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What's new in human rights doctoral research

A collection of critical literature reviews

Vol. II

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Introduction

Pietro de Perini, Paolo De Stefani

This volume collects the critical literature reviews prepared at the end of their first year by seven students enrolled in the International Joint PhD Programme in 'Human Rights, Society and Multi-level Governance' (involving the universities of Padova, Zagreb – Faculty of Law, Western Sydney and Nicosia).

What the authors provide in this volume are primarily the larger frames within which their specific researches and criticisms are to be set and built. Notwithstanding, their works already bring specific original contributions to the broader scientific community focusing on human rights. First, they update and systematise a set of ongoing scientific debates on human rights matters, identifying existing gaps and possible new avenues for research. Secondly, they provide an interesting overview of what themes young human rights researchers deem relevant nowadays from a wealth of disciplinary perspectives, including law, politics, sociology of religion, pedagogy, global health and epidemiology.

In this doctoral programme, candidates are selected on the basis of the quality and originality of their research projects and on their motivation. There is not a shared overarching puzzle that their individual research projects are expected to contribute solving, or tackling. Accordingly, their topics are quite heterogeneous.

This may certainly provide a sense of disorientation in the reader of this volume, as the focus and topics of the presented critical literature reviews are largely disconnected between each other. At the same time, the following papers represent a truly variegated and multi-disciplinary understanding of a part, although small, of what is currently at stake concerning human rights and human dignity, where current political, legal, social and economic answers are unsatisfying and need to be approached by new conceptual and empirical lenses.

And indeed, the overall message conveyed by the research conducted for the present publication is that human rights scholarship is currently moving towards a neo-empiricist mode, and seeking 'new' grounds to affirm its relevance in the public debate.

The socio- and geo-political landscape of the post-war era in which the modern human rights discourse emerged – incidentally and timidly – 70 years ago, and in which thereafter human rights as a normative frame gradually grew and became a pervasive and authoritative driver of globalisation, has dramatically changed in the last few years. The turn of the Century has inaugurated a time in which human rights normative achievements need a deep recasting in order to re-align with the reality that individuals and societies have witnessed and embodied during the last couple of decades. Ecological, technological, economic, demographic, political, strategic transformations – and the corresponding conceptualisations that have spread through traditional and non-traditional media –, have greatly impacted the normative construction of international human rights, raising radical questions and criticisms.

It seems that, on one hand, the idealistic (rationalistic) programme of steering globalisation processes by fertilising it with the seeds that generate human rights, democracy and the rule of law – that is, the 'universal grammar' of individual rights – has proved untenable. On the other hand, a cursory survey of current world's affairs shows that the objective social and material predicaments, and the mental imagery associated to them, from which the human rights discourse historically stemmed, are no longer experienced by contemporary societies. Human rights have lost their 'objective correlative', the evocative power they had in the past – and still have in some domains and under given circumstances – to mobilise individuals and groups in thoughts and deeds and ignite transformative struggles at various levels, including at global scale.

The apparent variety of subjects and methods displayed in human rights-related research and literature, as mirrored also in this book, responds to a specific call: to re-enact the concepts – and thus the percepts, images, narratives, emotions, stories, personal and collective practices – that can frame the XXI Century's human rights. It is no surprise that in this effort for reincarnating human rights, situatedness, local knowledge, context-dependent variables and predicaments prevail over normative-driven analyses and general accounts. Country-specific case studies are prioritised *vis-à-vis* generalisations and world-wide surveys. In the same vein, inquiries addressing the determinants of the very subject of rights – the human being/human body (also as opposed to an intellectualistic focus on human mind) – and tackling the 'irrational' world of religions, are particularly significant, as they explore areas that the legal rationalism of human

rights grammar largely neglected in the past. Similarly, a renovated attention at human rights as a persuading strategy, rather than a compelling 'higher' morality or a set of irresistible legal obligations, underpins the interest in pedagogy and human rights education.

The first chapter of this book, by Davide Carnevali, focuses on the broader debate conerning religious freedom in social sciences as framed within the growing academic interest concerning the relations between religions and human rights. Carnevali's specific focus is on the phenomenon of religious rebirth in post-Soviet countries with particular reference to the role gained by Orthodoxy in the Republic of Moldova after 1991. From a socio-anthropological perspective, Carnevali argues that the local conceptualisation of religious freedom in this country is related to the growth of Orthodox communities and their role in the adaptation to the ineffectiveness of the new secular policies, as an expression of the socio-political role Orthodox institutions have in a global and local scale.

Chapter 2 presents a critical literature review by Francesca Cimino. Cimino's work revolves around the debate connected with the identification of women victims of trafficking in human beings in mixed migration flows, also in consideration of the broad connections existing between migration policies, migration routes and identification of victims. As Cimino acknowledges, the long, complex but crucial process of identifying victims of trafficking is even more important and problematic in times of mixed flows since, in large migration movements, the difficulty of identifying the victims of trafficking is connected to the complexity of the composition of these flows, which include different types of migrants sharing the same journey. From this perspective, the process of identification of victims of trafficking becomes essential to avoid severe violations of human rights.

The third chapter, authored by Rossella De Falco, originates from a research interest in the consequences of the 2008 global financial crisis on the enjoyment of socio-economic rights worldwide and specifically on the rights of the most vulnerable groups. De Falco scrutinises the growing body of academic literature and civil society research that address the human rights implications of regressive fiscal consolidation measures on the right to health, which occupies a huge share of public expenditure in most welfare states, with particular attention to the realm of epidemiology, public health and health equity.

In Chapter 4, Ino Kehrer addresses the issue of the rights of intersex people with particular attention to the contributions of legal scholars on the discussion related to 'normalizing genital surgeries' on non-consenting minors, thus centering on what emerges as the main concern of the intersex community, a source of their social and legal invisibilization and of se-

vere physical, psychological and emotional pain. As these medical practices have already been recognized as infringements of human and children's rights by some international and national judicial instances and human rights organizations on still unstable legal bases, the review also provides different approaches proposed both by legal scholars and activists as alternative treatment protocols.

Chapter 5, by Adriana Michilli, focuses on the usage of Restorative Justice (RJ) as a Transitional Justice (TJ) mechanism, with particular attention to the post-conflict societies of Bosnia-Herzegovina and Croatia. Michilli's literature review addresses a number of specific aspects of this theme including the role and limitations of RJ, the usage of RJ as a mechanism for TJ, the benefits of implementing such strategies in transitional societies and on how theories of RJ mechanisms and TJ models were implemented in Bosnian and Croatian societies. The paper points out that, while the literature tends to focus on the positivity of using RJ as a peace-building mechanism within transitional societies, there is less attention dedicated on how to restore, repair and rebuild societies when the departure of such attempts are challenged by local socio-cultural elements, political affiliations, and even economic factors.

In Chapter 6, Elena Mara focuses on the relation between migration and security. Her paper tries to explain why migration has become a security threat by looking at the debate on the three mainstream understandings of security, namely, national, societal, and human security. The main goal of Mara's critical literature review is to show how the topic of immigration has entered the security calculus justifying, legitimately or not, the enactment of measures that are turning against migrants' human rights, infringing international humanitarian standards.

Barbara Santibañez's work on human rights education in schooling is the seventh and concluding chapter of this volume. The paper builds on Amartya Sen's theorisation on the importance of going beyond a purely legal approach to human rights, and advocates for the crucial role of education as an enabler of a public discussion that encourages the realisation of human rights. On the basis of her literature review, Santibañez argues that education is a key practice in which human rights are to be recognised and enacted by all of those engaged in the process. Human rights education practice in formal, non-formal, and informal contexts, favours the development of knowledge, skills, and attitudes necessary to foster social change.

The G-local Debate on Religious Freedom and the Social Role of Christian Orthodoxy in the Republic of Moldova: Bridging the Gap

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Abstract: This paper examines the main directions that the debate in social sciences about religious freedom has taken during the last decades, as a central aspect of the growing academic interest on the relation between religion and human rights. The underpinning issues, as well as the theoretical and empirical dimensions that characterises this literature, will be then connected to the attempt to provide a connection with the multi-sided phenomena of the so-called religious rebirth in post-Soviet countries. In particular, with the analysis of the role that Orthodoxy gained in the Republic of Moldova after the dissolution of the MSSR.

Moldovan political parties, pressured by the Russian and European competitive influences on the area, fluctuated between the rhetoric of religious freedom and the promotion of Orthodoxy as the pillar of the national-traditional identity. In the meanwhile, two different official Churches coexist, in a non-canonical condition that, on the other side, mirrors the fragile Moldovan geopolitical position and the problematic processes of social reconfiguration of the region.

The specificity of the context suggests the need for a local observation of human rights narratives that goes beyond the normative and legal perspective, approaching the debate on religious freedom from the inside. From this socio-anthropological perspective, the local conceptualisation of religious freedom is related to the growth of Orthodox communities and their role in the adaptation to the ineffectiveness of the new secular policies, as an expression of the socio-political role Orthodox institutions and communities have in a global and local scale.

Keywords: Religious freedom, Orthodoxy in Moldova, Religion and human rights, Gaps in normative perspectives, Political socio-anthropology of human rights.

1. Human Rights and Social Sciences. Going Beyond a Normative Perspective

The relationship between religion and politics appears nowadays with all its evidence, but it came into the focus of the everyday academic and public debate after having been treated for a long time as an 'ethnological' affair, according to a supposed homogenous and progressive connection between the processes of modernization, westernization and rationalization of social behaviours. These are three terms that not accidentally, at first glance, appear to us almost synonymic. According to the presuppositions of this normative cultural assessment – usually kept far from the political and economic history associated with its concrete creation and evolution – all human societies would have been on the path to build an ethical regime founded on the (same) innate values of human beings. This regime would be therefore able to prevent and repair claims of illegitimate power within national and international relation, through laws, a rational organization of communities and the adherence to universal ethical principles.

Heir of the political history of Western institutions, grounded in a legal and philosophical discourse mostly influenced by the liberal juridical-contractual tradition, human rights shared this framework. Along with a growing international socio-economic intertwining, the concrete diffusion of this pattern in a worldwide political scale forces the global attitude of human rights to face, even in its internal debate, the growing variance the local implementation these same legal standards produced. As stated by Palombella (2006), the discrepancy between the different collective cultures operating in an interconnected social and institutional system could not be regulated by the pure homogeneous normativity of rights, but it requires the negotiation of an equilibrium between this legal system and the social practices of the different cultural groups. A huge acceleration of these phenomena took place after the end of the Cold War, with the emergence of a unified economic and legal system. As suggested by Goodale (2009), the fall of the Iron Curtain represented the key-event of this new wave of transnationalisation in the human rights discourse. Among human rights advocates, this supposed 'end of the history' (Fukuyama 1992) seemed to give the real possibility of constituting a new global order. Along with the diffusion of a neoliberal model that proposed a deep lightening of the state control on national economy, society and borders, the new international system would be capable to alter practices within states according to the aim of ending human rights violations (Barnett & Finnemore 2004, Nash 2015).

The attempt to preserve the worldwide applicability of human rights

principles – notwithstanding the recognition of the differences in socio-political and cultural contexts – represented therefore a fundamental push-factor in going beyond the legal perspective and involving social scientists in an inter-disciplinary challenge, parallel to this attempt to give to the human rights discourse the cross-cultural flexibility and epistemological sensibility needed by the paradigm of 'tolerable tension' of rights. This new sensibility opens the human rights talk to the confrontation with two basic postulates of the social sciences' reflection on this topic. Firstly, human rights are social construct; despite any controversial universal legitimating of their trans-historicity, the rights result from the institutions, the political bodies and the societal structure in which they are embedded. From a sociological perspective, human rights can be observed as mechanisms for protecting the functioning and the 'institutionalised expectations' of a modern differentiated society (Luhmann 1965). Secondly, the meaning and the social value of a right cannot be unrelated to the cultural specificity of a context. The meaning and the recourse to the language of human rights change according to the public sphere in which this language is adopted, or on which it is applied. The American Anthropological Association already stated this in 1947, by the eponymous anthropological document on human rights. In the *Statement on Human Rights* we read that 'what is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history' (AAA 1947, 542). Written by Herskovits under the solicitation of UNESCO, this document played no role in the drafting of the UDHR by the well-known Commission chaired by Eleanor Roosevelt (Morsink 1999, Goodale 2009).

We can observe a renewed recognition of these problems. An inclusion of these social perspectives moves the human rights organizations in the direction of debating the political contradiction in projects, interventions and purposes, of creating a framework for more effective and attentive interventions, and of rethinking the further development of human rights theory and institutional practices. Within this frame, the relationship between human rights and religion attracts also an ever-increasing academic interest. Among others, we assisted in the last decades to broader theoretical discussions on the relationship of religion and human rights traditions (Ferrari 2002, Witte and Christian Green 2012, Joas 2013, De Sousa Santos 2015, Ventura 2015), studies on the intersectionality of the right to freedom of religion with other human rights (Afkhami 1995, Thornberry 2002, Langlaude 2007, Jenkins 2008), researches in sociology of law and political science regarding different models of religious policies implemented by the states (der Vyver & Witte 1996, Sarkissian 2015, Grim-Finke 2006), case studies on religious pluralism, on religious education and on the influence of religious factors and cultural diversities affecting law

and regulations (Price 2002, Richardson 2004, Fox 2008), reflections on the central position of the problem of religious freedom within this topic (Finke 2013, Zuber 2017, Breskaja, Giordan & Richardson 2018). No more only limited to matters of governance and procedures, these studies can move the human rights talk toward the hermeneutical effort to overcome an institutionalist approach and address laws and religions as specific cultural systems, represented by different religious institutions and actors, producers of meaningful and plural attitudes, beliefs and social practices.

2. A post-Soviet Republic, a New Orthodox State

Through this paper, we will underline some theoretical aspects and we will describe the plural conceptual field for a socio-anthropological analysis of a particular religious scenario, the one of the Republic of Moldova, and the ways in which religious freedom is debated in it. The exploration of the many-sided debate on the social and political role of Orthodoxy is a privileged way to investigate the forms of political transfiguration and the processes of re-elaboration of individual and social resources operating in a post-Soviet context, in which religion appears as one of the most influential factors in the individual, social and institutional behaviours. Furthermore, from the – often silent – debate on religious freedom we can observe emerging some fundamental aspects of the Moldovan social reconfiguration: the institutional relations between clergy and political parties, the new role in governance detained by churches in a smaller scale; the re-adaptation of orthodox doctrines, rituals, ideologies to the new economic and political paradigms, human rights' narratives included. Finally, the religious scenario of the Moldovan republic gives to researchers the possibility, within its particularities, to stress a possible affinity between the contemporary scenario of crisis of the twentieth century's political patterns and a phenomenon that in the academic literature of the last decades has assumed different definitions. Among them there are 'God's revenge', re-enchantment, desecularization, de-privatisation of religions and religious rebirth (Kepel 1991, Casanova 1994, Cox 1994, Berger 1999, Scott 2005). Definitions that indicate, from different orientations, a reconsideration of the influence of religions in contemporary individual and social actions.

The Republic of Moldova is a national state mostly left out by the Western political and scientific debate. Wedged between Romania and Ukraine, between the Russian sphere of influence and the promises of a European admission, Moldova has a small and landlocked territory that was deeply integrated during the second half of the twentieth century in the political

structures and the ideological and cultural patterns of the Soviet period. This parliamentary republic occupies indeed the territory of the former *RSS Moldovenească*, which was one of the six Soviet Socialistic Republics of the European continent. Moldova is a border area, for centuries contested between different hegemonic poles and whose cultural identity has been disputed in the recent past and nowadays. The national identity and ideological conflicts related to it are far to be resolved still today, and the debate about the history, the language and the identity of the area influences the political positioning of parties and organizations. This is largely reflected not only among the researches carried out by local historians, sociologists and political scientists (Cazacu 1992, Cașu, 2000, Mosneaga 2001, Serebrian 2001, Negru 2003, Cuzco and Sarov 2009, Dungaciu 2009, Trifon and Cazacu 2017), but also in the few historical monographs dedicated to the region by Western scholars (King 2000, Dima 2001, Basciani 2007).

After the declaration of independence, in the August 1991, the new ruling class – not much different from the former – was engaged in the construction of a national identity for a region that 'has never been a national state' (Dupoye 2001, p.56). The Moldovan republic has experienced two decades of difficult and contradictory institutional and economic transition, largely directed by the former Soviet nomenclature then converted in local business networks, by pressures of the economic partners and by conditional loans provided by the IMF and European Bank (Negura 2015). The organization of political authority, the allocation of economic resources, the positioning in the new geopolitical context (three main fields of a national construction project) had to be managed according to radically new directives: the establishment of a democratic regime with European standards, the conversion to a market economy out of State direction and protection, the relocation in a field of globalised forces. The fragile economy of the country is still mainly agricultural and very much tied to trade with foreign countries, according to the inter-regional work planning of the Soviet-era. The main industrial and energetic poles of the former RSSM are now located on the Eastern border, in Transnistria, a *de facto* autonomous region after its unilateral declaration of independence in September 1990, a phenomenon that makes clear how the national-building process is far from being accomplished (Cojocaru 2006).

The main socio-political problems of the country remained virtually unchanged, among them a dramatic decline in purchasing power and social services, a hard handling of Russian influence and rapprochement with Romania, tensions derived from an extremely ethnic and linguistic diversity. A third of the potential labour force of the country, corresponding to 22% of the population and the electorate, work and live abroad (with Russia and then Italy as top destinations), and about the 26% of the national GDP

comes with certainty from the remittances sent by the so-called 'Moldovans guest-workers' (Timpul 2015). Together with the huge decrease in industrial and agricultural output following the dissolution of the Soviet Union, immigration is the main reason for the growth of the service sector, which dominates Moldova's formal economy composing over 60% of the national GDP (National Bureau of Statistics, 2016).

The analysis of the current situation suggests a condition of permanent crisis, whose fundamental phenomenon is the fragility of the political apparatus. This fragility has a deep result also in the effectiveness and in the credibility of monitoring the human rights implementation through the state's agenda. As recognised from the Report for Human Rights Practice by the U.S. Department (2017), the lack of credibility and effectiveness of the government, police and the judiciary is also one of the main problem in the implementation of human rights. Furthermore, most of the reports and monitoring activities put under observation only the region of Bessarabia, without any systematic access whatsoever to information on the separatist region of Transnistria. The left bank of the Dniestr river is still a grey-zone, almost not tracked by international organisations (Bobick 2012).

In a census of 2004, thirteen years after the forming of the new Republic, 93% of all the citizens declared their Orthodox faith, a percentage that rose to 95% excluding the main urban Bessarabian municipalities of Chisinau and Balti. This percentage raised to 96,8% ten years later (NBS 2014). Undoubtedly, Orthodox churches are today the public institutions which enjoy greater trust among the population. According to a survey of the *Institut de politice publice* in Chişinău (2017), the Church totals 79.6% of favourable opinions, far from the distrust versus the government, the parliament or the president of the republic. In the last decades, the Moldovan Orthodoxy has been engaged in the reconstruction – if not invention – of a Moldovan national tradition, mainly based and founded on religion. This religious tradition is a rediscovery made in the last twenty-five years, by a young clergy in course of institutionalisation and by the believers, who earlier had only a domestic religion confined to few rituals gestures and festivities. After decades of interrupted transmission, a tradition largely known for its conservatism has also 'largely been reinvented in the process of reconstructing the Church' (Roussellet 2013, 11), in dialogue with the questions raised by the current local and global social contexts.

The Republic of Moldova is a party to many international human rights documents (ECHR, ICCPR, ICESCR) and other legal obligations that should promote, protect and fulfil fundamental rights in this area, including minority rights and freedom of religion. Yet, many of the events that has happened in the last three decades indicates that the recognition of these standards under the international law is mainly interpreted as a formal step

to foster the European integration process. For the same reason, regarding the application of the right to freedom of religion, the country is approaching these obligations instrumentally and inconstantly, according to the change of positioning in the international balances (Suveica & Spranceana 2015).

The Moldovan Constitution recognises the freedom of religion as protected by law and it is moreover committed to the promotion of laicity and religious pluralism. According to the *Article 31* of the Constitution, religious cults are autonomous and separated from the state, while the *Law n.125* of 2007 protect the freedom of conscience of (registered) religious cults and their members, at the same time not allowing them to express or manifest publicly their political preferences or their support for any political party or socio-political organization. On the other hand, the Moldovan Orthodox Church, linked to the Patriarchy of Moscow, recently took through public documents an official distance from the political realm, prohibiting religious actors from getting directly involved in political affairs. Looking to the concrete practices, the tie between Moldovan parties and Orthodox Churches is still visible, as the strong electoral endorsement the president Igor Dodon has received by the metropolite Vladimir and his bishops in 2018 shows. On July 3, for example, the president met with 100 priests to discuss the impact of religion on society, making a donation to the MOC of 8,000 books to be used for studying Orthodox Christianity in schools.

3. Toward a Political Socio-anthropology of Religious Freedom. Approaching the Moldovan Case

The Moldovan debate on religious freedom offers the opportunity of understanding the social role the Orthodoxy assumes in context. This debate is strictly linked with the reconfiguration processes of this region, the g-local institutional relations, the management of a 'bipolar' religious hegemony by religious and political actors, the re-adaptation of Orthodox beliefs to the new ideologies and social patterns, the general meaning of Orthodoxy in the daily life of Moldovan citizens and believers. As mentioned, Sociology of religious freedom is becoming in the last decades a growing subfield of the emerging Sociology of human rights. With reference to the above-mentioned literature regarding this topic, we can notice a clear ambivalence towards the relationship between scholars and the promotion of human rights institutions. This ambivalence suggests us two models. From one side, social scientists seem directly involved in incorporating human rights in 'emancipatory cultural politics' (Turner 1997), in legitimating organizations oriented to a normative and social change in

this direction. They answer the critics made by Herskovitz giving to the global project of human rights the possibility to expand the definition of human rights within an anthropological perspective (AAA 1999), or directly supporting projects in a smaller scale. From the other side, we can observe a commitment in scientific studies in how human rights operate, which role they have in global politics, what religious freedom means in different social contexts and for different social actors. In brief, a prosecution of the classical sociological approach to laws and rights, already inaugurated with different modalities by Marx, Durkheim and Weber (Somer & Roberts 2008, Madsen & Verschraegen 2013). In this case, the supposed universal and neutral content of human rights, incorporated by laws, has not been identified as ascertained yet but became direct object of analysis, debated as a social construction.

The second possibility still appears largely as a minority. The subfield is indeed oriented to follow and assist the institutional process of definition of an international standard-setting. The engagement of sociology with human rights does not usually question their normative foundation and sociologists mainly work within the normative framework, through the standard definition of human rights they were supposed to study too. A well-known example of this approach is what Brian Turner already affirmed in 1993, with the proposal to inaugurate a 'theory of human rights' still grounded in the concept of human nature and based on the plausibility of a governance based on values derived from natural law. The problem of religious freedom would be therefore interpreted mostly in term of compatibility or resilience toward the implementation of these international human rights standards. As a consequence, the empirical researches and case-studies on local contexts and religious traditions are also mainly oriented toward the creation of reference tools and sociological instruments for the task of legal measurements, according to preconceived parameters (Grim & Finke 2006; Van der Ven & Ziebertz 2012).

The specificity of the Moldovan context makes the exclusive use of this approach controversial. An enquire limited to factors of violation or advancement of human rights standard, related in this case to the right to freedom of religion, would not say much of the multisided problem of religious freedom. In a broader sense, religious freedom has to deal not only with laws, its definition and social impact, but with the history and the social role of religion in the context (Balan 2009).

This social role appears to be significant even if we look to practices in the legal framework. As stated by Vitali Catana (2004), for example, the recognition of the fulfilment of legal conditions for the registration of religious groups does not prevent the Moldovan government from using double standards in practice, manipulating the religious scenario through the

manipulation as well of the instruments that should guarantee the state neutrality. Moreover, the strong role Orthodoxy has as a *civic religion* (Bellah 1967) can explicitly be used as a justification of this inequality in legal procedures. For example, the registration of religious groups or the permission for building worship places has been refused on the ground that '97% of the population of Moldova is Christian' (ICHR 2003). The Islamic League of Moldova will be recognised in 2011 by the Minister of Justice Alexandru Tănase from the coalition Alliance for European Integration, after more than ten years of legal and political disputes.

Nonetheless, in both of these analytical perspectives the 'politics of human rights' is recognised and analysed for its capability to impact and shape, as religions also do, individual attitudes, cultural patterns and social configurations. In this sense, different researches contribute to this classical issue of social studies on religions, developing some useful variables for measuring the compatibility of a political context with the implementation of the right to freedom of religion (Richardson 2006; Sarkissian 2015, Sullivan et al. 2015). Through a comparison of the literature, we can summarise nine main elements: the presence of enforcement policies by a strong state; the cultural intimacy of decision makers; the lack of State/Religion identification; a 'culture of autonomy' in the legal system and political institutions; a combination of religious diversity and 'westernization' of values; a combination of religious diversity and political competition; a good glocal prestige of the alternative faiths; a legal system and institutional policies not involved in enforcing the privileges of the dominant religions; the presence of efficient power-groups and organizations that support the implementation of rights.

Briefly looking at the Moldovan case through these variables, we can observe an evident lack of convergence. As anticipated before, this region has a weak state, with a huge component of decision-makers which do not express cultural intimacy in the matter of laicity, despite the strongly secular past. It has little, marginalized and sometimes ridiculised religious minorities (especially outside the urban contexts) and a selective strategic reception of the so-called 'western values' like individual autonomy, religious tolerance and so on. The legal system and the political institutions are explicitly involved in enforcing the central role of Orthodoxy, and a fragile third-party sector faces a spread disillusionment and suspect toward institutions.

Starting from these preliminary evaluations, we would move the analysis in the direction of connecting the problem of religious freedom to socio-political conditions and dynamics of power relations, at different levels, and observing speeches and practices of Moldovan religious actors from the inside, in the direction of questioning as a process the local concep-

tualisation given to religious freedom. This confrontation with the human rights framework is not just a task necessary for the Moldovan state but also for the Orthodox churches, as promoters of an ideal system of beliefs and as social institutions. Even Orthodoxy, heir of a centuries-old tradition founded on their ideas of the universality of divine law and of the divine nature of man, is today increasingly pressured to confront with this new alternative global discourse, which demands new ethical reflection and a universally broad theology (Wolterstorff 2012, Giordan & Gugliemi 2017). The need Orthodox institutions have in facing different models of social cohesion – and different principles of legitimization of the authority – is not new in the history of the area, but is nowadays realised in a way different from the pressures suffered under the Soviet agenda and its previous pattern of universality.

The growth of Orthodox communities emerges through these lenses as a conscious form of adaptation to the ineffectiveness of the new secular local policies, with Orthodox institutions and parishes having a political role at both a larger and a smaller scale. The religious rooting could be investigated both as a hermeneutical instrument of handling a context of widespread socio-economic insecurity and as a governmental instrument, influencing speeches, practices and beliefs that affect the political perception and will of implementation of this right. In the final paragraph, we will briefly look along which directions this research can be moved.

4. Borders, Identity and Alternative Societies. Some Preliminary Reflections about the Local Debate on Religious Freedom

As a first step for addressing the Moldavan debate on religious freedom, we can observe on a large scale the social role of Orthodoxy in correlation to patterns of a positive or negative identification between governmental and religious institutions (Duhram 2012). According to Sarkissian (2015, 88-127) – that crossed in her cost/benefits study two main variables, the level of political competition and the structures of religious division in society – we can describe the Moldovan model of religion-state relation as a state 'repressing most by favouring one religion'. Like other 13 post-socialist countries, Sarkissian says, the close relationship between national identity and a dominant religious group led to the state favouritism of the religious majority and to the state repression of religious minorities. In this category, the majority religion is not controlled politically, but benefits of government favouritism in exchange of support and legitimacy for the leading political force.

The collapse of the Soviet regime is an undoubtedly crucial historical

factor, having consequences in the patterns of state-church relation still nowadays. At least two fundamental historical data need to be emphasized. The first is that 1991 marks the fall of a political super-referent, in which the politicians had taken responsibility for a global planning of life. Its end means, despite different continuities, a drastic transition to a 'light policy', especially for what concerns social policies (Rutland 2013). After a model of direct action and global control of economy and society, religious life included, the new state lives a structural condition fragility. In the same years, we assisted in Moldova, like in most of the former Soviet countries, to a huge growth of believers and an impressive reopening of hundreds of churches (Tihonov 2004, Moldovan Orthodox Church 2018). The second aspect is that a dogmatisation of the atheistic Marxist theories occupied an essential role in the Soviet official ideology. The Soviet program of a collective liberation from religion influenced religious policies and believers' practices, confining Orthodoxy – a religion mainly expressed through a strong sense of liturgical community (Morini 1996) – to the private sphere. After the collapse of the Soviet Union, the Russian Orthodox Church saw a shift from prosecution, but in a warranted position of monopoly, to empowerment, with a hegemonic position now supported, within the new asset of power, by political parties. Religious actors, which were stigmatized and marginalized as second-class citizens for seventy years, are today protagonists of an almost empty public space in which they became one of the most socially recognised figures.

Touched by two spheres of influence – now in competition – the Republic of Moldova hosts two different official national Churches, standing together in a non-canonical condition which mirrors the Moldovan geopolitical position. When the independence of the Republic was declared, part of the Orthodox bishops followed the pan-Romanian enthusiasm and the reorganization of the country's leadership happening in Chisinau, declaring the secession from the Patriarchy of Moscow, to which the Metropolis was linked as a diocese for fifty years. This alternative Metropolis, the Bessarabian Orthodox Church (BOC), subordinated itself to the Patriarchy of Bucharest. This declaration reactivated a long history of competition between Moscow, capital of an Orthodox Empire, and Bucharest, established as an autocephalous national Church in 1872 when the region of Bessarabia was under the Tsarist autocracy (Livizeanu 1995, Popescu 2004, Ciorba 2011).

This condition of religious bipolarity suggests us the utility to observe the debate about the right to freedom of religion, and the problem of religious freedom in general, from the point of views of the Churches, through a comparative inter-Orthodox approach. This duplicity encompasses not only the role of Churches as a regional power, but their influence as geopolitical soft-power agents (Panainte 2006, Curanovic 2012). The ideological

perspective and the political opinions of the two canonical Orthodox Moldovan Churches are not the same. From one side, we have a Metropolis born during the '90s in connection with the declaration of independence from Soviet Union, soon monopolized from a movement asking a failed annexation to Romania and still in dialogue with the Western border. From the other side, the majoritarian *Metropolia din Chisinau* presents itself as 'the Church of Moldovans' but is in the meantime strictly linked to Moscow. This affiliation is now justified on the idea of a 'Slavic Orthodox Civility': Orthodoxy represents and protects a traditional culture, divergent from the Western one, with a clear affirmation that the harmony in the Christian community is more important than religious freedom. Both the Churches define themselves as Moldovan traditional and national churches.

The Orthodox Metropolis of Bessarabia gained recognition and a stable position after the intervention of the European Court of Human Rights in 2002. The intervention supported the legalisation of a condition of bipolar monopoly (among other smaller Orthodox institutions) that represents a good compromise across the entire political spectrum of the Bessarabian region. Not without reasons, in recent times these two main Churches have been allied in affirming together the social centrality of Orthodoxy and the condemnation of other 'not national' or 'not canonical' religious faiths, as long as new claims over the religious properties expropriated during the Soviet time. The intervention of the ECHR is an early example of the growing willingness by the Court to support through legal interventions the religious freedom of minority religious groups (Fokas 2015). In recent times, also the U.S. embassy officially declares to be engaged in collaborating with representatives of religious minorities, in order to give them visibility (U.S. Department of State 2017). It suggests in particular how legal courts can play an active role in handling such kind of social issues through a 'judicialization of religious freedom' (Richardson 2015), and confirms, from the point of view of researchers, the importance of approaching the human right speeches through the frame of the institution that are involved in it (Luhman 1965). Furthermore it exemplifies, from a political perspective, how the European pattern is able and willing to 'put boots on the ground' and impose some influence even in the ideological asset of a border region that still is experiencing the heritage of a partially different history in the conceptualization of universal rights.

One of the principal topics related to the problem of religious freedom is, as we already observed, that of national identity, produced and reproduced by the Churches and strictly related to the idea of public morality and state security. The problem of national identity shapes the relationship between Churches and State and plays an important role in the Moldovan contradictory transition to the European liberal model. For Moldovan gov-

ernments – the main promoters, after the local businessmen, of the reconstruction and financing of churches, monasteries and theological schools – Orthodoxy is the pillar of the construction of the history, language and identity of 'a State in which the question *Who are the Moldovans?* continues to concern politicians as much as scholars' (King 2000, p. 47). Ethnocultural and linguistic issues are the subject of a continuous speculation by various parties and organisations, with the consequences of a growing solidification of 'ethnic ideological blocks' (Vizitei 1998, Boţan 2002), a polarisation of identity tensions (Cernencu & Boțan 2009, Cazacu & Trifon 2017), and a more general political instability.

In the last thirty years the political parties have maintained close ties with the Orthodox clergy and support (even financially) its hegemonic role. The Orthodox identity talk is extremely important in consolidating the Moldovan society, even if at the same time, in other occasions, the parties cannot renounce the use of the rhetorical theme of religious freedom as a sign of the new era. This happens not only when public power is held by conservative-traditional political parties, the one corresponding in the politological literature to the pro-Russian parties. Also the more liberal (pro-European) parties, generally well represented in the religious panorama by the Romanian Patriarchy (and its model of religious-political collaboration), are not interested in general in a head-on collision with the national majoritarian Church.

The support the Moldovan Orthodox Church is giving to the pro-Russian candidate Igor Dodon since 2016, in view of the elections to be held at the end of 2018, has been openly criticized by her pro-European concurrent Maia Sandu, which for the first time put the question of the Orthodox political influence under the judgment of the Constitutional Court. In their defence, the bishops declared that they were not carrying out political activism, but they simply did care about the future of the country. The main effect of this position has been a deeper attack by the Orthodox hierarchy. In November 2016, the bishop of Balti defined her a non-Christian woman, voted by the gay population and still not married at the age of 40: in brief, an expression of the degrading and immoral European lifestyle.

Despite some official documents or extemporary declarations – devoted in most of the cases to preserve, through adaptations, a conservative theological position compatible with the new regional context – the religious debate on religious freedom is realized debating other topics we could relate to the same matter: for example the attitude towards the others religious faiths operating in the country, or the problem of individual freedom in a religious understanding of the social dimension of human life (Gundyayev 2011). The bishop of Balti is also known as particularly committed against the implementation of LGBTQ rights. During the debate for

the adoption of a law for equality – while the Synod of the MOC was officially defining the law as an attack to the traditions and the public Christian morality (MOC, 2013) – he complained for example that this law 'would give to gays the possibility to work in a blood transfusion centre'.

In a survey conducted in 2016 by Soros Foundation, asking Moldovan people their opinion about the relationship between State and Church the majority of participants (80%) declared they would accept a certain degree of Church interference in political affairs (Voicu, Cash & Cojocariu 2017). It might be said, thus, that Orthodoxy is considered to be an alternative and preferred source of legitimate social authority.

The majoritarian religious debate on human rights, and on religious freedom in particular, is not far from the Romenian most conservative political groups, but has interesting corrispondence especially with the Russian foreign policy, which perceives the human rights speech as 'an ideological smokescreen' (Mälksoo 2014). According to this 'romantic-realistic interpretation', following the definition by Viatcheslav Morozov (2002), the human rights speech is no more than a Trojan horse offered by the West in order to subvert the society, to hinder its internal consolidation and social structures. Human rights will be interpreted 'almost universally as no more than a disguise for 'real' political goals of the Western leaders' (Morozov 2002, p. 18). As a consequence, the critics on human rights are involved in a process of securitisation of the identity, in which the notion of human dignity, not totally convergent with the definition of right, serves the process of constructing a border between 'us' and 'them'. As already stated by Kharichkin (1999), this narrative of condemnation finds his political justification in the perception of the risk of a 'NATO-colonialism' in the Eastern Europe, or giving to the human rights speech and organisations the responsability for endorsing geopolitical interests, even through forms of 'military humanitarianism', as in the case of the dissolution of Yugoslavia. Orthodox values will be therefore invocated as the alternative cultural tradition on which the unity of the Slavic community is built. And for which, as affirmed by the Patriarch Kirill, 'some human rights can be considered as heresy' (Dolgov 2016).

The ambiguity of political speeches about human rights, far from being the sign of a fledging and hesitant – but in progress – transition toward the liberal model, like it is generally perceived from the point of view of international organizations (UN Human Rights Council 2011), is a consolidated pattern. This confirms the importance, in line with Foucault's genealogic idea of discourse as a structured network of power and knowledge, to give a contextualised frame also to the analysis of the identity-talks in this bipolar local Orthodox scenario. The semiautonomous Metropolis of the Russian Patriarchate is strongly committed, both in Bessarabia and

Transnistria in the promotion of a traditional Moldovan identity based on Orthodoxy, whose safeguard cannot but be Russia (Munteanu 2015). The Bessarabian Metropolis is instead linked to Bucharest and directly promote the Romanism as the majoritarian (and therefore, 'winning') identity basis of this multicultural and multi-ethnic area. The Orthodox speech about identity, like the political one, is therefore permanently oscillating between the nationalist Romanian model of European integration and the neo-traditionalist Russian one that, as stated by Burgess, among others, 'while eager to achieve a Western standard of living, did not now think of themselves as mere *junior Europeans*' (Burgess 2017, 19). If the 'Western proposal' does not refuse a strong nationalistic identification based on Orthodoxy, Moldovan believers received from the Holy Rus', the capital of the third Christian Empire, a call for loyalty in sharing an alternative civilizational value, deeply rooted in Orthodoxy (Suslov 2015).

We should underlie, regarding this attempt of contextualising religious freedom, a last element. The local Orthodox scenario, and the religious phenomena in general, offer to the believers the opportunity to answer social fragilities going not only beyond the space of the sanctuary, but also beyond the geopolitical institutional relationships and the mutual instrumentalism that are carried out between religious and political players. Notwithstanding the separation between the Church and the State, reality has shown how this separation is vague and fragile. The inefficacy of political institutions, the widespread disillusionment and the retreat into the private and informal practices among citizens, give to Orthodoxy new roles that must be analysed in their local specificity. The role and the efficacy of the Orthodoxy in the Moldovan context mostly lies in spite of and beyond the state and the legal speeches, operating in spaces left behind the formal political control of the territory, where citizens consider state governance as not appropriate or ineffective, or where political institutions deliberately have not any will of regulation.

Especially at the level of local community, and despite its conservatorism and liturgy-centered behaviour, the Orthodox churches are the protagonist of those informal practices that are so essential in the post-Soviet phenomena of replacing, renegotiating, and reshaping the local governance (Polese 2016). The growth of Orthodoxy in Moldova is connected to its role in the reconstruction of a social order: through the centrality of its rituals in the empowerment of individual agency, through a widespread sense of belonging in a community of believers, through the effectiveness the parishes have in the reconstruction of a post-Soviet society, especially among the former *kolkhozy*. An analysis limited on the official speeches is therefore not sufficient to observe how this efficacy is built, and how reli-

gious actors influence the nine aspects previously detected.

Much more of this informal reality can be understood at the grassroots level, through an anthropological observation of the orthodox communities. Here the priest becomes not only the pillar of a shared generic sense of religious and national belonging, but the protagonist of a context in which the distinction between citizen and believer is definitely blurred. A this level, the problematic identity claim that equates Moldovan citizenship and Orthodox believing, or the strategical condemn of the human rights discourse as the expression of a post–Cold War 'moral imperialism' (Hernández-Truyol 2002), are made intelligible. Who put in danger religious belonging is at the same time out of the social and political attempt to put order in an – already fluid, fragile and dramatically market-oriented – community.

This research, realised in a field for the most still very much unexplored, will offer some insight about why religious belonging and the promotion of religious freedom, where proponents of two alternative visions of rights, security and public order, can enter into collision. This effort can also give some suggestions to frame the socio-anthropological study of religious and political believing through the lenses of the contending between powers, and to rethink the right to freedom of religion with the sensibility needed for promoting a new valorisation of rights, beyond the pure legal approach and inside the lived dimension of social relations.

References

Afkhami M. (1995) *Faith and Freedom: Women's Human Rights in the Muslim. World*. Syracuse: Syracuse U.P..

American Anthropological Association (1947) 'Statement on Human Rights', *American Anthropologist*, 49(4), 539–543.

American Anthropological Association (1999) '1999 Statement on Human Rights', retrieved from: www.humanrights.americananthro.org (accessed: 22/09/2018).

Balan E. (2009) 'Socializarea politică: abordări conceptuale', *Revista de filozofie, sociologie şi ştiinţe politice*, 3(151), 65-72.

Barnett M. and Finnemore M. (2004) *Rules for the World: International Organizations in Global Politics*, Ithaca: Cornell U.P..

Bellah R. (1967) 'Civil Religion in America', *Daedalus*, 96(1), 1-21.

Berger, P. L. (1999) *The Desecularization of the World: Resurgent Religion and World Politics*. MI: William B. Eerdmans Publishing Co..

Bobick M. (2012) 'Profits of Disorder: Images of the Transnistrian Moldo-

van Republic', *Global Crime* 12(4), 239-265.

Boţan I. (2002) *Armonizarea relaţiilor interetnice – sfidări şi oportunităţi*, Chişinău: IPP.

Breskaya O., Giordan G. and Richardson J.T. (2018) 'Human Rights and Religion: A Sociological Perspective', *Journal for the Scientific Study of Religion*, 57(3), 1-13.

Burgess J. (2017) *Holy Rus': the rebirth of Orthodoxy in the New Russia*, New Haven: Yale U.P.

Casanova J. (1994) *Public Religions in the Modern World*, Chicago: Chicago U.P.

Caşu I. (2000) *Politica națională în Moldova Sovietică 1944-1989*, Chișinău: Cartdidact.

Catana, V. (2004) 'The Legal Status of Churches in the Republic of Moldova – Provisions and Practice.', in Devetak S., Kalčina L. and M. Polzer, *Legal positions of Churches and religious communities in South-Eastern Europe*, Maribor: Iscomet.

Cazacu P. (1992) *Moldova dintre Prut şi Nistru 1812-1918*, Chişinău: Ştiinţa.

Cazacu M. and Trifon N. (2017) *Un Etat en quête de nation : la République de Moldavie*, Paris : Nonlieu.

Ciorba V. (2011) *Biserica Orthodoxă din Basarabia şi Transnistria (1940-2010)*, Chişinău: Pontos.

Cernencu M. and Boțan, I. (2009*), The Evolution of the Multiparty System in Moldova*, Chișinău: ADEPT.

Cojocaru N. (2006) 'Nationalism and Identity in Transnistria', *The European Journal of Social Science Research*, 19(3-4), 261-272.

Cox H. (1996*) Fire from Heaven. Pentecostalism, Spitituality and the Reshaping of religion in the Twenty-first century*, Addison-Wesley.

Curanovic, A. (2012) *Religious Factor in Russia's Foreign Policy*, New York: Routledge.

Cuzco A. and Sarov I. (2009) 'Identitate, memorie şi discurs istoric în Moldova postsovietică: O abordare critică', in Suveică S.et al., *Istoriografie şi politică în estul şi vestul spaţiului românesc*, Chişinău: Oradea U.P., 72-87.

Dima N. (2001) *Moldova and the Transdnestr Republic*, New York: Columbia U.P..

Dolgov A. (2016), 'Russia's Patriarch Kirill: Some Human Rights Are 'Heresy'', *Moscow Times*, 21 March 2016, retrieved from: old.themoscowtimes.com (accessed: 22/09/2018).

Durham W.C. (2012) 'Patterns of Religion State Relations', in Witte, J. and Green, M.C., *Religion and human rights: an introduction*, Oxford: Oxford U.P., 360-378.

Dungaciu D. (2009) *Cine suntem noi? Cronici de la Est de Vest*, Chişinău: Cartier.

Dupoye H. (2001) 'La Moldavie', in Radvanyi J. *Les états postsovietiques*, Paris: Armand Colin.

Ferrari, S. (2002) *Lo spirito dei diritti religiosi: ebraismo, cristianesimo e islam a confronto*, Bologna: Il Mulino.

Finke, R. (2013) 'Origins and consequences of religious freedom: A global overview', *Sociology of Religion*, 74, 297–313.

Fokas, E. (2015) 'Directions in religious pluralism in Europe: Mobilizations in the shadow of European Court of Human Rights religious freedom jurisprudence', *Oxford Journal of Law and Religion*, 4, 54-74.

Fox J. (2008) *A World Survey of Religion and the State*, New York: Cambridge U.P..

Fukuyama, F. (1992) *The end of history and the last man*, London: Hamish Hamilton.

Giordan G and Guglielmi M. (2017) 'Ortodossia cristiana, modernità e la questione dei diritti umani. Prospettive teoriche', *Religioni e società*, 32(87), 41-49.

Goodale, M. (2009) *Surrendering to utopia : an anthropology of human rights*, Stanford: CA Stanford U.P..

Gorban A. (2011) 'Ethnic And Socio-Cultural Aspects Of Political Culture In Moldova', in Brie, M. et al., *Ethnicity, Confession and Intercultural Dialogue at the European Union's East Border*, Debrecen/Oradea: Eurolimes, 133-151.

Grim, B. and Finke R. (2006) 'International religious indexes: Governmental regulation, government favouritism, and social regulation of religion', *Interdisciplinary Journal of Research on Religion*, 2(1).

Grim, B. and Finke R. (2007) 'Religious persecution in cross-national context: Clashing civilizations or regulated religious economies?', *American Sociological Review*, 72, 633-58.

Gundyayev V.M. [Patriarch Kirill] (2011) *Libertatea și responsabilitatea: în căutarea armoniei. Drepturile omului și demnitatea personală*, Chișinău: Tipografia Centrala.

Hernández-Truyol B.E. (2002) *Moral imperialism: A critical anthology*, New York: NYU Press.

Institute of Public Policies (2017) *Barometrul de Opinie Publica – April 2017* , retrieved from: www.statistica.md (accessed: 22/09/2018).

Islamic Human Rights Commission (2003) 'Briefing: Moldova's unofficial Muslims', retrieved from: www.ihrc.org.uk (accessed: 22/09/2018).

Jenkins W. (2008) *Ecologies of Grace: Environmental Ethics and Christian Theology*, Oxford: Oxford U.P..

Joas, Hans (2013) *The sacredness of the person: A new genealogy of human rights*, Washington: Georgetown U.P..

Kepel G. (1991) *La Revanche de Dieu. Chrétiens, juifs et musulmans à la reconquête du monde*, Paris: Le Seuil.

Kharichkin, I.K. (1999) *Politicheskaya elita i ee rol' v obespechenii natsional'noi bezopasnosti Rossii*, Moscow: MVI.

King C. (2000) *The Moldovans: Romania, Russia, and the Politics of Culture*, Stanford: Hoover U.P.

Langlaude S. (2007) *The Right of the Child to Religious Freedom' in International Law*, Boston: Martinus Nijhoff.

Livizeanu I. (1995) *Culturâ si nationalism în Romania Mare*, Bucarest: Humanitas.

Luhmann, N. (1965) *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie, Berlin: Duncker und Humblot*.

Madsen M.R. and Verschraegen G. (2013) *Making Human Rights Intelligible: Towards a Sociology of Human Rights, Oxford/Portland: Hart*.

Mälksoo L. (2014) *Russia and European human rights law : the rise of the civilizational argument, Leiden: Brill Nijhoff*.

Moldovan Othodox Church (2013) 'Adresarea Sinodului Bisericii Ortodoxe din Moldova către autoritățile de vârf ale țării, pentru modificarea Legii anti-discriminare', retrieved from: www.mitropolia.md (accessed: 22/09/2018).

Moldovan Othodox Church (2018) *Calendar Bisericesc Ortodox*, Chişinău: Consiliul Editorial al Bisericii Ortodoxe din Moldova.

Morini E. (1996) *La Chiesa Ortodossa. Storia, disciplina, culto, Bologna: EDS*.

Morozov V. (2002) *'Human Rights and Foreign Policy Discourse in Today's Russia: Romantic Realism and Securitisation of Identity', Cooperation and Conflict, 37(4), 409-29*.

Morsink J. (1999) *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, *Philadelphia: Pennsylvania U.P.*.

Moşneaga V. (2001) *Moldova între Est şi Vest: identitatea naţională şi orientarea europeană*, *Chişinău: USM, Editorial centre.*

Munteanu V. (2015) *'Behind the Curtain: The relationship between the Moldovan state and Church', in Hug A. Traditional religion and political power. Examining the role of the church in Georgia, Armenia, Ukraine and Moldova. London: The Foreign Policy Centre.*

Nash, K. (2015) *The political sociology of human rights*, Cambridge: Cambridge U.P..

National Bureau of Statistics – Republic of Moldova (2017), Statistical Reports database, retrieved from: www.statistica.md (accessed: 22/09/2018).

National Bureau of Statistics – Republic of Moldova, Recensământului Populației și Locuințelor, retrieved from: www.statistica.md *(accessed: 22/09/2018).*

Negru E. (2003) *Politica etnoculturala în Rass Moldoveneasca (1924-1940)*, Chisinàu, Prut International.

Negura P. (2015) 'Republica Moldova la un sfert de veac de tranziţie: între un comunism ratat şi un capitalism ne început?', retrieved from: www.petrunegura.blogspot.md (accessed: 22/09/2018, re-edited English translation available on: *Romanian Political Science Review*, 2016 / 26(4).

Palombella, G. (2006) *Dopo la certezza: il diritto in equilibrio tra giustizia e democrazia*, Bari: Dedalo.

Panainte S. (2006) 'Secularism in Republic of Moldova-Politics of Religion or Religious Politics: Where Do We Draw the Boundaries?' *Romanian Journal of Political Science*, 6(2).

Polese A. (2016) *Limits of a Post-Soviet State*, Stuttgart: Ibidem press.

Popescu T.C. (2004) 'L'Église moldave entre les patriarcats de Moscou, Constantinople et Bucarest' *Revue d'études comparatives Est-Ouest*, 35(4), 191-198.

Price, D. (2002) 'Islam and human rights: A case of deceptive first appearances' *Journal for the Scientific Study of Religion*, 41(2), 213–25.

Richardson, J.T. (2004) *Regulating religion: Case studies from around the globe*, New York: Kluwer.

Richardson, J.T. (2006) 'The sociology of religious freedom: A structural and socio-legal analysis', *Sociology of Religion*, 67(3), 271-94.

Richardson, J.T. (2015) 'Managing religion and the judicialization of reli-

gious freedom', *Journal for the Scientific Study of Religion*, 54(1), 1-19.

Rousselet K. (2013) 'L'autorité religieuse en contexte post soviétique', *Archives de sciences sociales des religions*, 2013/2 (162), 15-36.

Rutland P. (2013) 'Neoliberalism and the Russian Transition', *Review of International Political Economy*, 20, 332-362.

Santos B. de Sousa (2015) *If God Were a Human Rights Activist*, Stanford: Stanford U.P.

Sarkissian A. (2015) *The Varieties of Religious Repression. Why Governments Restrict Religion*, Oxford: Oxford U.P..

Scott M.T. (2005) *The Global Resurgence of Religion and the Transformation of International Relations: The Struggle for the Soul of the Twenty-First Century*, New York: Palgrave Macmillan.

Serebrian O. (2001) *Basarabia: geopolitica unei identităţi în derivă*, Chişinău: Cartier.

Somers M.R. and Roberts C. (2008) 'Toward a new sociology of rights: A genealogy of 'buried bodies' of citizenship and human rights', *Annual Review of Law and Social Science*, 4, 385-425.

Sullivan W.F. et al. (2015) *Politics of Religious Freedom*, Chicago: Chicago U.P..

Suslov, M.D. (2015) 'Holy Rus': The Geopolitical Imagination in the Contemporary ROC', *Russian Social Science Review*, 56/3, 43-62.

Suveică S. and Spranceana V. (2015) 'Perspectives on Human Rights and Religion in Moldova', Ziebertz, H.G. and Crpic G., *Religion and human rights*, Cham: Springer.

Thornberry P. (2002) *Indigenous Peoples and Human Rights*, Manchester: Manchester U.P..

Timpul.md (2015) 'Analiză economică: Republica Moldova – un cocktail exploziv la frontiera României', available at : www.timpul.md (accessed: 22/09/2018).

Turner, B.S. (1993) 'Outline of a theory of human rights', *Sociology*, 27(3), 489-512.

Turner B.S. (1997) 'A Neo-Hobbesian theory of human rights: A reply to Malcolm Waters', *Sociology* 31(3), 565–71.

UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief – Heiner Bielefeldt*, 27 January 2012, A/HRC/19/60/Add.2, retrieved from: www.ohchr.org (accessed: 22/09/2018).

United States Department of State – Bureau of Democracy, Human Rights and Labor (2017) *International Religious Freedom Report – Moldova*, retrieved from: www.state.gov (accessed: 22/09/2018).

United States Department of State – Bureau of Democracy, Human Rights and Labor (2017) *Country Reports on Human Rights Practices – Moldova*, retrieved from: www.state.gov (accessed: 22/09/2018).

Van der Ven, J.A. and Ziebertz H.G. (2012) *Tensions within and between religions and human rights*, Leiden/Boston: Brill.

Van der Vyver J.D. and Witte J. (1996) *Religious and human rights in global perspective: Legal perspectives*, The Hague: Martinus Nijhoff.

Ventura M (2015) 'Human rights within religions', in Ferrari S. *Routledge handbook of law and religion*, New York: Routledge, 161–78.

Vizitei N. (1998) 'Ideologo mirovozzrencheskaja situacija v Moldove: istoki, osnovnye protivorechija, vozmozhnye transformacii', in *Moldova, România, Ucraina – bună vecinătate şi colaborare regională,* Chişinău: Perspectiva, 225-31.

Voicu O., Cash J. and Cojocariu V. (2017) *Biserică şi Stat în Republica Moldova*, Chişinău: Soros Foundation-Moldova/ Public Innovation Centre. Tipogr. Bons Offices.

Witte J. and Green M.C. (2012) *Religion and human rights: an introduction*, Oxford: Oxford U.P..

Wolterstorff N.P. (2012) 'Christianity and human rights', in Witte J. and Green M.C. *Religion and human rights: an introduction*, Oxford: Oxford U.P., 42-55.

Zuber V. (2017) *La liberté religieuse: Droits de l'Homme et religions dans l'action extérieure de la France*, Paris: Van Dieren.

Women in Mixed Migration Flows under Risk for Trafficking. A Literature Review on the Human Rights Approach in the Identification Process

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Abstract: The aim of this literature review is showing the existing studies on the topic of the identification of women victims of trafficking in human beings in the mixed migration flows. Human Trafficking is nowadays considered a serious breach of human rights and manifestation of social injustice, and it disproportionately affects women and children worldwide. In the latest years the global attention about the phenomenon and the anti-trafficking strategies increased. There is a wide consensus among the State that the process of identification of victims is fundamental in combating trafficking, even if it has always been considered a problematic issue due to its complexity and length. In the times of mixed migration flows, it is even more important to early and properly identify a trafficked person, but, at the same time, it has become more controversial: in large migration movements, the difficulty of identifying victims have to deal with the complexity of the composition of the flows that see different kind of migrants making the same journey together: trafficked people, minors, asylum seekers, economic migrants, etc. Therefore, the identification process results to be essential to avoid severe violation of human rights. The article also considers the broad connections between migration policies, migration routes and identification of victims.

Keywords: identification of victims of human trafficking, trafficking of human beings, identification process, mixed migration flows, women's human rights.

Introduction

This literature review is intended to be the first part of a broader study on the identification of women victims of trafficking in human beings. The purpose of the article is to critically analyse the existing literature on trafficking in persons in the particular context of mixed migration flows. The phenomenon of trafficking exploitation of persons is a gross violation of human rights and an early and prompt identification process permits to the injured people to fully enjoy the rights derived from the status of victim, that is nowadays universally recognized by States and International Organisations.

The article is divided into four parts. The first is about the methodology used to arrange the review, the reasons of the choices regarding the articles and documents to consult and consider are explained, as well as the ways adopted to search and analyse the material. The second paragraph explains why human trafficking is a breach of women's human rights and consequently why identification process is fundamental in avoiding violation of rights. The third part tries to analyse mixed migration flows, by considering the vulnerability of the migrants, the existing ways to read the phenomenon, the interconnection with the management migration policies. The last part instead focuses on the core of the problem, the identification of victims in the mixed flows, difficulties and strategies proposed in the latest years.

1. Note on Methodology

The review was organized using a four steps strategy to compile literature relevant to the identification of victims of human trafficking. The first step was a systematic review of computerized journal database on social sciences trough AIRE portal (Integrated Electronic Resources Access). The quick set of resources of Social Sciences was chosen, that included databases of JSTOR, EBSCO, Web of Science, ESSPER. The following search strings were used in the initial searches: human trafficking, identification of victims of human trafficking, victims of trafficking in mixed migration flows. These searches yielded 292 potentially relevant journal articles for review, 193 for the first string and 69 for the second, 30 for the third but many belonging to these last strings were before 2002 or not pertinent.

All the material found was in English except for one article. The article selection was made by specific article inclusion criteria, that permitted to gather information most pertinent to the identification of victims of trafficking in the mixed migration flows. The three inclusion criteria were: (a) the article's primary focus was the identification of victims of trafficking in

persons, possibly including both labour and sexual exploitation; (b) the article provided explicit practice recommendations for identifying victims of trafficking that could be used by practitioners; and (c) the article was written in the last five years. Furthermore, Google Scholar was used with the same strings to harvest more articles. Given the low number of relevant peer-reviewed articles, the systematic search was expanded to include documents available on the Internet. An extensive scrutiny was made by using the broad search term identification of victims of human trafficking in the Google search engine.

This strategy provided additional potential sources of information, including reports and reference guides from government entities (e.g., Italian Ministry of the Interior, Italian Equal Opportunities Department), nongovernmental and no-profit organizations (e.g., Council of Europe, ADPARE, Fairwork, Mixed Migration Platform..) and International Organizations (e.g., UNODC, UNHCR, UN, OIM, OHCHR, ILO). Each document listed was evaluated using the inclusion criteria given above. Then, backward literature search was conducted by reviewing the references of the articles and documents already selected for review. In all, 35 documents were assembled for review, including reports and guidelines of Organisations. All the material was read through a standardized review form, that permitted to identify better the purpose of the documents, a short summary, and the conclusions.

2. The Relevance of Human Rights Discourse in the Identification Process of Women Victims of Trafficking in Persons

Dimension of the Phenomenon

Trafficking in human beings is a complex and global phenomenon that today is commonly recognized as an international issue of concern (Hodge 2014). According to the United Nations Office on Drugs and Crime (UNODC 2016) between 2012 and 2014 more than 500 different trafficking flows were detected around the world, 137 different citizenships of the victims and 69 countries reported to having identified victims from Sub-Saharan Africa. Over the last 10 years, the profile of detected trafficking victims has changed but, although the number of children and men detected as victims made up larger shares of the total number of victims than they did a decade ago, the majority are still women. Indeed, females have made up the most of distinguished victims since UNODC started collecting data on trafficking in persons in 2003. Usually women are trafficked for porpoises of sexual exploitation, but also for sham or forced marriages, begging,

domestic servitude and in the recent years also increased the number of women and girls trafficked for labour exploitation, (agriculture or catering, sweatshops, cleaning industry), forced begging and forced criminal activities.

Since the beginning of the phenomenon of mixed migration flows, that it is possible to situate around 2007, identification of victims has always been a delicate and difficult issue. The line between smuggling of migrants and trafficking in human beings has become irreparably confused. Smuggling always involves the crossing of an international border and individuals who pay a smuggler to permit the entry into a state voluntarily. Smuggling by the sea in the European context takes place via the Mediterranean, under the management of sophisticated well-structured criminal networks linked with a variety of other criminal groups controlling individual parts of the travel process. This because it is practically impossible for an undocumented migrant to make a journey from South Saharan Africa to North Africa and to Southern Europe across the Mediterranean without the help of a paid smuggler. In these years the dangerousness of the journey has increased as well as the economic costs. The situations that migrants live are more and more characterized by serious violations of human rights, especially during detention in Libya as documented in multiple reports where they are often reduced to slavery and subjected to violence and torture of all kinds. Human trafficking involves some form of coercion, physical or psychological, for the purpose of exploitation of the victim. As foreseen in Article 3 of the UN 'Protocol to Prevent, Suppress and Punish Trafficking in Persons'[1], the exploitation must include 'at a minimum, the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'. Human trafficking is a gross violation of human rights and dignity and is a crime against the person. As opposed to smuggling that involves at least two countries, it can also very well occurs within national borders.

A real and concrete capacity to distinguish between smuggling and trafficking is necessary for the investigation and prosecution of these crimes, as well as for a correct and prompt identification of trafficking victims and the activation of relevant assistance and protection referral mechanisms. However, even if the same smuggling criminal groups often oblige their clients to experience situation of exploitation, this interconnection often remains unsolved or ignored and, as consequently the processes of victimization and subjugation risk to stay unexplored (OSCE 2018).

[1] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

Trafficking in Human Beings as a Violation of Women's Human Rights

Trafficking in persons represents a serious violation of human rights, as stated by many international human rights law instruments. It is explicitly prohibited and marked as a breach of fundamental rights in the European Charter of Fundamental Rights (art. 5), as well as in art. 4 of the European Convention on Human Rights and Fundamental Freedoms (see the 2010 judgment in the case Rantsev v. Cyprus[2]). Both the Council of Europe's Convention on Action against Trafficking in Human Beings (2005a) and the 2011 European Union Directive 'On preventing and combating trafficking in human beings and protecting its victims'[3] identify trafficking as a violation of human rights. The United Nations General Assembly and the Human Rights Council have repeatedly affirmed that trafficking violates and impairs fundamental human rights, as many documents in the framework of international human rights mechanisms recognized (OHCHR 2014).

Trafficking is incompatible with the equal enjoyment of rights by women and with the respect for their dignity. Both the Beijing Platform for Action (United Nations 1995) and the Vienna Declaration (UN General Assembly 1993) listed trafficking of women and girls among the different forms of male violence against women. The Committee on Elimination of All Forms of Discrimination against Women (CEDAW Committee) in General Recommendation No 35 on gender-based violence against women of 2017[4] (updating the previous 1992 CEDAW Rec. No 19, 'Violence against women'[5]) refers to trafficking as a particular situation of discrimination because it puts women at special risk of violence and abuse. States have an obligation to investigate and prosecute violence against women that is now well established in international law and policy. The Convention on the Elimination of All Forms of Discrimination Against Women (Un General Assembly 1979) specifies that States Parties 'shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'. That is more detailed in the European Trafficking Convention, where it is stated that 'States Parties are required to ensure the necessary legal framework is in place as well as the

[2] ECrtHR, Rantsev v. Cyprus and Russia, Application No. 25965/04, 7 January 2010

[3] European Union: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU

[4] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35* on gender-based violence against women, updating general recommendation No. 19, 2017.

[5] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992.

availability of competent personnel for the identification process. They are also required to cooperate with each other and, internally, with victim support agencies in this process' (Gallagher 2010, p. 281).

The Importance of the Identification Process

The importance of an accurate and authentic identification can be sought at different levels and it is an important step to avoid violation of human rights and to strengthen the anti-trafficking response.

The most recent European legal instrument concerning Human Trafficking that reflects this necessity is the 'Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA'. It requires Member States to '[...] take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations' (art. 11.4). Here two elements should be considered. First of all, the article contains no conditions or restrictions, it applies to all victims of trafficking, regardless of sex, immigration status, ethnic origin, citizenship or country of origin or any other status. It should therefore be read to encompass all victims, including persons at risk of being trafficked, victims of an attempt to commit the crime of trafficking, and potential or presumed victims (UNHCR 2011). Second, a multi-level and multi-agency dimension of the identification is envisaged, where 'relevant support organisations' work together with Government agencies to precociously identify the victims. The early identification is intended as an essential part of a referral mechanism for granting supporting and assistance actions. In other words, this Directive considers that a presumed or potential victims of trafficking should be immediately informed of her/his rights to assistance and protection and if possible, criminal investigations should begin, in a multi-agency context, with a human rights based and victim-centred approach permitting to reduce the possibility of human rights breaches.

The identification of trafficking victims is also an essential point in the assistance process in particular of healing and restoration of wellness. Many trafficked persons are still not identified (Gallagher 2010; UNHCR 2011) and, as a result, they are never afforded the opportunity to access services, and escape from traffickers (Hodge 2014). A failure in identification of a victim results in a denial of the full enjoyment of his or her human rights. International law (and the national law of most countries) now recognizes that individuals who have been trafficked have a special status and that the State owes an obligation of protection and support to those persons. The Palermo Protocol (UN 2000) the Council of Europe Conven-

tion on Trafficking (2005) and the EU Directive 2011/36/EU set out States' positive obligations and give a clear definition of human trafficking.

According with the Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe 2005b) even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving State. Identifying a trafficked person is a procedure that takes time. Many victims are illegally present in the country where they are being exploited (or where they risk to be exploited). To avoid this situation they should be immediately identified as victims. Chapter III COE Convention on Trafficking secures various rights to trafficked people, but those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible.

As reported by Jones (2012), 'the most perplexing obstacle to prevention of human trafficking lies in the inability of governments and nongovernmental organizations to properly identify victims of human trafficking and quantify their numbers' (p. 484) and this is attributed to the lack of consensus regarding who is a victim of trafficking. The difficulties emerge from an inability to isolate the jurisprudential, conceptual, and practical distinctions between victims of human trafficking (those forced to perform certain acts) and smuggled migrants (those who consent to be transported across international borders as means to engage in certain acts). The distinction is well established in the juridical definitions but, in spite of this clear definition, often a migrant begins his or her journey being smuggled and end it being trafficked (Jones 2012; OHCHR 2010a; True 2012), misidentification and conflation between migrant smuggling and human trafficking, also tends to impede law enforcement processes. Women and children are more likely to become victims of trafficking through document confiscation, threats of violence against family members, psychological control, forced confinement and debt bondage (Voronova & Radjenovic 2016). Gendered perceptions inform the categorization of people smuggled or trafficked: according to Lansink (2006), usually men are referred to as smuggled and women as trafficked.

A correct identification is important also for a proper assistance of victims. Macy and Graham (2012) recognize the importance of a correct victim identification by observing that if the identification of a victim fails,

> [...] service providers are likely to go about service delivery in the usual manner, without tailoring their services to the needs of this especially vulnerable group. In light of this serious knowledge gap, providers need a set of practice protocols and screening questions to help identify sex-trafficking victims, regardless of where and when they appear in the human services system (p. 60).

In conclusion of this discourse about the importance of the identification of victims of trafficking in persons, it is worthwhile remembering that it is essential also in the field of prosecution of perpetrators: if the victim remains invisible and not identified as such, also the traffickers and the criminal network behind that victims will remain not detected and, consequently, unpunished (Degani 2017a).

3. The Protection of Women's Human Rights in the Mixed Migration Flows

What are Mixed Migration Flows?

The second edition of the 'Glossary on Migration' (IOM 2011) defines the mixed migration flows as a '[c]omplex migratory population movements that include refugees, asylum-seekers, economic migrants and other migrants, as opposed to migratory population movements that consist entirely of one category of migrants'.

In 2006 UNHCR published the '10 Points Plan' (updated in 2017 with the good practices of the implemented plan), a document aimed to help States in dealing with the new emerging phenomenon of the 'Mixed movements' where different kind of migrants with diverse migration projects, needs of protection and goals travelled together following the same routes. This UNHCR document is quite entirely devoted at granting protection to asylum seekers and refugees in the mixed migration flows, but it recognizes the importance of a functioning entry system where border guards are capable of identifying not only asylum seekers and refugees, but also other vulnerable groups of migrants like victims of trafficking and separated children. Furthermore it underlines also that processes and procedures in identification of migrants should be differentiated based on the complexity of the claim to address the situation of people with specific needs.

The reasons behind the mixed migration flows are complex and their analysis is not the primary goal of this paper but it is interesting to give few hints with the purpose of having a global picture of the phenomenon. Scholars have been studying mixed migration flows since a lot of years, and there is a wide consensus that globalisation and migration are 'inextricably linked' (Droesbeke 2017, 13) and that globalisation rendered migration more complex. The succession of events results in migrants with different motives sharing not only the same routes, but also the same transit points, the same intermediaries such as smugglers, migration agencies and the same destinations. Thus, the consequence of all these changes in migration flows is that the legal, sociological and political categories normally used to identify migrants are now old and do not reflect the reality. In the

mixed flows we do not just find forced migrants with economic migrants, victims of trafficking with unaccompanied children, but this 'labels' could even change during the journey: '[m]igrants not only move between places, they can also 'migrate' between migration categories and change status' (Droesbeke 2017, 13).

Human Rights at Stakes in Mixed Migration Flows

According to The Global Report on Trafficking in Persons (UNODC 2016), people fleeing from wars, refugees and migrants in large movements are more vulnerable of being trapped in a human trafficking criminal network than other migrants, as also recognized by Member States in the New York declaration for refugees and migrants of September 2016. To confirm the well-know fact that trafficking increases in the conflict zones, it has recently been studied that trafficking in the Middle East, in Europe and along the Balkan route prior to the conflicts in Syria and Iraq was way less present than after the wars started (Mixed Migration Platform 2017). The 2017 report 'Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges' (UNHCR et al. 2017) shows once more that refugees and migrants along both the eastern and the western route, women in particular, are vulnerable to different forms of exploitation and trafficking including sexual assault and forced prostitution and, in particular, they report women and girls victims of domestic servitude or sex trafficking in Sudan and Ethiopia, others sold to Gulf countries from Sudan; cases of kidnapping and sexual exploitation in Sudan and on the way to Libya.

In a report of 2018 ('Desperate journeys'), UNHCR denounces that women and girls, as well as some men and boys, still face particular risks of sexual and gender-based violence along routes to Europe as well as in some locations within Europe. The report says that along routes to Greece, the risk of violence during the journey is relatively high, especially for women travelling on their own and unaccompanied children. While sexual and gender-based violence is in general highly under-reported, more than 300 incidents that occurred during the journey from their country of origin were reported to UNHCR Greece in 2017, including a high rate of rape, sexual assault and trafficking. Along the Mediterranean route to Italy, the majority of women and girls are believed to face serious risks of violence and many persons disembarking in Italy have reported incidents at different points along the routes, including incidents in which men and boys have also been victims. Thus, the recommendations of UNODC appears solid, given that migrants in mixed migration flows are more likely to be vulnerable and in need to be protected:

> '[…]migration and refugee policies should take into consideration the vulnerability of migrants and refugees to trafficking in persons and attempt to ensure that programmes for the identification of and support to victims of trafficking are a core component of refugee protection systems' (UNODC 2016, 19).

Are Categories still Needed?

How is it possible to guarantee the protection of human rights, through an early and a prompt identification of the victims of trafficking in the context of mixed migration flows? And is it still possible and useful to try to identify the victims among the multitude of people on the move? According to some authors, it is nowadays impossible to read the actual migration situation through the established legal, political and sociological categories (Carling et al. 2015; Degani 2017a; Droesbeke 2017). When the discourse focuses on women victims of trafficking, the confusion is even more complex, due to the difficult debate around the definition of the key-terms: sexual exploitation, sex worker, victims of trafficking. Parreñas, Hwang and Lee in their review essay about human trafficking (2012) evaluate the most recent publications and underline that there is still a contrast among the scholars mostly on the concept of the consent of the victim. The majority of the scholarship analysed in the article is focused on human trafficking as sex trafficking and lacks studies concerning labour exploitation, with the exception of the anthology of Kempadoo (2005). Indeed, since 1988 when the 'Coalition Against Trafficking in Women' (CATW) was funded based on the idea of conflation of human trafficking and prostitution and the view of sexual exploitation of women compared to the contemporary slavery, many studies have been made following this theoretical approach (Degani 2017b). Some scholars though, argue that a failure in distinguishing between voluntary and involuntary prostitution makes confusion in the study of human trafficking in the contemporary period, and that the conflation of human trafficking and prostitution discounts the will of the victims (Parreñas et al. 2012). The given consent on being exploited can be fundamental in the judgement of the situation driving a 'moral culpability' and switching the condition of the exploited person from victim to potential criminal. Jones (2012) identifies five different categories of migrants who are in the blurred area between being smuggled and trafficked.

1. Standard Human Trafficking. Human trafficking victims do not consent to violate the law by being exploited. They have no other choice than doing what their trafficker ask them to do, they are usually subjected to threads, forced isolation, and other forms of coercion, fraud, deception, or abuse.

2. Standard Migrant Smuggling. The relationship between the migrant and the smuggler ends once the border has been crossed, it is voluntary on the part of the person being smuggled and always transnational.
3. Fraudulently Induced Smuggled Migrant and Human Trafficking Victims. Smuggled migrants who become victims of human trafficking after initially agreeing to be transported across an international border. After crossing the border, the smuggled migrants are divested of their means to control their own destiny. The human trafficker robs these individuals of their freedom and treats them as profit-generating instruments rather than human beings
4. The Consenting Debtor. These persons agree to perform sex or slave labour for the trafficker in change of having being transported across an international border.
5. The Consenting Participant. These individuals voluntarily agree to perform sex or labour as payment for having been transported across an international border.

Degani (2017a) notes that the different situations related to exploitation and trafficking are not fixed and defined but rather there is a sort of 'continuum […] so that the same person may be simultaneously exploited in more ways, or be periodically moved depending on the needs of the criminal group, from one area to another' (p 53). Furthermore, nowadays smugglers are in some cases taking the role of traffickers bounding smuggled migrants to a large debt even after the end of the journey and destining them to extortion, sexual exploitation or forced labour (Carling et al. 2015). In his article, Jones considers that the given or refused consent informs the moral culpability, he sustains, for example, that individuals of categories 'Consenting Debtor' and 'Consenting Participant' would unlikely be accepted and identified as victims, because the exploitation was not a result of a coercive agent, but of a deliberate conduct and choice. Jones recovers the never-ending debate among the anti-trafficking scholars and practitioners about sex work and sex slavery, and distinguishes two different approaches in dealing with the consent matter, that are the approaches still present in the feminist movement. The first is the 'Liberal feminism', that considers the will of the exploited persons as fundamental, capable to make a person decide to work as a sex worker or labourer even if consciously exploited. It is usually considered close to the movement 'pro sex-workers' rights', that generally stands behind the various proposal of policies oriented toward the decriminalization of the sex work. The other approach Jones describes is the Gendered one, that discounts the individual's consent, claiming that it is irrelevant in the circumstances where there is exploitation. In the author's view this last approach, possibly comparable to paternalism, is in line with the definition that is given in the Additional

Protocol to the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (2000) where, in article 3, it says that the '[t]he consent of a victim of trafficking in persons to the intended exploitation [...] shall be irrelevant [...]' (UN General Assembly 2000, 5). In the conclusion, the author argues that '[the] Liberal approach safeguards the preeminence of consent and respect for human dignity and voluntary undertakings' but '[to] be effective a careful evaluation of the availability of reasonable alternatives and sequence of choices that gave rise to the lack of palatable alternatives is necessary' (Jones 2012, 511). Therefore, considering consent in the process of identification of victims of trafficking without evaluating the presence of other possibilities could cause grave harm or leaves a wide multitude of harms suffered by some categories of victims not recognized as such.

Migration Policies and Protection of Human Rights

It remains an unanswered question whether or not dividing migrants into categories, based on a difficult identification, helps to assure the enjoyment of human rights to the migrants or, on the contrary, it worsens and harms the condition of persons in large movements. The migration management policies that European Union and Member States adopted in the latest years seems in fact to have layered and stratified the third country nationals arriving in Europe, and Roos (cited in Droesbeke 2017) claims that they reinforce inequalities among migrants and separated 'wanted' migrants from the 'unwanted'.

Nowadays it is a shared opinion among scholars that repressive migration policies of European Union aimed at lower the number of arrivals of migrants 'have helped create and sustain a robust market for paid facilitators who are able to circumvent all but the most draconian border controls' (Carling et al. 2015, 12), rather than discourage people to leave for a better life. The policies tried to answer to the two needs of the States: to have a low cost labour force to be employed in the low skills jobs and to create a legal system where regular entry, stay and residence was mainly impeded, where the 'Fortress Europe' could be built and protected. In Degani's opinion these dynamics contributed to the development of the 'industry of irregular entry' with the consequences discussed (Degani 2017a). A recent study of REACH and UNHCR on mixed migration routes and dynamics in Libya found out that the migration measures implemented in Libya since early 2017 aimed at the restriction of access by European Union have led to a multiplication of smuggling routes to and within the country. They also observed that refugees and migrants are stuck for longer periods of time in warehouses and hidden accommodation sites along the coast with

very limited freedom of movement waiting to be transferred to the shores for the boat trip but that the previous knowledge of this situation did not inform their decision to leave their country for Libya (REACH *and* UNHCR, 2018).

4. The Challenge of Identification of Women Victims of Trafficking in the Mixed Migration Flows

The importance of an early and correct identification of the victims of trafficking is now clear, in particular in the context of the large movements where migrants, especially women and those fleeing from conflicts, are more vulnerable. International law and the national law of many States now recognize that trafficked persons have special rights, and that the State owes a particular duty of protection and support to those persons. If a victim is misidentified as illegal or undocumented migrants,

> 'international practice makes clear that illegal migrants do not generally benefit from even the minimal protections afforded to those who are identified as having been smuggled. Without the 'resources of citizenship', illegal migrants are vulnerable to detention and removal' (Gallagher 2010, 279).

A Definition of the Identification

In spite of the broad importance of the identification of victims of trafficking, academic material on the issue is scarce, mostly on victims of sex trafficking and, when it comes on the identification within the context of mixed migration flows, the material is even scarcer. According to Lutenco (2012), the process of identification is composed by three essential elements: (1) the procedure by which certain facts are established about the person; (2) the comparison of these facts with the definition of the victim of human trafficking and (3) the decision to grant or to deny the status of victim. These elements result in the 'application of a set of indicators to a factual situation in order to produce a decision' (p 67). States are encouraged to follow different sets of indicators developed along these years among the others by ILO, IOM, UNHCR and UNODC. In 2009, European Commission together with ILO developed a Delphi survey to reach consensus among European experts on what indicators should be used to characterize the various elements of the definition of trafficking for data collection purposes. It is of primary importance to have a European consensus on operational indicators and their appropriate combination for harmonizing research and try to have realistic dimensions of the phenomenon. In these recent years International Organizations that specifically work on

the matter produced plenty of works and in 2016 for the first time a European Member State (Italy), together with UNHCR, released the guidelines concerning the identification of victims of human trafficking among asylum seekers. In the document the identification of victims is defined as a multiphase process aimed at detecting the condition of exploitation through the 'trafficking indicators'; once more is underlined that the process of identification is an essential moment to guarantee protection to the victims (UNHCR 2017).

There is a general agreement among the States, although the practical approach sometimes denies this commitment, that a human rights centred approach is the appropriate strategy for dealing with trafficked persons and that it requires early identification and assistance to victims. Identification is crucial to ensure both the protection of the rights of aggrieved persons, and successful prosecution of the traffickers. Nevertheless, it still remains a challenge: first of all due to the complexity and extreme variability of the phenomenon, the procedure is not and cannot be perfect and, given the fact that it is implemented by human beings, to guarantee against errors in assessment of alleged victims of trafficking is impossible. Assumed this, the main difficulties mostly encountered are the followings (Bhabha and Alfirev, 2009; FLEX et al. 2016; Macy and Graham 2012):

1. The interaction between the trafficker and the victim may be multi-faceted, since the perpetrator is often also 'protecting' the victim's illegal status from the authorities. The victim can feel grateful, dependent on, and bounded to the traffickers, for instance by debts. Moreover, individual members of the criminal network can adopt different roles in relation to the victim, varying from abuse and control to support and 'protection';
2. The mistrust of the victims towards law enforcement because of their precarious status or absence of status in the country of destination, because of corruption among law enforcement agents;
3. The difficulty of the victims to consider their condition of work as exploitation due to the poverty and lack of worker's rights in the country of origin;
4. The difficulties experienced by the actors involved (law enforcement, police forces, social workers, NGO, health service providers…) in distinguishing trafficked people in the mixed migration flows;
5. Cultural and situational behaviours that can confuse and make the professionals involved in the identification process mistaken the indicators;
6. The difficulty to install a trusty relationship with the alleged victim in a short period of time, as to be sure that the individual would come back

for the next interviews finalizing the procedure. Essential is a quick and efficient interview with the individual, trying to gain enough knowledge;

7. The increasing conflation between immigration control and labour inspection, that jeopardizes the effectiveness of labour inspection and constitutes a significant barrier to the identification of victims of trafficking for labour exploitation.

In commenting the Trafficking Directive, the UNHCR (2011) stresses the problem of the lengthy and difficulties of the identification procedure and envisages a 'low threshold approach', that consists in procedures that foster the referral of persons for whom there are reasonable grounds to believe that they have been trafficked to specialized services as soon as indicators or a suspicion of trafficking are noted. Irrespective of official and judicial identification procedures, service providers and other first responders may activate a request for immediate support in the presence of a reasonable suspicion that a person may have been trafficked. This ensures that access to basic support and assistance can be provided to individuals who are suspected to be victims.

There is not a defined and universally accepted procedure of the identification process, but we can gain the different phases from the documents that International Organizations elaborated through the years. First, the process involves different actors: the 'Recommended Principles and Guidelines on human rights and human trafficking' (OHCHR 2010) promote the cooperation between the State officials and agencies involved in identification and for them to be given training in identification. The process is normally divided into three phases: (1) the initial preliminary screening, where a range of indicators are assessed and evaluated before interviewing the individual; (2) a phase where information are given to the individual about the protection of the victims of human trafficking; (3) the 'formal identification' with the interview with the individual consisting of a set of questions focusing on the recruitment, transportation and exploitation phases of the trafficking experience that gives the individual the status of victims of trafficking in human beings and all the derived rights. The last phase has to be implemented only by trained professionals. The standard procedures adopted need to be framed in the new social and global context, with specific duties assigned to the different actors involved: that is humanitarian operators at the disembarkation, first reception centres (Hot Spot, Hub), asylum seekers reception centres, medical staff, personnel involved in the assessment of the international protection. The obligation derived from the 2011 EU Directive on the early identification, needs to result in working referral systems that can guarantee that each professional involved is capable to contribute at his or her best (Nicodemi 2017).

Developed Indicators

The IOM 'Handbook on Direct Assistance for Victims of Trafficking' (2007) list a set of indicators, specifying that they are generalizations, and stressing the possibility of exception for all of them. It leaves it open and encourages the possibility to enlarge and adapt the list according to specific context. IOM suggests to consider as indicators: age, gender, nationality, documentation, last location, context, signs of abuse, assessment of the referring agency, current service delivery organisation knowledge and experience. In 2009 the Delphi survey conducted by ILO with the European Commission resulted in four set of indicators: deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative conditions of work, coercion at destination, abuse of vulnerability at destination (ILO 2009). Hodge (2014) groups indicators into three categories: situational, demeanour and story. Situational indicators refer to contexts where victims of trafficking usually live. Included among these are the absence of documentation, the constant presence of another individual, signs of physical abuse, a large number of people living together in a private residence, and frequent changes of address or physical location. An individual's emotional demeanour can be an important indicator of trafficking. Examples of this include signs of fear or depression or a tendency to answer questions evasively, for these indicators is essential the presence of cultural mediator who can understand cultural or warning signals. Story indicators refer to elements of a person's narrative that suggest the presence of trafficking. They can help practitioners distinguish between trafficking and a difficult employment situation. For example, indications that the individual is being controlled, does not have the freedom to move or change employment, or is forced to provide sex may denote the existence of trafficking (Macy and Graham 2012). Recently IOM published the 'Report on victims of trafficking in persons in the context of mixed migration flows' (2016) where indicators for the identification are updated, with specific reference to the women victims. The updates regard the context of origin, the level of instruction, the self-declared orphan status, the anomaly condition for the journey (like a free journey), the appearance submitted condition. Furthermore, it includes a new set of indicators to be observed during the first step reception: psychological or behavioural problems, frequent getaways, controlling presence (even through over the phone) by a third person, engaged in illegal activities as prostitution or begging.

Conclusions

The increasing migration flows toward European Union are day after day in constant evolution and change, due to a multiplicity of factors difficult to isolate and to accurately explore. However, the analysed literature in the article underlined that migrants in these flows are more vulnerable and subjected to be trafficked and exploited, especially asylum seekers, women and minors. The identification of exploited and trafficked persons in the context of mixed flows became more and more complex and difficult, but at the same time more and more important to assure the protection of individuals human rights too. When policy makers deal with global large movements, they have to consider this aspect, and consequently act.

A human rights based approach is essential to grant the protection of rights to vulnerable migrants, especially for victims of trafficking in human beings. In Italy this critical area of concern emerged with the case of the Nigerian trafficked women, who were not properly early identified as victims, deprived of the rights entitled to that status, and instead often destined to the sexual exploitation (even if consistent cases of labour exploitation among women are also recently emerging).

Despite the wide consensus on the importance of a human rights approach in the identification of trafficked people, the actual situation in the European Union seems to be far away from the conditions that surrounded those agreements: today the nationalist and 'anti-immigrants' movements are spreading all over the Member States, and recently the Parliament has asked EU member States to determine, in accordance with Treaty art. 7, whether Hungary is at risk of breaching the EU's founding values[6]. This is the first time that Parliament has called on the Council of the EU to act against a member state to prevent a systemic threat to the Union's founding values.

Thus, on one hand we have the Member States that agreed on promoting and protecting European values, such as respect for democracy, equality, the rule of law and human rights, enshrined in the EU Charter of Fundamental Rights and in the European Union Treaties, and on the other hand populist, sovereigns and nationalist movements that seems not interested in common European values, but that are raising and conquering important parts of the electorate.

Therefore, considering the present and the uncertainty of the future, the need for a human rights based approach in the identification of victims of trafficking in persons, and consequently the usefulness of updated and enhanced related research studies, appears of paramount importance.

[6] Press release: 'Rule of law in Hungary: Parliament calls on the EU to act', retrievable at http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act

References

Bhabha, J. and Alfirev, C. (2009) 'The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs, A Report commissioned by the United High Commissioner for Refugees (UNHCR)' retrieved from http://lastradainternational.org/lsidocs/UNHCR_Trafficking_Executive_Summary_09.pdf (accessed: 13/09/2018).

Carling, J., Gallagher, A. T., and Horwood, C. (2015) 'Global migration and the smuggling–trafficking nexus', retrieved from https://works.bepress.com/anne_gallagher/41/ (accessed: 13/09/2018).

Council of Europe. (2005a) 'Council of Europe convention on action against trafficking in human beings : Warsaw, 16.V.2005', retrieved from: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197 (accessed:13/09/2018).

Council of Europe. (2005b) 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), (197), 1–59', retrieved from http://www.conventions.coe.int/Treaty/EN/Reports/Html/197.htm (accessed: 13/09/2018).

Degani, P. (2017a) 'The Mixed Flows Reality among Plural Identities, Legal Constraints and Policy Limits. Issues Related to Human Rights', *Peace Human Rights* Governance, 1(March), 43–66.

Degani, P. (2017b) 'Tutti in comune disaccordo. Diritti umani e questioni di policy nel dibattito sulla prostituzione in Europa', *Studi sulla Questione Criminale*, fascicolo 3 (settembre- dicembre 2017), 45–78.

Droesbeke, L. (2017) 'The migration-asylum nexus in EU migration policy. Discourse analysis on the use of labels by the European Commission', retrieved from https://lib.ugent.be/fulltxt/RUG01/002/377/283/RUG01-002377283_2017_0001_AC.pdf (accessed: 13/09/2018).

European Union: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, retrieved from: http://www.refworld.org/docid/50ec1e172.html (accessed. 11 September 2018).

FLEX, Adpare, and Fairwork. (2016) 'Improving the Identification and support of victims of trafficking for labour exploitation in the EU', retrieved

from: http://www.labourexploitation.org/sites/default/files/publications/PROACT%20Policy%20Paper.pdf (accessed: 13/09/2018).

Gallagher, A. T. (2010) *The International Law of Human Trafficking*, Cambridge: University Press.

Hodge, D. R. (2014) 'Assisting victims of human trafficking: Strategies to facilitate identification, exit from trafficking, and the restoration of wellness' *Social Work* (United States), 59(2), 111–118.

ILO (2009) 'Operational indicators of trafficking in human beings: Results from a Delphi survey implemented by the ILO and the European Commission' Retrieved from: http://www.ilo.org/sapfl/Informationresources/Factsheetsandbrochures/WCMS_105023/lang--en/index.htm (accessed: 10/09/2018.)

IOM (2007) 'Direct Assistance for Victims of Trafficking: The IOM Handbook, 356' retrieved from http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT handbook.pdf (accessed: 10/09/2018.)

IOM (2011) 'Glossary on Migration' retrieved from: https://publications.iom.int/system/files/pdf/iml25_1.pdf (accessed: 11/09/2018).

Jones, S. V. (2012) Human trafficking victim identification: Should consent matter? *Indiana Law Review*, 45, 483–511.

Lansink, A. (2006) Human Rights Focus on Trafficked Women: An International Law and Feminist Perspective. *Agenda*, 20(70), 45–56.

Lutenco, A. (2012) 'The Extent of State Obligations in Preventing and Combating Trafficking in Human Beings : Challenges and Perspectives for a European Human Rights-Based Approach' Retrieved from: https://eige.europa.eu/docs/54_HU.pdf (accessed: 30/08/2018).

Macy, R. J., and Graham, L. M. (2012) Identifying Domestic and International Sex-Trafficking Victims During Human Service Provision. *Trauma, Violence, and Abuse*, 13(2), 59–76.

Mixed Migration Platform (2017) 'Trafficking in mixed migration flows' retrieved from: http://www.mixedmigration.org/resources/?keyword=%27Trafficking+in+mixed+migration+flows%27&action=-search&topic=&type=&region=&sortby=date-desc&country=&publisher= (accessed: 13/09/2018).

Nicodemi, F. (2017) Le Vittime della Tratta di Persone nel Contesto della Procedura di Riconoscimento della Protezione Internazionale. Quali Misure per un Efficace Coordinamento tra i Sistemi di Protezione e di Assistenza? *Diritto, Immigrazione e Cittadinanza*, 1(24), 1–31.

OHCHR (2010) 'Recommended Principles and Guidelines on Human Rights and Human Trafficking- Commentary' retrieved from: https://www.ohchr.org/Documents/Publications/Traffickingen.pdf (accessed: 13/09/2018).

OHCHR (2014) 'Human Rights and Human Trafficking' retrieved from http://www.ohchr.org/Documents/Publications/FS36_en.pdf (accessed: 13/09/2018).

OIM (2016) 'Rapporto sulle vittime di tratta nell'ambito dei flussi migratori misti in arrivo via mare aprile 2014 – ottobre 2015', retrieved from: https://italy.iom.int/sites/default/files/documents/OIM_RapportoAntitratta_2015_ITA.pdf (accessed: 13/09/2018).

OSCE (2018) 'From Reception to Recognition : Identifying and Protecting Human Trafficking Victims in Mixed Migration Flows retrieved from at: https://www.osce.org/secretariat/367061?download=true (accessed: 13/09/2018).

Parreñas, R. S., Hwang, M. C., and Lee, H. R. (2012) 'What Is Human Trafficking? A Review Essay', *Signs*, 37(4), 1015–1029.

REACH, and UNHCR (2018) 'Mixed migration routes and dynamics in Libya. The impact of EU migration measures on mixed migration in Libya', retrieved from: http://www.reachresourcecentre.info/system/files/resource-documents/reach_lyb_so_mixed_migration_routes_and_dynamics_in_libya.pdf (accessed: 13/09/2018).

True, J. (2012) The Political Economy of Violence against Women. New York: Oxford University Press.

UN Committee on the Elimination of Discrimination Against Women (2017), 'CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19', retrieved from: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en (accessed: 10/09/2018).

UN Committee on the Elimination of Discrimination Against Women (1992), 'CEDAW General Recommendation No. 19: Violence against women', retrieved from: http://www.refworld.org/docid/52d920c54.html (accessed: 10/09/2018).

Un General Assembly (1979) 'Convention on the Elimination of All Forms of Discrimination against Women- Resolution 34/180 of 18 December

1979', retrieved from: http://www.un.org/womenwatch/daw/cedaw/ (accessed: 13/09/2018).

UN General Assembly (1993) 'Vienna Declaration and Programme of Action 12 July 1993' retrieved from: http://www.refworld.org/docid/3ae6b39ec.html (accessed: 3 July 2018).

UN General Assembly (2000) 'United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly A/RES/55/25', Retrieved from http://www.refworld.org/docid/3b00f55b0.html (accessed: 3 July 2018).

UN General Assembly (2016) 'New York Declaration for Refugees and Migrants' retrieved from: http://www.refworld.org/docid/57ceb74a4.html (accessed: 13 September 2018).

UNHCR (2011) 'Prevent, Combat, Protect: Human Trafficking', retrieved from: http://www.refworld.org/docid/4edcbf932.html (accessed: 13 September 2018).

UNHCR (2016) 'Refugee Protection and Mixed Migration: The 10-Point Plan in action', retrieved from: http://www.refworld.org/10pointplaninaction2016update.html (accessed: 13 September 2018).

UNHCR. (2017) 'L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral' Retrieved from: http://www.refworld.org/docid/5b211b594.html (accessed: 13/09/2018).

UNHCR, Altai Consulting, and IMPACT (2017) 'Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges', retrieved from: http://www.unhcr.org/595a02b44.pdf (accessed: 13/09/2018).

UNHCR (2017), 'Desperate Journeys', retrieved from: http://www.refworld.org/docid/58b58b184.html (accessed: 13 September 2018).

United Nations (1995) 'Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women', retrieved from: http://www.refworld.org/docid/3dde04324.html (accessed: 3 July 2018).

United Nations General Assembly (2000) 'Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations convention against transnational organized crime', retrieved from: https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx (accessed: 13/09/2018).

UNODC (2016) 'Global report on trafficking in persons', retrieved from: https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf (accessed: 13/09/2018).

Voronova, S., and Radjenovic, A. (2016) 'The gender dimension of human trafficking', retrieved from http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577950/EPRS_BRI(2016)577950_EN.pdf (accessed: 13/09/2018).

Socioeconomic Rights at Times of Economic Crisis: a Literature Review

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Abstract: The 2008's global financial crisis has undermined the enjoyment of socioeconomic rights worldwide. With vulnerable groups bearing the heaviest burden of economic reforms, the human rights community has not remained silent. In fact, over the last decade, a growing body of literature has been exploring the protection of socioeconomic rights at times economic crisis. Both academic and civil society's voices have highlighted the human rights implications of regressive fiscal consolidation measures. Furthermore, UN bodies are framing guidelines on how to undertake economic recovery in line with international human rights law. This article reviews such a dynamic and action-oriented literature, with a special focus on the right to health. As only few studies have shed light on the health implications of economic policy from a human rights perspective, this work will also examine scholarly efforts developed in the realms of epidemiology, public health and health equity.

Key words: socioeconomic rights, *economic crisis*, *fiscal adjustment*, *rights-based economic recovery*, *fiscal policy*, *right to health*, *public finance and human rights*, *austerity.*

Introduction

In 2008, a crisis hit the US mortgage subprime market, triggering one of the most severe recessions since the 1930's Great Depression. As a first reaction, governments around the world unanimously implemented conven-

tional countercyclical fiscal policies, increasing spending and rising taxes as to revive aggregate demand. However, two years later, many governments turned to harsh austerity measures to contain mountain public debts, either out of their own volition or under pressure from regional banks and international financial institutions (IFIs). In this way, horizontal budget cuts, regressive welfare reforms and large-scale privatisation have become increasingly accepted in policy-making circles, while spreading socio-economic malaise in developed and non-developed countries alike. Draconian cuts can also result in socioeconomic rights' backsliding, with the most vulnerable groups bearing the heaviest burden of fiscal adjustment. In these particularly severe cases, economic recovery policies amount to a *prima facie* violation of the International Covenant on Economic, Social and Cultural Rights (ICESR, 1966), and they can be labelled as *deliberative retrogressive* measures. Detecting whether a violation exists and providing remedies, however, is a delicate process, requiring budget analysis and human rights measurement through indicators, as well as a polycentric assessment of responsibilities (for a discussion of polycentrism and human rights, see Burger 2003). To do so, scholars, grassroots movements and UN bodies have all been reflecting on how human rights law can challenge regressive fiscal consolidation measures when they produce unacceptable human costs. Some have focused on socioeconomic rights and austerity in general, while others have been investigating a specific theme or right. Most writers have focused on the effects of austerity on socio-economic rights using qualitative methods. A limited number of human rights defenders, though, is also considering quantitative impact assessments' strategies. This approach can help bridging the gap between human rights advocacy and economics.

Throughout this literature review, special emphasis will be given to the right to health, which is among those socioeconomic entitlements that have been sternly affected by post-2008's austerity policies. This is not surprising, as healthcare often occupies a huge share of public expenditure in most welfare states.

1. Socioeconomic Rights and Public Finances: Exploring the Nexus

The realisation of socioeconomic rights largely depends on financial resources' availability. ICESCR Art. 2, in fact, obliges state parties to ensure the *progressive realisation* of economic, social and cultural rights (ESCR) using their *maximum available resources.* Luckily, human rights bodies and UN Special Rapporteurs have all contributed to the interpretation of such a broad principle. For example, the Committee on Economic, Social and Cultural Rights (CESCR 2007) defines maximum available resources as those

deriving from national fiscal revenues as well as international assistance. Sepulveda (2003) further specifies that governments must mobilise resources to their utmost capability, and that governments failing to effectively curb corruption are also neglecting their obligations under the Covenant. Türk (1992) also notes that progressive taxation, as opposed to regressive fiscal schemes, is an effective tool to achieve a fair redistribution of resources and realise socioeconomic rights, without renouncing to sustainable growth and economic efficiency. This has also been recently discussed by Saiz (2010). Framing taxation as a human rights issue, Saiz underlines the key role played by fiscal policy in redistributing wealth and easing socio-economic inequalities. Moreover, Saiz presents human rights law as a powerful tool to challenge unfair taxation, especially in the wake of the global financial crisis. Similarly, in *Public Finance, Maximum Available Resources and Human Rights* (Elson et al. 2010), the authors display how the human rights movement would immensely benefit from enhanced knowledge on the role of fiscal and monetary policies in collecting revenues.

Not all components of ESCR, however, are subject to progressive realisation. In fact, there are *minimum core obligations* of immediate effects. The principle of *non-discrimination*, for example, must be applied regardless of economic constraints. Similarly, states must immediately demonstrate their will to *take steps* towards the realisation of ESCR. This principle has been insightfully clarified by Colombian jurisprudence in the context of austerity measures, as it is magisterially exemplified by Landau's field-defining article (Landau 2013).

Finally, it is noteworthy that, when discussing human rights and public finances, contemporary scholars usually have in mind relatively recent concepts, such as gender or children budgeting. For example, Thurkal (2010) scrutinizes children's rights and public budgets in South Africa and Brazil, whereas *Gender Budgeting in Europe* (Hagan et al. 2018) or *Equality from Proofing the Budget: Lessons from the Experiences of Gender Budgeting?* (Quinn 2010) investigate women's rights and public finances. Similarly, Rooney et al. (2010) analyse social housing programmes in Northern Ireland and their contribution to the progressive realisation of the right to housing. However, the relation human rights and public finances began much earlier: for a discussion of this, see O' Connell (2010).

2. Is there No Alternative? Towards a Rights-Based Approach to Economic Recovery

Farnsworth et al. (2018) recently pointed out that austerity measures are nothing more than a by-product of neoliberalism. According to this perspective, austerity measures achieved conventional neoliberalists' am-

bitions such as shrinking the welfare state, deregulating labour markets and empowering corporations. In other words, the new politics of austerity would be a 'dream come true' for advocates of neoliberalism. In line with this interpretation, McKee and Stuckler (2011) believe austerity to be a full-fledged assault on universalism. In fact, the two authors maintain that austerity measures are nothing more than a political plan to dismantle the welfare state. As such, regressive fiscal consolidation would embody a neoliberalist vision of the world rather than a technical necessity. If this is true, it is no good news for human rights. In fact, an ever-larger body of literature is emerging regarding the irreconcilability between human rights norms and neoliberalism. For example, *Economic and Social Rights in a Neoliberal World* (MacNaughton et al. 2018) suggests that socioeconomic rights have the potential to challenge the individualistic, libertarian ethos that fuels mainstream economic thought. By the same token, the works of Moyn (2014), O' Cinneide (2014), O' Connell (2011). Additionally, Nolan (2017) analyse how privatisation threatens the realisation of socioeconomic rights, a topic which has long been neglected by human rights scholarship.

The relationship between neoliberalism and the right to health has been widely explored too. For example, Chapman's ground-breaking book *Global Health, Human Rights and the Challenges of Neoliberal Policies* (2016) investigates how neoliberal policies undermine both the affordability and the availability of healthcare services, access to medicines, and the promotion of universal healthcare coverage (UHC). Interestingly, Chapman also concludes that profit-based healthcare services transform the patient-doctor relationship in a customer-seller scenario, with negative implications for the efficiency and quality of care. Moreover, Chapman sustains that the commodification of health by itself is irreconciliable with a rights-based approach to medical care. For a legal analysis of the same themes, see Yamin (2008). Similarly, in *Blame it on the WTO?: A Human Rights Critique* (Joseph 2012), there are many insights on the tensions between international trade and human rights law, with a chapter dedicated to essential medicines and the TRIPS Agreement on Intellectual Property.

Austerity, however, is far than unavoidable. In effect, the long-term deleterious effects on output and employment have been highlighted by orthodox (Krugman 2015; Stiglitz 2014; Blanchard et al. 2013) and heterodox (Balakrishnan et al. 2016) economists alike. Luckily, the human rights community is developing a rights-based set of guidelines to undertake economic recovery without unnecessary. Carmona (2014) explains that states can collect revenues restore public budgets by increasing taxes on the wealthy, cutting defence budgets or investing in public services. Similarly, the Center for Economic and Social Rights (CESR 2018b) is monitoring avai-

lable fiscal alternatives to austerity and good practices in economic recovery from a human rights perspective. Balakrishnan et al. (2016) also offer tangible economic options to recover from crisis in line with human rights law. Their work demonstrates that the two traditionally divided fields of economics and human rights can be reconciled. To this end, Balakrishnan et al. highlight the radical potential of human rights law in achieving social justice. Moreover, Kinley (2018) maintains that the financial sector could even serve as a positive agent in promoting human rights, instead of representing solely a threat to their enjoyment.

3. The Impact of Austerity on Socioeconomic Rights

The 2008's global financial crisis impinged on human rights all over the world. Such a negative impact was aggravated, in some countries, by the implementation of austerity policies, with budget draconian cuts diminishment of social safety nets or privatisation of public services. The International Labour Organisation (ILO) (Ortiz et al. 2015) calculates that 124 countries are expected to be considering or implementing austerity policies in 2018. This means that regressive fiscal consolidation would affect more than an estimated 80 per cent of the global population. Moreover, according to the same source, a predicted 30 per cent of countries in the world, including states with high developmental needs such as Angola, Eritrea, Iraq, Sudan and Yemen, are likely to be undergoing excessive[7] fiscal contraction by 2030.

UN bodies have not remained silent on the human rights' impact of fiscal adjustment. For example, the Independent Expert on Human Rights and Foreign Debt dedicates its latest reports to the impact of post-crisis economic reforms on women's rights (2018a) and labour rights (2017). The protection of human rights at times of crisis has also been object of attention for EU institutions, as in the case of the widely circulated reports by the OHCHR (2010) and the Council of Europe (2014). More recently, the Steering Committee for Human Rights (CDDH) also drafted a report (CDDH 2015) on the impact of the 2008's economic crisis on human rights in Europe. The report critically reviews the relevant case-law of the European Court of Human Rights (ECtHR) and the European Committee of Social Rights. Likewise, academic literature on austerity and human rights is flourishing. For example, *Social Rights in Europe in an Age of Austerity* (Civitarese et al. 2018) investigates the crucial question of whether human rights law is 'fit for purpose' in protecting socio-economic rights at times of financial meltdown. Through the case studies of Germany, France, Italy,

[7] Excessive fiscal contraction is defined as cutting public budgets below pre-crisis level.

Spain and the UK, the book examines the link between public law and economic reforms in the fields of health, pensions, housing and unemployment. The second part of the volume offers, instead, an engaging discussion on open legal debates such as the effects of territorial asymmetries on the guarantee of social rights within the European Economic and Monetary Union (EMU). The legal implications of austerity policies are also discussed in Koukiadaki's *Can the austerity measures be challenged in supranational Courts? The cases of Greece and Portugal* (2014), which clarifies whether the measures backed by the Troika can be effectively challenged before supranational judicial bodies.

Of a broader scope is *Economic and Social Rights After the Global Financial Crisis* (Nolan 2014), which represents the most comprehensive scholarly work on socioeconomic rights and austerity to date. Other key works include the pioneering *Of Austerity, Human Rights and International Institutions* (Salomon 2015) and *Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse* (Wills and Warwick, 2015). Amnesty International's 2017-8 report focuses on austerity measures and human rights from a global perspective too. Noteworthily, AI observes that Sub-Saharan Africa and Southeast Asia will be the most affected by fiscal consolidation in the future. Pillay and Wesson (2013) offer another in-depth contribution, considering the impact of the crises in South Africa, as well as governments' responses and the options available for the judicial enforcement of socioeconomic rights at times of resource constraints.

Some researchers have also detected the human rights impact of economic reforms on specific vulnerable groups. For instance, *Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries* (UNICEF 2013) is an *ex-ante* impact assessment on the potential human costs of fiscal consolidation measures on children. The report, in fact, examines IMF government spending projections for 128 developing countries, comparing three periods: 2005-7 (pre-crisis), 2008-9 (crisis phase I: fiscal expansion) and 2010-12 (crisis phase II: fiscal contraction). Based on such findings, authors group and assess the most common adjustment measures from the perspective of the right of the child. On a similar pace, UNICEF's global report *Children of the Recession: The Impact of the Economic Crisis on child well-being in Rich Countries* (2014) analyses change in child poverty and youth unemployment ratios in 41 developed countries.

A final note is needed on the literature regarding the legal implications of challenging unfair economic reforms. In effect, the cornerstone of any discussion on socioeconomic rights and economic recovery is the principle of non-retrogression under the ICESR. Quintessentially, retrogressive measures constitute a *prima facie* violation of the ICESCR *except if* they are

implemented after careful consideration of every possible alternative and when 'fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' (Nolan et al. 2014, 124). Here, the authors also signal that, despite the central importance of the provision for the realisation of ESCR, the barring retrogressive steps has not received enough attention by human rights bodies. The difficulty of using the prohibition of non-retrogressive measures in litigation is discussed in detail by Hershkoff et al. (2013), who analyse the case of the United States after the global financial crisis.

4. Measuring Socioeconomic Rights: Human Rights Impact Assessments (HRIAs) and Economic Reforms

The Independent expert on Foreign Debt and Human Rights is currently developing guidelines on how to develop efficient Human Rights Impact Assessments (HRIAs) of economic reform policies. According to a recent Report of the Independent Expert (2018b), developing a specific framework to identify the human rights implications of fiscal consolidation is more than urgent, as to ensure remedies and prevent future violations. HRIAs, in effect, are the most widely used tool when it comes to measuring the impact of public policies on human rights' enjoyment (Landman et al. 2010). This is not surprising, as HRIAs provide human rights practitioners with evidence-based arguments, enabling them to take part in the public-policy debate (Bakker et al. 2009). Moreover, HRIAs can address human rights issues *during* the development of policies, influencing, thus, the policy-cycle. In this way, human rights practitioners can aspire at protecting all individuals, and not only those who have the money to bring cases to courts (Harrison, 2010, 4). For the same reason, HRIAs can prevent human rights' violations when they take the form of *ex-ante* impact assessments. Meaningfully, Harrison (2011) has critically engaged with the practice of HRIAs in a variety of different fields. Harrison further evinces that HRIAs has been used in the field of development, children's rights, business and human rights (Harrison 2010a), trade and human rights (Harrison et al. 2008). As for the right to health, the NGO Aim for Human Rights stands as a pioneer (Harrison 2011, 168), having developed a Health Rights of Women Assessment Instrument (HeRWAI)[8]. Moreover, UN actors have framed guidelines on HRIAs and health (Hunt et al. 2006), as well as other NGOs (People's Health Movement 2006). Gostin and Mann (1994. In one of the first study addressing the topic, Gostin et al. (1994), the two

[8] More information at Aim for Human Rights: http://www.aimforhumanrights.org/, last accessed: 13/09/2018

authors signalled how public health practitioners often lack human rights expertise, failing to consider the right to health implications of public health policies. Thus, they propose human rights impact assessments as a powerful instrument to achieve the best possible health outcomes while protecting, at the same time, the human rights of individuals and populations (Gostin et al. 1994, 77).

HRIAs have been already applied to the analysis economic recovery policies, but this is limited to few studies. For instance, Harrison et al. (2011) realised an impact assessment of public spending cuts on women's rights and equality in Coventry, UK. Specifically, they undertook a Human Rights and Equality Impact Assessment (HRIEA). The authors went through 8 phases: screening; scoping; consultation; evidence gathering; analysis; conclusions and recommendations; publication; monitoring. Data were collected from a variety of national and local sources, as well as through semi-structured interviews and consultations with local groups. The report yields that post-2008 spending cuts disproportionately impacted women in different areas, such as education and training, labour market, housing, health, violence against women, legal aid, income and poverty and social care.

Reed et al. (2014) realised, instead, a quantitative study assessing the cumulative impact of tax, spending and benefit changes in the 2010-15 period on vulnerable groups in the UK. Specifically, this project measures the distributional impact of public expenditure cuts, disaggregated by gender, ethnicity, disability and age, revealing possible vertical inequities. At the same time, the study investigates horizontal discrimination by dividing the population into income deciles, from the poorest to the richest. The result of this analysis display how ethnic minorities, households with at least one disabled member, lone parents and women will be the most affected by the public spending cuts. Moreover, across all age groups, the most severe losses are experienced by the 65-74 and the 35-44 age groups (Reed et al. 2014, 3-4). Overall, this impact assessment signals that UK's public policies implemented after the financial crisis were strongly regressive (p. 30), as they likely boosted the income of the two top deciles, while substantially reducing earnings for the bottom half. Meanwhile, the heaviest burden would be beard by vulnerable groups such as ethnic minorities, families with more than three children and disabled people.

Looking at methodologies only, the Centre for Economic and Social Rights (CESR) is developing a framework to assess austerity policies in light of human rights law. In *Assessing Austerity* (CESR 2018a), CESR's researchers propose to apply the OPERA framework to the human rights analysis of fiscal adjustment. The OPERA framework is a four-step investigation developed by the New York-based NGO, and it is constituted of the following

phases: outcome; policy-effort; resources; assessment. Building on this general procedure to evaluate public policies, the CESR further specifies a seven-step standardised process that can be used to conduct transparent, attentive and participatory human rights impact evaluations: preparation, screening, scoping, evidence-gathering, initial findings and recommendations. Innovatively, the report suggests that econometrics methods can be used to examine the casual relationship between socioeconomic rights' backsliding and austerity measures. In fact, econometric techniques for programmes evaluation can help disentangling the explanatory power of specific policies from the broader, mixed influence of other potentially influential variables. Finally, according to the authors of the report, some fiscal measures in place today are clearly incompatible with human rights law. On the other hand, hard choices are sometimes unavoidable, and human rights impact assessments cannot be blind to the necessity of undertaking trade-offs between welfare provisions that confront many policy-makers. Implementing HRIAs, to this end, is also a way of determining the least-damaging alternative from a human rights' perspective.

5. The Right to Health, Economic Crisis and Austerity

The literature regarding austerity and specific rights is still at an early stage. Research on the human right to health and austerity makes no exception, as there are very few studies narrowing down the analysis solely to public healthcare provisions. Key articles include reflections on themes such as priority setting (Yamin et al. 2014), or case studies on Southern European countries such as Portugal (Legido 2016). Similarly, another recent article (Sakellariou et al. 2015) investigates the effects of neoliberal reforms and structural adjustment programs on access to care of people with disabilities in Chile and Greece. On the connection between international financial institutions' (IFIs) lending, austerity and human rights, see Stubbs et al. (2017). Always on Chile, a remarkable 2017's piece by Sakellariou et al. inquires the long-lasting inequalities produced by neoliberal reforms within the country.

To date, Lusiani (2013) undertakes one of the most in-depth and shrewd analysis of the relationship between the right to health and fiscal adjustment measures. In fact, Lusiani critically reviews the impact of Spain's austerity measure implemented in 2010 and 2012 on the country's healthcare system from a human rights' perspective. Pressured from bond-holders, international financial institutions and the new EU Fiscal Rules (European Council 2013), Spain implemented an historic €7 billion cut to health in May 2012. Additionally, public spending downsizing was

combined with structural reforms of both health and labour sectors, with the aim of restoring creditors' trust and boosting competitivity. Notwithstanding such drastic measures, growth turned negative, unemployment continued skyrocketing and investors' confidence remained shaky. Under such harsh economic conditions, Lusiani underlines that Spain's austerity measures impinge on the determinants of health, especially decent work, housing and adequate living standards. Second, the author discusses how Spanish austerity measures threaten the accessibility, universality and quality of healthcare throughout the country, dedicating special attention to migrants.

Even if research on the right to health and austerity is limited to a few case studies, many human rights scholars refer to the healthcare implications of fiscal adjustment when looking at socioeconomic rights in general. Solomon (2015), for example, highlights how access to basic health services was severely curtailed in Greece, including with the introduction of user fees. Solomon also shows that the inability to obtain care mostly impinged on the right to health of older people. Likewise, Oxfam denounced that the increase in user fees undermines the affordability of healthcare in Italy, especially for older and unemployed people (Petrelli 2013). UNICEF's Report Children of Austerity (Chantillon et al. 2017), instead, displays how austerity measures can severely limit children's access to prompt healthcare in Belgium, Greece, Germany, Hungary, Ireland, Italy, Japan, Sweden, UK, USA and Spain.

6. Public Health, Epidemiology and Fiscal Consolidation: Useful Results for Human Rights' Advocacy

While there is limited human rights scholarship on the right to health and austerity, there is a plethora of articles and volumes dedicated to fiscal consolidation in the field of public health. In fact, public health voices concerned with health inequities have depicted vividly the deadly effects of austerity on populations' health. For example, *The Body Economic: Why Austerity Kills* (Stuckler et al. 2013) scrutinises austerity as it had been a large-scale clinical experiment, where the treatment is administered by ministries of finance rather than doctors. Their main finding is that 'recession can hurt, but austerity kills' (preface). In other words, Stuckler and Sanjau believe that the effect of economic crisis on health outcomes can be either worsened or mitigated by post-crisis political choices: namely, fiscal stimulus or draconian cuts to health budgets. Relying on epidemiological evidence from a comparative perspective, the authors contrast the health outcomes of austerity cases with non-austerity ones: Iceland vs Greece in

the current crisis; the US states which followed Roosevelt's New Deal prescriptions vs those that did not during the Great Recession; Russia, Hungary and most of the former Soviet Union countries vs Czechoslovakia, Poland and Belarus in the post 1989 period; Indonesia vs Thailand during the East-Asian financial crisis of the 1997. In all cases, those countries that eschewed austerity experienced better health outcomes (141). Another key contribution is *Financial crisis, austerity, and health in Europe* (2013), where the authors investigate the cases of Greece, Spain, Portugal and Iceland to infer that, although economic crisis alone can damage health, the combination with weakened social protection and regressive fiscal policies is the deadly mix that ultimately leads to particularly gloomy health outcomes. Similar claims are found in the WHO Report's Health policy responses to the financial crisis in Europe (2013), which provides a summary of health policy responses to the financial crisis in 52 European countries.

Special attention is to be given to the econometric analysis undertaken by Reeves et al. (2013) in: *The political economy of austerity and healthcare: Cross-national analysis of expenditure changes in 27 European nations 1995–2011*. In fact, the findings of this study could be of much use when speculating on the human rights implications of the conditionalities attached to international financial institutions' loans. Interestingly, Reeves et al. deduce which factors likely pushed governments towards the implementation of healthcare budget cuts in Europe. From a methodological point of view, the researchers used multivariate random- and fixed-effects models, correcting for pre-existing time trends. They analysed the following four variables: magnitude of economic recession in terms of GDP change per capita, cumulative GDP decline and changes in tax revenue; political ideology (i.e. whether Left or Right parties were more likely to implement cuts than those at the Centre of the political spectrum); exposure to IMF lending. Tellingly, the findings yield that IMF-lending recipient countries where 3.9 times more likely to implement healthcare budget cuts than non-recipient ones. Additionally, even when contrasted with other countries implementing austerity, IMF-recipient states displayed larger healthcare cuts. Differently, the authors did not find any significant association between the choice to implement austerity and the magnitude of the recession. The 'third party' hypothesis was rejected too.

In *Austerity and Health in Europe*, Quaglio et al. (2013) inspect the consequences of austerity measures on health in Europe, reflecting on the logic of European health systems responses to the financial crisis. They conclude that horizontal cuts in health at times of crisis seriously jeopardize health outcomes. By contrast, the negative effects of financial crisis on health can be moderated through investing in social protection and health promotion.

Looking at single case studies, Kentikelenis et al. (2014) maintain that the Greek economic crisis has deepened since it was bailed out by international financial institutions in 2010 (748). In effect, the country underwent its sixth economic contraction, with anaemic or no growth and tripled unemployment between 2008 and 2012. According to the authors, because of the harsh austerity policies implemented in line with the Memorandum of Understanding (MoU) signed with the Troika institutions, Greek public health was devastated. In fact, the authors explain, the main goal of the fiscal adjustment programme as regards healthcare was reducing public health expenditure as low as 6 per cent of GDP. To meet such a threshold, hospitals' operating costs and drugs expenditure were both significantly curtailed. Similarly, prevention and treatment programs for illicit drugs, including heroin, were also reduced. Consequently, the number of HIV infections rose from 15 to 489 between 2009 and 2012, and the incidence of tuberculosis on this population likely more than doubled according to available epidemiological data. Importantly, at the end of June 2013, the Minister of Health A. Georgiadis re-introduced a controversial law stipulating forced testing for infectious diseases under the supervision of the police for drug users, prostitutes and migrants. To prove the existence of such a Greek public health tragedy, Kentikelenis et al. analyse cross-sectional data on unmet medical need because of excessive cost, waiting list or travel distance over the period 2007-2011. Of special importance, from a human rights perspective, is that data are disaggregated by sex, age, family status, urbanisation and education level. As a main conclusion, it is advised that Iceland and Finland can serve as examples of economies that recovered without implementing excessively regressive fiscal policies and, thus, without undermining public healthcare services.

De Vogli et al. (2012) also highlighted how economic crisis and budget cuts can severely impact mental health. In fact, the authors show that the 2008's financial crisis resulted in a remarkable excess in suicides when compared with secular trends. This negative mental health trends are also linked to unemployment figures in De Vogli (2013).

Public health advocates have worked on access to medicines and treatment rationing at times of financial recession. For example, Zimmermann et al. (2016) examine the pharmaceutical policies that have been undertaken in 32 European countries after the global financial crisis. The authors undertook a bi-annual survey in collaboration with the Pharmaceutical Pricing and Reimbursement Information (PPRI) network (1346). The results show that mostly implemented policies where: price reductions and price freezes; changes in co-payments; modifications to the reimbursement lists. Importantly, the authors suggest that these measures might have deleterious effects on affordable access to pharmaceuticals as well as on overall health outcomes.

Conclusions

Human rights scholarship is increasingly paying attention to the human costs economic crisis and fiscal adjustment. UN bodies, scholars, grassroots organisations and governmental agencies are all contributing to the heated debate around the protection of socioeconomic rights financial recessions. Of course, the 2008's crisis, with its decennial repercussions, provides a breeding ground for research on how to undertake economic recovery in line with human rights law. Meanwhile, Human Rights Impact Assessments (HRIAs) are becoming the leading tool in assessing the human rights impact of economic reforms. Research gaps, however, are huge. This is not surprising, given the relatively recent development of the literature on human rights' and economic recovery. From a geographical point of view, much has been done on Europe, while other areas of the world have only just begun to be scrutinised. Research on the impact of fiscal consolidation in the Middle-East, Sub-Sharan Africa and South-Asia, for example, is urgent. As regards the right to health and austerity, only few contributions have already been realised by human rights specialists. Much has been done, instead, in the realm of public health. Luckily, lessons and findings from epidemiologic and health economics can be easily imported into human rights scholarship.

References

Amnesty International (2018) 'Annual Report 2017-8', retrieved from: https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF (accessed: 20/05/2018).

Amnesty International (2018) 'Wrong Prescription: the Impact of the Right to Health in Spain', retrieved from: https://www.amnesty.org/download/Documents/EUR4181362018ENGLISH.PDF (accessed: 08/05/2018).

Anastasiou, F., Antonopoulou, M., Tsiligianni, I. and Lionis, C. (2016) 'Long term impact of the economic crisis on health care in the Greek setting: The Pandora box?', *Health Policy*, 120(7).

Andrieux-Meyer, I., Cohn, J., De Araùjo, ES., and Hamid, SS. (2015) 'Disparity in market prices for hepatitis C virus direct-acting drugs', *The Lancet Global Health*, 3(11).

Bakker, S., Van Den Berg, M., Düzenli, D. and Radstaake, M. (2009) 'Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)', *Journal of Human Rights Practice*, 1(3).

Balakrishnan, R. and Elson, D. (2008) 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights', *Essex Human Rights Review*, 5(1).

Balakrishnan, R., Elson, D., Heintz, J. and Lusiani, N. (2011) 'Maximum Available Resources & Human Rights: Analytical Report', Center for Women's Global Leadership, Rutgers, New Brunswick, retrieved at: https://csrdar.org/sites/default/files/196_e.pdf (accessed: 05/08/2018).

Balakrishnan, R. and Elson, D., eds. (2012) *Economic Policy and Human Rights: Holding Governments to Account*, Zed Books, London and New York.

Balakrishnan, R., Elson, D. and Heintz, J. (2016) *Rethinking Economic Policy for Social Justice: The radical potential of human rights*, Routledge, New York.

Burger, M. (2003) 'Bi-polar and Polycentric Approach to Human Rights and Environment', *Columbia Journal of Environmental Law*, 28(2).

Carmona, M. S. (2014) 'Alternatives to austerity: a human rights framework for economic recovery', in: Nolan, A., ed. *Economic and Social Rights after the Global Financial Crisis*, Cambridge University Press, Cambridge.

CESR (2012a) 'The OPERA Framework: Assessing Compliance with the Obligation to Fulfil Economic, Social and Cultural Rights', retrieved from: http://www.cesr.org/sites/default/files/the.opera_.framework.pdf (accessed: 20/02/2018).

CESR (2012b) 'Assessing Fiscal Policies from a Human Rights Perspective: Methodological Case Study on the Use of Available Resources to Realize Economic, Social and Cultural Rights in Guatemala', retrieved from: http://archive.cesr.org/downloads/assessing.fiscal.policies.from.a.human.rights.perspective.pdf (accessed: 03/04/2018).

CESR (2018a), 'Assessing Austerity', retrieved from: http://www.cesr.org/sites/default/files/Austerity-Report-Online2018.FINAL_.pdf (accessed: 02/03/2018).

CESR (2018b) 'Rights in an Age of Austerity: Encouraging Fiscal Alternatives at IMF', retrieved from: http://www.cesr.org/sites/default/files/LostDecadeatIMF-Summary-Final%20May%2025.pdf (accessed: 20/06/2018).

Chapman, A. R. (2016) *Global Health, Human Rights and the Challenges of Neoliberal Policies*, Cambridge University Press, New York.

Civitarese M. S., Halliday, S. (2018) *Social Rights in Europe in an Age of Austerity*, Routledge, New York.

Committee on ESCR (2007) 'An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant', UN Doc E/C.12/2007/1, retrieved from: https://www2.ohchr.org/english/issues/escr/docs/e_c12_2007_1.pdf (accessed: 06/09/2018).

Commissioner for Human Rights (2014) 'Safeguarding Human Rights in Times of Economic Crisis', retrieved at: https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/16806daa3f (accessed: 02/09/2018).

De Vogli, R., Marmot, M., Stuckler, D. (2012) Excess Suicides and Attempted Suicides in Italy Attributable to the Great Recession, *Journal of Epidemiology and Community Health*, retrieved from: http://jech.bmj.com/content/early/2012/08/01/jech-2012-201607.abstract (accessed: 21/09/2018).

De Vogli, R. (2013) Unemployment and Suicides During the Great Recession in Italy, *BMJ: British Medical Journal*, 347(7920).

Dumit, J. (2012) 'Prescription maximization and the accumulation of surplus health in the pharmaceutical industry: The_BioMarx_Experiment', in: Rajan, S., Durham, K., eds. (2012) *Lively Capital: Biotechnologies, Ethics, and Governance in Global Markets*, Duke University Press, Durham.

Dutschke, M., Rooney, E. Nolan, A., O'Connell, R. and Harvey, C. (2010) 'Budgeting for Social Housing in Northern Ireland: A Human Rights Analysis', retrieved from: http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series4/kess_oconnell_harvey_nolan_rooney.pdf (accessed: 05/09/2018).

Farnsworth, K. and Irving, Z. (2018) 'Austerity: Neoliberal Dreams Come True?', *Critical Social Policy*, 38(3).

Forman, L., Caraoshi, L., Chapman A. R. and Lamprea, E. (2016), 'Conceptualising minimum core obligations under the right to health: How should we define and implement the 'morality of depths'', *International Journal of Human Rights*, 20(4).

Fuller, L. 'The Forms and Limits of Adjudication', *Harvard Law Review*, 92(1978).

Gostin L. and Mann, J. M. (1994) 'Towards the development of a human rights impact assessment for the formulation and evaluation of public health policies', *Health and human rights*, 1(1).

Hagan, O'. and Klatzer, E., eds. (2018) *Gender Budgeting, Development and Challenges*, Palgrave MacMillian.

Harrison, J. and Goller, A. (2008) 'Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?', *Human Rights Law Review*, 8(4).

Harrison, J. (2009) 'Trade Agreements, Intellectual Property and Access to Essential Medicines: What Future Role for the Right to Health?', in: Aginam, O., Harrington, J. and Ku, P. Y, eds., *The Global Governance of HIV/AIDS, Intellectual Property and Access to Medicines*, Edward Elgar, Northampton.

Harrison, J. (2010) 'Measuring Human Rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future', *Warwick School of Law Research Paper*, No. 2010/26.

Hershkoff, H. and Loffredo, S. (2013) 'Tough times and weak review: the 2008 economic meltdown and enforcement of socio-economic rights in US state courts', in Nolan, A., ed. (2014) *Economic and Social Rights after the Global Financial Crisis*, Cambridge University Press, Cambridge.

ILO (2017) 'World Social Report 2017', retrieved from: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_604882.pdf (accessed: 10/09/2018).

Independent Expert on the Effect of Foreign Debt on Human Rights (2018a) *Report to the General Assembly (main focus: Impact of economic reform policies on women's human rights)*, retrieved from: A/73/179; (2018b), *Report to the Human Rights Council (main focus: Development of guiding principles for assessing the human rights impact of economic reform policies)*, retrieved from: A/HRC/37/54; (2017), *Report to the Human Rights Council (main focus: structural adjustment and labour rights*), retrieved at: A/HRC/34/57.

Joseph, S. (2011) *TRIPS and the Right to Health. In Blame it on the WTO? A Human Rights Critique*, Oxford University Press, Oxford.

Karanikolos, M., Mladovsky, P., Cylus, J., Thomson, S., Basu, S., Stuckler, D. and Mackenbach, J. P. (2013) 'Financial crisis, austerity, and health in Europe', *The Lancet*, 381(9874).

Kentikelenis, A., Karanikolos, M., Reeves, A., McKee, M. and Stuckler, D. (2014) 'Greece's health crisis: From austerity to denialism', *The Lancet*, 383(9918).

Kinley, D. (2018) *Necessary Evil: How to Fix Finance by Saving Human Rights*, Oxford University Press, Oxford.

Koukiadaki, A. (2014) 'Can the austerity measures be challenged in supranational Courts? The cases of Greece and Portugal', retrieved from:

https://www.etuc.org/sites/www.etuc.org/files/publication/files/austerity_greeceportugal_en_3.pdf (accessed: 04/09/2018).

Krugman, P. (2014) 'The Austerity Delusion', *The Guardian*, retrieved from: https://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion (accessed: 18/08/2018).

Lagarde M. and Palmer N. (2011) 'The impact of user fees on access to health services in low- and middle-income countries', *Cochrane Database of Systematic Reviews*, 4(CD009094).

Legido-Quigley, H., Karanikolos, M., Hernandez-Plaza, S., De Freitas, C., Bernardo, L., Padilla, B., Machado, S., Diaz-Ordaz, K, Stuckler, D. and McKee, M. (2016) 'Effects of the financial crisis and Troika austerity measures on health and health care access in Portugal', *Health Policy*, 120(7).

Lusiani, N. (2014) 'Rationalising the Right to Health: Is Spain's Austere Response to the Economic Crisis Impermissible Under International Human Rights Law?' in Nolan, A., ed. (2014) *Economic and Social Rights after the Global Financial Crisis*, Cambridge University Press, Cambridge.

MacNaughton, G. and Frey, D. F. (2018) *Economic and Social Rights in a Neoliberal World*, Cambridge University Press, Cambridge.

MacNaughton, G. and Hunt, P. (2006) *Impact Assessment, Poverty and Human Rights: a Case Study using the Right to the Highest Attainable Standard of Health*, retrieved from: http://www.who.int/hhr/Series_6_Impact%20Assessments_Hunt_MacNaughton1.pdf (accessed: 03/09/2018).

Moyn, S. (2014) 'A Powerless Companion: Human Rights in the Age of Neoliberalism', *Law and Contemporary Problems*, 77(4).

Nolan, A., ed. (2014) *Economic and Social Rights after the Global Financial Crisis*, Cambridge University Press, Cambridge.

Nolan, A. (2015) 'Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis', *European Human Rights Law Review*, 2015(4).

Nolan, A. (2018, forthcoming), 'Privatization and Economic, Social and Cultural Rights', *Human Rights Quarterly*, 40(4).

Nolan, A., Lusiani J., and Courtis, C. (2014) 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights', in: Nolan, A., ed. (2014) *Economic and Social Rights after the Global Financial Crisis*, Cambridge University Press, Cambridge.

O'Cinneide, C. (2014) 'Austerity and the Faded Dream of a 'Social Europe'', in: Nolan, A., ed. (2014) *Economic and Social Rights after the Global Financial Crisis*, Cambridge University Press, Cambridge.

O'Connell, P. (2007) 'On Reconciling Irreconcilables: Neoliberal Globalisation and Human Rights', *Human Rights Law Review*, 7(3).

O'Connell, P. (2011), 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity', in: Nolan, A., O'Connell, R., and Harvey, C., eds. (2011) *Human Rights and Public Finance*, Hart Publishing, Oxford.

Ortiz, I., Cummins, M., Capaldo, J. and Karunanethy, K. (2015) *The Decade of Adjustment: A Review of Austerity Trends 2010-2020 in 187 Countries*, (Extension of Social Security Series No. 53), International Labour Office (ILO), Geneva, retrieved from: http://www.social-protection.org/gimi/RessourcePDF.action?ressource.ressourceId=53192 (accessed: 08/08/2018).

Pringle v the Government of Ireland, Judgment delivered by Supreme Court on 31/7/2012, [2012] IESC 47.

Ramirez, S.A. (2011) 'Taking Economic Human Rights Seriously After the Debt Crisis', *Loyola University Chicago Law Journal*, 42(4).

Reeves, A., McKee, M., Basau, S. and Stuckler, D., (2014) 'The political economy of austerity and healthcare: Cross-national analysis of expenditure changes in 27 European nations 1995–2011', *Health Policy*, 115(1).

Rico, A. and Blakey, E. (2012) 'Crisis económica y desigualdades en salud', Colección de Minitemas Online de la Escuela Nacional de Sanidad; Instituto de Salud Carlos III: Madrid, Spain.

Riedel, E., Giacca, G., and Golay, C., eds. (2014) Economic, Social and Cultural Rights: Contemporary Issues and Challenges, Oxford University Press, Oxford.

Rotarou, E. S. and Sakellariou, D. (2017) 'Neoliberal reforms in health systems and the construction of long-lasting inequalities in health care: A case study from Chile', *Health Policy*. 121(5).

Rumbold, B., Baker, R., Ferraz, O., Hawkes, S., Krubiner, C., Littlejohns, P., Norheim, O. F., Pegram, T., Rid, A., Venkatapuran, S., Voorhoeve, A., Wang, D., Weale, A., Wilson, J., Yamin, A. E. and Hunt, P. (2017) 'Universal Health Coverage, Priority Setting, and the Human Right to Health', *The Lancet*, 390(10095).

Sakellariou, D., and Rotarou, E. S. (2017) 'The effects of neoliberal policies on access to healthcare for people with disabilities', *International Journal for Equity in Health*, 16(199).

Salomon, M., (2015) 'Of Austerity, Human Rights and International Institutions', *LSE Law, Society and Economy Working Papers, 2/2015*, re-

trieved from: www.lse.ac.uk/collections/law/wps/wps.html (accessed: 10/09/2018).

Sepulveda, M. (2003) *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerpen and New York.

Spanish Finance and Public Administration Ministry (2012) 'Proyecto de Presupuestos Generales del Estado, retrieved from: www.sepg.pap.minhap.gob.es/sitios/sepg/es-ES/Presupuestos/PresupuestosEjerciciosAnteriores/Paginas/Ejercicio2012.aspx (02/09/2018).

Steering Committee for Human Rights (CDDH) (2015) *The impact of the economic crisis and austerity measures on human rights in Europe feasibility study*, retrieved from: https://rm.coe.int/the-impact-of-the-economic-crisis-and-austerity-measures-on-human-righ/16806f2030 (accessed: 20/08/2018).

Stephenson, MA., Harrison, J. (2011) 'Unravelling Equality: the Impact of the United Kingdom's Spending Cuts on Women', *Political Quarterly*, 82(4).

Stiglitz, J. (2014) 'Europe's Austerity Disaster', *Social Europe*, retrieved at: https://www.socialeurope.eu/europes-austerity-disaster (accessed: 20/07/2018).

Stubbs, T. and Kentikelenis, A. (2017) 'International financial institutions and human rights: implications for public health', *Public Health Reviews*, 38(1).

Tapia Granados, J. A. and Rodriguez, J. M. (2015) 'Health, economic crisis, and austerity: A comparison of Greece, Finland and Iceland', *Health Policy*, 119(7).

Thurkal, E. G. and Shastri, P. (2010) 'Budget for Children Analysis', retrieved from: https://www.internationalbudget.org/wp-content/uploads/Budget-for-Children-Analysis.pdf (accessed: 10/09/2018).

Turk, D. (1992) 'Third Report by the Special Rapporteur on the Realisation of Economic, Social and Cultural Rights', E/CN.4/Sub.2/1992/16, retrieved from: https://digitallibrary.un.org/record/146643/files/E_CN.4_Sub.2_1992_16-EN.pdf (accessed: 09/09/2018).

UN General Assembly (1966) International Covenant on Economic, Social and Cultural Rights (ICESCR).

UNAIDS (2013) 'UNAIDS urges Greek authorities to repeal Sanitary Decree', retrieved from: http://www.unaids.org/en/resources/presscen-

tre/pressreleaseandstatementarchive/2013/july/20130731greece (accessed: 02/09/2018).

UNICEF (2011) *Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries*, UNICEF, New York.

UNICEF (2014) 'Children of the Recession: The Impact of the Economic Crisis on child well-being in Rich Countries', UNICEF, New York, retrieved from: https://www.unicef-irc.org/publications/pdf/rc12-eng-web.pdf (accessed: 08/09/2018).

Van Gool, K. and Pearson, M. (2014) 'Health, Austerity and Economic Crisis: Assessing the Short-term Impact in OECD countries', *OECD Health Working Papers*, No. 76, OECD Publishing, Paris.

Vargas-Peláez, C. M., Rover, M. R. M., Leite, S. N., Buenaventura, F. R. and Farias, M. R. (2014) 'Right to health, essential medicines, and lawsuits for access to medicines – A Scoping Study', *Social Science & Medicine*, 121(2014).

Vogler, S., Zimmermann, N., Leopold, C. and De Joncheere, K. (2011) 'Pharmaceutical policies in European countries in response to the global financial crisis', *Southern Med Review*, 4(2).

Vogler, S., Zimmermann, N. and de Joncheere, K. (2016) 'Policy interventions related to medicines: Survey of measures taken in European countries during 2010 – 2015', *Health Policy*, 120(12).

Wills, J. and Warwick, B. T. C. (2016) 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse', *Indiana Journal of Global Legal Studies*, 23(2).

Yamin, A. E. and Norheim, O. F. (2014) 'Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health', *Human Rights Quarterly*, 36(2).

Medical Interventions on Newborns with Intersex Traits: a Legal Literature Review

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Abstract: Most of the modern western legal systems are silent when it comes to people possessing neither exclusively male nor female sex characteristics. Currently, there are almost no legal dispositions that regulate the birth of such individuals. Since the 1950s, in order to solve the 'problem' of children born with ambiguous genitalia, physicians have normalized the newborns' appearance by assigning them to the male or female sex through surgical operations. The harmful consequences of this so-called medicalization and pathologization of the natural variation of sex characteristics have been denounced since the origins of the intersex social movement, born in the 1990s. Scholars from different disciplines started to question those practices and to call for a change in approach towards those people that do not fit within a social, cultural and legal binary sex and gender system. In particular, the intersex community itself brought the discussion from a framework of medical correction to that of legal protection of human rights. The result is that, while international human rights organizations started to recognize unnecessary genital surgeries on non-consenting minors as human rights abuses, urging States to put an end to them, legal scholars provided persuasive arguments to change the current medical and legal treatment of intersex people.

Keywords: intersex, *children*, *surgery*, *informed consent*, *bodily integrity*, *self determination.*

Introduction

The term 'intersex[9] traits' means a variation of sex characteristics that involves the genetic, chromosomal, gonadal, hormonal, or external genitalia asset of an individual. It is therefore a natural phenomenon that does not allow to classify the individual's sex as unambiguously male or female.

Even if the public debate about this phenomenon is still relatively limited, its occurrence is not such rare. There is no certainty about the frequency of such a variation in sex characteristics, and this is due to several reasons; for instance, unless the variation causes atypical external genitalia, it is very likely that the individual with this condition will never discover it, if not perhaps by chance during other medical examinations. Another reason is that there is no agreement about which sex characteristics variation should be included into the umbrella term 'intersex' as OII suggests there will never be a clear definition of intersex since we have no clear definitions for what a woman is or a man is.

Despite there being no certain data about the real incidence of this phenomenon, however, it has been estimated that about 1,7% of newborns, born alive, will have some kind of sex characteristics variation (Fausto-Sterling 1989), recent studies have shown the existence of at least 40 different known sex characteristics variations (Hiort 2013, 13).

As a natural occurrence, intersex traits are not a new topic. They were well known in the past, as shown by several cosmogonic mythologies,[10] in which this phenomenon is represented with the term 'hermaphrodite'. While within the mythologies this phenomenon has no negative connotation, rather representing a form of divine perfection, people exhibiting those traits in real life were treated differently. In ancient Rome, for instance, intersex newborns were considered a portent, a sign of an ominous future. Since then, this phenomenon has been connected to discussions about natural order, about monstrosity, and for this reason newborns with ambiguous genitalia were normally burned alive, as the rites prescribed.

[9] Besides the term 'intersex', there are also other terms that refer to the same phenomenon: 'hermaphroditism' and 'disorder of sex development.' The last one was proposed in substitution of the term 'intersex' in 2005, during the Lawson Wilkins Pediatric Endocrine Society conference in Chicago. The intent was to create a global term for all congenital variation of the physical, chromosomal, and gonadal development with exclusive reference to the clinical conditions. This was the reason why this term was strongly criticized by different intersex organizations, which argued about how the term 'disorder' led to the portrayal of intersex as a pathology. This is the reason why I will use the term 'intersex.' (Lee, *et al*. 2006). For further information about the ongoing debate concerning the terminology, see Balocchi 2012.

[10] Just some examples: the figure of Hermafroditus within the greek mithology, the egyptian divinities Hapi, Atum, Neith di Sais; the indian divinities Shiva e Vishnù and the aztech Ometeotl.

Such an approach toward intersex people was based on a perception of them as abnormal beings whose diversity should be obliterated through death sentence[11], or the obligation to live in conformity with one of the 'normal' sexual identities, male or female – an approach that persisted until the 20th century.

The treatment of intersex people changed with the emergence of modern science and of positivism, during the first half of the past century: they started to be perceived as people that had to be corrected through medical interventions. Indeed, the idea was that growing up with ambiguous genitalia could constitute a (not demonstrated) danger for the concerned individual and his relatives' physical and psychological wellbeing. Medicine became the solution to a social and legal uncertainty, a problem linked to bodies that could not be assigned unambiguously to the male or female sex.

'Normalizing' genital surgeries started to be considered a necessity to restore a presumed standard of 'normative gender identity' and 'normal body.' These are the roots of the so-called process of medicalization of the intersex phenomenon, which sees such a condition as a pathology. In particular, the pathologization of intersex traits was grounded on the theme of health in relation to 'normality' (Durkheim 2008, 65). As affirmed by Lorenzetti, "the wellbeing of the intersex child was evaluated on the basis of a scientific standard of 'normal' female and male body, assuming that the normality of a body can be established on statistical data, stigmatizing the traits that are not conform to this standard, and curing them surgically" (translation by the author) (Lorenzetti 2018,7).

In this article, the main focus will be the contribution of legal scholars to the discussion about legal issues related to normalizing genital surgeries on non-consenting minors. Indeed, although legal scholars are discussing even the legal status of intersex people, which has relevance in many contexts, such as that of marriage, formal identity documents and discrimination, the enquiry of this article centers on the main concern of the intersex community, source of their social and legal invisibilization and of severe physical, psychological and emotional pain. These 'normalizing' surgeries have already been recognized as infringements of human and, in particular, children's rights by some international and national human rights organizations; but on a national level, except for few examples such as that of Malta and of Portugal, they are still usually not regulated. In this article, thus, different solutions proposed both by legal scholars and activists as alternative treatment protocols will be presented.

[11] One of the last sentence to death of an intersex was in 1599 where Antide Collas was burned alive in Dole (Martin1880).

1. The Medical Treatment of Children Born with Atypical Genitalia

The roots of the surgical treatment, still in use today, of children with intersex traits could be found in what has been called by Dreger the 'age of genitals,' that came after the 'age of gonads.' The 'age of genitals' lasted from 1950 to 1990 and was characterized by the fact that the criterion to establish the 'true sex' of an individual were the genitalia and no longer the gonads (Dreger 1998). This changed the approach towards sexual identity, now determined by the genitalia and strictly connected to the idea that the gender identity of an individual at birth is like a *tabula rasa*. Scientists and psychologists were indeed convinced that the gender identity of a person is determined by the social imprinting, and that therefore it is a product of the children's socialization and education. Exactly from this idea of gender malleability Dr. Money and his team conducted what later became the most famous case of sex reassignment within medical literature, known as the John/Joan case (Money Ehrhardt 1972). Money, a psychologist of John Hopkins Hospital, was convinced like others that the gender identity of a person depended on the socialization of the individual, and that therefore individuals could be freely assigned to any of the two genders, male or female, as far as this assignment happened as soon as possible after birth, ideally within the first 18 months. John Money had the opportunity to test his theory with the case of a 7-month-old child that had lost his penis during a circumcision procedure. Money surgically assigned the child to the female sex and advised the parents to raise the child in line with the assigned sex, never telling the child of what had happened.

For Money the experiment was a success, with the support of 'female' hormones, the child would have assumed a female gender role and a female identity (Money Ehrhardt 1972). From that moment on, Money became a promoter of sex assignment as a solution to be adopted by parents and physicians in the best interest of the child. He was convinced that by 'normalizing' the aspect of the atypical genitals of children with an intersex condition, then considered 'unfinished subjects,' it would be possible to ensure their growth as sexually and psychosocially regular individuals. It was indeed believed that the necessary and sufficient condition for a 'normal gender identity and rule' was the 'normal' appearance of the external genitalia.

The Money protocol became the standard medical treatment for children born with atypical genitalia (Lorenzetti 2014), although in 1997 Diamond and Sigmundson demonstrated that Money's experiment had in fact failed, since the child never accepted his assigned sex and gender identity and started to live as a man at the age of 14, as soon as his father told him the truth (Diamond Sigmundson 1997).

The protocol prescribes a 'corrective surgical operation' that aims to fix the sex in order to ensure a gender-normative behavior and appearance. The intervention is therefore characterized by the creation of new sexual organs and the removal of those that are not in line with the sex chosen by the physicians for the child. This operation includes, *inter alia*, gonadectomy (removal of healthy viable testes, ovaries or other reproductive organs or secondary sex characteristics inconsistent with gender assignment, sometimes recommended to prevent gonadal tumor[12]), hysterectomy, hypospadias repair and, for the feminizing procedure, genitoplasty, clitoral reduction/recession and vaginoplasty.[13]

In order to guarantee a positive outcome of such treatments, the doctors recommended to carry out the surgery within the first two years after birth, with the best solution being to perform it when the newborn was around six months old. As the American Academy of Pediatrics stated in 1996, the 'children whose genetic sexes are not clearly reflected in external genitalia (ie, hermaphroditism) can be raised as member of either sex if the process begins before the age of 2 and half years. Therefore, a person's sexual body image is perceived as socialization' (American Academy of Pediatrics 1996, 590).

For a successful outcome, the procedure also requires unambiguous education in line with the surgically assigned sex, because this would lead to the acceptance of the child's gender of rearing. Parents should therefore hide from their child the truth about the nature of the condition and the treatment (Zieselman 2015).

It was through the fundamental advocacy work against the harmful consequences of such 'normalizing' surgeries that, after 1990, those medical practices started to be questioned even on an academic and medical level. This has led to the establishment of some guidelines such as the Chicago Consensus Statement on disorders of sex development in 2006 (Lee *et al*. 2006) and the 2016 Consensus Statement Update, that provides some recommendations aimed at improving the pediatric management of intersex traits. Instructions include, for example, the creation of multidisciplinary teams and the involvement of the child's parents in order to evalu-

[12] It has to be noticed that the tumor risks vary among the different types of intersex traits, and normally cancer occurrence is very low before puberty. The gonadectomy, that leads to sterilization, can therefore in several cases be safely postponed to a later age. (Karkazis Rossi, 2010; Deans *et al*. 2012; Hughes *et al*. 2006).

[13] Until the 1970-1980s, the usual procedure adopted by surgeons for elective feminizing genitoplasty for femal- assigned infants and children was the clitoridectomy, which included the removal of the corpora and the glans; this practice was then replaced by the clitoroplasty, perceived as less intrusive for it only implies a dissection of the clitoris' skin and subsequent removal of most of the paired clitoral corpora. (Minto *et al*. 2003). A description of the procedures and the risks of such intervention can be found in Ismail Creighton 2005.

ate the best treatment for the child, along with a focus on solely functional (and not cosmetic) criteria for any genital surgery. Many people of the intersex community are still very skeptical about the impact and the implementation rate of those recommendations in practice, especially due to the fact that they are not binding. As shown by a study conducted in 2012 by Ghattas (Ghattas 2013) in 16 different countries, the western medical praxis of 'normalizing' surgeries on children born with atypical genitalia is still performed.

However, atypical genitalia do not constitute a health problem per se,[14] and there is still not enough evidence to prove the putative surgical and sexual benefits of the sex assigning surgeries. There are thus not enough grounds to support or recommend such procedures from a medical point of view (Lee *et al*. 2012).

Since the foundation of the Intersex society of North America (ISNA) in 1990, intersex people started to raise their voice within the international governance, challenging the standard medical protocol. People with a variation of sex characteristics that underwent those 'normalizing' surgeries started to document the short- and long-term consequences of the operation, that include chronical pain, scarring, incontinence and loss of sexual sensation/function (including involuntary sterilization and psychological trauma), due to the several surgical operations that are often required, as well as the regular vaginal dilation with solid objects after vaginoplasty. As per the psychological trauma, it could be ignited by the continuous medical display and exposure to photographs of the genitalia (Tamar-Mattis, 2014). In some cases, involving 8 to 20% of the children (Hughes *et al*., 2006; Furtado *et al*., 2012), they did not even identify with the sex and gender that had been assigned to them.

It was due to this fundamental advocacy work that, even on an academic and medical level, the sex assigning surgeries have started to be questioned, and that alternative protocols have been proposed. On a legal level the questions are related in particular to the 'if' and 'who', namely on whether it is legitimized for physicians, parents and intersex people themselves to take decisions with regards to unnecessary and intrusive medical treatments on minors. As we will see, the answers vary according to which subject is considered the most appropriate to pursue the best interest of the newborn with intersex traits, as this is the paramount principle that should be considered for all actions that affect children, in line with art.3 of the Convention on the Rights of the Child.

[14] There are just a few cases of necessary genital surgery, for example that of urinary tract obstruction, where early medical interventions, even if not necessarily sex-assigning surgeries, are required to avoid future physical harm (Karkazis Kon Tamar-Mattis 2010).

2. Informed Consent Doctrine

The doctrine of informed consent is the product of a real change of perception, wide and deep, that concerns the relationship between physicians and patients: no longer paternalistic, but equal-standing. This doctrine has its roots into the recognition of the individual's freedom and inviolable human rights, in particular those of self-determination and autonomy, as fundamental principles protected on a constitutional ad international level. The informed consent has indeed been internationally recognized as one of the main tools, both in a biomedical and ethical framework, for the protection of the individual's fundamental rights in the context of continuous scientific and medical progress – especially the right to bodily integrity, dignity, life and health. By understanding the body as a fundamental part of a person and of his identity, the informed consent became a tool to limit other social powers, including the medical (Rodotá 2010).

The essential core of the informed consent doctrine is the right to be fully informed about the treatment, the possible risks and benefits and the existing alternatives. The right to information is therefore an 'instrumental right to be exhaustively informed upon one's health condition and the chosen treatment' (Paradiso 1982, 143). It constitutes a necessary prerequisite to allow the subject to balance between the rights to health, to bodily integrity and to self-determination. Only in this way is it possible to talk about a conscious consent, true expression of the individual's freedom. As it emerges from art. 6 of the UNESCO's Universal Declaration on Bioethics and human rights, the free and informed consent is the *condicio sine qua non* for medical treatments, as it is the necessary requisite to ensure respect of the person's autonomy, self-determination and dignity.

As far as the 'normalizing' surgeries on children with ambiguous genitalia are based on medical protocols they have been examined both by legal scholars and intersex activist within the informed consent doctrine framework.

A byproduct of the Money protocol was the concealment model (Tamar-Mattis 2006). Indeed, as often reported, it is usually by chance that the individual who has undergone a 'normalizing' surgery becomes aware of it – if at all (Fröhling 2003). The physicians, with an approach defined by some as the product of a 'benevolent paternalism' (Beh Diamond 2000), advised parents to hide the truth about their children's intersex traits and about the performed interventions by simply raising their children in line with the sex that was surgically assigned to them. The idea was that it would be possible to prevent psychological traumas to the minor by raising them with a non-ambiguous gender identity.

Furthermore, in some cases aside the transmission to the parents faced with an unexpected and unknown, atypical aspect of the children's gen-

italia, of a feeling of necessity and urgency of the treatment (Greenberg 2003, 277) the doctors did not even share the information (at all or in part) concerning the children's conditions and the undergone treatment with the parents themselves. The idea was indeed that in this way they would be more able to bind with their child, not attempting to reveal the truth.

Even if the 'normalizing' genital surgeries do not constitute a medical malpractice, as they are based on medical recommendations, the validity of the consent given to them is questionable, since the medical treatment of intersex traits is based such on a concealment approach.

The German Court of Cologne, in the case of Christiane Völling (Landgericht Köln, 25 O 179/07) indeed recognized that the surgical removal of some of Christiane's female sex characteristics such as the uterus, ovaries and the fallopian tube when Christiane was 18, was carried out without a valid informed consent. The court therefore convicted the physicians to compensation as they were found liable not to have provided exhaustive information concerning the nature and the invasiveness of the intervention.

Some among the legal scholars who analyzed the standard medical protocol for children born with ambiguous genitalia questioned therefore whether the problem lies in the fact that the parents are not truly informed, and suggested the introduction of a higher standard of informed consent as a possible solution. This approach seems to be based on the same assumption on which the surrogate decision-making principle is based, namely, that parents know what is the best for their child. This means that if parents are fully informed about the possible long-term consequences associated to the treatments and about the lack of evidence in terms of possible benefits for the child, they would not give their consent to those practices (Laureau 2003). Such an approach can be found in the Columbian Constitutional Court reasoning, illustrated below.

In the case (Columbian Constitutional Court, Sentencia T-551/99) concerning the validity of the consent given by parents for a sex assigning surgery a two years old child the Columbian Constitutional Court recognized the existence of an impasse for the law. The genital surgeries recommended by the doctors where indeed in line with the existing standard medical protocol, and parents should have therefore been allowed, from a legal point of view, to give their surrogate consent. Yet, perhaps the judges had doubts on whether those practices were in the best interest of the child, especially due to the evidence regarding long-term consequences of such genital surgeries, reported by several intersex movements and advocacy groups. The court thus established that, since prohibition of the medical procedure would be a social experiment, as it would be in contrast with the standard medical protocol established for the birth of a child with am-

biguous genitalia, in order to protect the child's rights and best interest the parental consent should be an enhanced informed consent. This means that the parental autonomy is limited, as the consent had to be not only informed but even 'qualified and persistent' in these cases. Indeed, the consent must be written, the information must be complete and given in several occasions, over a reasonable time period. The reasoning behind this decision was that enough time should be given to parents to fully understand the situation, in order to get out of that widespread perception of the parents of the birth of an intersex children as social and psychological emergency that has to be cured with urgency.

Tamar-Mattis states that while the reinforcement of the informed consent would contribute to avoid some issues related to the genital surgeries it would nonetheless not solve the problem. As also affirmed by Ehrenreich, what has to be eradicated in order to avoid unnecessary genital surgeries, are the justifications on which they are grounded, namely the cultural and social biases that are rooted into a binary sex and gender system, and that influence the treatment of those that do not fit within this dimorphic system by trying to 'fix' and 'cure' them (Ehrenreich 2005).

The so-called middle approach implied by the reinforcement of the informed consent would indeed not tackle some important aspects, i.e.:

- Intersex traits do not constitute a disease (Laureau 2003, 136)
- Parents should not be able to give their consent to such a medical treatment (Ford 2000)

3. Surrogate Decision-making

One of the fundamental questions regards whether the caregivers of minors should have the authority to give their consent to non-emergency operations that, by removing mostly healthy genital tissue, alter in an irreversible way the bodily integrity of a young child, possibly creating conflict with their own interest, beliefs and values.

It is generally understood that minors do not have the necessary capabilities to give an effective consent, as they are not able to fully outweigh the consequences of their consent. In these cases, law normally empowers the caregivers of the minors to give their surrogate consent, as it is believed that they are in the position to know what is the best course of action for the wellbeing of the child (Beh Diamond 2000). But the parental power is not unlimited, and parents must make decisions taking in first consideration both the immediate and the long-term best interest of the child. Indeed, the parents' surrogate decision making is part of the parental duty to cure and custody of the minor, which should always strive for

the child's interests (UN Committee on the Rights of the Child 2013). The primary focus should therefore be the interest of the minor. If the values, preferences, beliefs and expectations of the family are conflicting with the ability to choose in the best interest of the child, those competing interests should be balanced on the grounds of a 'reasonability' standard by involving third parties, such as courts.

In the case of intersex surgical treatments, the capability of parents to make impartial, objective decisions that have the highest benefit for the minor as their main goal is controversial. Concerns arise in relation to the parents' capacity to focus on the best interest of the child due to a possible conflict with their own interest, beliefs and values and a possible external influence. The parents' decision-making process may indeed be inappropriately influenced by external advice and personal desire to avoid the distress caused by the social stigma of being different, abnormal.

Except those limited cases where the intersex variation requires a medical intervention to cure health issues, in mostly all the other cases, the grounds, even on a medical level, that underlie the practice of such surgeries are in fact more cosmetic than medical. The benefits they bring should entail, for instance (Kennedy 2016; Creighton 2004):

- The development of a 'normal' and stable gender identity
- A good psychological and psychosocial outcome
- A relief of parental anxiety
- A 'normal' sexual functioning
- An appropriate and 'normal' gender role behavior

Therefore, even if those surgeries are almost unnecessary and not urgent as they are not required to cure any life threatening disease, parents give their consent influenced by the medical advice to 'normalize' the genitalia of their children and to erase the intersex traits, so as 'to raise them as girls or boys with no hint of abnormality' (Kipnis Diamond 1999, 405). Research shows that parents experience shock, confusion, fear, guilt, anger, sadness, anxiety, shame, and alienation (Karkazis Rossi 2010) when faced with the birth of a child with ambiguous genitalia. The impact of the birth of an intersex child on the parents is shown by a study conducted in United Kingdom. The study outlines how parents try to protect their children through genital surgery, believing that in this way they could prevent their children from being bullied or teased. 'The parents' motivation to protect their child from possible threats was grounded in their own beliefs of binary sex (i.e. children are either born male or female) and their desire to avoid potentially negative social and emotional outcomes for their child.' Parents believed that, by aligning the aesthetical appearance of the child's genitals to one of the binary sexes through surgery, they would create a 'unity be-

tween sex, gender and physical function' that could not be achieved otherwise (Sanders et al. 2011, 2225).

Some authors have indeed already stated that in these cases parents mainly give their consent to operations so as to avoid the exclusion and stigmatization of their children, and to bind with them (Karkazis 2008). The answer to the question of whether they are acting in the best interest of their children is not easy, but as the Committee on the Rights of the Child has declared, 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's right under the Convention' of the Rights of the Child (UN Committee on the Rights of the Child 2011, para. 61; UN Committee on the Rights of the Child 2013, para. 4).

The children's rights are affected by the possible risks associated to the practice (such as the child's loss of bodily integrity, adult sexual capacity and sensibility) even if the parents may consider such risks outweighed by the social and cultural benefits of having a 'normal' external appearance that, in their view, contributes to the wellbeing of the child in terms of identification and integration with a certain society or community (Sarajilic 2014).

This reminds in some way of the justification given by parents who consent to practices that are grounded on cultural and traditional reasons, such as for example forced marriages or FGM; practices that have mostly been banned because recognized as severe violations of children's rights. In all these cases there is indeed, in the words of Lorenzetti a "'potential conflict' between the parental choices and the interest of the minor, a conflict not only understood in terms of general protection of his wellbeing but even as concrete protection of his bodily integrity and an impairment of their actual and future social and relational life" (Translation by the author) (Lorenzetti 2014, 486).

Some scholars (Ehrenreich Barr 2005; Jones 2017) have indeed started to analyze the commonalities between genital surgeries on intersex children and genital mutilations/cutting–especially on female children, asking why those two treatments, both carried out through the often irreversible modification of healthy intimate tissue from non-consenting minors are normally perceived as two completely different things. By taking this approach they problematize the parental authority to give their consent to genital surgeries on children with atypical genitalia, since their choice seems to, not only be based on cosmetic rather than medical reasons, but even embedded in social and cultural values and beliefs.

Given this existing conflict between the parental beliefs, values, and own interest and the interest of the child, the question is whether courts should be involved to resolve the conflict, by protecting the rights of the children and establishing what is in their best interest.

4. Involvement of Third Parties

The parental authority to take decision instead of their children is not an unlimited power. The limits are the preservation of the child's fundamental rights, including to life and to wellbeing. Every decision must be taken in the best interest of the child.

The surgical treatments have a permanent impact on the bodily integrity of the child, in that they could for example cause sterility or an irreversible loss of sexual capacity and function. It is thus possible to say that this impairment limits the individual's rights to procreation, liberty, health and privacy.

On the grounds of the invasive and often irreversible nature of these medical treatments, some scholars have discussed about whether they could be inserted within the category of treatments on children that require the authorization of a court, other than the parental consent. Tamar-Mattis, together with other legal scholars like Greenberg, questioned if the genital surgeries on newborns have some commonalities with the existing categorical exceptions to the surrogate decision-making process, such as the cases of donation of children's organs or sterilization of mentally ill people. These cases involve medical treatments where there is a conflict of interests, and it is not obvious if the treatment is in the individual's or others' best interest. As outlined by Tamar-Mattis, the genital surgeries on intersex children exhibit some features that characterize the categorical exceptions and that thus justify the intervention of an independent and external authority to oversee the parental consent, such as a court. These features are:

- Not demonstrated medical benefit (Dreger 1998; Ford 2001),
- Possible conflict of interest between surrogate decision maker and the concerned individual (Lareau 2003),
- Risk for the fundamental rights of the involved individuals (right to bodily integrity, privacy and, in some case, reproduction; (Haas 2004).

In these cases, courts are involved as impartial third parties to resolve the conflict of interest by guaranteeing the protection of the child's rights (Rosato 2000).

Normally, judges evaluate whether:

- Benefits outweigh risks,
- Procedure is the least invasive to achieve the same benefit,
- Procedure is purely in the best interest of the child.

Therefore, for some legal scholars the categorical exception model would be very useful to the regulation of genital surgeries on intersex children (Greenberg 2003; Tamar-Mattis 2006). The involvement of judges in this decision would not ensure the contribution of a better decision maker, since judges could be influenced by the same sex and gender bias that doc-

tors and parents have; but it may at least guarantee a 'better decision-making process' (Tamar- Mattis 2006, 103), since for the judge it would be imperative to examine the 'evidentiary quality of the advice parents receive and to independently consider the child's best interest.' This solution is seen whit a skeptical eye from some, as it is not certain that courts are sufficiently prepared to deal with such difficult situations, and they may 'lack the necessary intimate connection' to evaluate such a personal decision (Rosato 2000).

The troubles that arise with regards to this sensible issue may be seen from the Columbian Constitutional Court decision-making process. Since there were no other court rulings worldwide that had considered the issue, the Constitutional Court had to acquire the necessary knowledge concerning the intersex phenomenon and the concerned issues. The court therefore availed itself of an amicus brief supplied by ISNA, articles and books from different disciplines about the intersex phenomenon, as well as consultations with experts about all the concerning aspects including the medical, psychological, ethical and legal and even life testimonies of intersex people through two video tapes.

To avoid the danger of lacking knowledge and bias that may influence the judges, Greenberg advised the establishment of an ethic committee made up by experts (sociologists, endocrinologists, psychologists, pediatricians and adult intersex persons), providing information to both parents and judges (Greenberg 2012). Matt and Greenberg further suggested the involvement of ethic committees in the decision-making procedures, even in medical instances like the one at issue, in which parents may give their consent only after the experts have established whether the child would truly benefit from the concerned procedures (Matt 2006, 144).

5. Fundamental Rights at Stake

To evaluate if parents could give their informed consent or if it would be sufficient to involve courts within the decision-making process it seems useful to see under which extend the sex assigning surgeries affect the rights of the involved intersex children.

Already in 2005, the Human Rights Commission of the city of San Francisco stated that the genital surgeries called 'normalizing interventions' on non-consenting minors carried out without necessity are a human right abuse, due to their invasive and irreversible nature. As stated by Kolbe the fact that parents and physicians decide to modify the sexual characteristics of children, by adjusting the children to the sex and gender chosen by them with the self-determination of intersex children on such an intimate and

personal sphere as the body and sex and gender identity of a person (Kolbe 2012). This affects the children's rights to privacy, dignity, autonomy, health and physical integrity.

Plett upholds that the bodily integrity rights especially affected not only by the surgical modification of healthy intimate tissue and the connected short- and long-consequences themselves, but also by the fact that such right includes protection of the individual's privacy and interest to choose autonomously and without external interference if bearing a child, having an abortion or refusing a medical treatment (Plett 2007). Thus, the parental decision to carry out the medical intervention, which may result in a loss of sexual sensation and of reproductive capacity, severely infringes the intersex child's right to bodily integrity.

To this, Tamar-Mattis adds that intersex children are especially powerless due to their young age and difficult condition, and that the removal of healthy sexual organs, causing possible health risks including involuntary sterilization for solely cosmetic/social purposes, may classify as torture or cruel, inhuman or degrading treatment under art. 1 and 16 of the Convention Against Torture (Tamar-Mattis 2014)[15].

The Human Rights Commission further commented that such medical operations constitute a violation of the child's human rights all the more, since they carried out not to cure a disease but to diminish the parental and social discomfort related to the diversity of the child. Indeed, some scholars have already noted that the Convention on the Right of the Child may constitute a useful legal basis for advocating the rights of children with intersex traits (Greenberg 2012), as the Convention recognizes the children's rights to unhindered development of sexual identity and of individual bodily and psychological growth, free from arbitrary interference unless specific conditions of urgency and necessity justify an intervention.

More extensively, the UN Convention on the Right of the Child contains several dispositions that could be applied to cases of early genital surgeries: best interest of the child (art. 3); the guaranteeing of the child's survival and development (art. 6); the respect of the child's identity (art. 8); protection against arbitrary (unless life-saving) and unlawful interference in the privacy (art. 16); the protection of the child from any form of physical or mental violence and injury (art. 19); the right to the highest attainable standard of health and the abolition of traditional practices prejudicial to the health of children (art. 24).

[15] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that: 'Whereas a fully justified medical treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, ..., may constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned' (UN Doc. A/63/175, of 28 July 2008).

Greenberg stated, moreover, that the genital surgeries are even in contrast with art. 2, forbidding discrimination on any grounds, including sex-related. Discrimination could be identified not only in the different treatment of people with ambiguous genitalia because they do not fit within the binary sex and gender norm (UN Office of the High Commissioner for Human Rights 2015), but even because the criteria used by the standard medical protocol to assign a child with ambiguous genitalia to the male or female sex reflects sex and gender stereotypes. The criteria used to assign a child to one or the other sex was indeed the surgical capacity to create, in the case of males, a penis that would allow them to engage in heterosexual penetrative intercourse and to urinate while standing, and for females to maintain the ability to procreate, instead of having a satisfactory sexual intercourse.

Yet, the right the advocacy groups also refer to is art. 12, stating the children's right to self-expression and to have their opinions taken into account. The advocacy groups call at least for the postponement of the medical procedures in order to allow to the involved children to express their opinions.

Within the fundamental rights framework, some scholars (such as Benson 2005; Haas 2004; Lloyd 2005) together with activists demanded for a complete moratorium of the genital surgeries, affirming that parents do not have the authority to surrogate decision-making in this case as they do not only not preserve but even affect the children's fundamental rights, by limiting even the children's right to an open future (Matt 2006). The often irreversible nature of those surgeries indeed limit the children's capacity and ability to take in the future self-determinate decisions in one of the most intimate sphere of an individual's personality. The suggestion is therefore that those medical practices, as they are not medically necessary or urgent, should be postponed until the individual would eventually chose autonomously to undergo such a sex assigning surgery.

The protection of the children's right in this case could be done through the application of existing national dispositions concerning for example bodily injuries, the general parental prohibition to consent to the sterilization of their children (Kolbe 2012, 174; Kolbe 2003, 34) or by the adoption of specific dispositions that outlaw them, as done by Malta in 2015 (Gender Identity, Gender Expression and Sex Characteristics Act 2015).

Conclusion

In recent history, people with intersex traits have largely been absent from legal concerns and instead approached as a medical problem, foretelling questions of identity and legal protection. Consequently, intersex

bodies have been informally regulated by the medical profession, which has constructed a biomedical narrative of intersex through a catalogue of 'sex development disorders and diseases' that, despite their often benign nature, are portrayed as requiring medical intervention (Davis, 2015).The legitimacy and lawfulness of the sex assigning surgeries on non consenting minors has mostly not been questioned. But things are changing: the intersex community is gaining more and more attention.

Indeed, although this issue is still not widely discussed in the public Italian debates, on an international and European level the situation is different. On an international level, the awareness about the harmful consequences of the unnecessary genital normalizing surgeries on intersex children is rapidly increasing, as shown by the 2013 statement by the UN Special Rapporteur on torture (Mendez Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 2013),as well as other statements by the Council of Europe's Human Rights Commissioner in 2015 (Council of Europe Commissioner for Human Right 2015) and by several committees of the United Nations, such as the Committee against Torture, Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities in occasion of the periodic review of the member states (Committee on the Rights of Child 2015, 2016 ; Committee against Torture 2015; Committee on the Rights of Persons with Disabilities 2015).

On a national level there is perhaps still a 'policy disjunction' (Carpenter 2016, 78). Only Malta has so far adopted a specific legal disposition that bans unnecessary surgeries on intersex infants, in 2015.

But as the existence of people that cannot be assigned unambiguously to the male or female sex is an unequivocal fact and the medical treatment of intersex people is under scrutiny, modern western legal systems will have to answer the request of the intersex communities to have their rights respected. For this purpose the examined contributions of the legal scholars may be an useful tool, even if law can be a solution to protect the intersex individual rights, such as the right to physical integrity, to health and to self-determination; but to achieve a real change to the legal situation of people that does not fit within a binary sex and gender system an 'interaction between law and society' is necessary (Kolbe 2009). It will therefore be very interesting to follow the developments that are making room to people with intersex traits, regulating the medical practices to protect their rights, and seeing how this will have an impact on our western socio-cultural and legal systems.

References

American Academy of Pediatrics (1996) 'Timing of elective Surgery on the genitalia of male children with particular reference to the risks, benefits, and psychological effects of surgery and anesthesia', *Pediatric*; 97(4), 590-4.

Balocchi, M. (2012) 'Intersex. Dall'ermafroditismo ai 'Disturbi dello sviluppo sessuale'', *Zapruder. Il nome della cosa. Classificare, schedare, discriminare*, n.29, Sep-Dec., 76-84.

Beh, H. G., Diamond, M. (2000) 'An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?', *Michigan Journal Gender & Law*, n.7, 1-63.

Benson, S. R. (2005), 'Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed', *Cardozo Journal Law & Gender*, 12, 31-80.

Carpenter, M. (2016) 'The human rights of intersex people: addressing harmful practices and rhetoric of change', *Reproductive Health Matters*, 24(47), 74-84.

Chase, C. (1998) Hermaphrodites with Attitude. Mapping the Emergence of Intersex Political Activism', *GLQ: A journal of Lesbian and Gay Studies*, 1 4(2), 189-211.

Columbian Constitutional Court, Sentencia T-551/99 Bogota, Aug. 2, 1999.

Committee on the Rights of Child. Concluding observations on the seventh periodic report of Switzerland. In: Report No.: CAT/C/CHE/CO/7. Geneva: United Nations, 2015.

Committee on the Rights of the Child. Concluding observations on the combined fourth to fifth periodic reports of Chile. In: Report No.: CRC/C/CHL/CO/4-5. Geneva: United Nations, 2015.

Committee on the Rights of the Child. Concluding observations on the fifth periodic report of France. In: Report No.: CRC/C/FRA/CO/5. Geneva: United Nations, 2016.

Committee on the Rights of the Child. Concluding observations on the combined third to fourth periodic reports of Ireland. In: Report No.: CRC/C/IRL/CO/3-4. Geneva: United Nations, 2016.

Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Germany. In: Report No.: CRPD/C/DEU/CO/1. Geneva: United Nations, Apr 2015.

Committee against Torture. Concluding observations on the fifth periodic report of China. In: Report No.: CAT/C/ CHN/CO/5. Geneva: United Nations, 2015.

Committee against Torture. Concluding observations on the fifth periodic report of China with respect to the Hong Kong Special Administrative Region. In: Report No.: CAT/ C/CHN-HKG/CO/5. Geneva: United Nations, 2015.

Council of Europe, Commissioner for Human Rights. Human rights and intersex people, Issue Paper, Strasbourg, 2015.

Creighton, S. M. (2004) 'Long term outcome of feminizing surgery: the London Experience', *British Journal of urology International*, 93, 44-46.

Davis, G. (2015) *Contesting Intersex: The Dubious Diagnosis*, New York: New York University Press.

Deans, R., et al. (2012) 'Timing of gonadectomy in adult women with complete androgen insensitivity syndrome (CAIS): patient preferences and clinical evidence', *Clinical Endocrinology (Oxf)*, 76(6), 894-8.

Diamond, M. and Sigmundson, H. K. (1997) 'Sex reassignment at birth long-term review and clinical implications', Arch. Ped. Adolesc. Med., 151, 298-304.

Dreger, A. D. (1998) 'A History of Intersexuality, from the Age of Gonads to the Age of Consent', *Journal of Clinical ethics*, 9, no.4, 345-355.

Dreger, A. D. (1998) ''Ambigous Sex'- or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality', *Hasting Center Report*, 28, 24-35.

Durkheim, E. (2008), *Le regole del metodo sociologico. Sociologia e filosofia*, Torino: Einaudi.

Ehrenreich, N., Barr, M. (2005) 'Intersex surgery, Female genital cutting and the Selective Condemnation of 'cultural practices'', *Harvard Civil Rights-Civil Liberties Law review* 40(1), 71-140.

Fausto-Sterling, A. (2012) *Sex/Gender: Biology in a Social World*, New York: Routledge.

Fausto-Sterling, A. (1989) 'Life in the XY Corral', *Women's Studies International Forum*, 12(3), 319-331.

Ford, K. K. (2000) ''First do no harm'-The fiction of Legal Parental Consent to Genital-Normalizing surgery on Intersexed Infants', *Yale Law & Policy Review*, 19, issue 2, article 7, 468-488.

Fröhling, U. (2003), *Leben zwischen den Geschlechtern. Intersexualität- Erfahrungen in einem Tabubereich*, Berlin: Ch. Links Verlag.

Furtado P. S., et al. (2012) 'Gender dysphoria Associated with Disorders of Sex development', *Natural Review Urology*, 9(11): 620-627.

Gender Identity, Gender Expression and Sex Characteristics Act, 2015 Available from: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1.

Ghattas, D. C. (2013) 'Human Rights between the sexes, A preliminary study on the life situations of inter* individuals', *Heinrich Böll Foundation Publication Series on Democracy* 34.

Greenberg, J. (2012) *Intersexuality and the law: why sex matters*, New York and London: New York University Press.

Greenberg. J. A. (2003) 'Legal Aspects of Gender Assignment', *The Endocrinologist*, 13, No. 3, 277-288.

Hiort, O. (2013) 'I-03 DSDnet: Formation of an open world-wide network on DSD', in *Proceedings of the 4th International Symposium on Disorders of Sex Development*, Glasgow: University of Glasgow.

Haas, K. (2004) 'Who Will make room for the Intersexed?', American Journal of Law and Medicine, 30(1), 41-68.

Hughes, I. A. et al. (2006), 'Consensus Statement on Management of Intersex Disorders', *Archives Of Disease in Childhood*, 91, 554-563.

Interim Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/63/175, of 28 July 2008.

Ismail, I., Creighton, S. (2005) 'Surgery on intersex', *Reviews in Gynaecological Practice* 5(1), 57–64.

Jones, M. (2017) 'Intersex Genital Mutilation – A Western Version of FGM', *International journal of children's rights*, 25(2), 396-411.

Karkazis, K., Kon, A., Tamar-Mattis, A. (2010) 'Genital surgery for disorders of sex development: implementing a shared decision-making approach', *Journal of Pediatric Endocrinology and Metabolism*, 23(8), 789-805.

Karkazis, K., Rossi, W. C. (2010) 'Ethics for the pediatrician: Disorders of sex development: Optimizing care', *Pediatrics in review/American Academy of Pediatrics*, 31(11), 82-5.

Karkazis, K. (2008) *Fixing sex: Intersex, Medical Authority, and Lived Experience*, Durham and London: Duke University Press.

Kennedy, A. (2016) 'Fixed at Birth: Medical and Legal erasure of Intersex Variations', *University of New South Wales Law Journal*, 39(2), 813-842.

Kessler, S. (1998) *Lessons from the Intersexed*, New Brunswick, NJ: Rutgers University Press.

Kipnis, K., Diamond, M. (1998) 'Pediatric Ethics and the Surgical Assignment of Sex', *Journal Clinical Ethics*, 9(4), 398-410.

Kolbe, A. (2009) 'Intersex, A Blank Space in German Law', in Holmes, M. (ed.), *Critical* Intersex, Farnham: Ashgate, 147-170.

Kolbe, A. (2010) *Intersexualität, Zweigeschlechtlichkeit und Verfassungsrecht*, Frankfurt an Main: Nomos.

Landgericht Köln, 25 O 179/07, 06 February 2008.

Laureau, A. C. (2003) 'Who decides? Genital-Normalizing Surgery on Intersexed Infants', *Georgetown Law Journal*, 92(1), 129-51.

Lee, P., et al. (2012) 'Review of Recent Outcome Data of Disorders of Sex Development (DSD): Emphasis on Surgical and Sexual Outcome', *Journal of Pediatric Urology*, 8(6), 611-615.

Lee, P.A. et al. (2006) 'Consensus statement on management of intersex disorders', *Pediatrics*, 118(2), 814-815.

Lloyd, E. (2005) 'Note, From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children', *Cardozo Journal Law & Gender*, 12(155).

Lorenzetti, A. (2018) 'Il Trattamento giuridico della condizione intersessuale', *Genius*, anno V, n.1, 6-11.

Lorenzetti, A. (2014) 'La problematica dimensione delle scelte dei genitori sulla prole: il caso dell'intersessualismo', in Giuffré, F., Nicotra, I. (eds.), *La Famiglia davanti ai suoi giudici*, Napoli: Editoriale scientifica, 485-493.

Martin, P. L. (2002) 'Moving toward an international standard in informed consent: the impact of intersexuality and the internet on the standard of care', *Duke Journal of Gender Law & Policy*, 9(1, 135-169.

Martin, E. (1880) *Histoire des monstresdepuisl'antiquitéjusqu'à nos jours*, Paris: C. Reinwald.

Matt, E. (2006) 'Das Recht auf eine offene Zukunft, Überlegungen zur medizinischen Normalisierung intersexueller Kinder', *Juridicum*, Nr.3, 144-146.

Méndez J., Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A.HRC.22.53. February 2013

Minto, C. L., et al. (2003) 'The effect of clitoral surgery on sexual outcome in individuals who have intersex conditions with ambiguous genitalia: a cross- sectional study', *The Lancet*, 361(9365), 1252-1257.

Money,J., Ehrhardt, A. A. (1972) *Man & Women, Boy & Girl: the differentiation and dimorphism of gender identity from conception to maturity*, Baltimore: John Hopkins University Press.

Paradiso, M. (1982) 'Il dovere del medico di informare il paziente. Consenso contrattuale e diritti della persona', in Busnelli, F. D., Scalfi, G. (eds.), *La responsabilità medica*, Milano: Giuffré.

Plett, K. (2003) 'Intersexuelle – gefangen zwischen Recht und Medizin', in Koher, F., Pühl, K. (eds.), *Gewalt und Geschlecht*, Wiesbaden: VS Verlag für Sozialwissenschaften, 21-41.

Plett, K. (2009) 'Intersex und Menschenrechte', in Lohrenscheit, C. (ed.), *Sexuelle Selbstbestimmung als Menschenrecht*, Baden-Baden: Nomos, 151–167

Rodotá, S. (2010) 'Il nuovo Habeas Corpus: la persona costituzionalizzata e la sua autodeterminazione', in Rodotá, S., Talacchini, M. (eds.), *Trattato di Biodiritto*, *1*, *Ambito e fonti del Biodiritto*, Milano: Giuffré, 169-228.

Rosato, J. L. (2000) 'Using Bioethics Discourse to Determine When Parents Should Make Health Care Decisions For Their Children: Is Deference Justified?', *Temple Law Review* 73(1), 1-68.

Sanders, C., et al. (2011) 'Parents need to protect: influences, risks and tensions for parents of prepubertal children born with ambiguous genitalia', *Journal of Advanced Nursing*, 67(9), 2220–2230.

Sarajlic, E. (2014) 'Can Culture Justify Infant Circumcision?', *Res Publica*, 20(4), 327–343.

Tamar-Mattis, A. (2014) 'Medical Treatment of People with Intersex Conditions', *Report to the UN Committee Against Torture* , available from https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18525_E.pdf.

Tamar-Mattis, A. (2014) 'Medical Treatment of People with Intersex Conditions as Torture and Cruel, Inhuman or Degrading Treatment or Punishment', in Center for Human Rights & Humanitarian Law, Washington College of Law, American University (eds.), *Torture in Healthcare Settings: reflections on The Special Rapporteur on Torture's 2013 Thematic Report*, Washington DC: Center for Human Rights & Humanitarian Law, 99-104.

Tamar-Mattis, A. (2006) 'Exceptions to the rule: Curing the Law's Failure to Protect Intersex Infants', Berkeley Journal of Gender, Law & Justice, 21(59), 89-98.

UN Committee on the Rights of the Child (2013), General comment n.14 on the right of the child to have his or her best interests taken as primary consideration (Art. 3 para. 1) CRC/C/GC/14.

UN Committee on the Rights of the Child (2011), General comment n.13: The right of the child to freedom from all forms of violence, CRC/C/GC/13.

UN OHCHR Fact Sheet: Intersex (Free and Equal campaign) available from http://www.ohchr/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Intersex_EN.pdf

Zieselman, K. (2015) 'Invisible Harm', *Narrative Inquiry in Bioethics*, 5(2), 122-125.

Applying Theories of Restorative Justice as a Transitional Justice Mechanism: a Critical Literature Review of Social Experiences in Bosnia-Herzegovina and Croatia

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Abstract: This literature review focuses on the usage of Restorative Justice (RJ) as a Transitional Justice (TJ) mechanism within the post-conflict societies of Bosnia-Herzegovina and Croatia. The paper attempts to synthesize relevant literary contributions to garner an answer as to how the instalment of international policies and national legislation have attempted to achieve justice, reconciliation and peace within the concerned focus countries. To this end, the potential of RJ as a strategy for peacebuilding in comparison to retributive justice is challenged via theoretical contributions. This collection of literature is complemented by a practical analysis which illustrates how Bosnia-Herzegovina and Croatia have each chosen to deal with their nation's past; reparative forms of justice such as: Truth and Reconciliation Commissions (TRCs), public apologies, and reparations are presented and analysed as restorative forms of transitional justice within each country. The critical literature review is underpinned by a political advocacy perspective which contends that peace, reconciliation and justice within both post-conflict societies require that the institutionalization of restorative and/or transitional measures of justice: mobilize the utmost political and organizational resources to accomplish such ambitions, call for a balanced delegation of responsibility regarding the role of the international community and such RJ projects integrate rather than marginalize voices from one of the most important participant stakeholders, the community of victims.

Keywords: Restorative Justice, Transitional Justice, post-conflict societies, reconciliation, peace, human rights.

Introduction

The impact of a violent conflict is often categorized by rampant lawlessness, the absence of functional state institutions and widespread social disorder (Bernard et al. 2010; Lambourne 2009). As articulated by Meernick (2005) one of the major features inherited by a post-conflict society following a period of mass-victimization or war is the need for truth, justice, and reconciliation. When the pursuit of such rights are unachieved, relationships between communities at ends during the conflict remain polarized; this phenomenon is perceived to yield damaging consequences for the individual as a victim and collectively impedes overall social betterment. In order to advance society's transition from conflict and into peace, it is the responsibility of the new state to bring such crimes of the former regime to justice. In this post-conflict environment, the safeguarding of fundamental human rights administrated via governing civic structures becomes increasingly critical and simultaneously challenging to ascertain. As a response to this turbulent climate found within society, there are certain juridical and alternative juridical measures that states confronted with such issues of post-conflict rebuilding can elect to employ in order to assist and sometimes even accelerate their nascent nation's transformation into peace, democracy and stability (Clamp and Doak 2012; Gibson 2006).

The existence of measures via the institutionalization of Restorative Justice (RJ) policies as mechanisms of Transitional Justice (TJ) reforms are utilized to ease an individual's post-conflict reintegration experience by assisting their potential to come to terms with their wartime traumas via processes of reconciliation. At the international level, the instalment of such programs have also encouraged collective community forgiveness. If executed appropriately to the context in which they are applied RJ initiatives serve to reduce feelings of adversity, insecurity and injustice while procuring the rise of justice, peace and security within the structures of post-conflict society (Clamp and Doak 2012; Gibson 2006). Reflections gathered from sociologists, international security analysts, and United Nations jurists alike are cognizant of how such structural factors exhibited in post-conflict settings amongst victim and perpetrators communities including inequality, out-group discrimination faced on a quotidian basis can breed xenophobia and aggravate many previous wartime hostilities (Clamp and Doak 2012; Lambourne 2009; United Nations 2000). In an attempt to evade regression towards civil war or a return to violence, the need to procure the rise of a 'rule of law' culture standing besides pillars of transitional and restorative justice becomes imperative. The duty of recognizing a victim's suffering, exposing concealed truths and creating pluralistic diversity are tantamount to longitudinal development and democratic advancement

in post-conflict scenarios. Support for such ideals are reinforced by international community reports, as exemplified via United Nations Rule of Law Reports (2000) which emphasize that the attainment of a minimal level of reconciliation is a pre-requisite to achieving justice, peace, and democracy is vital. It is critical to maintain that a variety of restorative and transitional programs should be expansive, flexible and easily able to adapt and serve justice within the local context they arrive in. Here, taking into account economic, social, and cultural rights of persons within focus countries in alignment with international human rights standards becomes tantamount; it is possible that when such precautions are exhibited in theory but not manifested in practice, the applied society suffers the consequences; references to this ideology is expressed by the following scholars such as: Zehr and Gohar (2003), Clamp and Doak (2012), Barria and Roper (2008), Lambourne (2009) as well as Jakala and Jeffrey (2012), Braithwaite (2002), Grodsky, (2009), Sokolic, (2017), Pejic (2001), Roche (2006) and will be extrapolated upon in the upcoming sections of this literature review.

Currently, literary evidence affirms that RJ can be highly beneficial in endorsing and encouraging peace, justice and reconciliation; as referenced by Braithwaite (2002), Zehr and Gohar (2003), Clamp and Doak (2012), Barria and Roper (2008), and, Lambourne (2009) in post conflict situations. However, there is little discussion as to *how* such RJ mechanisms can be re-instituted in the concerned country when initial attempts to do so have failed (Grodsky 2009; Sokolic 2017). The scope of this paper is then to fill this literary gap, by providing an assessment which combines theory and practice in order discern where policy reforms ought to be targeted from a localized perspective. By re-addressing the social phenomenon through this integrative and top-down approach, it is hoped that reconciliation, justice and peace can be achieved via concrete restorative justice mechanisms that are considerate of the unique context(s) within the transitional country in which they are applied to.

This literature review is organized in four parts. In this first portion of the literature review, the role and limitations of retributive justice are discussed; here special attention is given to identify the shortcomings in using orthodox models of the criminal justice system in transitional settings when dealing with gross violations of human rights. In the second and third portion of the collection of literature, the usage of RJ as a mechanism for TJ are critically assesed. In this regard, theories by Braithwhite (2001) as well as Zehr and Gohar (2003) are explicated parellel to the benefits of implementing such strategies in transitional socities (Roche 2006). The final portion of the literature review focuses on the how theories of RJ mechanisms and TJ models were implemented in both the juridical and non-juridical practices of Bosnian and Croatian post-conflict society. In

the end, the paper underscores that while literature tends to focus on the positivity of using restorative justice as a peacebuilding mechanism within transitional societies, there is less attention dedicating on how to restore, repair and rebuild societies when the departure of such attempts are challanged by local socio-cultural elements, political affiliations, and even economic causes. This literature review represents a starting point by providing a framework as to how factors that challenge the implementation of transitional and restorative justice can be dealt with, appropaitely considered, and properly managed at a local level.

1. The Role and Limitations of Retributive Justice

In dealing with the administration of justice for especially grave international crimes against humanity and other forms of gross human rights violations retributive justice offers perpetrators of such atrocities to be brought before national courts or global tribunals (Clamp and Doak 2012). The ideology behind this framework of retributive justice reflects a core criminological theory that the fear of punishment produces a deterrent effect on potential offenders, in turn, decreases their likelihood of committing the intended criminal act or behavior (Zehr and Gohar 2003). While there is speculation by criminal sociologists on the functionality of this theory, it is important to mention for the purposes of this paper to mention as a core and potentially limiting fundamental principle of retributive justice. According to Braithwaite (2002) justice executed via retributive or traditional means values the notion that punishment is necessary to assure that perpetrators are held accountable for their criminality. In the international arena, traditional justice is utilized to for a variety of functions; most popularly, because of its deterrent role and secondly, because of the international community's manifestation of international jurisdiction to bring fundamental human rights violations to justice, in national judicial forums traditional mechanisms serve to reassert the previously weakened rule of law system within the country (Clamp and Doak 2012; Lambourne 2009). In these respects, retributive justice plays an 'educational' role in the reconstruction of civic value systems and the re-establishment of norms based upon the standards of law and order within a given society. Furthermore, when retributive justice is furnished within the confines of international courts, fact finding missions and commissions of inquiry working to establish the truth are often spectated by a global audience; extending awareness on the suffering of the victims to society as a whole.

The usage of retributive justice alone, however proves to be limiting in its capability to accomplish peace, reconciliation and harness democratic

stability on a national level in post-conflict scenarios. Repairing social relations where communities have faced widespread victimization practices for an extended period of time is denoted by scholars such as Lambourne (2009) and Braithwaite (2002) as well as Zehr and Gohar (2003) as impossible if attempted to be attained within the walls of a courtroom. As articulated by Jakala and Jeffrey (2012) and Zehr and Gohar (2003), trials both national and international affront the reality that all suspected war criminals are unable to be tried. Consequentially, many wartime truths remain concealed and victims feel as though justice has not been served. Even when remanded to entities such as the International Criminal Court because the transitional state lacks the proper functionality of adequate legal resources to 'justly' try and prosecute such crimes; victims still express that their 'voice' in court processes is largely ignored as trials tend to concentrate on the perpetrators. The attainment of criminal accountability and justice in a post-conflict atmosphere with regards to retributive justice, implies that gross human rights violations of international law have been punished (Lambourne 2009). Strategies of accomplishing reconciliation between the victim and offender are not prioritized; in fact, studies show that having both parties go through the criminal justice channels further distances and polarizes both persons because of the offender's likely instruction to deny guilt and responsibility for fear of punishment; aggravating the victim (Clamp and Doak 2012; Lambourne 2009). It is not surprising then that, victims tend to prize restoration of their human and civic dignity compared to punishment of the perpetrator. Given the adversarial atmosphere of tribunals, these goals may be increasingly difficult to attain. The passivity of victims being silently involved in their own cases is further described by Clamp and Doak (2012) and Zehr and Gohar (2003) as well as Braithwaite (2002) as they mention that victims the exclusion of victim and selective presence to testify may trigger further traumatization of their wartime experiences.

The shift to change the direction of traditional justice which is retributive in nature and reorient responses to large scale violations of human rights by placing victims at the center of the legal stage is supported by McKay (2008) her address to the Rome Conference on behalf of the Victims Rights Working Group whereby she stated that: 'Victims need the opportunity to speak the truth about what happened to them, and official acknowledgement concerning the violations. They need to be involved in the process…they need compensation, restitution and rehabilitation'[16]. Restorative Justice is an alternative juridical mechanism which reshapes the orthodox architecture of post-conflict jurisprudence by mobilizing the

[16] F. McKay (2008) speech available at: www.un.org/icc/speeches

agency of victims and placing them in control of how the violations of human rights afflicted unto them should be handled and via which measures such crimes should be dealt with from *their* perspective.

2. On a Theory of Restorative Justice

When a crime occurs, society is confronted with how to administrate justice. The Western legal systems approach to justice has profoundly shaped individual thinking on how criminality should be dealt with at a universal level. While this criminal justice system's approach has a series of strengths, there has been a growing acknowledgement in the last three decades of its' limitations. Specifically, victims, communities and offenders have expressed that retributive and Western systems of jurisprudence are inadequate in meeting their individual needs (Zehr and Gohar 2003). Since the 1970s, restorative justice has emerged as a novel area of theory to address many of these needs. Initially beginning as an attempt to deal with property crimes restorative justice approaches have transcended what is typically perceived as 'minor offences' and provide a response to severe forms of violent criminality including assault, rape and even gross scale violations of human rights. Today restorative justice philosophy has been used in schools, workplaces and religious institutions to transform conflict. Sometimes and in cases where western criminal justice systems have suppressed traditional justice mechanisms restorative justice procures a functional framework to overcoming such injustices. The theoretical framework behind the meaning of restorative justice is further explicated by Zehr & Gohar (2003, 3) in the following quotation: 'RJ encompasses a variety of programs, a philosophy, an alternate set of guiding questions… providing an alternative for thinking about wrongdoing'. One of the key challenges in the developing field of RJ is an understanding of its purpose. Governments, offenders and even victims perceive RJ as a space where forgiveness and reconciliation overrides accountability. As denoted by Zehr and Gohar (2003) and Braithwaite (2002), RJ victim advocates are seen to react negatively to RJ because they hold the pre-conceived ideology that the institutionalization of such programs coerce them to forgive their offenders. In practice, the victims' decision to forgive remains entirely at his or her discretion. The major difference between retributive and restorative forms of justice administration is that the opportunity for participants to forgive is procured; as where in western legal systems such processes are marginalized in respect to the tribunal customs. In theory, RJ attempts to provide participants with the opportunity for an 'open-dialogue', differing from mediation; facilitated meetings between victims and offenders typi-

cally involves components where the offender acknowledges their wrongdoing. When applying RJ to conflict transformation, parties are presumed to be agents on moral level with culpability being shared by all members who engaged in the crime (Braithwaite 2002; Zehr and Gohar 2003).

Restorative Justice movements began as an effort to rethink the needs and roles in crimes, in this sense RJ was concerned with needs that could not be met with the western jurisprudence conditions. Under these tenets, belief in the field of RJ supposed that the agents or legitimate stakeholders involved in traditional jurisprudence was too limiting . (Braithwaite 2002; Roche 2006; Zehr and Gohar 2003). Instituting RJ means expanding the circle of stakeholders beyond traditional representatives of justice, such as prosecutors, judges and so on to include unofficial members into its sphere such as victims, offenders and community members. RJ then argues that this type of alternative legal structure produces a greater impact on 'participant' agency and if its guiding principles are understood its impact can yield far greater results than forums of retributive justice for providing responsibility, rehabilitation and reconciliation (Braithwaite 2002; Roche 2006; Zehr and Gohar 2003).

The victim community has been at the cornerstone of developing the theory and practice of RJ. In their advocacy, this group has often expressed that the justice processes is neglectful. In recognition of this Braithwaite (2002) has argued that according to the western legal system the traditional definition of a crime fails to include victims: here, criminality is defined as crime against the state. Restorative methods to justice, reorient the victim in this spatiality placing them at the center of criminal redress. Sociologists such as Braithwaite (2002), Zehr and Gohar (2003) and Roche (2006) discuss that under the auspices of western legal traditions, violence is congested in the hands of the state; therefore when criminality occurs the state has the right to extol punishment or measures proportional to the violent behavior at the discretion of courts of law. Under the system, the victim because lost in the patterns of such processes. Restorative Justice considers that victims need: *information*, *truth-telling*, *empowerment and restitution*. In terms of *information*, victims deserve to receive answers to 'why' the offender engaged in such an offense; freed from the binding ties of legal speculation; RJ theorists posit that its institutionalization is beneficial because the victim can directly question the offender in receipt of such closure (Braithwaite 2002; Roche 2006; Zehr and Gohar 2003). Another important aspect of RJ is truth telling, here victims can recount their story of the trauma occurred, sometimes in post-conflict settings this forum is furnished in the spaces of a public apology later made by the offender. In this regard, the victim receives public acknowledgement for their lived experiences and expresses to the offender the impact of the harm done

onto them. In terms of empowerment, victims often feel as though being a part of their cases direction provides them with a sense of purpose and helps them to regain personal strength. Restitution by offenders also helps to repair the harm and/or injury done onto the victim; such behavior can be material or verbal and assist in catalyze a victim's perception of their culpability in unfortunate events and aid in their personal transformation (Roche 2006).

In traditional legal models, offenders are rarely encouraged to understand the human toll on impact of their criminality. As expressed by Zehr and Gohar (2003), offenders are discouraged from acknowledging their responsibility and given minimal chances to emphasize with their victims; in fact the traditional legal moderns push criminals to distance themselves from their victims. Social exclusion, stigmatization and alienation from re-integration are all typical consequences of an offender's confrontation with common legal systems. Restorative Justice make strides in overcoming these setbacks for the community of offenders not only to prevent recidivism but to also make perpetrators aware of the effects of their behaviors on a personal level. Through these restoring strategies it is hoped that processes of accountability for the injury encourages offender's empathy as he takes ownership of his crime and transforms these feelings into meaning personal transformations where he can learn restraint, consequences and have an opportunity to be a contributing member to civic society (Braithwaite 2002; Roche 2006; Zehr and Gohar 2003).

Communities are also a critical cohort of Restorative Justice programs. As articulated by Zehr and Gohar (2003) they share an important role in reinforcing guiding norms, values and principles shared by both victims and offenders. Communities working together towards common goals help to bring participants into 'safe-spaces' that are non-judgmental as respected elders, religious and/or cultural leaders remind both parties of the benefits in reconciliation and choosing a path that restores civic order and peace. As where the traditional legal system concentrates on the administration of penalty to assure the offender gets what he *deserves*; the major point of departure for RJ in its focus on the *needs* of victims, offenders and communities following a crime.

3. Restorative Justice as a Transitional Justice Mechanism in Post-conflict Settings

Transitional Justice helps to answer how society should face the legacy of grave crimes against humanity; it deals with the establishment of both retributive and restorative measures of justice in order to discern which independent models are best for the population at hand or if the society would

benefit from a hybrid approach to peacebuilding and reconciliation. As articulated by Clamp and Doak (2012), TJ references a series of processes via which extreme transformations for change in a certain socio-political order are executed. As expanded upon by Lambourne (2009), TJ is challenged by balancing demands for peace with those of justice and discerning the degree to which such objectives can be concurrently achieved. For example, transitional justice is able to guarantee a response to pertinent questions faced in post-conflict settings such as: Should society institute retributive justice to punish perpetrators? Or does the need for victim's truth supersede traditional venues of criminal justice and call for reconciliation via truth & reconciliation commissions and/or the granting of political amnesty in order for society to move forward? In many global post-conflict scenarios, the discretion to make these decisions is oftentimes concentrated in the hands of the international community, this changes in certain scenarios when heads of state and national parliaments collaborate as participatory actors in the implementation of TJ and RJ practices political and social negotiations can take place. During this stage, TJ theorists emphasize that negotiations be 'aimed at achieving agreements that are satisfactory enough for all parties concerned, in such a way that they are willing to accept the transition' (Lambourne 2009; Robin and Hudson 2016; Roche 2006). Of particular importance, are the needs of the community of victims and the protection of their rights in alignment with internationally adopted human principles and legal standards. Balancing stakeholder's voices and materializing victims' rights to access to justice furthers the scope of RJ mechanisms installed in measures such as: truth commission, reparations and individual forgiveness through combined approaches which make strides towards the establishment of a stable peace and national reconciliation.

One of the major challenges in the effective functionality of TJ and restorative processes is compliance. Obstacles faced by jurisprudence concerned with this realm of international law ascertain that it is difficult to receive acceptance of a 'justice-formula' which satisfies both the offender and victim community without further catalyzing already existent tensions from the deep-seeded roots of the prior conflict. In these conditions, state sponsored reconciliation which includes social and political viable solutions for truth, peace and justice should attempt to strike a balance between precluding absolute impunity and recognizing the duty of assigning responsibility to offenders who have carried out crimes against humanity (Clamp and Doak 2012; Lambourne 2009; Robin and Hudson 2016; Zehr and Gohar 2003).

In it is through this inlet that justice, which *restores* cultural, ethnic and/or religious relations in post-conflict settings through a victim-centered model to peacebuilding can metamorphose (Clamp and Doak 2012; Lambourne

2009; Zehr and Gohar 2003). State policies that satisfy victim's needs helps to not only recognize the victim's suffering, forms of acknowledgement garner support for the new government on a collective level, encouraging social harmony. As RJ philosophy incorporates a forward-thinking approach to peacebuilding in post-conflict settings, it organically contests evaluations made upon the offender's guilt and calls for the instrumentalization of measures which make him conscious of the harm he afflicted, admit his responsibility and attempt to repair the harm done. When transitional societies employ restorative measures to justice these are most noticeably seen in: truth commissions, public apologies and financial or material reparations and restitutions. In some post-conflict settings where RJ has been employed, victims preferred the tangible benefits that had a direct impact on their daily lifestyle and expressed that their fundamental rights had been heard and respected in a concrete way in contrast to a courtroom verdict.

Restorative Justice mechanisms assure the protection of a persons' fundamental human rights in the procurement of alternative spaces for justice to be accessed when they cannot be procured by the limitations of a state's legal resources. Societies undergoing the institutionalization of other TJ processes can benefit from restorative justice processes because of their flexibility and adjustability to the setting they are supposed to manage and resolve. The UN Basic Principles on RJ characterizes such programs as any processes aimed at achieving reparative outcomes which integrates the voices of all parties involved to arrive at the resolution of matters arising from the crime; such processes can differ and adapt to the usage of situational contexts which part of their strength as they are not contained by theoretical limitations (2000). In expansion of this ideological basis, renowned RJ sociologists such as Braithwaite (2002) have suggested that reparative outcomes are discretionary; and can sometimes include: property loss, injury, a sense of security, dignity, sense of empowerment, deliberative democracy, harmony and social support. It is important to note that the parties included in RJ programs are the victims, the offender and other members affected by the crime. As a systematic means of addressing wrongdoings that emphasize the healing of wounds and rebuilding of relationships, RJ does not focus on punishment for crimes but on repairing the harm caused by the crime. Truth telling, and meeting of victims and perpetrators are important in any RJ process, remorse and restitution.

It is also critical to maintain that some elements of RJ are proven to be less effective than others. Restorative justice typologies are grouped as fully restorative, mostly restorative and partly restorative. For the purposes of this paper it is important to highlight that victim reparation, community reconciliation and offender responsibility are the three main components of restorative patterns. In transitional justice settings, sociologists have argued

for the benefits of installing measures which are fully and mostly restorative in nature; among those are: (fully) truth and reconciliation commissions, (mostly) special victim's hearings, victim's restitution and amnesty hearings. Although common forms of RJ which are implemented yet not as effective in their reparative capability involve: (partly) reparative bonds, victim compensation funds, symbolic reparations and writing of history (Robin and Hudson 2016).

In transitional justice settings one RJ technique used to enhance restoration is through the establishment of Truth Commissions. As expanded upon by Pejic (2001), truth commissions are established to help nations overcome conflict, immense human rights abuses and to aid in society moving forward mentally, legally, politically and culturally. One of the benefits of such commissions is that it investigates the causes of conflict, via mixed-method forms of analysis including witness interviews, fact finding missions (list of victims) and conduct historical and ethnographic inquiries. Upon the Commissions closure, the production of a report of recommendations compiled which includes a consultation for the focus country on which reforms should be prioritized given the research conducted. Information aggregated from this Commission is typically made public via hearings, and informational awareness campaigns. Persons involved in these projects find that commissions can expose otherwise clandestine truths, lead to social healing and encourage reconciliation on a collective level. As described in the earlier section of this paper, applying this method of RJ in transitional societies is seen as beneficial to the victim because they are furnished an 'open-forum' for dialogue, in order to express their wartime traumas and feel as though are re-defined as a competent member of a rebuilding and newly transformed society. The use of RJ strategies as a mechanism for accomplishing transitional justice within the structures of transformative societies such as South Africa is accredited as being the pedigree of international best practice models, in its ability to implement commissions which created a safe-space forum of dialogue between victims and perpetrators and opened a space where the healing processes committed by the prior regime could be discussed freely without fear of out-group stigmatization or punishment from law enforcement authorities (Gibson 2006; Pejic 2001).

4. Using Restorative Justice as a Transitional Justice Mechanism in Bosnia-Herzegovina

The International Criminal Tribunal for the Former Yugoslavia (ICTY) realized the need for truth, reconciliation and justice in the region. As articulated by the International Center for Transitional Justice (2004) the han-

ding down of 'verdicts' on gross human rights violations seemed to further polarize and inflame intolerance among diverse ethnic and religious communities in BiH, creating a growing distrust among citizens and decreasing the new State's capacity for sustainable peace and democratic development. Given the various post-conflict discrepancies and contested victim narratives in BiH, it appeared as though the country could benefit from an absolute, undeniable and shared truth. The notion for justice via RJ measures is further corroborated by the ICTJ (2004) report which delineates that truth could provide freedom from the conflict in a way that could not be contested by the media, politics, school textbooks or any other social forces.

Truth and Reconciliation Commissions

The need to establish a Truth and Reconciliation Commission (TRC) is at the cornerstone of a state's ascension into the post-war peace process. International human rights organizations such as the UN (2000) advocate for the deliverance of justice through these alternative mechanisms because it gives voice to the victims of human rights abuses, while also recognizing the offender's rationality for committing such acts of warfare (Barria and Ropper 2008). According to Gibson (2006, 173) 'The truth process apportions blame to all sides and is relatively high in two characteristics: political pluralism, competing centers of power, and commitment to the rule of law with its emphasis on universal standards judging'. As non-judicial inquiries established to determine the facts, root causes and societal consequences of past human rights violations, TRCs can concentrate on providing victims of the most heinous atrocities against humanity a level of empathy, acknowledgement, and recognition of suffering (ICTJ 2006). It is important for a state emerging from conflict such as Bosnia-Herzegovina to have such initiatives because institutional reform processes in the areas of criminal justice can provide victims with a sense of relief, empowerment and help in their transformation of beginning the rebuilding process and recreating trust among their civic counterparts (ICTJ 2006; Gibson 2006; Meernik 2005; Pejic 2001; Jakala and Jeffrey 2001; Ryngaert and Schrijver 2015; RECOM 2017).

In 2000, the Association of Citizens for Truth and Reconcilation was established. The United States Institute of Peace aided in the development of a proposal for the establishment of such norms; its' intention was serve as a safeguard against patriotic, secretarian or even revisionist accounts of the conflict (ICTJ 2004). The idea was to have reforms where a public platform for victims could represent a safe haven for them to recount their wartime experiences freed from cultural stigmas, and/or labelling practi-

ces. From the begining the Truth and Reconcilation Commissions received backlash from the international community (ICTJ 2004; Meernik 2005; RECOM 2017). International jursists from the ICTY were keen to view the establishment of the BiH TRC as a threat and potential duplication of the ICTY's own efforts (ICTJ, 2004). Literary and international commission reports document that this attitude shifted overtime and at certain points the ICTY desired a 'complementarity' approach to collaborating with BiH's local TRC in the promotion of domestic peace, truth and reconcilation (ICTJ 2004; Meernik 2005; Ryngaert and Schrijver 2015; RECOM 2017). Both initatives in 2001 and 2006 failed. As detailed by the literature each TRC originated with the goals of investigating the political and moral abuses during the war; to provide a total to the number of fatalities and overall encourage the goodwill of persons by procuring a form of closure for victim's experiences of war-time traumas (Jakala and Jeffrey 2012; Meernik 2005; Pejic 2001). However, both initiatives failed with zero fact-finding impact.

The Srebrenica Commission

The Commission for the Investigation of the Events in and around Srebrenica between the 10th and 19th of July 1995 also known as 'The Srebrenica Commission' is a secondary example of the failure to establish concrete truths about the events which transpired during the conflict (ICTJ 2004; Meernik 2005; Ryngaert and Schrijver 2015; RECOM 2017). The conclusions put forward by the report denote that Bosniaks had been 'rounded-up' by Serb perpetrators who then engaged in gross human rights violations by executing this group of persons and moving the bodies to mass grave sites. The report also located 32 mass grave sites, four of which being 'primary location', the conclusions drawn by this commission were reversed as recently as August 2018 by the Republika Srpska which further promote the need for the clear establishment of facts in the country (United Nations 2018).

Reparations

The program of reparations is a feature used in both transitional and restorative justice models. The populace of BiH holds the greatest number of wartime victims in need of reparations; yet there are many challenges impeding the attainment of such material and monetary restitutions (ICTJ 2004; Gibson 2006). It is unfortuante that reparation programs do not function properly, comparatively speaking in post-Aparthied South Africa, reparation programs along with the notable truth and reconcilation were seen to accelerate a return to normalcy for many victims of the conflict and help repair damaged social relations (Gibson 2006). Post-conflict Bo-

snia-Herzegovina is characterized by a tremendously beuacratic governing structure making reparations difficult to ascertain for victims. Statistics have indicated that a majority of reparations remain on the national court's docket for years, yet due to a weak rule of law system cases have yet to be finalized. As articualted in a report by the ICTJ (2004), following the war the greatest number of reparations were filed with the Human Rights Chamber, the volume was so high that a massive backlog was created, as a result there are still families marginalized from their human right to access national justice systems.

5. Using Transitional & Restorative Justice Models in Croatia

The usage of restorative and transitional justice in Croatia has been seen to have experienced higher rates of success in comparison to the current situation in its neighboring country of Bosnia-Herzegovina. As articulated by Grodsky (2009) and Sokolic (2017) inter-agency collaboration has been on the rise on the national and regional level. A majority of truth-seeking work is now handled by non-government organizations (NGOs) (RECOM 2017) and investigations into the conflict seem to take on their juridical course. Setbacks still include political denial of war crimes and the promotion of state-sponsored victor narrative of the war (Grodsky 2009; Sokolic 2017; RECOM 2017). As articulated by the ICTJ (2006), governments have a duty of upholding the right to truth, through this process they are required to preserve documents, provide access to archives and procure other records which can direct, inform and assist in the investigative analysis of truth and reconciliation commissions. By the same token, Croatian governments have also found it equally as challenging to uphold a 'just' and 'fair' matter of state policy for episodes experienced during the conflict, this form of contests and continuously tense public debate makes is difficult to ascertain foundational pillars in which a democratic order rests upon including transparency, security, equality and peace. The rise of NGOs in finding, exposing and telling the truth coincides with global trends in post-conflict societies, yet, the duty should stand on the shoulders of the state, and is in a democracy its citizens can have a say in drafting and taking part in such policies, procedures, and legislative programming.

Truth Seeking Initiatives, Public Apologies and Reluctancies

Independent media and NGOs have played a profound role in shaping the formation of truth-seeking spaces in Croatian society. In stark contrast is the minimal compliance manifested by the Croatian government to achieving the same end. As articulated by Sokolic (2017), and reports

by RECOM (2017), Croatian authorities are shy to expose and publicize facts surronding the events which took place on their national territory in the 1990s. It is interesting that the State's memory of conflict is passed on from generation to generation, literary evidence demonstrates that Croatian war veterans exhibit pride and express joy in glorifying their country's victory of the war as a result, there is a trend in popular belief reinforced by the State which promotes the narrative of Croatia having won their homeland war (RECOM 2017). As part and parcel of the RECOM (2017) non-profit organization, *Documenta* its' Croatian branch in Zagreb directs a series of programs and investigative projects that organize fact-finding missions. To this end, the Commision understands that inter-regional cooperation is needed; scholarly authorship on this as accoring to Sokolic (2017) and Grodsky (2009) underline that one of the major hurdles in unvieling truth in the region is the reluctancy of Serbian officials to admit their responsibility for crimes committed during the conflict.

Media is also a double-edge sword in post-conflict settings, often exploited as a political mouthpiece to promote messages for the ruling political elite; RECOM (2017) has attemmpted to use this outlet as a channel to raising awareness on wartime agression and criminality. As articulated by the ICTJ (2006), independent media sectors have courageously pushed for accountabliity of those responsible. Support for truth-seeking intiatives by NGOs, the local community, and media representatives helped garner the publicized list of missing persons which helped many families recieve an answer to the questions regarding the whereabouts of their loved ones. The NGOs remain the single most visible team in advocating for victim's rights to justice, they have aided in the compiliation of documents, the gathering of victims testimony's and creating the sapce for an open and emotional discussion on Croatia's human rights abuses. Unfortuantely, the lack of political volition is still exhibited by parliament to take on a role in shedding light on many of the clandestine truths of the conflict (Grodsky 2009; Sokolic 2017). Infact, the only government supported truth commission known as the Comission to Investigate the Creation of the Republic and Homeland War in 2001 also closed with zero fact-finding impact (Grodsky 2009; Sokolic 2017;). There is a high degree of speculation that it was implemented as a national strategy in an attempt to appease and pacify the directives of the international community in evasion of handing over Croatian war criminals to the auspices of ICTY jurisprudence (Grodsky 2009; Sokolic 2017). Croatian NGOs and scholars of transitional justice alike are especially critical of this national political manuever and affirm that any future and/or current attempts to establish such commissions ought to be established with good intentions and the maximization of political resources.

Recognition, acceptance of responsiblity and acknowledgement of af-

flicted harm are important cornerstones in the achievement of peace and reconcilation. On September 10, 2003 the former President of Croatia, Mesic in his first post-conflict visit to Belgrade exchanced apologies with the President of the former State Union of Serbia and Montenegro for the actions of his citizens during the 1991-1995 conflict (ICTJ 2006). However, these attitudes shift overtime and according to various political interests and agendas, for example as referenced by Sokolic (2017) in 2011 there was an episode where Croatian senior officials expressed their opposition to the verdict of Operation Storm where Military Commanders Gotovina & Markac were convicted of war customs violations committed by their national forces during a military offensive in Krajina region during 1995. International scholars such as Grodsky (2009), Sokolic (2017) as well as Jakala and Jeffrey (2012) affirm that the application of complete transitional and restorative justice measures could be instrumental in the conclusions they can draw from investigative analysis and the arrival at a shared truth.

Conclusion

As this literature review has indicated, the benefits of using restorative justice in partnership with transitional justice models in post-conflict societies is a theory commonly documented in the relevant theoretical literature. Scholarship on this issue provided by nominated RJ sociologists such as: Braithwaite (2002) as well as Zehr and Gohar (2003) not only defines the usages of this alternative juridical space yet it also illustrates the methodology in which such responses can furnish the achievements of peace and reconciliation in certain ways in which traditional and retributive justice are unable to garner. Transitional Justice scholars including Clamp and Doak (2012), Barria and Roper (2008) and Lambourne (2009) as well as Jakala and Jeffrey (2012) have come to understand how the impact of truth commissions, public apologies, reparations and other commissions of inquiry can profoundly assist a nation their rebuilding phase and encourage their transition out of conflict and into a future where tolerance, pluralism and inter-ethnic diversity is accepted and respected. Given this potential outcome coupled with the backdrop of a conflict, high inter-ethnic turbulence and marked cultural divisions within the fragmented societies of, Bosnia-Herzegovina and Croatia seemed best placed to receive and fully integrate such initiatives with the utmost success. In practice, when implemented TRCs, reparation programs, public apologies and other commissions of inquiry experienced zero fact finding impact. As perceived through the writings of the critical literature review, there exists a trend in the scholarship where research into the issue of administrating RJ and TJ

in Bosnian and Croatian society ends after identifying the overall failure of such projects (Barria and Ropper 2008; Grodsky 2009; Sokolic 2017).

It was the goal of the literature review to go beyond this conclusion. Now, through an organized approached which has blended both theory and practice in an attempt to critically asses how BiH and Croatia can achieve peace, justice, and reconciliation the collection of literature has highlighted that the needs of the victim community should be the highest prioritized group of stakeholders in post-conflict settings intending to use restorative justice mechanisms in the applied schematic models of transitional justice. This literature review has proved, that theory is currently unmatched by practice. This challenge can be overcome however if, scholarship takes notice on the importance of studying and involving the local victim community when initial attempts to reform justice fail; by complementing academic research into the area of RJ and TJ with practical work this gap can minimized and societies such as Bosnia-Herzegovina, Croatia and other post-conflict countries transnationally speaking, can inherit a nuanced perspective which is considerate of the needs of the local population. Underpinned by a political advocacy foundation, this paper has shown that the inclusion of the victim community in the drafting, preparation and implementation of RJ programs are as critical as the need for political volition, organizational resources and a balanced collaboration between the national law enforcement and international human rights community. In the end, it becomes important for programs to be twofold; in one respect, they must be well grounded in their application of RJ and TJ theory where relevant and in the second aspect, initiatives need to be flexible and easily adaptable to the socio-cultural, political and even economic norms dictating the population's life within the focus country. When tailored rather than 'blanket' programs invest in respecting, fulfilling and protecting a victim's human right to justice, the impact they can have on both a personal and community level can catalyze reconciliation and foster sustainable social cohesion and peace.

References

Barria, L., and Roper, S. (2008) 'Judicial capacity building in Bosnia and Herzegovina: understanding legal reform beyond the completion strategy of the ICTY', *Human Rights Review*, *9* (3), 317-330.

Bernard, T., Gerould, A., and Snipes, J. (2010) *Vold's Theoretical Criminology*, New York: Oxford University Press.

Braithwaite, J. (2002). *Restorative Justice and Response Regulation*, New York: Oxford University Press USA.

Clamp, K., and Doak, J. (2012) 'More than words: restorative justice concepts in transitional justice settings', *International Criminal Law Review*, 12 (1) , 339-360.

Gibson, J. L. (2006) 'The contributions of truth to reconciliation: lessons from South Africa', *Journal Of Conflict Resolution*, 50 (3), 409-432.

Grodsky, B. (2009) 'International prosecutions and domestic politics: the use of truth commissions as compromise justice in Serbia and Croatia', *International Studies Review*, 11 (4), 687-706.

International Justice Resource Center. (2017) 'Truth and reconciliation commissions', retrieved from: www.ijrcenter.org (accessed:: 10/7/2017).

International Center for Transitional Justice. (2004) 'Bosnia and Herzegovina', selected developments in transitional justice', retrieved from: www.ictj.org (accessed: 3/4/2017).

International Center for Transitional Justice. (2006) 'Croatia: selected developments in transitional justice', retrieved from: www.ictj.org (accessed: 5/4/2017).

Jakala, A., and Jeffrey. M. (2012) 'Beyond trial justice in the Former Yugoslavia', *The Geographical Journal*, 1 (1) , 1-6.

Lambourne, W. (2009) 'Transitional justice and peacebuilding after mass violence', *International Journal of Transitional Justice'* 3 (1), 28-48.

McKay. F. (2008) 'Speech Regarding Redress on Behalf of Victims' Rights Working Group', retrieved from: un.org/icc/speeches (accessed: 20/8/2018).

Meernik, J. (2005) 'Justice and peace? How the International Criminal Tribunal affects societal peace in Bosnia', *Journal of Peace Research'* 42 (3), 271-289.

Pejic, J. (2001) 'The Yugoslav Truth and Reconciliation Commission: a shaky start', *Fordham International Law Journal*, 25 (1), 1-22.

RECOM. (2017) 'RECOM', retrieved from: www.recom.link/ (accessed: 15/3/2017).

Robsin, J., and Hudson, J. (2016) 'Restorative justice: a typology and critical appraisal', *Willamette Journal of International Law and Dispute Resolution*, 23 (2), 335-366.

Roche, D. (2006) 'Dimensions of restorative justice', Journal of Social Issues, 62 (2), 217-238.

Ryngaert, C., and Schrijver, N. (2015) 'Lesson learned from the Srebrenica Massacre: UN peacekeeping reform to legal responsibility', *Netherlands International Law Review*, 62 (2), 219-227.

Sokolic, I. (2017) 'Sources of information on transitional justice in Croatia', *Political Science Review*, 53 (4), 77-104.

United Nations. (2000) 'Basic principles on the use of restorative justice programs in criminal matters', retrieved from: www.un.org/ruleoflaw/blog (accessed: 20/7/ 2018).

United Nations. (2018) 'Special adviser on the prevention of genocide', retrieved from: www.un.org/sg (accessed: 20/7/2018).

Zehr, H., and Gohar, A. (2003) *The Little Book of Restorative Justice*, Intercourse: Good Books.

Zyberi. G., and Cernic, G. (2015) 'Transitional justice processes and reconciliation in the Former Yugoslavia: challenges and prospects', *Nordic Journal of Human Rights*, 33 (2), 132-157.

Immigration and Security. The Appearance of Migration in Security Concepts: National Security, Societal Security and Human Security

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Abstract: Immigration evolved as one of the most critical security considerations of our time. While previously was seen as a political issue, migration has elevated in the sphere of security politics, resulting to a series of human and humanitarian rights violations, targeting people on the move, as potential sources of threat. The scope of the current literature review is to answer why migration becomes a security consideration, by examining the penetration of migration in the security calculus of the three most prominent security concepts, namely, national, societal, and human security.

Keywords: security, migration, human rights, human security.

Introduction

Immigration evolved as one of the most critical security considerations of our time (Huysmans 2000). While previously seen as political issue, migration has elevated in the sphere of security politics, entailing a series of human rights violations, targeting people on the move, as potential sources of threat. The Middle East turmoil of the past decade and the rise of terrorism reaffirm the notion that the 3d country citizens' influx is a source of threat for the national, societal and human security of host states.

The process of turning a political issue like immigration into a security issue can be best explained through securitization theory (ST). Securitiza-

tion describes the process by which a previously non-security issue can be transformed into an important security concern as a result of security speech acts, performed by elites, and demands the audience acceptance to give the elites the power to proceed by implementing extraordinary measures (Buzan et al. 1998). Securitization goes beyond the classical reading of security as a military issue alone, and introduces the broadening of security agenda to other areas of concern such as environment, society, economy, and so forth (Buzan et al. 1998).

The scope of this article is not to answer how immigration became a security threat, using securitization theory. The scope is to answer why migration has become a security threat. This will be achieved by looking at the three mainstream understandings of security. The main aim is to see how immigration enters the security calculus, justifying legitimately or not, the enactment of measures that are turning against migrants human rights.

It is important to stress that, the term migrant is not used in its conventional sense. International Organization for Migration defines migrant as the *'a person who is moving or has moved on the international border or within a state away from his/hers habitual place of residence regardless of the persons legal status, whether the movement is voluntary or involuntary, the causes of the movement and the length of the stay' (IOM).* The definition of migration as given covers a vast array of people on the move, including students, businessmen/ women, or even tourist. The use migrant in the current review rather refers to irregular migration. Irregular migration is defined as '*movement that takes place outside the regulatory norms of the sending, transit and receiving countries. From the perspective of destination countries it is entry, stay or work without the necessary authorization or documents required under immigration regulations'*[17] (IOM). The adoption of the term 'irregular migration' is an outcome of the understanding that, the vast majority of refugees, asylum seekers, and forcefully displaced persons fell, often by definition, under the status of irregular migration, which at times is intertwined (for political reasons) with illegal migration.

The current article is divided into three sections. The first section examines the concept of national security. National security is the dominant field of security studies. The referent of security is the state, and the focus is on the preservation of territorial integrity and state sovereignty against military aggression (Del Rosso 1995, Rothschild 1995). Even though traditionally nonmilitary issues such as migration, are not perceived as threats to national security, democratization and globalization shifted the focus of national security to non-traditional threats, including migration (Ulman 1983). The aim is to identify the justifications provided for placing migration in the security calculus of national security considerations.

[17] https://www.iom.int/key-migration-terms

The second section examines the concept of societal security. Societal security derives as a consequence of the expansion of the concept of security, in an effort to broaden the scope of national security. The state remains the primary security provider, but the focus shifts from sovereignty and territorial integrity to the societal threats, placing state's identity as the principal value to be safeguarded. In this context migration presented among the gravest threats to state's identity (Bucan et al. 1998).

The third section examines the concept of human security. Human security places the focus on the individual, and the need to be protected against threats to his/hers physical integrity welfare and dignity. Even though humanitarian in principal, human security portray migration flows as potential threats to human security, resulting in an onslaught on migrants rights by the hosting states. Particular focus is given to the relationship between human security and human rights. Given the attempt by the proponents of human security to interconnect, or even subdue human rights to human security, it is crucial to investigate the relation of the two, arguing that human security can potentially undermine human rights regime.

It is important to clarify that the way in which human rights are undermined due to security considerations is beyond the scope of this article since the aim is to portray why immigration is perceived as a security threat under different security concepts.

1. National/ State Security

Immigration was introduced in the national security calculus relatively recently, as a non-traditional threat to national security. The main point of differentiation from a traditional national security threat is that immigration does not come in the form of a threat from another state, or include the use of force.

In the traditional conception of security, closely related to the realist theory, the protection of state is the main point of interest. The referent object, or the answer to the question of what should be protected, is state sovereignty and territorial integrity by external forces, with the use of military means (Del Rosso 1995, Rothschild 1995, Walt 1991). Hobbes position security as an absolute value, and threat as the leading force that gathers individuals and incentivizes them to abandon certain freedoms to obtain security in an anarchic system. Thus the state is viewed as the ultimate security provider. Threat represents the catalyst by which the collective identify the enemies and authorize the state to respond (Hobbes in Goldstein 2010).

Dominant perception of national security is the understanding that a secure state is an agent of security both to the individual (extended downwards)

and of the international system(extended upwards) (Rothschild 1995, Liotta 2002). This is reflected in the United Nations Charter, in which the referents of national security are protected. In essence, the UN Charter legally recognize that the international system is made of equal sovereign states and that the respect of territorial integrity is the higher value of the system (Bain 2000). Thus while the Charter prohibits the use of force in general, Art.51 allows the use of force for defensive reasons, that is for the protection of territorial integrity against aggression.

Democratization and globalization affect the idea of national security, introducing expansions previously unthinkable. Structural realists like Waltz argue that the internal changes within states do not change the basic structure of the system, which remain anarchic and based on power maximizing and survival (Newman 2001), insisting that security must be understood only as '*the study of threat, use and control of military force'* (Walt in Doty 1998: 74). Democratization and globalization, though, have shifted the notion of threat to nontraditional conceptions of threat, meaning away from the single representation of a threat with military means, which led to the expansion of the meaning of national security (Ulman 1983)

Democratization and the modern social contract theory dictate that the government, which is the personification of the state, is responsible for the protection of its citizens (Shinoda 2004). From this point of view, the state is not only responsible for protecting its citizens from external aggression, but also, to protect them against violations of their rights, and against threats to their welfare. Furthermore, the state is obliged to protect the social and economic lives of the nationals and to pursue the social security of its citizens(Shinoda 2004).

Furthermore, globalization implies that states are interconnected. National security is no longer understood as an internal issue of each respective state, but as a common goal of the international system. In an interconnected system, where internal disorder can spill over to other nations in a much quicker pace than in the past, the national security of the state becomes a point of interest for the entire international community (Shinoda 2004, Newman 2001). The proliferation of international organizations like World Trade Organization, UNHCR, European Union as so forth, serves as a justification that states moved away from the system of self-help to that of international cooperation as means to preserve international stability through internal stability.

Many academics share the view that national security cannot be confined in military terms alone. Ulman in 1983 attempted a new definition of national security according to which: '*a threat to national security is an action or sequence of events that threatens drastically and over a brief span of time to degrade the quality of life for the inhabitants of the state or threatens significant-*

ly to narrow the range of policy choices available to the government of the state'(Ullman 1983:133). In his definition, Ullman injects three more parameters: the imminent of the threat, the agency of the public and the limitation of political choices, implied by the existence of a threat. Vaclav Havel suggests that the sovereignty of the state derives from the sovereignty of the human being. Thus states must protect the sovereignty of their citizens to solidify theirs (Havel in Rothschild 1995). As sovereigns, citizens express demands from the polite-even if not political in nature- that travel through political channels thus their essence becomes political. Only citizens can express political demands, which reaffirmed that the notion of the state and its function is firmly attached to the notion of the citizenry (Choucri 2004).

The expanded conception of national security can be considered the outcome of the combination of military, regime and structural security. Military security is still the higher means of protecting the territorial integrity and state's sovereignty. Regime security reflects the ability of the government to function internally and to protect its self against domestic dangers, which in a democratic society are often represented by political opposition. Structural security is the ability to meet population demands by the allocation of resources and life-supporting properties. (Chourci 2002).

In a nutshell, national security refers to the security of the state, which is the personifications of its constituent components, meaning territorial integrity, sovereignty, population, resources, and governance, against external acts of aggression, traditionally expressed by military means.

2. National Security and Migration

In the post-Cold War era, the nature of threat changed significantly including the perception of what constitutes a national security threat. While interstate aggression has been minimized, non-state actors gain prominence as possible agents of state insecurity, such as terrorism, drug trafficking and irregular migration (Del Rosso 1995, Walters 2010). As such, migration enters the security calculus as a nonmilitary imminent, mobile threat to the state, or as Weiner pose it, as a risk not of military nature that has the potential to affect stability and economy (Weiner 1992).

Territorial integrity entails the control of border movement, which irregular migration questions. While state retains the right to control the entry on its sovereign territory, irregular migration by definition implies that the movement of people takes place in an uncontrolled manner, through unauthorized crossings, without the legal procedures imposed by the state for the movement of people (Koser 2005). Given that, in situations like the current refugee crisis, in which the movement of people is characterized by

a large number of unauthorized crossings, irregular migration is portrayed in realpolitik terms. That is like an invasion that constitutes an imminent threat to the territorial integrity of the state (Doty 1998, Collyer 2006, Kizinger 2004).

Bigo elaborates by calling the urgency of the need to control the borders, as sovereignty myth, by which the monitoring of the borders reassures the integrity of the inside, thus elevates migrant to the status of an invading outsider (Bigo 2002). The urgency was given by the realpolitik symbolization of the invading populations, which creates the sense of an imminent threat to state's sovereignty, which in turn is mobilized to counter the threat (Weaver 1995). Furthermore, the failure to control the borders can potentially undermine the political authority of the state, which might deemed insufficient to safeguard its integrity from the invading forces, in essence undermining states capabilities and governmental authority. (Adamson 2006, Del Roso 1995)

Additionally, immigration is perceived as an ontological threat due to the association of the movement of people with terrorism. Irregularity raises the perception that terrorist cells might hide under invisibility and penetrate the host country (Collyer 2006, Faist 2005, Bigo 2002). This notion has been reinforced by a number of Security Council resolutions, (ex. Resolution 1373) that raised awareness about the possible relation of irregular migration and terrorism.

Weiner elaborates on the threat impose by migration to national security, by identifying how migration could affect the foreign policy of a receiving country, namely by threatening the relations between hosting country and country of origin(Weiner 1992). Weiners argument is that granting refugee status to people applying for asylum, often creates adversity with the country of origin, despite the fact that refugee status is deemed as neutral (Weiner 1992). Furthermore, he argues that the existence of a large number of refugees, or asylum seekers in a host country, might create a political minority that potentially could intervene in the exercise of the foreign policy of the host country in relation with the country of origin (Weiner 1992). Concurrently, migration is deemed not only as a threat to the state but as a threat to the international system itself.

Also, Weiner, and later Bigo argue that migration diasporas might acquire the status of a powerful political entity in the host country, using their political power to intervene in the internal affairs of the host country on behalf of the country of origin (Weiner 1992, Bigo 2002). Thus, the ability of the sovereign state to act in the international environment for the interest if its citizens is undermined by the existence of nonnational and potentially non-citizens entities.

The final point of discussion is the economic threat posed by immigrants to the state security. The argument is that immigration undermines state's economic capability, implying the allocation of scarce resources to accommodate the flows of people on the move. In the state-centric conception of security, economic performance deemed as crucial because it is through the economic welfare that the state can maintain its military capabilities that are crucial for the defense of the country. (Adamson 2003, Weiner 1992).

The arguments that portray migration as a threat to state sovereignty and territorial integrity have as an outcome what Agamben call 'the sovereign ban.' The sovereign ban is the power of the state as the ultimate sovereign to distinguish lives, and par extent rights, to those worth protecting and those that are not (Agamben in Casabo 2016). The citizenry perceived as a system of exclusion, which legitimizes the state to strip non-citizens from their rights, to protect the rights of the rightful beneficiaries of state's protection (Casabo 2016). Furthermore, the existence of a perceived imminent threat to the core referent of security, the state, legitimizes not only the limitation of the rights of immigrants but of citizens as well. In an analogy with a state of war, citizens appear willing to sacrifice their civil and political rights in order to be protected by the invisible invader that threatens to undermine their ultimate security provider. What is expressed in wartime as 'rally around the flag,' which is the rise of nationalism, and the acceptance that rights can be suspended for the survival of the state, is evident in the case of migration as well. Even if the enemy is not a military force ante-portas, but an unarmed immigrant intra-portas, states, and their citizens appeared both able and willing to counter the threat using means that initiated for the treatment of traditional threats to national security.

3. Societal Security

The end of the Cold War marked a shift to the security understanding beyond the traditional state-centric conception. Societal security, answers the questions of security for what, by whom and how different from the traditional state-security conception. Thus societal security implies that the referent object of security in society, identifying identity as its core value (Buzan et al. 1998). The state remains the ultimate provider of security, without excluding non-state actors in the form of communities driven by conventional understandings of belonging. The threat is not confined to another states aggression, but migration, alien cultures or even the state itself, are identified as potential sources of insecurity.

Buzan and Weaver argue that the state is no longer the sole referent object of security in the traditional sense of sovereignty and territorial integrity (Buzan et al. 1998). They slightly push for an understanding that identity can be the referent object of security or the core value to be protected. As Weaver argues, the state protects itself from threats to its sovereignty, while society tends to defend itself against threats to identity (Weaver 1995). Previously Anderson defined nations as abstract entities, as imaginary communities, in which identity served as the cohesive element of society (Anderson 1991).

National identity comprises by many different elements such as the sense of political community, of the existence of a historically recognized territory which is perceived as a homeland, of common myths, language culture, collective rights and duties and common economic environment. Religious groups, when existing as independent entities can be as well the referent objects of security as an element of the formation of national identity. (Weaver 2008).

Weaver elaborates that societal survival is an outcome of collective identification of threats. He also points out that security is not a matter of collective mobilization. Instead, he suggests that smaller entities can act on behalf of the collective, or in this case of the society, acquiring power from the fact that the collective claims its right to survival in the face of a grave threat (Weaver 1995). Social communities pose identity as the referent object of security when the threat is not directed objectively to state sovereignty but rather to the constituent components of the national identity. Anion, as Buzan and Weaver put the state in a position of responsibility as the primary security provider when claims of social security and identity arose (Anion in O'Neil 2006, Buzan et al. 1998, Buzan 1991).

4. Societal Security and Migration

Migration enters the security calculus as a direct threat to societal security. Immigrants are perceived as 'others,' or as aliens potentially threatening the social fabric (Huysmans 2000). The construction of otherness appears to be in direct opposition to the construction of self. The existence of a large number of people with different culural identity in the territorial boundaries of a stable society bounded by a collective identity has perceived as a challenge to the homogeneity and cohesion of most identity (Huysmans 2000).

Buzan identifies four ways by which social security can be threatened: physically, economically, as threats to rights and as threats to the position or status of the prevailing identity (Buzan 1991). Primary concern appears

to be physical integrity. Based on the abovementioned connection of immigration to terrorism and organized crime, immigration is perceived as a potential threat to the physical integrity of the community that can cause pain, injury, and death (Buzan 1991, Collyer 2006, Faist 2005). It is important to clarify, that to the authors understanding the ontological threat posed by migration differs in the context of societal security to that of national security. In the context of societal security, the referent object is the bodily integrity of the community which might be endangered by terrorist activities. In the context of national security, terrorist acts are perceived as a threat to sovereignty, or in other words as a military offense performed by non-state actors, against the integrity of the state, fundamentally undermining it materially and structurally. The same attributes applied to economic security, where the referent is not the economic performance of the state as means of power maximizing, but as a threat to the economic performance of the dominant identity.

Rudolf moves a step forward to provide a typology or a set of conditions that can potentially accelerate or minimize the perception of threat. This set of conditions include cultural proximity of the migrant with the receiving community visibility of the migrant flows, stressing that visibility might be enhanced if the movement of people is massive and contained in a specified period, in addition of being physically visible in ghettos, refugee camps or minority enclaves the entry channel of migrants which will classify them as legal or illegal, and the effects of migrant flows in the policies of the state (Rudolf 2002).

Some authors reject the conception of societal security, in essence rejecting the existence of different referents to security. McSweeney argues that identity, as a nonobjective measurable fact, should not be studied as a security consideration. He stresses the fact that the expansion of security to non-objective entities, might lead to dangerous political paths (McSweeny 1998). He insists that security must remain within the traditional objective boundaries of national security, rejecting the notion that security must expand to nonobjective variables.

Weaver and Buzan defend their position, but Weaver warns that societal security considerations might be potentially dangerous if used in a specific political context. Weaver argues that identity is determinant for the individual behavior and can either reinforce or undermine the state (Weaver 1995). The labeling of an issue as an existential threat, unusually subjectively conceptualized, on one had legitimizes the state to adopt extraordinary measures, and on the other might undermine the very existence of the state itself regarding regime survival (Weaver 1995, Buzan et al. 1998). Waver warns of the rise of neo-nazism and far-right populism, while stresses the importance of dealing with identity considerations with

caution when labeled as security risks, warning against the distanced from the core security problematique (Weaver 1995, Dotty 1998).

Also, some authors argue that introducing migration into security considerations might be on its own a threat to the core identity of the referent object. O'Neil, taking European Union as an example, argue that the externalization of migration controls, which in essence is subordinating rights to security, undermines the very European identity, of which constituent component is the respect of human rights and international law (O'Neil 2006). Huysmans warns against the securitization of migration as a threat to societal security, arguing that by trapping migration as a choice made against a political community jeopardize the multiculturalism and societal stability of Europe. The construction of a threating 'other,' pushes states inwards, enhancing nationalistic behavior, which as a consequence might endanger the process of European Integration itself (Huysmans 2000).

5. Human Security

The concept of human security emerged, as the societal security concept in the aftermath of Cold War. Its first and until now more authoritative appearance is in the United Nations Development Report of 1994 (now UNDP), even though its origins can be traced back to the 1970s and 1980s. The concept is an outcome of the growing dissatisfaction with the prevailing, at the time, conceptions of security and development(Banjpai 2003).

The concept set as referent object of security the individual, including all the aspects of rights, needs, and demands elevating the interest of people as the interest of humanity (Fukuda 2012). The conception of human security varies widely among scholars and policymakers.

As already mentioned the UNDP 1994, drafted by Mahbub ul Hag, provides the most authoritative definition. Accordingly, human security is characterized as the freedom from fear, meaning freedom from violence that might occur due to states aggression both internally and externally, and freedom from want. UNDP describes human security as '*Safety from chronic threats such as hunger, disease and repression and protection from sudden and hurtful disruptions in the patterns of daily life- whether in jobs, homes or communities.' (UNDP* 1994). The definition expanded to cover seven new areas of consideration: Economic, food, environment, health, personal, community and political security (UNDP 1994).

Furthermore, the report characterize human security as a universal concern. Its components are deemed as interdependent, implying that a disruption in human security anywhere in the world can result in a disruption

of human security globally. It also stresses the importance of preventive intervention and reaffirms its people-centered orientation (Alkire 2003). The state remains the primary security provider for its citizens, while the security of the state as perceived in the traditional notion of security it is not the end of states obligation. The state must continue to ensure the security of its subjects (Bajpai 2003).

Rothschild suggests that the human security concept extends the national security concept in all four directions. It extended downwards from the security of the nation to the individual. Upwards, from the security of the nation to the security of the international system. Horizontally, expanding the variety of threats that should be taken into consideration, from military to environmental, social and human. It also implies the extension of states responsibility as a security provider that is infused in all direction vertically and horizontally (Rothschild 1995, Alkire 2003).

The very concept of human security has turned in to a field of contention among scholars. The main point is the all-encompassing definition of human security, that practically covers all aspects of human existence. The point of division is whether human security should be limited to the 'freedom from fear.' part, or should remain expanded, as the UNDP implies. The dichotomy appears both in the practice of states and in the academia. For instance, Canada, introduced the narrower concept of human security as its foreign policy framework, while Japan adopted the broader, all-encompassing definition.

The main argument of the expansionist view is based on the 'humanitarian' aspect of human security (Fukuda 2012). Reed and Tehranian consider the broadening agenda as a more comprehensive framework of analysis, that deals with global insecurity in more holistic and humanistic manner, by observing that natural and human considerations are interconnected (Reed and Tehranian 1999). The authors move forward and introduce psychological security, in addition to the seven components of security that included in the UNDP (Reed and Tehranian 1999). Tabjakhsh also argues that the broadening of the agenda is essential, considering that the individual is the fundamental basis of security. In the human security context, the individual is elevated, as a source of identification of potential threats, and takes an active role in efforts to mitigate them(Tabjakhsh 2005).

However, a large part of the academia stands critical to the concept of human security. The vagueness of the term and its all-encompassing nature deemed the concept as analytically weak and not useful in policy making (Newman 2010, Paris 2001, Ewan 2007).

Attempts to narrow the scope, though, have failed to provide a cohesive understanding or framework of what human security should include. For instance, King and Murray define human security as freedom from fu-

ture risks with the focus being on the threat of severe deprivation. The primary failure of King and Murray's approach is that they define as domains of well being the values that people are willing to put their life at risk in order to protect (King and Murray 2000). Bajpai, suggest the creation of an audit that will measure direct and indirect threats to physical security and provide measures that will deal with those threats. Both suggestions, even though are an honest effort to provide utility to human security, focus on perceived higher values without providing any justification. For instance, King and Muray overlook the existence of a vast array of value systems with different hierarchies, which often prioritize issues that are not included in their conception of values worth to 'die for.'

Paris went and stepped further to reject the concept as a paradigm shift and suggest its conception as a distinctive field of analysis. He tries to distinguish security studies in a matrix in which threats are classified according to the presence of a military threat, and to the position of the state as a referent object. According to the matrix, human security can be a particular category of research concerning nonmilitary threats to human beings (Paris 2001). Paris matrix is indeed useful as it recognizes that security cannot be a matter of single definition, but what he fails to acknowledge is that the categories are not mutually exclusive, and in the real world, they are often overlapping (Alkire 2003).

Other authors put their emphasis in the danger of oversecuritization. They stress the danger of labeling political issues like migration as security threats, and the militarization of responses which is the typical state's reaction to security threats (Krause 2005, Fukuda 2012). As Shakibanou and Tabjakhsh argue, the inclusion of such vast array of issues under the security umbrella makes political action almost impossible, leaving securitization as the only option (Shakibanou and Tabjakhsh 2005).Buzan, even though accused himself as among the theoreticians that overexpanded the security agenda, warns that issues like poverty, migration, or human rights should remain on the political agenda (Buzan 2004). He further insists that state should remain the referent object of security, being the unquestioned principal actor in international politics, and the primary security provider. The inclusion of a broad array of issues under the security umbrella runs the risk of oversecuritization inevitably (Buccin 2004).

6. Human Security and Migration

When comes to migration the concept of human security is somewhat complicated. While the concept elevates the individual as the referent of security and claims universality, by which it applies to every human be-

ing irrespective, the very concept itself essentially excludes migrants, and places them as a threat to security. In several parts of UNDP, migration movements are considered as a threat to economic and political stability (UNDP 1994, Edwin 2017). Surprisingly the report recognizes the reasons for mobility as threats to security, but it classifies the people on the move as threats as well, without any apparent distinction in the form of mobility. Additionally, the Human Security Commission report of 2003, drafted by the Human Security Commision with the support of the then Secretary General of UN, Kofi Annan, refers to human mobility as a source of ontological threat, associating migration with the potential penetration of armed elements among civilians or with the uncontrollable spread of disease, that directly threatened human security globally (Human Security Commision Report 2003)[18]. Thus, migrants irrespective of the reason of movement are considered as a threat to global and transnational security (Bajpai 2003).

Furthermore, by portraying migrants as security threats, the report inherently provokes antagonistic relation among citizens of the receiving state and non-citizens (Odutao 2016). State, remains the primary provider of security. Thus the security of the individual can be achieved through the state, presupposing access to political channels. Migrants lack the agency or the access to political channels, which citizens acquire. Migrants are not perceived as co-citizens but in an antagonistic relationship with the citizens for whom is a source of threat to their welfare (Rothschild 1995, Odutao 2016). Security is not neutral to citizenry when comes to the state. By portraying migration as a threat, states create the impetus to call on 'emergency measures,' using security considerations as justification to strip non citizens of their rights, otherwise recognized by international law (Dobrowlksy 2007, Odutao 2016).

What is understood, is that migration becomes a victim of securitization. Buzan, and Krause, as already mentioned, warned about the inclusion of political issues like migration in the security nexus (Krause 2005, Buzan 2004). The inclusion of migration in the array of security threats cast doubt on the protection of vulnerable populations such as refugees. The refugee status is design to provide security to insecure people fleeing from situations of imminent threat (Odutayo 2016). The status presupposes the recognition of rights and above all the right to security. By portraying the movement of people as security threat irrespective of the cause, mainly the UNDP, and human security concept in practice removes the right for security from people on the move, in favor of the 'threatened' citizens.

[18] https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-security-may03.pdf

7. Human Security and Human Rights

The relation between human security and human rights deserves a special focus. While the human security concept claims to be highly interconnected with human rights, or even seen as a supplement of human rights and international law, in practice, the security discourse might potentially undermine human right standards especially in the case of migration and refugee flows (Hassman 2012, Edwards 2009).

Human rights are entitled to all people by virtue of being human. Additionally, they are not tight to any particular social status, group, citizenship, and are, in theory, entitled to any human being, either a national or not (Weissbrodt 2008). States are obliged to protect the human rights of citizens and non- citizens, while human right norms, at some instances, allow for derogations in cases of a national emergency, which are restricted by the rule of proportionality.(Hassaman 2012, Weisbrodt 2008).

Humar rights where designed primarily to protect the individual against the state and gradually evolved to protect individuals from nonstate actors as well. In essence, human rights ought to be protected by every agent of the society, while states are not permitted to prioritize certain rights over others. (Hassaman 2012).

Human rights extend to cover the rights of noncitizens, even though in practice, noncitizens refrain from claiming their rights from the receiving state (Weisbrodt 2008).

Proponents of the human security concept argue that the concept should be intertwined with human rights, justifying their position in the pitfalls of the human rights regime, namely the lack of enforceability, and the realization that specific threats to human security are not covered by the existing human rights instruments (Edwards 2009, Ronzai 2014). Additionally, Edwards argues that in the case of refugee and migrant protection, human rights offer only a minimum standard of protection, while the human security concept deals with every aspect of migrants insecurities (Edwards 2009). Furthermore, it is argued that human rights distinguish citizens and non-citizens thus efficiently excluding non- citizens from a specific set of rights, while human security concerns every person, irrespectively (Odutao 2016).

What has been overlooked, is the fact that discourse does matter. Security is by no means a neutral term. By labeling something as security, raises demand for action to counter the perceived threat (Buzan et al. 1993, Edwards 2009, Hammerstad 2010). As already discussed in the previous section, despite the claims of universality, the human security concept put migrants in the position of being a security threat, virtually depriving them of the right to claim protection for their insecurities. The claim that human

rights are not universal because in some instances derogations are allowed is deemed superficial. Even though derogations are an indirect expression of states consideration, derogations must be proportionate, limited in time and as minimum as possible. Human security concept does not provide any safeguard against potential violations of rights that might rank lower in the emergency hierarchy that the concept implies

Huysmans argues that security language can create and maintain antagonistic relations that lead to the deterioration of the rights of the group perceived as a threat (Huysmans 2006). The listing of threats by UNDP does not provide duties that can potentially safeguard the rights of people on the move. Instead, by labeling them as security threats, raises demands on behalf of the citizens for protection by their states in the face of the danger posed by migrants, even at the expense of their rights, reinforcing the antagonistic 'we' against 'them' relationship.

In essence, the two concepts have a competing designation. While human rights are designed to protect individuals from the state, human security gives the state the ability to prioritize rights according to the political agenda, by labeling them security concerns (Hassman 2010).

Hammerstad provides an excellent case study, of how, the introduction of human security to the UNCHR discourse led to the securitization of refugees and asylum seekers, which resulted to the deterioration of their protection and the respect of their rights (Hammestad 2010). Hammerstad argues that the language of human security adopted by UNHCR in the 1990s resulted to the rising invocation of security considerations by states as means to curb asylum and migration, the blurring between illegal and irregular migration, along with the attachment of refugee flows with terrorism.

Similarly, Papadopoulos, argue that the introduction of human security in the policies of European Union, led to the securitization of migration, resulting to the externalization of migration controls and the militarization of EU outer borders, which put the respect of human rights in question (Papadopoulos 2006).

A final comment would be that, besides the humanitarian aspirations of the human security concept, it may potentially act contrary to the values and norms it supposes to safeguard. The use of the term security instead of rights or development and the unfortunate classification of people on the move as a security threat gave the impetus for the undermining of the human rights regime. Human rights norms should maintain their primacy, and the language of human security must be altered to cover only areas in which human rights have not yet cover. Insisting on the concept of human security might render some of the most vulnerable parts of humanity more insecure than already are.

Concluding Remarks

Migration is perceived as a multilayered threat to the state and its citizens. The current article demonstrated the way in which migration is perceived as a threat to the three central security concepts, namely national, societal and human security.

Despite the variety of actors and referent objects, migration penetrated the security considerations, resulting in the unfortunate, but unquestionable conception of people on the move as threats to almost every single aspect of international, national and private life. People entitled to international protection found themselves as targets of xenophobia, racism, and exclusion, legitimized by grounded or often ungrounded security considerations.

As a consequence, human rights regime is today under pressure. The imbalance between security and human rights, favors security, resulting in the limitation of hard acquired rights. While the drafters of human rights conventions, in their wisdom, provided for derogations in cases of exception, it appears that the exception is becoming the rule, giving the sovereign states the impetus to derogate from their international responsibilities.

This is not to say that all security considerations are unjustifiable. States have the right to control the movement of people along their borders. Societies have the right to preserve their identity, and people are entitled to live and prosper in security. The argument is that by demonizing the totality of people on the move and neglecting their vulnerable situation, Western societies are jeopardizing their sense of humanitarianism, their rule of law and potentially their internal stability and legitimacy. As with the case of terrorism, the unproportionate reaction of Western states against the perceived threat of migration might act as a boomerang against their core values, and essentially, against their own security.

References

Adamson, F. (2006) 'Crossing Borders: International migration and national security', International Security Journal, 31(1), 165-199.

Alkire, S. (2003) 'Human security.'A Conceptual Framework for Human Security', CRISE Working Paper, 2, 1–52.

Bajpai, K. (2003) 'The Idea of Human Security', *International Studies Journal*, 40, 195-228.

Bain, W. (2000) *National security, Human Security and the Practice of State-*

craft in International Society, University of British Columbia Press, Canada.

Bigo, D. (2002) 'Security and migration: Toward a critique of governmentality of unease', *Alternative Journal*, 27, 63-92.

Browing, C. and McDonald, M. (2011) 'The Future of critical security: Ethics and the politics of security', *European Journal Of International Relations*, 19(2), 235-255.

Buzan, B. (1991) *People, States, and Fear: An Agenda for International Security Studies in the post-Cold War Era*, Harvester Wheatsheaf Publishings, United Kingdom.

Buzan, B. (1991) 'New patterns of global security in the 21st century', *International Affairs Journal*, 67(3), 431-451.

Buzan, B., Weaver, Ole, De Wilde, J. (1998) *Security a new framework of analysis*, Lynne Rienner Publishers, USA.

Buzan, B. (2004) 'A reductionist, Idealistic Notion that Adds little Analytical Value', *Security Dialogue*, 35(3), 369-370.

Bourbeau, P. (2006) *Migration and security: Securitization theory and its refinement*, University of British Columbia, Canada

Bourbeau, P. (2015) 'Migration, Resilience, and Security: Responses to new inflows of asylum seekers and migrants', *Journal of Ethics and Migration Studies*, 41(2).

Casabo Voyvodic, C. (2016) 'Security and self: Identity Construction from above and below in the refugee crisis in Europe', *Belonging and Exclusion Journal*, 24.

Choucri, N. (2002) 'Migration and security: Some key Linkages', *Journal of International Affairs*, 56(1).

Collyer, M (2006) 'Migrants, migration and the security Paradigm: Constraints and opportunities', *Mediterranean Politics*, 11(2), 255-270.

Crepeau, F., Nakache, D. and Atak, I. (2007) 'International migration: Security Concerns and Human Right Standards', *Transcultural Psychiatry Journal*, 44(3), 311-337.

Del Rosso, S. (1995) 'The insecure state: Reflections of the State and Security in a changing world', *Daedelus*, 124(2), 175-207.

Dobrowolsky, A. (2007) '(In)security and Citizenship: Security, Immigration, and Shrinking Citizenship Regimes', *Theoretical Inquiries in Law Journal*, 8(2).

Doty Lynn, R. (1998) 'Immigration and the politics of security', *Security Studies*, 8(3), 71-93.

Edwards, A. (2009) 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders', Michigan Journal of International Law, 763.

Edwin, J. (ed) (2017) *Rethinking security in the 21st century*, Palgrave and Macmillan, USA.

Ewan, P. (2007) 'Deepening Human Security Debate: Beyond the Politics of Conceptual Clarification', *Politics Journal*, 27(3), 182-189.

Faist, T. (2005) 'The migration security nexus: International migration and security before and after 9/11', Working Papers- Center for Migration, Citizenship, and Development, University of Bielefeld.

Fukuda, S. and Messineo, C. (2012) 'Human Security: A critical review of the literature', Center of Research of Peace and Development, Available at https://soc.kuleuven.be/web/files/12/80/wp11.pdf.

Goldstein, D. (2010) 'Toward a critical anthropology of security', *Current Anthropology*, 51(4), 487-517.

Hammerstad, A. (2010) 'UNHCR and the securitization of forced migration' in Alexander Betts, Gil Loescher (eds.) *Refugees in International Relations*, Oxford: Oxford University Press, 237-260.

Hassman Howard, R. (2012) 'Human security undermining Human Rights', *Human Rights Quarterly*, 34, 88–112.

Huysmans, J. (2000) 'The European Union and securitization of migration', *Journal of Common Market Studies*, 38(5), 751-777.

Krause, K. (1996) 'Broadening the agenda of security studies, politics and methods', *Mershon Institutional Studies Review*, 40 229-254.

Krause, K. (2005) 'Human Security: An Idea whose time has come?', *Security and peace Journal*, 23(1), 1-6.

King, G. and Murray, C. (2002) 'Rethinking Human Security', *Political Science Quarterly*, 116, 585–610.

Kicinger, A. (2004) 'International migration as a nontraditional security threat and the EU response to the phenomenon' Critical European Forum For Migration Research Working Paper Available at: http://www.cefmr.pan.pl/docs/cefmr_wp_2004-02.pdf.

Koser, K. (2005) 'Irregural migration, state security and human security', Global Commission on International Migration report.

Liotta, P.H.(2002) 'Boomerang effect: The convergence of National and

Human Security', *Security Dialogue Journal*, 33(4), 473-488.

Liotta, P.H. and Owen, T. (2006) 'Why Human Security', *The Whitehead Journal of Diplomacy and International Relations*.

Mathews Tuchman, J. (1989) 'Redefining Security', *Foreign Affairs*, 68(2), 162-177.

Newman, E. (2001) 'Human Security and Constructivism', *International Studies Perspectives Journal*, 2, 239-251.

Newman, E. and Van Selm, J. (eds.) (2003) Refugees and forced displacement, United Nations University Press, Japan

Newman, E. (2010) 'Critical Human Security Studies', *Review of International Studies Journal*, British International Studies Association, 77-94.

Oberleitner, G. (2005) 'Human security: a challenge to International Law', *Global Governance Journal*, 11(2), 185-203.

Odutayo A. (2016) 'Human security and the international refugee crisis', *Journal of Global Ethics*, 12(3), 365-379.

O'Neil, P.E. (2006) 'The European Union and migration: Security VS Identity', *Defence Studies Journal*, 6(3), 322-350.

Papadopoulos, A. (2007) 'Migration and the human security in the Balkans', *Migration Letters Journal*, 4(2), 95-100.

Owens, H. and Arneil, B. (1999) 'The human security paradigm shift: A new lens on Canadian Foreign Policy', *Canadian Foreign Policy ISSN*, 7(1), 1-12.

Paris, R. (2001) 'Human Security: Paradigm Shift or hot air', *International Security Journal*, 260(2), 87-102.

Paris, R. (2004) 'Still and Inscrutable concept', *Security Dialogue*, 35(3), 370-372.

Reed, L. and Tehranian, M. (1999) 'Eving Security Regimes', in Tehranian, M. (ed.) (1999), Worlds apart: Human Security and Global Governance, IB Tauris Publishers London- New York.

Ronzai, Y. (2014) 'The Insecurity of human security', *Wisconsin International Law Journal*, 32.

Rothschild, E. (1995) 'What is security?' *Daedalus* 124(3), The Quest for World Order, 53-98.

Rudolf, C. (2002) 'Security and the political economy of international migration', *The American Political Science Review*, 70(4), 603-620.

Shinoda, H. (2004) 'The concept of Human Security and the Theoretical

Implications', *English Research Report Series*, 19.

Tadjbakhsh, S. (2005) 'Human security concepts and implications', *Les Etudes du Ceri*, 117-118.

Ulman, R. (1983) 'Redefining Security', *International Security*, 8(1), 129-153.

United Nations (1994) *Human Development Report 1994*, Oxford University Press.

Weaver, O. (1995) 'Securitization and Desecuritization', in Lipschutz, R. *On Security*, Columbia University Press, Canada.

Weaver, O. (1996) 'European Security Identities', *Journal of Common Market Studies*, 34(1), 104-132.

Weiner, M. (1992) 'Security, Stability and international migration', *International Security Journal*, 17(3), 91-126.

Weissbrodt, D. (2008) *The human rights of non-citizens*, Oxford University Press, UK.

Taking Stock: Limitations and Perspectives of Educating about Human Rights in Formal Schooling

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Abstract: This article builds on Sen's theorisation on the importance of going beyond a purely legal approach to human rights, and advocates for the crucial role of education as an enabler of a public discussion that encourages the realisations. I argue that education – and in particular, the learning experience – is a key practice in which human rights are to be recognised and enacted by all of those engaged in the process. One way of looking 'outside the box' of human rights-related legislation is the human rights education (HRE) practice in formal, non-formal, and informal contexts, that favours the development of knowledge, skills, and attitudes necessary to foster a culture of human rights. Further, this article illustrates some of the limitations observed by a number of scholars in the HRE field, focusing specifically in formal schooling and the role of teachers and educators.

Keywords: human rights education; transformative learning; education policy.

1. Beyond the Legal Frameworks

As a researcher in the field of citizenship and human rights education, I find myself often reflecting about the same questions: what is the best approach to educate about human rights? What contents should be used? A first – and likely – reaction is to look for an answer within the pages of the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights (UNDHR) adopted by the United Nations in December 1948 and the International Covenants on Human Rights and its two

Optional Protocols (OHCHR n.d.). Undoubtedly, this international framework serves as a primary source of content, along others that are specific to the human rights education practice – such as the UN Declaration on Human Rights Education and Training (UNDHRET) and the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education. Nonetheless, staying within the pages of the UNDHR will answer these questions only so far; rather, I will argue that legal literacy is an important part, but we should also take into consideration everyday experiences that illustrate the 'relevance and value' of human rights (Meintjes 1997, 64); both perspectives provide valuable knowledge and insight on the relevance of educating about human rights.

This article will explore these questions, analysing the challenges of educating about in formal education. Framed within the HRE field (hereby, HRE), I will describe some of the main limitations highlighted by a number of scholars in this area. In doing so, I will focus particularly in the challenge of introducing HRE in formal schooling, taking also into account the role of teachers and educators.

Undoubtedly, one of the first steps towards an education that is action-oriented is to move away from a purely prescriptive approach. In the HRE field, this principle holds true; international frameworks and laws serve as the basis to develop content, but there needs to be a process in order to inspire learners to integrate and enact human rights in their everyday realities (Bajaj et al. 2016; Flowers and Bajaj 2017; Tibbitts and Katz 2017). Sen (2005) provides a clear argument for the need to 'go beyond existing laws to give human rights their due' (Sen 2005, 2927); without public discussion, claims Sen, there will be no recognition of the importance of advancing human rights as compelling ethical claims. Further, the author states that, in order to realise human rights there is no need to involve lawmaking, as long as they 'survive open an informed scrutiny' (2916).

Following Sen's theorisation, I will argue that one way of strengthening public discussion is through education – formal, non-formal, informal – as it provides a structured space to collect and share information (knowledge) and consequently, learn from it. As for HRE, its role in fostering public reasoning is fundamental; an education about, through, and for human rights (UN General Assembly 2011) is likely to encourage learners to promote and enrich a human rights culture. However, as stated earlier, in spite of the existing international frameworks educating about human rights is not exempt of challenges when implemented in practice. Hence, this article will analyse some of the limitations illustrated by the research in this field, using a multi-level perspective based on the vertical case study approach proposed by Bartlett and Vavrus (2006, 2009, 2014).

The vertical case study (VCS) approach uses three axes of analysis – the vertical, the horizontal, and the transversal, focusing at the same time on micro-, meso-, and macro-levels which interact with and influence each other. As suggested by Bartlett, 'the local' cannot be divorced from national and transnational forces but neither can it be conceptualized as determined by these forces' (Bartlett 2014). This approach enables a more comprehensive understanding of what is at stake in the process of introducing HRE in formal schooling, taking into account the international progress made so far, the policy implications, and what happens with teachers and educators in the classroom at a micro-level.

Another distinctive feature of the VCS approach is the emphasis on the differences across contexts in terms of policy development, practices, and perceptions of practitioners themselves. Finally, this approach encourages education researchers to historically situate process and relations, 'tracing the creative appropriation of educational policies and practices across time and space' (Bartlett 2014, 31). This transversal perspective is particularly useful to conduct research in the HRE, as it takes into consideration the wealth of unofficial – or 'local' – knowledge, and puts it on equal foot with the legalistic knowledge developed in the last decades in this field.

The following pages will provide a brief overview of the challenges identified for the introduction of HRE in formal schooling. First, I will outline some conceptual definitions related to HRE; then, I will offer an analysis of the main limitations highlighted by several scholars, and I will conclude by providing a personal perspective on this issues.

2. HRE in Formal Schooling: Taking Stock of the Challenges

This article builds on Sen's theorisation on the importance of going beyond a purely legal approach to human rights, and expands on the crucial role of education as an enabler of public discussion. Indeed, acknowledging that to advance the ethics of human rights we must 'look beyond the rigid box of currently legislated rights' (Sen 2005, 2927) allows us to consider education – and in particular, the learning experience – as a key practice in which human rights are to be recognised and enacted by all of those engaged in the process. In this regard, Sen asserts the importance of having widely available information to foster public discussion so that human rights are understood as plausible ethical claims: 'The force of any particular claim to be seen as a human right would be seriously undermined if it were possible to show that such a claim is unlikely to survive open public scrutiny' (Sen 2005, 2925). Therefore, and as argued before, one way of looking outside the box of human rights-related legislation is the human

rights education practice in formal, non-formal, and informal contexts, that favours the dissemination of information useful for public reasoning.

For the purpose of this paper, human rights (HRE) is understood first and foremost as a practice that has expanded in the last decades as a theoretical and research field. The HRE practice encompasses human rights-related content and pedagogical action-oriented processes; teachers and educators are invited to play a key role in facilitating a transformative experience for the learners so that they acquire the knowledge, skills, and attitudes needed to enact human rights in their everyday lives (Bajaj 2011; Bajaj et al. 2016; Jennings 2006; Osler and Starkey 2010; Struthers 2016; Tibbitts 2005). HRE may take place in primary or secondary schools, at universities, in a community-led group or a national youth programme, as part of a professional training for medical staff, social workers, public servants or police officers, etc. Indeed, a salient characteristic of this field is the variety of target groups, pedagogical goals, and methodologies that may be observed across HRE initiatives (Andreopoulos and Claude 1997).

Generally, HRE in formal schooling is associated to the integration of human rights-related contents into subjects such as civics/citizenship education, history or philosophy through the official curriculum and textbooks. Most of the non-formal initiatives in HRE are led by non-governmental and civil society organisations, usually addressing young people and disadvantaged groups – e.g. refugees, migrants, people with disabilities, marginalised populations, etc. Moreover, some scholars have studied the development of HRE at a grassroots level through popular education to foster inclusion, community engagement, and even political resistance (Bajaj et al. 2016; Flowers 2015). In an effort to systematise the HRE practice in formal and non-formal education contexts, Tibbitts (2002, 2017) and Bajaj (2011) have developed models to categorise its conceptualisation and implementation according to criteria such as audiences, strategies, key contents, etc. These models, based on the experiences and feedback collected among practitioners across countries and regions, have enriched the practice with frameworks for understanding the evolution of the HRE field.

As stated before, and as a caveat for this critical literature review on human rights education: human rights-related contents are usually considered as part of citizenship education courses in several countries in Europe, North America, and Latin America (Cassidy et al. 2014; Cox et al. 2005; De Coster et al. 2012; Diallo et al. 2016; European Commission/EACEA/Eurydice 2017; IBE UNESCO 2014; Kakos and Palaiologou 2013; Kerr and Keating 2011; Osler and Starkey 2001; Suarez and Ramirez 2004; Tibbitts 2015). Often both topics are studied together encompassing contents and methods, but as theorised by Kiwan (2005) while both citizen-

ship and human rights concepts could be linked, it would be erroneous to conflate them since

> Human rights discourses are located within a universalist discourse, in contrast to citizenship, which is located within a more particularist discourse (…) The conflating of human rights with citizenship not only is conceptually incoherent but may actually obstruct the empowerment and active participation of individual citizens with the context of a political community (Kiwan 2005, 48).

Therefore, in accordance with Kiwan's critique this article considers citizenship and human rights education as separate fields, although as underlined above there may be an overlap of contents and methodologies among the sources cited. The emphasis of this piece is on what makes HRE a distinctive field – i.e. its transformative potential, its multifaceted nature, and its emancipatory roots –, which is not contingent to specific learners' characteristics such as their citizenship or legal status.

Previous research in the field of HRE has identified some of the challenges in terms of its conceptualisation, implementation, and evaluation (Al-Daraweesh and Snauwaert 2013; Bajaj and Flowers 2017; Keet and Carrim 2006; Kingston 2014; Osler and Starkey 2010; Rinaldi 2017; Tibbitts 2005; Tibbitts and Katz 2017). This section critically analyses some of the limitations of teaching about human rights, specifically in formal schooling and paying particular attention to the role of teachers and educators.

3. From the International Framework to the Classroom

Several scholars have underlined that, although the international legal framework promotes the incorporation of HRE in formal education – through the official curriculum, textbooks, and overall educational policies -, in practice there are numerous limitations that could mitigate the empowering aspect of educating about human rights (Osler and Leung 2011; Osler and Starkey 2010; Struthers 2016a). As stated earlier, this article uses three levels of analysis to address this question. First, at a macro-level, the interaction between international frameworks and specific contextual factors is crucial to understand the implementation of HRE across education levels (i.e. primary, secondary, and tertiary). The work of international organisations such as the United Nations has undoubtedly helped to move forward in the last decades, with initiatives such as the UN Decade for Human Rights Education (1995 – 2004), the UN World Programme for Human Rights Education (2005 – ongoing), and the UN Declaration on Human Rights Education and Training (UNDHRET), adopted by the General Assembly in 2011. However, as claimed by Struthers,

> State practice in the provision of HRE is unlikely to be driven by the international legal framework filtering down into national policy and is instead likely to be based upon the personal teaching preferences and predilections of teachers. The classroom practice of these teachers is, in turn, affected by their own perceptions of human rights, and it is here that the complexities of HRE practice are revealed (Struthers 2016a, 136).

Further, there are at least two other useful perspectives to examine the HRE practice in formal schooling: a meso-level, understood as policy-related issues with regard to the introduction of human rights contents in the national education programmes; and a micro-level, understood as the influence of teachers' and educators' perceptions in their own practices in the classroom.

The international actions in the HRE field have emphasized the role of formal schooling in fostering an education *about*, *through*, and *for* human rights (UN General Assembly 2011), with the aim of giving learners the knowledge, skills, and attitudes needed to promote, respect, and defend them (UN General Assembly 2011; Council of Europe 2010). For a comprehensive overview of the international legal framework pertaining HRE and its evolution, see Osler and Starkey (1996), Struthers (2015), and Tracchi (2017).

Notwithstanding the advance made at an international level, the progress across regions and countries has been uneven, as it has been illustrated in previous reports and studies (Bajaj and Flowers 2007; Council of Europe 2017; European Commission/EACEA/Eurydice 2017; IBE UNESCO 2014; Suarez 2007). The advances made in the macro sphere have effected the conceptualisation and implementation of the HRE practice across countries, by facilitating or hindering its introduction in formal schooling. For instance, some authors have pointed out the challenges arising as a result of the globalising aspirations of certain HRE initiatives. Al-Daraweesh and Snauwaert (2013) posit that there are two major limitations for practitioners in the field that are linked to the discussion about the universality of human rights. First, since the so-called Western liberal tradition is at the roots of the human rights movement, the pedagogical experience may lack concrete examples adapted to the realities of the learners in a specific context. The authors provide an interesting example from an Indonesian educator: '[one of the challenges being] to link the concepts of human rights with daily life activities, especially in cases where students felt a contradiction between universal human rights values and the socio-cultural norms of their own communities.' (as cited in Al-Daraweesh and Snauwaert 2013, 391). A second limitation is the risk of leaving other (non-Western) cultural input outside the construction of the human rights concept, and therefore 'constitutive texts that provide the experiential meaning of human rights

— exemplified in Buddhism, Confucianism, Hinduism, Taoism, African traditions, Islam, and the like — are rendered irrelevant.' (Al-Daraweesh and Snauwaert 2013, 392).

Following the same critical approach, Coysh (2014) emphasizes that this globalising approach is a rather predominant discourse in the HRE field, ignoring or hiding any pre-United Nations knowledge or input that could contribute to future improvements. The author claims that since the United Nations is seen as the main source of 'official' human rights knowledge, this discourse has been accepted as a global perspective and thus there is little room left for questioning or debating – which would contradict Sen's suggestion on fostering public reasoning to strengthen the human rights discourse. Nevertheless, Coysh suggests that one of the most important tasks of HRE is 'making the idea of human rights relevant and resonant in the local context (…) unearthing pre-existing knowledges which have been buried and discounted by the global power structures' (110). Once again, the transformative potential of HRE appears as a tool for social change that can contribute to the questioning of global power structures. And because it is in the multidimensional nature of HRE to constantly question its contents, its process, and how it is implemented, calling to bring about 'pre-existing knowledge' would make sense as a healthy self-monitoring exercise for any practitioner in the field. As explained by Dirlik, 'the values of the dominant (such as human rights) are not *prima facie* undesirable because of the fact of domination, just as the values of the dominated are not to be legitimated simply by recourse to arguments of cultural difference.' (Dirlik 1999, 14).

In exploring the implications of this globalising approach, Coysh (2014) asserts that even if the practice of HRE 'can simultaneously be both a possibility for social change and a way to reproduce the status quo' (Coysh 2014, 89), its transformative potential could overcome the possible challenges. Indeed, as Audigier and Lagelee suggest, educating about human rights contains in itself a controversy for

> On the one hand, human rights presuppose free acceptance resulting from the exercise of critical reason and therefore cannot be imposed, while on the other, as the foundation of our democratic societies, they are in fact imposed on everyone as the moral and legal norm on the basis of which they think about the community and how conflicts can be resolved (as cited in Tibbitts 1994, 366).

As explained by Struthers (2016a) state actions to provide HRE through formal schooling are not necessarily driven by the international legal framework, and are more likely to respond to the current political agenda and

internal demands from the education sector. In this regard, Osler and Leung (2011) highlight that generally, formal education systems have a strong nationalistic approach which underlines values attached to a specific context rather than universal values such as human rights. This could explain the emphasis given to the citizenship education curricula that promotes concepts such as democracy, participation, and active citizenship (European Commission/EACEA/Eurydice 2017), which are also contingent to the local context in a specific country.

Finally, Flowers (2015) points to another common challenge that illustrates this interaction between the international actions to advance HRE and context-specific factors. For the author, the challenge is two-fold; on the one hand, states may consider that educating about human rights is likely to be disturbing and cause unrest among people that have become aware of their rights and legitimate claims, so they decide to undermine any effort towards integrating human rights in formal schooling. On the other, governments could choose to 'cherry pick' between rights that are convenient for their own ends, ignoring others that do not align with their priorities and thus depicting an incomplete picture about the indivisibility of rights (Flowers 2015, 11).

4. Policy Matters: Training the Trainers is Key

A second level of analysis pertains to policies and regulations encompassing the integration of HRE in formal schooling. Besides the challenges stemming from the interactions between the macro-level (international frameworks) and the local context, several scholars have questioned the limitations for the HRE practice related to education policymaking. Indeed, the guidelines provided by international organisations have contributed to the strengthening and expansion of the HRE field, filtering down into national education systems (Bajaj 2011; Struthers 2016). As Suarez (2007) highlights, incorporating HRE into the national curricula may have been too revolutionary forty years ago, but today it's part of the discussion across education systems.

However, the degree to which HRE is incorporated in the national curriculum varies greatly from one country to another depending on factors such as the political agenda, the educational system's structure, strength of the civil society, recent historical events, among others (Tibbitts 2002). In Europe, organisations such as the Council of Europe support and finance a series of activities related to the promotion of HRE at a regional and local level, publishing books and manuals, organising trainings, and working with youth groups to raise awareness around human rights, among other initiatives. Nonetheless, in the latest *Report on the State of Citizenship and*

Human Rights Education in Europe (Council of Europe 2017), a salient trend noted was the decline in recent years in policymaking explicitly referring to HRE, linked to governments' constrains in balancing between curriculum load and teacher training demands. Moreover, a majority of the respondents declared that HRE is rather promoted through a cross-curricular approach, with compulsory and optional courses covering topics related (but not exclusive) to human rights, civics, and citizenship education (Council of Europe 2017, 67). As stated earlier, human rights are usually integrated in other subjects (e.g. civics, citizenship education, philosophy, etc.) which undermines the possibility of fully developing a HRE course due to insufficient political will to make this topic a specific subject in the official curriculum (Bajaj and Flowers 2017).

The presence of HRE in national programmes and overall education policy – or lack thereof – in Europe has been documented by several scholars. In her study of the provision of HRE within primary schools in England, Struthers (2016), found that, notwithstanding the recognition of HRE in international frameworks as a key skill for learners, its presence in both the English National Curriculum and the classroom practice was not consistent. Further, Lapayese (2004) studied national initiatives in Japan, Austria, and the United States within the United Nations Decade for Human Rights Education (1995–2004), focusing in particular on the implementation of HRE in formal secondary schools. Importantly, the author notes that even though a number of activities took place during the Decade, there was a loose connection between policies promoting comprehensive national plans for HRE and the integration of the practice in schools. As Lapayese explains,

> The legislation lacks specific details to systematically implement human rights education programs in schools. The integration of human rights education in schools occurs at some levels, mostly secondary school settings, and is rarely imparted during every year of secondary schooling, but is targeted at specific age groups (…) there appears to be little guidance at formal policy level in relation to human rights education in initial teacher training. The professional development of teachers is an area that has been largely neglected with respect to human rights education (Lapayese 2004, 179).

Lapayese signifies another major issue at a policy-level – the provision of teacher training to develop adequate skills for educating about human rights. In Europe, policies and regulations on Initial Teacher Education (ITE) and Continuing Professional Development (CPD) in this area are generally oriented to the acquisition of knowledge and skills for citizenship education which, as discussed earlier, does not necessarily imply educating about human rights. Along these lines, the latest Eurydice report on *Citizenship Education at School in Europe* (2017) illustrates the current trends in the Eu-

ropean Union (EU) with regards to professional development for teachers from primary through secondary education. While the report emphasizes that EU governments are generally advancing their policy efforts in the area of teacher training, only six countries offer a citizenship education specialisation through ITE – United Kingdom (England), Belgium (French Community), Ireland, Luxembourg, the Netherlands and Denmark (European Commission/EACEA/Eurydice 2017, 157).

Certainly, a closer look to policies and regulations on teachers' professional development would allow us to determine to which extent human rights are part of the specialisation courses (contents) and how educators are prepared to address this topic in the classroom (process). From this perspective, Osler and Starkey (2017) assert that, in spite of the importance of teachers' perceptions about their own role as educators, during ITE 'student teachers are rarely encouraged to examine or reflect on their own identities or biographies as part of their preparation for teaching' (Osler and Starkey 2017, 87). For instance, in their study of ITE at one university in Scotland Cassidy et al. (2014) concluded that education students didn't feel adequately prepared to engage with HRE practices; feedback among participants in the study included the perception of human rights as 'a sensitive and sometimes complex topic requiring incorporation across the curriculum' (27). Further, Struthers (2016) emphasises that even if teacher training is only part of the solution to the lack of human rights education in English primary schools, it would greatly contribute to increasing teachers' confidence about facilitating empowerment-related activities in the classroom. As Flowers (2017) stresses, 'even where HRE is mandated by legislation and supported by the formal education systems, ongoing commitment to train a whole generation of teachers is still required' (Flowers and Bajaj 2017, 327).

The issue of insufficient teacher preparation to engage with human rights contents in the classroom could be linked to the predominance of a 'banking education' model in which teachers are expected to merely 'deposit' knowledge on learners, without developing critical thinking or agency among them (Bajaj et al. 2016; Roberts 2000; Struthers 2016). The critique of the banking model finds its roots in critical pedagogy, and more specifically, in the works of Brazilian scholar Paulo Freire. As a theoretical approach, critical pedagogy is greatly influenced by the Marxist tradition; education is understood as a social practice that can either empower learners or train them to maintain the status quo (Kincheloe et al. 2011; Struthers 2016). Questioning power relations, thinking critically about ourselves and our society, identifying oppressing structures and taking action against them are some of the main tenets of critical pedagogy. The HRE field is deeply influenced by this approach, as it seeks to help learners develop a critical awareness of themselves and their context, thus empowering them to act

upon injustice and inequity and to contribute to the strengthening of a human rights culture (Bajaj et al. 2016; Lohrenscheit 2006; Lücke et al. 2016; Struthers 2016; Tibbitts and Katz 2017).

The premise of HRE as a transformative practice is radically opposite to the banking model in which 'learners are expected to retain knowledge without perceiving its true meaning or significance' (Struthers 2016, 5); through HRE, learners are engaged in an empowering process at a personal and collective level. As a transformative learning experience, HRE encourages an open, participatory process in which learners feel safe and confident to critically reflect on their own personal experiences as well as the context they live in. As a learner-centred approach, HRE promotes collaboration among peers and educators, giving them the opportunity to share feedback and to practice self-assessment. A well-prepared teacher addressing human rights-contents in the classroom should be able to manage the tensions arising from the discussion, and feel confident about working with controversy and diversity (Nazzari et al. 2005; Taylor 1998).

Notwithstanding the inspiring goals of the HRE practice, in terms of policymaking a transformative approach to teacher training doesn't appear as a common trend. A greater challenge, however, is that learners missing the necessary information and skills to engage in public discussions – as theorised by Sen (2005) – are most likely to lack opportunities to participate actively in their communities. As emphasized by Keet (2015), the risk of HRE being a rather 'declarationist' field based mainly on legalistic content – e.g. declarations, protocols, etc. – is high, in particular in formal schooling; given the complexity of teaching about human rights, relevant policies on teacher training may remain vague enough, thus hindering the transformative potential of the HRE practice.

5. Perceptions and Roles: Micro-level Challenges to HRE

The last level of analysis presented in this article refers to the HRE practice in formal education, and takes into consideration teachers' and educators' perceptions about their own role in educating about human rights. Gibson and Grant (2017) suggest that when it comes to teaching about social justice issues, educators are 'encouraged to think about our work intersectionally (…) Race matters, class matters, gender matters, sexuality matters, migration status matters – taken collectively, each magnifies and complicates the others' (244). However, as discussed above, if student teachers have not had the opportunity to engage in self-reflection about their own role throughout ITE, to what extent will they be able to address these issues in the classroom? In a study conducted by Rinaldi (2018) in

Switzerland, the author found that the implementation of human rights topics at school depended largely on the teachers' own perceptions and preferences; in some cases human rights were seen as 'a difficult concept to teach', 'too abstract' or 'controversial', and in others, teachers simply lacked familiarity with the topic because they didn't have it during their initial training (98). Similarly, Struthers (2016) gathered concerns among English primary school teachers that she classified in three main categories: human rights as being 'too controversial', 'abstract', or 'biased a subject for young learners' (Struthers 2016, 136).

A strong argument among HRE practitioners is that well-prepared teachers are likely to engage in effective and empowering practices in the classroom; still, a number of scholars have signified that this is rather an exception than the norm in formal schooling (Cassidy et al. 2014; Flowers 2015; Flowers and Bajaj 2017; Jennings 2006; Kerr and Keating 2011; Osler and Starkey 1994, 2017; Rinaldi 2018; Struthers 2016). Generally, teachers that are knowledgeable about social justice issues will introduce them in accordance to human rights principles, although they may not have prior experience with HRE (Osler and Starkey 1994). Others may need to review the entire curriculum so as to integrate human rights-related subjects, which requires adequate and support from the school community (Lapayese 2004). Conversely, some teachers may feel hesitant about the idea of empowering learners, either because of their own experience or the school they work in (Struthers 2016).

Further, Jennings (2006) considers the influence of policy on teachers' perceptions by suggesting that, if human rights education standards were to become a reality, teachers and school communities would probably feel apprehensive about it: 'standardization efforts are often approached suspiciously as potential threats to the professional autonomy of educators and the self-determination of local communities regarding education.' (Jennings 2006, 288). Nonetheless, the author considers these concerns as valid, and suggests a collective approach to the construction of said standards, including a human rights-based approach to the process itself. In an effort to contribute to this exercise, Jennings proposes a series of standards for classroom teachers, taking into account all levels and populations of learners:

> Standard 1: Engages and supports all students' learning about human rights
>
> Standard 2: Creates and maintains effective environments that embody the principles and concepts of human rights
>
> Standard 3: Understands and organizes subject matter to promote student learning about human rights
>
> Standard 4: Plans instruction and designs learning experiences for the

human rights education of all students
Standard 5: Uses assessment strategies that embody human rights concepts and principles
Standard 6: Develops as a professional human rights educator (Jennings 2006, 292-294)

While the author adds valuable insights to the implementation of HRE in formal schooling, the task of 'standardising' the practice raises several questions that take us back to the policy level: Which actors are to be involved in the process? How to ensure that all actors involved have the same leverage? What resources are needed to successfully implement the standards? As mentioned before, variables such as political agendas, available resources, the influence of civil society, the relationship with teachers' associations, among others, are likely to affect any effort to introduce HRE in the official curriculum. Tibbitts and Katz (2017) highlight this tension between the policy level and the practice in the classroom:

We can find a key gap in this landscape of HRE and the state. This gap lies between the theorists' calling (back) for the emancipatory roots of HRE and the lived educational policies and practices of states and schools. These are the macro-policies that so heavily influence all realms of public education, from curriculum policy and teacher preparation and support, to teaching and learning resources. This gap is marked by the tension that individual educators and teacher trainers must confront in deciding whether, and how, to facilitate human rights learning in their classrooms (Tibbitts and Katz 2017, 34).

Though it would seem that HRE in formal schooling is not easily translated into a transformative experience, recent studies have brought up numerous examples from different contexts, describing these challenges and at the same time, providing potential avenues for improvement and progress. Tibbitts and Katz (2017) suggest that the HRE field is confronted today to a new stage in its evolution, 'one that calls for a return to its transformative potential as it enters the vernacular of state education policy' (39). Hopefully, this evolution will lead to effective educational policies that integrate human rights as a core content, taking into account the different needs for resources, training, and evaluation for their success.

Conclusion

This article sought to offer some useful aspects analysing the HRE practice in formal schooling, using a three-pronged approach and pointing to some of the most salient issues highlighted by the scholars in the field.

In doing so, it hopes to provide some leads for further research specifically with regard to the role of teachers in educating about human rights at primary and secondary levels. Importantly, this article is a contribution to the growing wealth of research in the HRE field, in an effort to go beyond a 'declarationist' approach, as theorised by Keet (2015).

Undoubtedly, the HRE field has seen a rapid progress in the last decades at an international level, thanks to the frameworks developed by organisations such as the United Nations and the Council of Europe. However, as it has been argued in this article, the development at an international level has slowly translated into comprehensive national policies that integrate HRE in the national curriculum. What it's written on paper does not mean an effective policy implementation; if human and financial resources are insufficient, filtering down HRE into the school context becomes a difficult task. As observed by several scholars, adequate teacher training is key, but is not the 'panacea' to all the demands of a policy reform in this direction (Struthers, 2016). Ultimately, the underlying argument in this article is that for any educational reform that seeks to provide a holistic and transformative learning experience to learners, it is crucial to move away from the banking model which appears to be predominant in our contemporary societies.

At a time in which xenophobia, racism, and populism have re-emerged across the world, it is worth asking ourselves some questions regarding the values and principles we are teaching to the future generations. Certainly, there is much to say about the existing human rights frameworks and their implementation; however, they are a sort of useful 'toolkit' that serve as a reference to oppose human rights abuses, and HRE may be a contribution to its improvement and strengthening in the long term.

References

Al-Daraweesh, F., and Snauwaert, D. T. (2013). 'Toward a Hermeneutical Theory of International Human Rights Education'. *Educational Theory*, *63*(4), 389–412.

Andreopoulos, G., and Claude, R. (1997). *Human rights education for the twenty-first century*. Philadelphia, Pa.: University of Pennsylvania Press.

Bajaj, M. (2011). *Human Rights Education: Ideology, Location, and Approaches.* Rochester, NY: Social Science Research Network.

Bajaj, M., Cislaghi, B., and Mackie, G. (2016). 'Advancing Transformative Human Rights Education. Appendix D to the Report of the Global Citizenship Commission'. Retrieved from: http://researchonline.lshtm.

ac.uk/4646392/1/The%20universal%20declaration%20of%20human_GOLD%20VoR.pdf (accessed: 15/08/2018).

Bajaj, M., and Flowers, N. (2017). *Human rights education : theory, research, praxis*. Philadelphia, Pa.: University of Pennsylvania Press.

Bartlett, L. (2014). 'Vertical Case Studies and the Challenges of Culture, Context and Comparison'. *Current Issues in Comparative Education*, *16*(2), 30–33.

Bartlett, L., and Vavrus, F. (2014). 'Transversing the vertical case study: A methodological approach to studies of educational policy as practice'. *Anthropology and Education Quarterly*, *45*(2), 131–147.

Bartlett, L., and Vavrus, F. K. (2009). *Critical approaches to comparative education : vertical case studies from Africa, Europe, the Middle East, and the Americas*. New York: Palgrave Macmillan.

Cassidy, C., Brunner, R., and Webster, E. (2014a). 'Teaching human rights? 'All hell will break loose!''. *Education, Citizenship and Social Justice*, *9*(1), 19–33.

Council of Europe. (2017). 'Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe'. Retrieved from https://rm.coe.int/the-state-ofcitizenship-in-europe-e-publication/168072b3cd (accessed: 15/08/2018).

Council of Europe (2010). *Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education: Recommendation Cm/Rec (2010) 7 (2010)*. Strasbourg: Author.

Cox, C., Jaramillo, R., and Reimers, F. (2005). 'Education for Democratic Citizenship in the Americas: An Agenda for Action'. Inter-American Development Bank. Retrieved from http://publications.iadb.org/handle/11319/3568 (accessed: 15/08/2018).

Coysh, J. (2014). 'The Dominant Discourse of Human Rights Education: A Critique'. *Journal of Human Rights Practice*, *6*(1), 89–114.

De Coster, I., Borodankova, O., and de Almeida, A. S. (2012). *Citizenship Education in Europe*. Luxembourg: Publications Office of the European Union.

Diallo, I., Embarki, M., and Abdallah, K. B. (2016). 'Education for Citizenship at School in France: Trajectory, Tensions and Contradictions', in Peterson, A., Hattam, R., Zembylas, M., and Arthur, J. (Eds.). *The Palgrave International Handbook of Education for Citizenship and Social Justice*. London: Springer, 391–409.

Dirlik, A. (1999). 'Is there history after Eurocentrism?: Globalism, postcolonialism, and the disavowal of history'. *Cultural Critique*, (42), 1–34.

European Commission/EACEA/Eurydice. (2017). *Citizenship education at school in Europe*, *2017*. Luxembourg: Publications Office of the European Union.

Flowers, N. (2015). 'The Global Movement for Human Rights Education'. *Radical Teacher*, (103), 5-16.

Gibson, M. L., and Grant, C. A. (2017). 'Historicizing Critical Educational Praxis: A Human Rights Framework for Justice-Oriented Teaching', in Bajaj, M. (ed.) (2017). *Human rights education : theory, research, praxis*. Philadelphia, Pa.: University of Pennsylvania Press, 225-251.

IBE UNESCO. (2014). 'Citizenship education in Latin America: Priorities in school curricula (IBE Working Papers on Curriculum Issues N° 14)'. Retrieved from http://www.ibe.unesco.org/en/document/citizenship-education-latin-america-priorities-school-curricula-ibe-working-papers (accessed: 31/03/2016).

Jennings, T. (2006). 'Human rights education standards for teachers and teacher education'. *Teaching Education*, *17*(4), 287–298.

Kakos, M., and Palaiologou, N. (2013). 'Citizenship education for unity and diversity within multicultural societies: critical policy responses within Europe'. Retrieved from: https://lra.le.ac.uk/bitstream/2381/27879/2/Kakos%20%26%20Palaiologou%2013.pdf (accessed: 25/08/2018).

Keet, A. (2015). 'It is time: Critical human rights education in an age of counter-hegemonic distrust'. *Education as Change*, *19*(3), 46–64.

Keet, A., and Carrim, N. (2006). 'Human Rights Education and Curricular Reform in South Africa'. *JSSE – Journal of Social Science Education*, *5*(1), 87-105.

Kerr, D., and Keating, A. (2011). 'Intercultural, citizenship and human rights education: the challenges of implementation for policy, practice and research'. *Educational Research*, *53*(2), 119–122.

Kincheloe, J. L., McLaren, P., and Steinberg, S. R. (2011). 'Critical pedagogy and qualitative research'. *The SAGE Handbook of Qualitative Research*, 163–177.

Kingston, L. (2014). 'The Rise of Human Rights Education: Opportunities, Challenges, and Future Possibilities'. *Societies Without Borders*, *9*(2), 188–210.

Kiwan, D. (2005). 'Human rights and citizenship: An unjustifiable conflation?' *Journal of Philosophy of Education*, *39*(1), 37–50.

Lapayese, Y. V. (2004). 'National Initiatives within the UN Decade for Human Rights Education: The Implementation of Human Rights Education Policy Reforms in Schools'. *Educational Research for Policy and Practice*, *3*(2), 167–182.

Lohrenscheit, C. (2006). 'Dialogue and Dignity – Linking Human Rights Education with Paulo Freire's 'Education for Liberation.'' *Journal of Social Sciences Education*, *5*(1), 126–134.

Lücke, M., Tibbitts, F., Engel, E., and Fenner, L. (2016). *CHANGE – Handbook for History Learning and Human Rights Education* (1st ed.). Schwalbach: Wochenschau Verlag.

Meintjes, G. (1997). 'Human rights education as empowerment: Reflections on pedagogy', in Andreopoulos, G., and Claude, R. (1997). *Human rights education for the twenty-first century*. Philadelphia, Pa.: University of Pennsylvania Press, 64–79.

Nazzari, V., McAdams, P., and Roy, D. (2005). 'Using transformative learning as a model for human rights education: a case study of the Canadian Human Rights Foundation's International Human Rights Training Program'. *Intercultural Education*, *16*(2), 171–186.

OHCHR. (n.d.). 'OHCHR International Law'. Retrieved from https://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx (accessed: 15/08/2018).

Osler, A., and Leung, Y. W. (2011). 'Human rights education, politics and power'. *Education, Citizenship and Social Justice*, *6*(3), 199–203.

Osler, A., and Starkey, H. (1994). 'Fundamental Issues in Teacher Education for Human Rights: A European perspective'. *Journal of Moral Education*, *23*(3), 349–359.

Osler, A., and Starkey, H. (1996). *Teacher education and human rights*. D. Fulton Publishers.

Osler, A., and Starkey, H. (2001). 'Citizenship education and national identities in France and England: inclusive or exclusive?' *Oxford Review of Education*, *27*(2), 287–305.

Osler, A., and Starkey, H. (2010). *Teachers and Human Rights Education*. London: Trentham Books Ltd.

Rinaldi, S. (2018). 'Challenges for human rights education in Swiss secondary schools from a teacher perspective'. *Prospects*, *47*(1), 87–100.

Sen, A. (2005). 'Human rights and the limits of law'. *Cardozo L. Rev.*, *27*, 2913-2927.

Struthers, A. (2015). 'Building blocks for improving human rights education within initial teacher education in Scotland'. Retrieved from: http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/publications/building_blocks_report.pdf (accessed: 16/08/2018).

Struthers, A. (2016). 'Human rights: a topic too controversial for mainstream education?' *Human Rights Law Review*, *16*(1), 131–162.

Struthers, A. (2016a). 'The underdeveloped transformative potential of human rights education: English primary education as a case study'. *Journal of Human Rights Practice 9*(1), 68-84.

Suarez, D. (2007). 'Human Rights and Curricular Policy in Latin America and the Caribbean'. *Comparative Education Review*, *51*(3), 329–352.

Suarez, D., and Ramirez, F. (2004). 'Human Rights and Citizenship: The Emergence of Human Rights Education'. Retrieved from http://cddrl.fsi.stanford.edu/publications/human_rights_and_citizenship_the_emergence_of_human_rights_education (accessed: 5/11/2015).

Taylor, E. (1998). 'The Theory and Practice of Transformative Learning: A Critical Review'. Information Series No. 374. Retrieved from: https://eric.ed.gov/?id=ED423422 (accessed: 10/08/2018).

Tibbitts, F. (1994). 'Human Rights Education in Schools in the Post-Communist Context'. *European Journal of Education*, *29*(4), 363–376.

Tibbitts, F. (2002). 'Understanding What We Do: Emerging Models for Human Rights Education'. *International Review of Education*, *48*(3–4), 159–171.

Tibbitts, F. (2005). 'Transformative learning and human rights education: taking a closer look'. *Intercultural Education*, *16*(2), 107–113.

Tibbitts, F., and Katz, S. R. (2017). 'Dilemmas and hopes for human rights education: Curriculum and learning in international contexts'. *Prospects*, *47*(1–2), 31–40.

Tracchi, M. (2017). 'Human Rights Education: a Literature Review between Legal and Normative Dimensions', in de Perini, P. and Mascia, M. (eds.) *What's new in human rights doctoral research. A collection of critical literature reviews*. Padua: Padova University Press.

UN General Assembly. (2011). 'United Nations Declaration on Human Rights Education and Training A. RES/66/137, 19 December 2011'. Retrieved from: http://daccess-dds-ny. un. org/doc/UNDOC/GEN (accessed: 20/08/2018).

Vavrus, F., and Bartlett, L. (2006). 'Comparatively Knowing: Making a Case for the Vertical Case Study'. *Current Issues in Comparative Education*, *8*(2), 95-103.