoz draws on critical race theory to show how racialized persons suffer and resist the normative invisibilization caused by everyday racism within the EU, including its legal frameworks; to Sabetta, where Timo Zandstra highlights how EU legal integration extends into Arctic territories, raising urgent questions of sovereignty, extractivism, and indigenous dispossession through energy infrastructure projects – these contributions collectively argue that legality is not always loud, and law's effects are not always spectacular. By shifting attention to the everyday, to the relational, they show that EU law is not only interpreted in courts or formulated in Brussels, but also lived, endured, and sometimes quietly refused. Rotterdam is but one site among many where this reorientation becomes possible.

This is why thinking European law from Rotterdam ultimately calls for a reflection on its rootedness: not in a presumed objectivity of the law, but in *situated knowledges beyond institutional discourses*.<sup>49</sup> Rethinking legal Europe does not mean extracting mere universal principles, but hybridizing its norms with practices, narratives, and vernacular epistemologies.<sup>50</sup> A transformative law can only emerge if it allows itself to be affected, to come into contact with what it ignores, and to be translated into the many languages of lived experience.<sup>51</sup> In other words,

<sup>48</sup> Many of such markers are noticeable along the story : “Europe is just eating shit. Everyone is risking their life.” ; “What rubbish is actually in these containers? Toys, TVs, Chairs, Tables, Bicycle, Shampoo. Only rubbish: Plastic American or Chinese Rubbish.”. The worker, navigating both machinery and human fragility, exists in a state of perpetual readiness. “He’s tense because accidents happen. Not often, but they have. A few times a year, they fall.” The urgency of the port’s operation never sleeps — “You can’t stop working”.

<sup>49</sup> See the foundational piece : Donna Haraway, “*Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*”(1988) 14 *Feminist Studies* 575. For an account in EU law, see : Päivi Neuvonen, ‘A Way of Critique: What Can EU Legal Scholars Learn from Critical Theory?’ (2022) 2 *European Law Open* 287. More specifically : “EU law scholars wishing to engage in critical legal scholarship should resist the temptation to reduce socio-legal critique into mere empirical research and instead approach law in its full socio-material reality.” (Neuvonen, p. 2)

<sup>50</sup> The following serie of blogposts notably account for such challenges in different context of EU Law : Vincent Réveillère, ‘Controversies over Methods in EU Law’ (VerfBlog, 18 March 2024) <https://verfassungsblog.de/controversies-over-methods-in-eu-law/> accessed 14 July 2025. ; Vincent Réveillère, ‘Ongoing Controversies over Methods in EU Law’ (VerfBlog, 7 May 2025) <https://verfassungsblog.de/ongoing-controversies-over-methods-in-eu-law/> accessed 14 July 2025.

<sup>51</sup> A ‘translational challenge’, as pointed out in Kalypso Nicolaidis, ‘The Third Democratic Transformation: From European to Planetary Politics’ (2024) 62 *JCMS* 845.

a law that, instead of seeking to impose coherence, is grounded in complexity – the complexity of history but also stories – in order to better accompany the re-compositions to come.<sup>52</sup>

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<sup>52</sup> For further reflections on the methodological and critical move of re-composition: Marie Petersmann, 'Re/de/composing International Law' (Völkerrechtsblog, 2024) <https://voelkerrechtsblog.org/re-de-composing-international-law/> accessed 14 July 2025.

# Troubled integration in European Societies: Religion and Migration in Avignon

by Marthe-Hélène de Dinechin\* and Clara Muller\*\*

## 1. Introduction

The functionalist perspective of religion, as developed by Émile Durkheim, argues that religion serves a vital social role by reinforcing unity and stability within society. Religion provides a shared set of values and beliefs that guide behaviour, while also acting as a socializing institution by bringing individuals together through the communal practice of religious rites. As Durkheim explains, "Religious beliefs proper are always shared by a definite group that professes them and that practices the corresponding rites. Not only are they individually accepted by all members of that group, but they also belong to the group and unify it"<sup>1</sup>. Such a unifying function of religion, however, appears to be in stark contrast with the prevailing atmosphere of conflict and discrimination rooted in religious identities, particularly in France, where the discourse surrounding the 'problème musulman'<sup>2</sup> has increasingly gained prominence. Set within this growing tension, Avignon<sup>3</sup> is one of the few stories in Ben Judah's book that directly addresses religion.

In the story, we follow Mahjoub Mahjoubi, first as a Tunisian boy who emigrated to join his father in France, then as a migrant in France struggling to find his place, facing cultural isolation and racism. Over time, he becomes an Imam, discovering his purpose within the Muslim faith through a pilgrimage to Mecca, while also navigating the difficulties posed by the COVID-19 pandemic within his religious community. Although the story is primarily set in Avignon, it begins and concludes in Tunisia. Beyond the events of the book, Imam Mahjoub Mahjoubi was deported back to Tunisia in March 2024, under the allegation of compromising the fundamental interests of the French State, despite having spent nearly 40 years of his life in France.

This article adopts a 'European law of everyday life' approach, using Mahjoub Mahjoubi's narrative account as an entry point to explore how legal norms on migration, religion, and integration operate in lived contexts. The narrative does not serve as empirical evidence, but as a heuristic device to reveal tensions, blind spots, and assumptions embedded in legal frameworks.

We will first assess the difficulties of integration for migrants in Europe at the intersection with religion (Part 2) and, second, the balancing exercise between freedoms of worship and the safeguarding of health and safety during health emergencies such as COVID-19 (Part 3). This paper argues that these challenges stem from the complex interaction between multiple sources of normativity within European societies. In particular, they arise from the juxtaposition of religious norms with European migration law and French legal provisions governing migration and health protection. This interaction raises questions about how these distinct normative systems coexist and the extent to which they may come into conflict.

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<sup>1</sup> Durkheim, E., *The Elementary Forms of Religious Life*, (1912), 41.

<sup>2</sup> Hajjat, A., and Mohammed, M., *Islamophobie: comment les élites françaises fabriquent le "problème musulman"*. (La Découverte, 2022).

<sup>3</sup> Judah, B., 'Avignon', *This is Europe: The Way We Live Now* (Picador 2023).

## 2. A story of immigration, integration and religious discourse in Europe

The initial story of Mahjoub, through immigration to France and his subsequent formation as an Imam, is not only a particular trajectory. It is also part of a broader context of second-generation migrants coming from Maghreb, following their parents who emigrated to find work in Europe. The question of their integration into the countries they emigrated to, alongside their religious affiliation, reveals an interesting tension within the European integration framework. In particular, we will demonstrate that the processes of religious re-affiliation have not been sufficiently considered within the European and French legal frameworks relating to integration **(A)**. Instead, religious re-affiliation is often considered only through the prism of radicalization, which is seen as a total separation from the values of the host society and thus as proof of lack of integration **(B)**.

### Religious re-affiliation as a missed element in the European integration framework

The story of Mahjoub is a story of legal migration: unlike other stories in the book, such as Brico's in Briançon, Mahjoub faces no particular hurdles to joining his father in France from Tunisia.<sup>4</sup> As his father worked in France, he probably benefited from family reunification provisions, which concern the spouse and the minor children of a migrant having a residence permit in the country.<sup>5</sup> In France, the creation of such a policy of familial reunification can be traced back to 1976, when work immigration provisions were expanded to include family immigration provisions.<sup>6</sup> According to some authors, this new framework of legal immigration aimed at ensuring a better social integration of immigrants, so that they could lead a normal familial life in the country they emigrated to.<sup>7</sup>

However, the subsequent social integration of the second generation of immigrants, the children of those workers, posed challenges. While Mahjoub's father has successfully integrated into French society through his professional career, Mahjoub faces significant obstacles in doing the same. He faces a linguistic barrier, as he does not speak French, and a cultural one (for instance, he does not know the difference between Nike and Adidas), which leads to him being singled out by his comrades and feeling rejected. His origin is also a factor of rejection by the parents of his girlfriends, who do not like him because he is of Arab origin. Mahjoub describes that he *'felt this savage rejection. Nobody respected him. No one'*.<sup>8</sup>

While he does not feel integrated within French society, he found integration within the religious community. As he engages more deeply in the practice and completes his religious education through pilgrimage, he appears to undergo a significant personal transformation. Mahjoub exactly describes it in these words, which conclude the story: *'He would become a new person. He would marry again. A real Muslim woman. He would correct all his mistakes'*.<sup>9</sup>

The story of Mahjoub can thus be seen through the lens of religious re-affiliation as an aspect of the social integration of second-generation immigrants, particularly coming from North African countries. This religious aspect of integration, however, is not easily grasped in the European and French legal frameworks for integration, as such frameworks tend to prioritize the individual

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<sup>4</sup>Judah, B., (n3) 'Briançon', 212–241.

<sup>5</sup>See French Code of the Entry and Stay of Foreigners and of the Right to Asylum, art L-434.

<sup>6</sup>Décret n°76-383 du 29 avril 1976 relatif aux conditions d'entrée et de séjour en France des membres des familles des étrangers autorisés à résider en France, online:

<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000855572/1976-05-02>

<sup>7</sup>See for instance Guimezanes, N, 'Le regroupement familial dans certains pays européens', (2002), 11-31, in *Les migrations au féminin*, Agadir, Sud contact.

<sup>8</sup>Judah, B., (n3) 388.

<sup>9</sup>Judah, B., (n3) 399.

integration of the immigrant and overlook the significance of community and religion for this particular category of immigrants.

The French framework for integration, which ultimately aims at naturalization,<sup>10</sup> is focused on assimilation: different religious beliefs must be respected, but ultimately what matters is the personal adhesion of the person to the principles and values of the French Republic.<sup>11</sup> Patrick Weil demonstrates that this framework of integration has been applied more strictly historically for certain immigrants, in particular North-African Muslim immigrants.<sup>12</sup> This then led the second generation of such immigrants, who benefited from equal conditions in law for integration, to still feel a *de facto* inequality in the way they were welcomed into French society.

At the European level, religion is in principle recognized as an important element of integration, where the “cultures and religions that immigrants bring with them can facilitate greater understanding among people, ease the transition of immigrants into the new society, and can enrich societies”.<sup>13</sup> However, this aspect of integration is not accounted for in the Commission's latest documents. In particular, the Commission on Integration and Inclusion's 2021-2027 Action Plan focuses on four main sectors: education and training, employment and skills, health, and housing. Religion is not mentioned, except as a ground for the non-discrimination policy.<sup>14</sup>

In addition to not being recognized as an integrative factor, religious (re-)affiliation is sometimes considered in opposition to integration, seen through the lens of values. This dynamic is suggested in the story: as Mahjoub becomes a Muslim, his new practices seem to clash with his integration into French society, particularly with the French population. Indeed, at first, Mahjoub is hesitant to leave the house with the djellaba because he thinks *‘the French are going to look at me. I was ashamed and I walked with my head down’*.<sup>15</sup> He already seems to differentiate himself from that category, the French, whom he doesn't identify with.

This lack of identification is at the heart of specific discussions in France around the ‘Muslim problem’ and the separatism thesis. According to Esmili and Giry, the formulation of such a problem rests on an understanding of religion and integration, which considers religious re-affiliation as a sign of Islamist separatism which would menace the unity of the French society.<sup>16</sup> This approach was endorsed by the French government through the adoption of a law in 2021, also known as the law on the fight against separatism.<sup>17</sup> It reinforces the surveillance and control of religious associations, introduces more severity in the sentences for incitement to hatred, as well as a facilitated procedure for regional authorities to close down mosques. Although the law is adopted on the basis of the French concept of *laïcité*, which implies the neutrality of the State towards religion, the law is clearly intended for a religion in particular as it aims “to give answers to the communitarian withdrawal and the development of radical Islamism”.<sup>18</sup> The preamble of the draft law confirms its targeting against Muslim separatism in general, as it aims to counter a communitarian threat, mostly of Islamist inspiration. According to the draft law, this political-religious project aims to make religious norms prevail over French law and entails a separatist

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<sup>10</sup>See document of the French government, ‘*Politique Française de l’Immigration et de l’Intégration*’ (2023), online: <https://www.budget.gouv.fr/documentation/file-download/19050>, 53.

<sup>11</sup>See for instance conditions for naturalization in the French Code of the Entry and Stay of Foreigners and of the Right to Asylum, arts 21-17, 21-24.

<sup>12</sup>Weil, P, *How to be French: Nationality in the Making since 1789* (Duke University Press 2008).

<sup>13</sup>Council of the European Union, ‘Common Basic Principles for Immigration Policy’ (Press Release, 19 November 2004) 23.

<sup>14</sup>Communication from the Commission, Action plan on Integration and Inclusion 2021-2027, COM/2020/758 final.

<sup>15</sup>Judah, B., (n3) 402.

<sup>16</sup>Esmili, H and Giry, J, ‘Le problème et la question : L’équation politique moderne ressaisie par la réaffiliation religieuse parmi les immigrés et leurs enfants’ (2023) 89 *Raisons politiques* 119–141.

<sup>17</sup>French Law No 2021-1109 of 24 August 2021 reinforcing respect for the principles of the Republic.

<sup>18</sup>Loi du 24 août 2021 renforçant le respect des principes de la République’ (Vie Publique), online : <https://www.vie-publique.fr/loi/277621-loi-separatisme-respect-des-principes-de-la-republique-24-aout-2021>, (authors’ own translation from French).

dynamic of division of the country.<sup>19</sup> Esmili and Giry point out that the social function of religious re-affiliation is missed by such a conservative lens, which necessarily considers the Muslim religion, in particular, in opposition to the values of the French society. Political answers, such as the law on separatism, ignore religion as a structural response to socio-economic marginalization.<sup>20</sup>

The French law on separatism seems to illustrate the mutation of the discourse on the Muslim communities in France from immigration to religion. They are no longer considered as immigrants who need to be integrated into French society, but as a separate religious community which refuses to integrate and, if radicalized, becomes a threat to the unity of the society. At the extreme end of this approach, radicalization is thus seen as in total opposition to integration within the emigrating country.

### **Radicalization as the total separation from integration and European values**

Beyond the story in the book, Mahjoub's relationship with religion, integration, and French society takes on a whole other dimension. On the 4th of March 2024, the Paris Administrative Court confirmed the validity of his expulsion from France as a radical Imam, because of the content of his sermons.<sup>21</sup>

A few remarks can be drawn from that follow-up on Mahjoub - Imam Mahjoubi's - story. First, this confirms Mahjoub's lack of legal integration in France: his expulsion from French territory shows that he never acquired French nationality and retained his Tunisian nationality, allowing France to expel him as a third-country national. According to the French nationality code, naturalization is conditioned on five years of legal residence in France, as well as assimilation conditions such as the knowledge of the national language, the knowledge of French history and culture, and, importantly, adherence to the essential values of the French Republic.<sup>22</sup> This further demonstrates the assimilationist characteristic of the French integration paradigm.

The second point concerns the way in which the religious radicalization of Imam Mahjoubi is considered as incompatible with integration in French society. This incompatibility is suggested by the judgment of the Administrative Court of Paris, which confirmed the expulsion order. Indeed, the Court's decision is justified, among other grounds, on the attacks of the Imam against the French flag and the fact that his praise of the Sharia "put at question the values of the Republic".<sup>23</sup> Interestingly, the Conseil d'État, which confirmed the expulsion of the Imam in last instance, did not use this argument of attack against the French flag and the values of the French Republic but instead only focused on the fact that the preaches of the Imam constituted explicit and deliberate provocations to discrimination against women.<sup>24</sup> The reasoning of the Administrative Court of Paris thus targets aspects of Imam Mahjoubi's radicalization that clash with the values of French society. This clash of values then consequently leads to the idea that the radical development of the Muslim religion demonstrates a lack of integration by its practitioners within the French society, which can lead to public policy measures. In this regard, the expulsion of Imam Mahjoubi

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<sup>19</sup>French Law Bill No 3649, reinforcing respect for the principle of the Republic, preamble, online: <https://www.assemblee-nationale.fr/dyn/ouverture/PRJLANR5L15B3649.html>

<sup>20</sup>Esmili, Giry, (n16).

<sup>21</sup>Ordinance of the Tribunal Administratif de Paris, 4 March 2024, case no 2404728/9.

<sup>22</sup>French Code of the Entry and Stay of Foreigners and of the Right to Asylum, arts 21-17, 21-24; see also circular of 27 July 2010 (IMIC1000113C) which links assimilation and respect of the values of the French society, in particular targeted against Muslim radical communities since the examples of lack of assimilation focus on practices of radical religion, online: <https://www.immigration.interieur.gouv.fr/Media/Immigration/Files/Circulaire-IMIC1000113C-du-27-juillet-2010-relative-a-la-deconcentration-de-la-procedure-d-acquisition-de-la-nationalite-francaise-par-decision-de-l-autorite-publique>

<sup>23</sup>Ordinance of the Tribunal Administratif de Paris of 4 March 2024, [para 8] (authors' own translation from French).

<sup>24</sup>Conseil d'État (Juge des référés), 29 March 2024, case no 492743, [para 17].

can be seen within the continuity of a series of measures that the French government has taken following terrorist attacks, such as the one on 13th of November 2015 and the installation of an 'état d'urgence sécuritaire'<sup>25</sup>, including the closure of mosques, and the expulsion of other imams.<sup>26</sup> These measures tie in with the law on separatism and the underlying discourse used to pass this law, specifically targeting radical religious affiliation to Islam.

The focus on values in the meaning of integration is also evident in the Common Principles on Integration adopted by the Council, which state that "integration implies respect for the basic values of the European Union".<sup>27</sup> Consequently, signs of disrespect for such values can prove the lack of integration of a person in the host European society and facilitate his or her expulsion, as in the case of Imam Mahjoubi. The risk, however, with such a use of values in this context is that values are instrumentalized as a tool of discrimination against Islamic minorities, not only as a matter of religion but also as a matter of rationalization of subjects along racial lines.

As demonstrated in this section, there is a tension between religious Muslim minorities and the values of French society and the EU, often perceived as incompatible. This tension stems not only from a clash of values but also from a conflict of legal norms, all the more visible when the law must balance religious freedom against other fundamental rights.

### 3. Balancing freedom of worship in times of health crisis

During the COVID-19 crisis, also depicted in this story, the legal balancing act centered on reconciling prescribed religious practices with the imperative of public health protection. From a bottom-up perspective, this raises complex questions about compliance with national and EU law when religious requirements conflict with state mandates. Hence, this section will examine the restrictions on freedom of worship in France during the health crisis (A) and the responses and adaptations of Muslim communities to these measures (B).

#### Restrictions on freedom of worship in France

Ben Judah's narrative offers a vivid recount of the early days of France's COVID-19 lockdown. The virus, initially a distant threat in China, became a source of fear and, for Mahjoub, an expression of divine wrath: *'Epidemics, my friends. Humanity has encountered them before on its journey. And now it's our turn. Yet all of this is the will of God.'*<sup>28</sup>

This perspective highlights the divergence between religious and secular frameworks for understanding crises. In Islamic traditions, disasters are often seen as tests from God,<sup>29</sup> a belief echoed by the European Council for Fatwa and Research (ECFR), which frames plagues as opportunities for spiritual recalibration.<sup>30</sup> Such interpretations stand in stark contrast to those of the French government or international bodies like the World Health Organisation, which view crises through secular public health lenses. This creates an almost inherent conflict, as many

<sup>25</sup>French Law No 2015-1501 of 20 November 2015 applying Law No 55-385 of 3 April 1955 on the state of emergency (état d'urgence).

<sup>26</sup>See the press release of the French Minister of Justice, Gérald Darmanin, of 14 October 2022, detailing the closing of 24 mosques and expulsion of 800 radicalised immigrants, focused on Islamic separatism only in the implementation of the separatism law of 24 August 2021, accessible online: [Deux ans après l'assassinat de Samuel Paty, le ministère de l'Intérieur poursuit son action contre le séparatisme islamiste | Ministère de l'Intérieur](#). See also the recent and mediatized expulsion of Imam Hassan Iquioussen, as confirmed by the Tribunal Administratif de Paris, judgment n° 2216712/4-2 of 11 March 2024.

<sup>27</sup>Council of the European Union, 'Common Basic Principles for Immigration Policy' (Press Release, 19 November 2004) 17.

<sup>28</sup>Judah, B., (n3), 376.

<sup>29</sup>Shabana, A, 'From the Plague to the Coronavirus: Islamic Ethics and Responses to the COVID-19 Pandemic' (2023) 7 *Journal of Islamic Ethics* 92.

<sup>30</sup>*Ibid.*

devout Muslims prioritize divine commandments over secular legal norms<sup>31</sup>, leading one to assume that this could result in a lack of conformity with EU and French legal norms.

On March 16, 2020, President Emmanuel Macron announced a nationwide lockdown to combat the spread of COVID-19.<sup>32</sup> This included the closure of mosques, to the surprise and confusion of Mahjoub and his community: *'They were heading into lockdown. These are our last prayers together. (...) The mosque will be closed, until the authorities decide it's over.'*<sup>33</sup> During the lockdown, several decrees that restricted or even completely prohibited the collective exercise of freedom of worship were imposed. The Order of March 14th, 2020 suspended collective worship, except for funerals, limited to 20 participants.<sup>34</sup> The Decree of May 11th, 2020 extended similar restrictions, prohibiting gatherings in places of worship except for funeral ceremonies.<sup>35</sup> These measures clearly prioritized public health over the collective freedom of worship. Indeed, France chose a form of Cartesian division between body and mind by managing the health crisis by restricting, or even banning, the exercise of certain religious practices to give priority to individuals as physical beings while maintaining the rights and freedoms of the mind.<sup>36</sup> From a legal standpoint, this raises questions about the extent to which governments can limit religious freedoms during health emergencies. On May 18, 2020, following appeals from several associations and individual claimants, the French Council of State reaffirmed that "the right to participate collectively in ceremonies is an essential component of freedom of worship."<sup>37</sup> This interpretation is consistent with the European Court of Human Rights (ECtHR), which advocates for a broad protection of religious freedom, as reflected in paragraph 62 of its Grand Chamber ruling in *Hassan and Tchaouch v. Bulgaria*.<sup>38</sup> However, despite these rulings, the Decree of October 29, 2020,<sup>39</sup> issued during the second lockdown, imposed a complete ban on religious gatherings, allowing only funeral ceremonies with a maximum of 30 attendees. This prompted appeals to the ECtHR, with a pending case *Mégard v. France*,<sup>40</sup> questioning whether such measures disproportionately infringed on religious freedoms. French law sought to resolve these tensions through proportionality tests that balanced public health and religious rights. However, approaches varied across Europe, reflecting distinct legal traditions and emergency governance structures.

### **The reaction and adaptation of Muslim communities to the restriction of freedom of worship**

Early on, the World Health Organisation recognized the influence of religious leaders and issued guidelines urging faith leaders to support public health measures during the pandemic. In Europe,

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<sup>31</sup>Ifop Group, 'État des lieux du rapport à l'islam et à l'islamisme des musulmans de France' (18 November 2025) <https://www.ifop.com/article/etat-des-lieux-du-rapport-a-lislam-et-a-lislamisme-des-musulmans-de-france> : According to this survey conducted among a sample of 1,005 people of the Muslim faith, drawn from a representative national sample of 14,244 people aged 15 and over residing in metropolitan France: "Nearly one in two Muslims (46%) believe that Islamic law should be applied in the countries where they live, with 15% believing it should be applied "in full, regardless of the country in which one lives" and 31% believing it should be applied "in part," adapting it to the rules of the country in which one lives."

<sup>32</sup>Emmanuel Macron, *Adresse aux Français, 16 mars 2020* (16 March 2020), online: <https://www.elysee.fr/emmanuel-macron/2020/03/16/adresse-aux-francais-covid19>

<sup>33</sup>Judah, B., (n3), 376.

<sup>34</sup>Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, NOR SSAZ2007749A, [2020] JORF n°0064, online: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041722917>

<sup>35</sup>Décret n° 2020-548 du 11 mai 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, NOR SSAZ2011695D, [2020] JORF n°0114, online: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041865329#:~:text=faire%20face%20...-D%C3%A9cret%20n%C2%B0%202020%2D548%20du%2011%20mai%202020%20prescrivant,%C3%A9tat%20d'urgence%20sanitaire>

<sup>36</sup>Fornerod A, 'Freedom of Worship during a Public Health State of Emergency in France' (2021) 10 *Laws* 15.

<sup>37</sup>Conseil d'État (Juge des référés), 18 May 2020, n° 440366, *Inédit au recueil Lebon*, [para 11].

<sup>38</sup>*Hassan and Tchaouch v Bulgaria* (2000) App no 30985/96, ECHR [para 62].

<sup>39</sup>Décret n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, [2020] JORF n°0261.

<sup>40</sup>*Mégard v France* (2022) App no 32647/22, ECHR.

the European Council for Fatwa and Research (ECFR) played a pivotal role in guiding Muslim communities. Between the 25th and 28th of March 2020, the ECFR issued a comprehensive statement titled *Legal Developments Related to the Corona COVID-19 Virus*.<sup>41</sup> This statement included 21 *fatāwā* (rulings) and 10 recommendations (*tawṣiyāt*), addressing key issues such as the performance of collective prayers, adherence to quarantine measures, and the conduct of funeral rites.<sup>42</sup> The rulings demonstrated alignment with public health directives, highlighting the ECFR's responsiveness to the pandemic and its integration of religious practices with governmental health measures.

Regarding the closure of Mosques, the ECFR declared that suspending congregational prayers in mosques would be mandatory until the pandemic subsided. Even with physical distancing measures, collective prayers were deemed inadmissible. On Funeral rites, a very sensitive issue, the ECFR permitted burials without washing (*ḡusl*) or dry ablution (*tayammum*) to prevent infection.<sup>43</sup> These adaptations were stricter than French legal requirements, demonstrating the ECFR's prioritization of public health.

The justification of these exceptional rulings in Islamic law derives from the higher objectives of Islamic law, *i.e.* the hierarchy of Islamic norms, divided into three categories presented in descending order, from the most to the least essential: necessities (*ḍarūriyyāt*), needs (*ḥāḡiyyāt*) and accessories (*taḥṣīniyyāt*).<sup>44</sup> Preserving life belongs to the first category, while washing the dead falls into the accessory category, thereby justifying the priority given to compliance with health protection measures.

These examples illustrate that Muslim communities largely complied with French COVID-19 restrictions, avoiding significant legal conflicts over mosque closures and funeral rites. Rather than demonstrating adherence to "European" or "French" values as such, this compliance can be understood as an example of legal adaptability and normative translation, whereby religious norms were reinterpreted in light of public health imperatives. Read in this way, the pandemic context exposes the limits of values-based integration narratives, which tend to frame Muslim religious practices primarily in terms of potential incompatibility and conflict with secular legal orders. This analysis does not seek to resolve broader controversies, such as those surrounding the hijab or political Islam; rather, it highlights how the focus on "values" risks obscuring the capacity of religious normativity to interact constructively with state law in specific legal contexts.

#### **4. Conclusion**

Taking stock of what we have learned from the complex and multifaceted story of Imam Mahjoub Mahjoubi, the first part of this article has shown the double-edged role that integration plays in his story. In France, Mahjoub found his integration in society through the Muslim religious community by becoming an Imam. This religious aspect of integration, in line with the functionalist perspective on religion of Durkheim, is overlooked by the French and European legal frameworks, which tend to focus instead on the phenomenon of religious re-affiliation as a radicalized threat to European values. The story of Mahjoub, who ends up being expelled for radical religious speech, exemplifies this shift in the discourse about immigration and integration of North African immigrants towards religion and separatism. The second part of this article demonstrated that, despite this prevalent narrative of a 'Muslim problem' and the perceived lack of integration of this religious community in Europe, Muslim religious leaders' guidance to their followers during the COVID-19 crisis was often in line with state-imposed bans on collective worship and practices such as funerals. These guidelines, in fact, frequently went beyond the requirements set by the

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<sup>41</sup>Al- Mustaḡiddāt al-Fiqhiyya li-Nāzilāt Firūs Kūrūnā Kūfid-19.

<sup>42</sup>De Angelo C, 'Muslims in Europe and Covid-19: Transnational and National Fatwas', (2023), online: <https://unora.unior.it/handle/11574/228360>

<sup>43</sup>Shabana, A, (n28) and De Angelo C, (n41).

<sup>44</sup>De Angelo C, (n41).

state, as seen in the case of France. This revealed that, contrary to the anticipated clash between Muslim religious norms and secular legal norms, there was, in reality, an alignment between Islamic religious practices and French legal standards.

In terms of methodology, this 'European law of everyday' approach, used to unveil the legal underpinnings in the daily lives of individuals, can serve as a valuable tool to address EU law and its current challenges from a fresh perspective. This lens, which approaches the law through its "lived experience," can help EU scholars identify the blind spots in EU law and acknowledge its embeddedness in various contexts and cultures, as demonstrated by the complexity of the religious question. In other words, one must step off the path of purely "legal doctrine study" to understand it more fully.

# A Taste of Europe: Wine, Law, and the Ambiguities of Local Food Heritage in a Globalized Market

by Marthe-Hélène de Dinechin\*

## 1. Introduction

### Setting the scene

Jean-Marc Roulot's story is one of tradition, the tale of a legacy and an identity bound to winemaking. The scene laid out by Ben Judah opens and closes in the same picturesque village of Meursault, Burgundy, a French region famous worldwide for its dry red wines made from Pinot Noir and its white wines made from Chardonnay. For Jean-Marc, this life wasn't a choice; rather, it was the life he was given. Only son, born into a winemaking family dating back to the 1820s, taking over the family estate was what was expected of him: "*This is how it went in Meursault. Father to son. The generation never breaking*". But Jean-Marc did not want this life. He did not want to live in the same village, on the same patch of land, making the same wine. Jean-Marc wanted to be an actor, so he initially resisted the call to the vineyard and left Meursault for Paris, the *city of light*. However, in 1982, following the unexpected death of his father, Jean-Marc was called to take over the family estate, a duty he fulfilled and then fully embraced by 1989.

Jean-Marc's life is complex, and no single framework can fully capture its multifaceted dimensions. It can, however, be narrowed down to three main themes.

Firstly, his story reflects a profound attachment to the land, its local customs, and the ways of life that constitute the heritage and traditions of families who have inhabited the region for generations. However, this heritage can also become a burden, prompting Jean-Marc, like many others, to seek emancipation from the constraints imposed by the community's expectations and familial obligations.

Second, Jean-Marc's narrative invites reflection on the cultural and economic significance of wine, a product deeply embedded in our daily lives. Wine appears on summer tables, selected with care to complement meals. It marks family celebrations, serves as a gift, and, when from a renowned vintage or estate, transforms from an agricultural product into a highly prized commodity. From a local food product, it becomes a European economic peril when the U.S. President Donald Trump threatens a 200% tariff on European wine and Champagne<sup>2</sup>. In this sense, wine is both a gastronomic heritage rooted in place and tradition and a globally marketable product.

The final theme concerns the production of wine itself and the climate. Jean Marc's obsession with the weather and its whims demonstrates how traditional methods and terroir are evolving because of climate change.

### Where is the law?

From this recount, one might ask where is the law in all this? The attempt in this short piece will be to unveil the role of EU law and, more specifically, to explore how the everyday life of a winemaker in a small French village reveals the broader challenges of safeguarding local food

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<sup>1</sup>Judah B, *This Is Europe: The Way We Live Now* (Picador 2024), p.245.

<sup>2</sup>Jolly J and Chrisafis A, 'Donald Trump Threatens 200% Tariff on EU Wine and Champagne' *The Guardian* (13 March 2025). <https://www.theguardian.com/us-news/2025/mar/13/donald-trump-threatens-tariff-on-eu-wine-and-champagne>

heritage and its production in a globalized Europe. To capture the complex nature of this story, our analysis will center on the legal framework of Geographical Indications (GIs). Although the European Union's internal market regulatory regime appears "*almost constitutively, allergic to the emotive register that terms such as identity, locality, tradition, or authenticity are inevitably loaded with*"<sup>3</sup> the EU has established through GIs a legal mechanism that derogates from the principle of free competition. These instruments serve not only to safeguard local food heritage within the EU but also function as strategic marketing and protectionist tools in the global marketplace.

This paper will therefore proceed in three parts. First, it will examine the legal instruments developed by the EU to protect winemakers' ways of life, *terroir*, and local food traditions through GIs (I). Second, it will assess the unintended consequences of these protections, revealing that paradoxically, the protection of local food heritage steers economic incentives to commodify local products for global consumption (II). Finally, it will consider one of Jean-Marc's primary concerns: the climate. The paper will thus briefly explore how wine production under the GI framework is being challenged by climate change, and if EU law is currently responding to these environmental pressures (III)

## **2. The protection of Europe's "*living cultural and gastronomic heritage*"<sup>4</sup> through geographical indications (GIs)**

Before delving into the legal aspects of wine production and denomination, one must first understand what a *terroir* and local food heritage refer to. Indeed, the uniqueness and distinctiveness of certain food products lie in the characteristics of the *terroir*, which Jean-Marc depicts in one of his returns to Meursault: "*Back to the vineyards, back to each terroir, each different with their soils or how the wind fluttered through them on a summer's day.*"<sup>5</sup> Although poetic, this recount of *terroir* closely matches the definition given by the French National Institute of Origin and Quality, which defines the latter as "*a particular geographical area where a product derives its originality directly from the specific features of its production area and within which a human community has built up a collective production know-how over the course of its history.*"<sup>6</sup> In other words, the term *terroir* encompasses the dynamic interaction between the physical properties of the land, such as the parcel of land and vineyard belonging to Jean-Marc's family, and the knowledge and cultural practices of winemaking passed down from generation to generation to Jean-Marc. In a broader sense, heritage extends beyond food itself; heritage is "*anchored in space and time*"<sup>7</sup> and reflects the practices, memories, and identities tied to specific localities. Thus, heritage is a marker of distinction, gaining legitimacy through its duration and territorial rootedness. It fosters a sense of belonging but can also be used to assert a particular identity and a certain way of life.

This heritage was first legally protected in France with the concept of "Appellations d'Origine" at the beginning of the 20th century to combat fraud. A 1935 decree-law aimed at defending the wine market created the Appellation d'Origine Contrôlée (AOC) for wines and eaux-de-vie, as well as the body responsible for defining, protecting, and controlling them. It is worth noting here the critical influence of certain local professional groups, such as the winegrowers' unions formed as early as 1884, notably in Saint-Émilion<sup>8</sup>. These unions formed social structures for the collective, corporatist defense of a particular local way of living and doing things. Inspired by the French

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<sup>3</sup>de Witte F, 'You Are What You Ate: Food Heritage and the EU's Internal Market' (2022) 47 European Law Review 647.

<sup>4</sup>Regulation (EU) No 1151/2012 recital 1 and Regulation (EU) 2024/1143 recital 6.

<sup>5</sup>Judah B, *This Is Europe: The Way We Live Now* (Picador 2024), p.249.

<sup>6</sup>Institut national de l'origine et de la qualité, "*Appellation d'origine protégée/contrôlée*" (AOP/AOC), Online:<<https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Appellation-d-origine-protegee-controlee-AOP-AOC>>.

<sup>7</sup>de Witte F (n3).

<sup>8</sup>Candau J, Roudié P and Ruffe C, « I - Le doyen des syndicats viticoles ». *Saint-Émilion, terroir viticole et espace de vie sociale*, Maison des Sciences de l'Homme d'Aquitaine, 1991, <https://doi.org/10.4000/books.msha.17403>.

policy, the EU devised in its Regulation 1151/2012<sup>9</sup> labels of ‘protected designation of origin’(PDO), ‘protected geographical indication’(PGI), or ‘traditional specialties guaranteed’(TSG). This regulation did, however, not apply to spirit drinks, aromatized wines, or grapevine products<sup>10</sup>. Instead, the rules on designations of origin, geographical indications, traditional terms, labeling, and presentation in the wine sector were found in Regulation No 1308/2013<sup>11</sup>, establishing a common organization of the markets in agricultural products. Indeed, along with the launch of the Common Agricultural Policy (CAP) in 1962, the Common Market Organisation (CMO) was created with the aim, namely, in the wine sector, to “*stabilize markets and ensure a fair standard of living for the agricultural community concerned*” and developed a very intricate regulation of the wine market. This framework has since then evolved to be simplified and made more efficient for wine and agri-food products, namely through the implementation of Regulation 2024/1143<sup>12</sup>, which applies to wine and other agricultural foodstuffs. It is interesting to note that in both regulations from 2012 and 2024, the EU stressed both the competitive advantage stemming from: “*the quality and diversity of the Union’s agricultural, fisheries and aquaculture production*” as well as its “*living cultural and gastronomic heritage*.”<sup>13</sup>

According to this regulatory framework, Meursault wine has been granted a Protected Designation of Origin (PDO)<sup>14</sup>. Similarly, Protected Geographical Indication (PGI) labels help preserve the relationship between terroir and product. These legal labels guarantee, in a less strict way, a product’s connection to a specific geographical region and the methods used in its production. To qualify for this label, at least one stage of the production, processing, or preparation must occur in the defined geographical area<sup>15</sup>, in contrast to PDOs, where all stages of production are carried out according to recognized know-how within the same geographical area<sup>16</sup>. In International law, Geographical Indications (GIs) are protected under the TRIPS Agreement<sup>17</sup>, specifically in Article 22(1), which identifies geographical indications as a good “*originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.*” and in article 23 for Wines and spirits. As the EU is a member of the World Trade Organisation, it is bound by the TRIPS Agreement, though EU law provides stronger protection for GIs than TRIPS.

Related to, but distinct from, geographical indications, the EU has established the concept of Traditional Speciality Guaranteed (TSG). TSGs protect products whose specific qualities are linked to their composition, manufacturing, or processing methods based on tradition without being tied to a specific geographical origin. In the case of wine, traditional terms are protected under Article 112 of Regulation 1308/2013 for products that hold a Protected Designation of Origin (PDO) or a Protected Geographical Indication (PGI) under EU or national law. This protection applies to specific production or aging methods, as well as qualities such as color, type of place, or any historical event associated with the product linked to a PDO or PGI.

Geographical indications, like PDOs, are thus a type of intellectual property right that help producers like Jean-Marc valorize their intangible assets and protect their heritage. PDOs also

<sup>9</sup>Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. No longer in force.

<sup>10</sup>Regulation (EU) No 1151/2012, art 2(2): “*This Regulation shall not apply to spirit drinks, aromatised wines or grapevine products as defined in Annex XIb to Regulation (EC) No 1234/2007, with the exception of wine-vinegars.*”

<sup>11</sup>Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products.

<sup>12</sup>Regulation (EU) 2024/1143 of the European Parliament and of the Council of 11 April 2024 on geographical indications for wine, spirit drinks, and agricultural products, as well as traditional specialties guaranteed and optional quality terms for agricultural products.

<sup>13</sup>Regulation (EU) No 1151/2012 recital 1 and Regulation (EU) 2024/1143 recital 6.

<sup>14</sup>In accordance with Article 107 on existing protected wine name of Regulation (EU) No 1308/2013.

<sup>15</sup>Regulation (EU) 2024/1143, art 46 (2)(c).

<sup>16</sup>Regulation (EU) 2024/1143, art 46 (1)(c).

<sup>17</sup>Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299.

safeguard products against fraud and unfair competition throughout Europe, ensuring that only wines from Meursault made according to traditional methods can carry the prestigious label. In that sense, wine is paradoxically as much a symbol of cultural heritage as it is an economic commodity that the EU has an interest in protecting.

### **3. Commodifying the *terroir*: The strategic use of GIs in global markets**

Wine and gastronomy are among the most renowned aspects of Europe worldwide. In 2020, the EU produced 64% of the world's wine, making it the leading global wine producer<sup>18</sup>. Moreover, in the agri-food sector, wine represents the largest share of exports.

Geographical indications (GIs) such as PDOs, PGIs, and other labels play a crucial role in preserving the local narrative and heritage of food products, including wine. These labels are not only symbols of cultural identity but also significant economic and trading assets. In 2017, the European food and drink sector was valued at EUR 1,101 billion, with GI and TSG products representing 7.0% of that total, roughly EUR 77.15 billion<sup>19</sup>. Over one-fifth of this value came from exports outside the European Union, with the United States being a primary market for several high-value EU products, although ongoing tariff tensions may disrupt this trade dynamic.

Still, studies by the European Commission highlight clear economic benefits of GIs, including enhanced marketing and increased sales driven by the high quality and reputation of these products. Yet, GI regulations can also have unintended adverse effects, hindering the preservation of food heritage. Indeed, the strict protection of GIs could be strategically weaponized to safeguard economic interests at the expense of other traditional foods. The conflict between Italy and Croatia in 2013 illustrates that *"for the European Union, its goal of respect for cultural diversity is second to economic benefit."*<sup>20</sup> The issue involved the famous Italian sparkling wine, Prosecco, and the traditional Croatian dark-amber sweet dessert wine, Prošek. During Croatia's accession process to the EU from 2005 to 2011, and consequently, to the internal market, the consortium of Italian makers of Prosecco raised concerns about potential consumer confusion between Prosecco and Prošek, given their similar appellations. Although the two products are fundamentally different in every respect, *"in taste, production methods, cultural significance, and availability"*<sup>21</sup>, the Prosecco industry's dominant position in the global sparkling wine export market, with a market share of approximately 44%<sup>22</sup>, created a strong incentive to protect the product from competition. In contrast, Prošek is a family-oriented, traditional product, often produced locally without commercial intent. Prošek is undeniably part of Croatia's cultural heritage and gastronomic legacy, linked to local customs and celebrations. Yet, only Prosecco holds a protected designation at both the national<sup>23</sup> and European levels<sup>24</sup>. As a result, with little

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<sup>18</sup>European Commission, 'Wine' (European Union Agriculture, 2025).

[https://agriculture.ec.europa.eu/farming/crop-productions-and-plant-based-products/wine\\_en](https://agriculture.ec.europa.eu/farming/crop-productions-and-plant-based-products/wine_en)

<sup>19</sup>European Commission, AND-International, Directorate-General for Agriculture and Rural Development and ECORYS, *Study on Economic Value of EU Quality Schemes, Geographical Indications (GIs) and Traditional Specialities Guaranteed (TSGs) – Final Report* (Publications Office, 2021) <https://data.europa.eu/doi/10.2762/396490>.

<sup>20</sup>S Gallagher, 'Prošek or Prosecco: Intellectual Property or Intangible Cultural Heritage?' in Julien Chaisse, Fernando Dias Simões and Danny Friedmann (eds), *Wine Law and Policy* (Brill Nijhoff 2020) p.652.

<sup>21</sup>Wine & More., 'Croatian Prošek vs. Italy's Prosecco' (6 December 2023) <https://www.wineandmore.com/prosek-vs-prosecco/>.

<sup>22</sup>European Commission, 'New Eurostat Data Shows EU Sparkling Wine Exports' (30 December 2024) <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/w/ddn-20241230-1>.

<sup>23</sup>The D.O.C. denomination was first introduced for Prosecco in 1969 and in 2009 was classified as a Denomination of Controlled and Guaranteed Origin (D.O.C.G.), the highest level of quality for Italian wines.

<sup>24</sup>Registered as a Protected Designation of Origin (PDO) the 01/08/2009 according to Article 107 of Regulation (EU) No 1308/2013 on existing protected wine name.

opposition and in anticipation of entering the EU, Croatia “officially” banned the appellation of Prošek<sup>25</sup>.

This situation reveals a striking irony: GIs, which were initially designed to preserve Europe's gastronomic heritage and protect its producers from unfair competition, can be deployed for sole economic purposes, to the detriment of the cultural products they are intended to protect. This raises the question of whether the EU's commitment to preserving cultural and gastronomic heritage depends on its potential to generate economic value.

#### 4. A frozen protection of local food heritage in a shifting environment

The protection of local food heritage can be argued to have another harmful side effect. Floris de Witte argues that GI regulation “comes with a risk of ossifying heritage” and “freezing a dynamic century-long process in an entirely artificial moment.”<sup>26</sup>

In the words of Jacinthe Bessière, heritage is more “a social construction than something fossilized and unchanging that gets handed down as such. Heritage continuously builds up and changes.”<sup>27</sup> While the GI Regulations recognize the evolving nature of heritage, acknowledging that traditions adapt to new production methods and materials,<sup>28</sup> the rigid requirements for registration of geographical indications (GIs) can create a static notion of heritage. In fact, the regulation requires a very detailed description of the product's characteristics, such as the “principal physical, chemical, microbiological or organoleptic characteristics of the product”<sup>29</sup>, as well as the method of obtaining the product and, where applicable, “authentic and consistent local methods.”<sup>30</sup> For wine, applications for protection require, among others, a detailed description of the “specific oenological practices used to make the wine or wines”<sup>31</sup>, or “the maximum yields per hectare”<sup>32</sup>.

These strict codifications seem incompatible with the fluctuating nature of terroir and cultivated soils, all the more challenged today by climate change. Viticultural regions are confined to particular geographical and climatic zones, where temperatures generally fall between 12°C and 22°C<sup>33</sup>. However, as Gregory Jones explains, “since the warming trend continues, traditional wine regions of our times are either being pushed out of the optimal ripening climates or even out of existence for certain wine cultivars”<sup>34</sup>. This trend poses a considerable threat to renowned wine regions such as Burgundy, the Rhine Valley, Barolo, and Bordeaux, where temperatures are likely to rise by 0.3 to 0.5°C, with global forecasts suggesting an increase of 1.5 to 2.4°C over the coming decades<sup>35</sup>.

<sup>25</sup>See S Gallagher, (n20): “although Wikipedia claims that “[b]ecause of the name similarity, on 1 July 2013, EU banned the use of name Prošek in all of their members” and that “Croatia filed a complaint because the name has been used ‘for at least 2000 years’,”<sup>124</sup> it seems that no such ban was instituted or complaint filed. (...) Indeed, it was purely an internal decision of the Croatian government, desperate to join the European Union, that led to pressure on producers in Croatia to avoid using the name.”

<sup>26</sup>de Witte F (n3).

<sup>27</sup>Bessière J, ‘Local Development and Heritage: Traditional Food and Cuisine as Tourist Attractions in Rural Areas’ (1998) 38 Sociologia Ruralis 21, p.27.

<sup>28</sup>Regulation (EU) 2024/1143, recital 6.

<sup>29</sup>Regulation (EU) 2024/1143, art 49(1)(b).

<sup>30</sup>Regulation (EU) 2024/1143, art 49(1)(e).

<sup>31</sup>Regulation (EU) 2024/1143, art 94(1)(e).

<sup>32</sup>Regulation (EU) 2024/1143, art 94(1)(g).

<sup>33</sup>Chaisse J, Simões FD and Friedmann D (eds), *Wine Law and Policy* (Brill 2020), p.5.

<sup>34</sup>Jones et al., *Climate, Grapes, and Wine: Structure and Suitability in a Variable and Changing Climate*, 2012, p.126-127.

<sup>35</sup>Chaisse J, Simões FD and Friedmann D (eds), (n33), p.7.

The angst of Jean-Marc for the weather and global warming is a feeling shared by many winemakers and farmers<sup>36</sup>, how *“there isn’t really winter anymore, not like there used to be; how they are harvesting a month earlier than they used to in summer; weeks and weeks earlier than they’d done for hundreds of years”*<sup>37</sup>. How, then, can heritage be preserved through strict codification when the terroir itself shifts? Hence, one could argue that the most significant challenge shared by winemakers, national governments, and the EU is protecting local food heritage while adapting to and anticipating climatic variations. In this sense, the French INAO has approved a temporary amendment to planting rights under Regulation 1308/2013, allowing French winegrowers to plant new grape varieties to adapt to climate change<sup>38</sup>. This change, governed by European and national legal frameworks, enables adaptation to global warming and permits the development of new grape variety categories within the same protected appellation. However, to preserve the quality and reputation of French wines, these new grape varieties must not exceed 5% of the appellation's grape varieties and 10% of the final composition of a bottle<sup>39</sup>. To conclude, much remains to be done to protect heritage in a changing environment.

## 5. Conclusion

What lessons can be drawn from the everyday life of a winemaker?

It is first essential to acknowledge the duality of EU law, which is both protective of cultural diversity and economic interests. While EU law aims to safeguard local food heritage, notably through mechanisms such as PDOs, PGIs, and TSGs, it must also contend with the pressures of multinational economic competition. Nonetheless, the codification of geographical indications (GIs) protects unique local products and the traditional know-how of producers such as Jean-Marc, thereby supporting their survival and competitiveness on the global market.

The flip side, however, is that this strict codification through GIs may “freeze” heritage in time, potentially limiting its ability to evolve in a rapidly changing environment. Furthermore, as demonstrated by the *Prosecco v. Prošek* case, these legal protections can sometimes be misused, not to preserve cultural diversity but rather to assert economic dominance, disrupting the equilibrium that EU law attempts to strike between these interests. This brings to the fore the essential issue that, while the EU aims to preserve cultural heritage, its approach often remains dominated by an economic perspective, leaving other dimensions of heritage undervalued. In other words, EU law does not yet know how to frame the protection of cultural heritage other than through economic interests.

Hence, to better address these complexities, EU law studies must develop a new language and methodology that draws from the lived experiences of ordinary Europeans, such as Jean-Marc Roulot. By engaging more directly with these lived experiences and drawing lessons from them, EU law can evolve into a more adaptable and context-sensitive instrument that enables local food heritage to flourish within a global Europe.

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<sup>36</sup>Gonin A, « Dérèglements : troubles dans les milieux agricoles », *Les Temps qui restent*, Numéro 3, Automne (octobre-décembre) 2024. Online: <https://lestempsquirestent.org/fr/numeros/numero-3/dereglemets-troubles-dans-les-milieux-agricoles>.

<sup>37</sup>Judah B, (n1), p.242.

<sup>38</sup>Art. D.665-2. of the code Rural.

<sup>39</sup>Giordano F, *'Tradition, Territory, and Terroir in French Wine: Role, Function, and Purpose of the Institut National de l'Origine et de la Qualité in the French Wine Law Model'* in *Wine Law and Policy* (Brill Nijhoff 2020) p.96.

# The Struggle for Supply Chain Justice in the Logistics Sector

by Judith Bauder\*

Ionut moves like an invisible sailor on the highways of Europe, accompanied by the sounds of “...the engine, that constant groaning, that trembling sound as the lorries hurled past you.” The sound of the road mingles with shouting orders: “Too late, too slow...Get there faster...” The streams of goods determine the direction of his life. “Endless dual carriageways, perpetual warehouses, more perimeter fences...endless passing cars...” His body wedged behind the wheel of his truck, day and night, is turned into a delivery machine of European goods. Between fences that span parking lots and are surveilled by cameras, Ionut is supposed to rest, but there is neither privacy nor safety in the rhythm of capitalism. The wider the distance, the bigger the separation from his loved ones. Living within capitalist structures in everyday life is alienating. Once he arrives somewhere, at a delivery station, a port, in his rearview mirror, he only sees “fleshy-faced men who never cared about you and only about how much money they were making out of the company.” Drily, Ionut comments on his situation as a Romanian truck driver. It would not matter where in Europe he was, but the conditions would be the same. “You are overworked like a slave...you just feel exploited eighty per cent of the time.” Ionut, the main character in Ben Judah’s chapter on Baloga in his journalistic novel “This is Europe”, provides us a glimpse of what it is like to be at the bottom of supply chains delivering goods throughout Europe.<sup>1</sup> What you hear about in the mainstream news is the business cost of disruptions in the supply chain. Too rarely are consumers confronted with the human price that workers pay to keep the global economy running.

The introduction of supply chain legislation in different European countries and at the EU level should have altered the situation of workers, including the destiny of drivers like Ionut in the logistics sector. For instance, since the German Supply Chain Act, a predecessor of the EU Corporate Sustainability Due Diligence Directive (CSDDD),<sup>2</sup> came into effect on 1 January 2023, business entities must identify, analyse and mitigate the human rights risks and violations in their global business operations.<sup>3</sup>

The German Supply Chain Act requires companies to exercise due diligence regarding working conditions. The Act should provide greater transparency into business entities’ supply chains and safeguard human rights and environmental obligations through imposing due diligence obligations on companies. It prohibits modern slavery and forced labour. It requires protecting occupational health and safety. It prohibits wage theft. It involves respect for workers’ freedom of association.<sup>4</sup> The Act has not only required companies to report on human rights risks and violations in their supply chains<sup>5</sup> but also requires the German authority to instigate controls when workers complain.<sup>6</sup> Civil Society deems the Act an important change lever because it shifts power

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<sup>1</sup> Ben Judah, “Baloga” in Ben Judah, *This is Europe: The Way We Live Now* (Picador, 15 June 2023).

<sup>2</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance), *OJ L*, 2024/1760, 5.7.2024, *ELI*: <http://data.europa.eu/eli/dir/2024/1760/oj>.

<sup>3</sup> Act on Corporate Due Diligence Obligations in Supply Chains of July 16 2021 (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten Vom 16. Juli 2021, Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021 (LkSG), <https://www.bundesumweltministerium.de/themen/nachhaltigkeit/wirtschaft/lieferketten/lieferkettensorgfaltspflichten-gesetz>, last accessed 1 August 2025.

<sup>4</sup> Section 2 LkSG.

<sup>5</sup> Section 10 LkSG.

<sup>6</sup> Section 14 LkSG.

between workers and companies.<sup>7</sup> The CSDDD will extend supply chain legislation to all member states of the European Union.

However, in the experience of truck drivers, it is not these laws alone that bring justice. Their courage and collective actions have sparked change. In 2023, the same year the German Supply Chain Act entered into force, a group of drivers launched a protest. They have endured inhuman working conditions for months, even though the Polish consortium run by Mazur, consisting of Lukmaz, Agmaz and Imperia, an essential supplier to major German corporations, did not pay them for their labour.<sup>8</sup> They faced what the German Supply Chain Act has prohibited. Issuing an official complaint to the *Bundesamt für Wirtschaft und Ausfuhrkontrolle* (BAFA), the German authority enforcing the German Supply Chain Act, in a language most of these drivers from Eastern Europe and the former Soviet Union would not speak was beyond reach. They took matters into their own hands to protect their rights. What was at stake was their survival and dignity.

The drivers first went on strike in Italy in March 2023. They were not successful. Their lack of industrial action experience and their lack of connection with local trade unions did not leverage enough power, and many drivers returned to work without being paid. One month later, when truck drivers gathered in a parking lot on the motorway near Gräfenhausen in Germany, they not only spotlighted their grievances but also succeeded despite the repression they faced. What was different this time around? There was solidarity and support from German trade unions, and some drivers had experience with factory strikes in their home countries, like the Georgian drivers. They endured for days. When Mazur sent a private security firm to reclaim the trucks and oust the drivers, the German police intervened on the drivers' behalf. Eventually, Mazur paid the drivers' wages, and they did get back on the road.<sup>9</sup> However, the strike did not change the abuse from recurring. In September 2023, an even larger group of drivers gathered in Gräfenhausen. Some went on a hunger strike when Mazur failed to pay the drivers' wages again. Mazur threatened the drivers with criminal charges for extortion and for embezzling the trucks. This time, BAFA launched an inspection at the site. German corporations compensated all drivers through a settlement, and Mazur dropped the criminal charges. The third strike was a success.<sup>10</sup>

The labelling of the transport and logistics sector as a high-risk sector and collaboration through sector initiatives help to keep the spotlight on the structural challenges regarding workers' rights that persist in this sector. While the BAFA is still working on guidance regarding human rights due diligence regarding the transport and logistics sector, it also continues to undertake preventive controls. This makes it harder for companies to look away, and they must confront the inhuman conditions many essential workers in the logistics sector face.<sup>11</sup>

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<sup>7</sup> European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt, Misereor, "Das deutsche Lieferkettengesetz: Umsetzung von unten: Wie das deutsche Lieferkettengesetz von denen genutzt werden kann, die es schützen soll", Positionspapier (2023), <https://www.ecchr.eu/publikation/das-deutsche-lieferkettengesetz-umsetzung-von-unten/> last accessed 28 July 2025.

<sup>8</sup> International Transport Workers' Federation and European Transport Workers' Federation, "Major global brands implicated in blatant violation of drivers' rights as wildcat strike continues" 12 Apr 2023, <https://www.etf-europe.org/major-global-brands-implicated-in-blatant-violation-of-drivers-rights-as-wildcat-strike-continues/> last accessed 29 July 2025.

<sup>9</sup> Giulio Benedetti, "Dozens of truck drivers went on strike in Germany and won. Here's how", Open Democracy (6 June 2023), <https://www.opendemocracy.net/en/odr/germany-georgia-uzbekistan-truck-drivers-strike-victory/> last accessed 1 August 2025.

<sup>10</sup> Business and Human Rights Resource Center, "Ausbeutung von LKW-Fahrer\*innen: Prekäre Arbeitsbedingungen und niedriger Lohn trotz Lieferkettengesetz und EU-Mobilitätspaket", taz (21 Nov 2023), <https://www.business-humanrights.org/en/latest-news/ausbeutung-von-lkw-fahrerinnen-prek%C3%A4re-arbeitsbedingungen-und-niedriger-lohn-trotz-lieferkettengesetz-und-eu-mobilit%C3%A4tspaket/> last accessed 1 August 2025.

<sup>11</sup> Irene Knoke, Sabine Ferenschild, and Johanne Zschornack, "Sorgfaltspflichten im Transportbereich. Wege zur Umsetzung" (FACHKONFERENZ AM 17. SEPT. 2024).

The staged workers' protests disrupted the biting sounds of capitalism by raising their voices in the *lingua franca* of solidarity. Their struggle to be paid and to maintain an adequate standard of living while on the road was what connected them. They made injustices visible. According to Edwin Atema, the head of the Road Transport Due Diligence Foundation, who supported the strikers, the truckers were "Not invisible anymore, but invincible."<sup>12</sup>

In the unprecedented strike, they achieved what legal changes in Germany or Europe alone could not bring about. Social movements and laws that mirror workers' demands, not only companies', can be a stepping stone toward greater justice in supply chains.<sup>13</sup> Even if the human rights risks that workers in transport and logistics supply chains face will not disappear overnight, given their systemic and structural nature, the struggle of these truck drivers reminds us that corporations' due diligence practices must place the focus on the human beings who face risks arising from their business operations.

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<sup>12</sup> Business and Human Rights Resource Center, "Germany: Truckers receive pay and end 'unprecedented' strike", *taz* (30 Sep 2023), <https://www.business-humanrights.org/en/latest-news/germany-truckers-receive-pay-and-end-unprecedented-strike/> last accessed 1 August 2025.

<sup>13</sup> Veronique Helwing-Hentschel, 'Contested Power Structures in Global Logistics Networks: Insights from the 2023 Truck Driver Protests in Germany' (2025) 21 *Case Studies on Transport Policy* 101543 <<https://linkinghub.elsevier.com/retrieve/pii/S2213624X25001804>> accessed 1 August 2025.





