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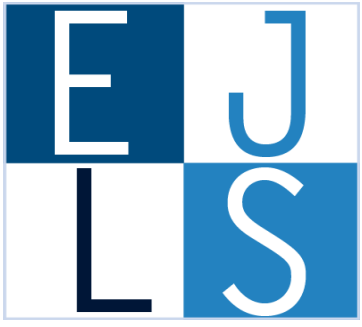

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EDITORIAL

TALKING ABOUT MY GENERATION

Rebecca Mignot-Mahdavi*

I. Entering Stormy Debates as Young Scholars

JE T'AIME, MOI NON PLUS: HOW FRANCE MADE THE UK LEGAL RATIONALE ON THE SYRIA STRIKES FAIL

Since the United States, the United Kingdom and France attacked several chemical weapons facilities in Syria on Saturday, the 14th of April 2018, the legal blogosphere has been abuzz. Yet, a key element sank into oblivion: France did not simply overlook the humanitarian intervention doctrine developed by the UK but rather deliberately ignored it. This note tells the story of how France makes the UK legal rationale fail on the Syria strikes; of how the 'Je t'aime, moi non plus' Franco-British alliance went unnoticed.

The general consensus on the blogosphere is that under the conventional *jus ad bellum* framework, the UK, the US and France's strikes cannot be considered lawful for four reasons: (i) they cannot be justified under the right of self-defense, (ii) they were not authorized by the UN Security Council, (iii) they have not been consented to by the Syrian government, and (iv) reprisals are unlawful.[1] I concur with this four-part conclusion. Alongside this

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[1] Jack Goldsmith and Oona Hathaway, 'Bad Legal Arguments for the Syria Strikes' (*Just Security,* 14 April 2018) <www.justsecurity.org/54925/bad-legal-arguments-syria-strikes/> accessed on 24 April 2018; Marko Milanovic, 'The Syria Strikes: Still Clearly Illegal' (*EJIL:Talk!*, 15 April 2018) <www.ejiltalk.org/the-syria-strikes-still-clearly-il legal/> accessed on 1 May 2018; Mary Ellen O'Connell, 'Unlawful Reprisals to Rescue against Chemical Attacks' (*EJIL:Talk!*, 12 April 2018) <www.ejiltalk.org/unlawful-

consensus, voices have also been heard in support of a humanitarian intervention justification, starting from the UK government itself.[2] I would like to confront the idea that the humanitarian intervention doctrine could offer a persuasive justification for the strikes. What I propose here is not a redundant conceptual exercise but rather it is to show that France, by deliberately excluding the humanitarian intervention doctrine and choosing a distinct legal rationale to justify the strikes, invalidates – or at least undermines – the attempt of the UK to legally justify the strikes on the humanitarian intervention ground.

President Macron, domestically, articulated an extensive interpretation of the Security Council authorization as a justification for the strikes. The detailed attempt to use a different normative framework was presented in an interview with President Macron, which appeared on the French television and deserves some attention. Although unconvincing, the clear choice of an alternative *jus ad bellum* norm to justify the strikes confirms that France deliberately diverged from the UK rationale.

The UK government argued that the Syria strikes were lawful under the humanitarian intervention doctrine. In its own words, the strikes (i) objectively constituted the only possible way to alleviate an extreme humanitarian distress, (ii) which required immediate and urgent relief. Besides, the strikes were (iii) the minimum necessary means to achieve that

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reprisals-to-the-rescue-against-chemical-attacks/> accessed 1 May 2018. For a more nuanced point of view, see Monica Hakimi, 'The Attack on Syria and the Contemporary Jus ad Bellum' (*EJIL:Talk!*, 15 April 2018) <www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum/> accessed on 1 May 2018; Monica Hakimi, 'Pigs, Positivism, and the Jus ad Bellum', (*EJIL:Talk!*, 27 April 2018) <www.ejiltalk.org/pigs-positivism-and-the-jus-ad-bellum/> accessed on 1 May 2018.

[2] UK Government, Prime Minister's Office, Policy Paper, 'Syria Action – UK Government legal position', 14 April 2018, <www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> accessed 24 April 2018. See also for scholarly support of the humanitarian intervention doctrine, Harold Hongju Koh, 'The Real "Red Line" Behind Trump's April 2018 Syria Strikes' (*Just Security*, 16 April 2018) <www.justsecurity.org/54952/real-red-linebehind-trumps-april-2018-syria-strikes/> accessed 18 April 2018.

end, and (iv) were conducted *for no other purpose*.[3] As it was argued approximately a year ago after the 2017 US strikes in Syria,[4] the overwhelming state support following the 2018 strikes[5] would reveal that the *jus ad bellum* actually contains or is developing a humanitarian intervention exception to Article 2(4) of the Charter of the United Nations (UN).[6] Without entering the discussion of how advanced the process towards accepting humanitarian intervention is as an additional exception to the prohibition on the use of force, the 2018 Syrian strikes cannot be considered either as justified on that basis or, thus, as triggering such law-making momentum.

Why is that? Because France did not leave the humanitarian intervention doctrine aside just by mistake. In an interview conducted by journalists Edwy

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[3] These criteria are recalled by the UK government itself. See UK Prime Minister's Office Policy Paper (n 2). The last criterion will be crucial to understanding how the French rhetoric makes the UK's justification fail. [Emphasis added by the author]

[4] The US used force in response to the Syrian government's chemical weapon attacks on the 4th of April 2017. After those strikes, Harold Koh talked about an 'important moment of lawmaking' with regards to the plausibility of the humanitarian intervention justification. Harold Hongju Koh, 'Not Illegal: But Now the Hard Part Begins' (*Just Security*, 7 April 2017) <www.justsecurity.org/39695/illegal-hard-part-begins/#more-39695> accessed 14 April 2018.

[5] It should be noted that after the US, the UK, and France conducted the strikes, the Security Council met in an emergency session. The draft resolution that would have condemned the strikes was not adopted. Russia, China, and Bolivia supported the resolution; eight states voted against it, and four abstained. See UN Security Council, 'Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression', 14 April 2018, SC/13296, <www.un.org/press/en/2018/sc13296.doc.htm> accessed 30 April 2018. See also Alonso Gurmendi Dunkelberg et al, 'Mapping State's Reactions to the Syria Strikes of April 2018' (*Just Security*, 22 April 2018) <www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/> accessed 22 April 2018: the map shows that States broadly condoned the 2017 operation against Syria. 19 states and one regional organization expressly supported the strikes without pronouncing on their legality. Many states – around 20 – neither fully supported nor criticized the strikes and only 11 states, including Syria itself and Russia have opposed the air strikes under international law.

[6] Andrew Bell, 'Syria, Chemical Weapons, and a Qualitative Threshold for Humanitarian Intervention' (*Just Security*, 10 April 2018) <www.justsecurity.org/54665/syria-chemical-weapons-international-law-developing-qualitative-threshold-humanitarian-intervention/> accessed on 1 May 2018.

Plenel and Jean-Jacques Bourdin on the 15th of April 2018, President Macron, while not expressly dismissing the humanitarian intervention doctrine, did reject the idea that the strikes were aimed at or capable of improving the humanitarian intervention in Syria.[7] When challenged on the possibility to affirm that peace can be obtained through the use of force, President Macron replied that, of course, one cannot seriously argue that peace can be obtained by military attacks.[8] On the contrary, he insisted that the 'only' reason for taking action was to respond to a violation of international law and to restore the credibility of the international community. The simple fact that President Macron considered the strikes as being, by themselves, unable to lead to 'peace' is of course not sufficient to establish that he excluded humanitarian intervention. However, the fact that he mentioned that the *only* reason for the strike was a goal other than the improvement of the humanitarian situation arguably reveals that he did exclude the idea that the strikes performed a humanitarian function.

Some might say that this conclusion is erroneous as Macron did not categorically and expressly exclude the humanitarian intervention justification. Yet, the interview illustrates that Macron refused to argue that the strikes constituted a humanitarian intervention considering that the operation would not demonstrably improve the humanitarian situation in Syria.[9] Macron, thus, preferred to put forth a different rationale to the UK's reasoning; possibly the only one that he found defensible.

This leads us to a second point: it appears that Macron deliberately left out the humanitarian intervention justification because he intended to articulate – contrarily to what has been said –[10] a claim under the traditional *jus ad bellum*

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[7] 'Macron, un an après: le grand entretien en intégralité', BFM-TV, Mediapart, (Paris, 15 April 2018) Interview conducted by Edwy Plenel (Mediapart) and Jean-Jacques Bourdin (BFM-TV), <www.youtube.com/watch?v=mt0as7x-kfs> accessed 24 April 2018 (BFM-TV & Mediapart Interview).

[8] Ibid.

[9] Koh, 'Not Illegal' (n 4). According to Harold Koh's test for judging the international lawfulness of claimed humanitarian interventions, the limited force has to be used 'for genuinely humanitarian purposes that was necessary and proportionate to address the imminent threat' and that 'would demonstrably improve the humanitarian situation'.

[10] See for instance, O'Connell (n 1).

framework. I understand his rhetoric as justifying the strikes by an extensive interpretation of the UN Security Council authorization, which constitutes a conventional exception to the prohibition on the use of force.[11] Although the French legal rationale falls short of being convincing, it is essential to acknowledge the two steps followed by President Macron in his attempt to substantiate that the attacking states were acting on some form of extremely extensive, partly silent and retroactive, authorization of the Security Council. First, he insisted that the UK, the US, and France had acted not outside of the UN framework but rather as three of the five permanent members of the UN Security Council. Second, he tried to establish the implicit and/or *a posteriori* approval of the two remaining permanent members, Russia and China. Let me elaborate on this.

When criticized for acting in lieu of the international community in the absence of Security Council authorization, President Macron asserted that, on the contrary, it was 'the international community' that was taking action through these strikes.[12] More precisely, he argued that France was acting in its function as one of the permanent members of the Security Council, along with two other permanent members, the US and the UK. He concluded, as if it were sufficient or *should be* sufficient to amount to a Security Council authorization, that three approvals 'constitute the majority'. He then repeatedly insisted that the strikes aimed at restoring the credibility of the international community as a whole, and not to pursue a state-centered enterprise in a marked disdain for the UN framework.

Since the majority argument was unlikely to convince, Macron focused on the two remaining permanent members, China and Russia, by entering an equally doubtful demonstration. He claimed that, while officially condemning the strikes, President Putin had agreed in principle to such action during his visit

[11] Pursuant to Article 2(4) of the Charter of the United Nations, the use of force is prohibited. One of the exceptions to this principle is that the United Nations Security Council may authorize the use of force to maintain and restore peace and security. Under the collective security system established by Chapter VII of the UN Charter, the Security Council is to take measures in such cases, including the authorization of military action. Article 27 of the UN Charter provides that decisions are made by an affirmative vote of nine members including the concurring votes of the permanent members.

[12] BFM-TV & Mediapart Interview (n 7).

to France in 2017.[13] Macron even insinuated that Putin may have given an off-the-record green light just before the strikes.[14] Concerning China, Macron questionably argued that 'it has not escaped [our] notice that China dissociated itself from Russia on several occasions' and that neither China's nor Russia's official reactions after the strikes suggested that they would take military action in response to the strikes that might lead to an escalation of violence.

Although no accepted interpretation of the *jus ad bellum* norms makes the French argumentation admissible, the *jus ad bellum* logic lies at the foundation of Macron's rationale. In fact, France is very clearly trying to push for a justification of the strikes under a certain interpretation of the Security Council authorization exception to the prohibition on the use of force. This approach relies on the cumulative effect of three claims: i) the three attacking states (France, the UK, and the US) performed their duties and functions as permanent members of the Security Council by conducting the strikes; ii) the two other permanent members (China and Russia) gave an off-the-record, implicit, retroactive consent; iii) action was required to save the legitimacy of the UN system, which previously proved unable to act upon the atrocities perpetrated by the Syrian forces.

Macron's refusal to admit that the trilateral intervention contravenes the *jus ad bellum* norms and institutional setting, exemplifies that France did work on framing a legal justification and did not accidentally distinguish itself from the UK's rationale. The French reasoning would be keen to persuade us that

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[13] President Macron refers to an interview of President Putin conducted by Alexis Brézet and Renaud Girard, Interview of President Vladimir Putin, 'Vladimir Poutine au Figaro: 'Arrêtez d'inventer des menaces russes imaginaires!', *Le Figaro*, 30 May 2017, <www.lefigaro.fr/international/2017/05/30/01003-20170530ARTFIG00381-vladimir-poutine-au-figaro-arretez-d-inventer-des-menaces-russes-imaginaires.php> accessed 24 April 2018.

[14] This was suggested twice by President Macron. First, prior to the strikes: Interview conducted by journalist Jean-Pierre Pernaut, 'Emmanuel Macron au 13H de TF1 : l'entretien integral', *JT TF1*, 12 April 2018, 4'30', <www.lci.fr/france/replay-interview-emmanuel-macron-au-jt-13h-de-tf1-jean-pierre-pernaut-l-entretien-integral-2084367.html> accessed 24 April 2018; and second, after the strikes: BFM-TV & Mediapart Interview (n 7)", 6'50: 'I had Putin [on the phone] in the morning [preceding the strikes]'.

the strikes did not circumvent the persistent vetoes of Russia and China, but were rather based on their off-the-record or implicit approval for a 'yes' that trumped their vetoes. All this had a unique goal: to remedy the harm caused by the inertia of the UN; not so much the harm caused to the Syrian population whose protection was not the purpose and within the capacity of the strike, but the harm caused to the legitimacy of the international community.

So, how can we have a serious discussion about whether the 2018 Syrian strikes are justified under the humanitarian intervention doctrine when at least one of the three attacking states does not consider that they are aiming to improve the humanitarian situation in Syria or at least, does not sufficiently believe that the strikes could demonstrably improve the humanitarian situation? France's decision not to frame the operation as humanitarian intervention and, thus, not to rebut the criticism that the strikes were 'meaningless' for the improvement of the humanitarian situation in Syria,[15] arguably leads to the rejection of the humanitarian intervention exception for the entire operation considering its alleged collective character. Contrary to what has been argued, the 2018 Syria strikes do not trigger a momentum of law-making and have not lent support to the humanitarian intervention doctrine. If anything, the strikes challenge the way the UN institution operates by trying to replace the Security Council authorization with a retroactive and/or implicit authorization by the international community.

[15] Samuel Moyn, interviewed by Christopher Lyndon on Radio Open Source, 'Another Look at the Crisis in Syria', 19 April 2018, <radioopensource.org/the-trump-doctrine-in-the-middle-east/> accessed 20 April 2018.

II. In this Issue

This issue reflects the European Journal of Legal Studies' long-standing commitment to explore a broad range of legal issues with a diversity of theoretical approaches. The Spring 2018 Issue opens with a set of articles focusing on legal interpretation, either discussing the purposes of interpretation or the practice of interpreting. First, *Orlin Yalzanov* examines legal uncertainty under a law-and-economics framework, aiming not so much at challenging but rather at refining and sophisticating the current approaches to legal uncertainty. He ingeniously proposes an alternative categorization by distinguishing between two types of legal uncertainty. Second, *Lize R. Glas* creatively undertakes to clarify the requirements of procedural fairness applicable to the European Court of Human Rights (ECtHR), by 'translating' what procedural fairness, as interpreted by the ECtHR, entails for the self-same court.

This second article interestingly paves the way to *Vladislava Stoyanova*'s scrutiny of the ECtHR's responses to cases concerning violations of migrants' human rights, in a context of countries hardening their immigration policies, and where populist narratives reject the intervention of the ECtHR on these matters. The analysis concludes, on the one hand, that the Court is willing to examine the Member States' decisions affecting migrants, and to condemn significantly harmful ones, and, on the other, that there is an emergence of unusual and less rigorous judicial reasoning in such cases. Remaining in the realm of rights litigation, *Volha Parfenchyk* tells the story of the Italian litigation for citizens' access to preimplantation genetic diagnosis (PGD). To do so, she explores how citizens' needs and interests interact with new technologies, constitutional rights and constitutional history. In that context, she resourcefully challenges the capacity of rights litigation to ensure the recognition of citizens' access to PGD in what she frames as a traditionally conservative society.

Following this set of articles, *Davor Petrić* invites us to go beyond the strict framework of the European Union to understand the global effects of EU energy regulation. The author shows the global influence of the EU in energy relations despite the absence of a consolidated internal and external approach to energy policy. The nuanced reasoning underlines the limits posed to the efficiency of such externalization by the EU's internal checks

and divisions. Also challenging EU institutions is *Riccardo Fadiga*'s article, which showcases the rigorous thinking of this Issue's New Voices contribution. The article scrutinizes the European Commission's remedy to unlawful tax rulings. Although Fadiga supports the Commission's intent of limiting Member States' abuse of fiscal autonomy, he criticizes their method of doing so, which, he argues, violates the principle of protection of legitimate expectations.

Finally, we are delighted to present in this issue a review by *Raphaële Xenidis* of Iyiola Solanke's book *Discrimination as Stigma: A Theory of Anti-Discrimination Law*. In this book review, Raphaële Xenidis seriously engages with the core theses of the book, shedding light on the precious theoretical tools and shifts that the book adds to discrimination theory. The review also successfully opens a critical dialogue with Solanke on the limits of the proposed anti-stigma principle.

III. Young Scholars Working Together and Supporting Each Other

WORKING TOGETHER

This issue is the first one that I have run along with four outstanding women, Anna Krisztián and Janneke van Casteren, the EJLS Managing Editors, as well as Maria Haag and Rūta Liepiņa, the EJLS Executive Editors. I would like to thank them on behalf of the Entire Board for their unwavering commitment to the Journal. After several esteemed editors had to leave the Journal last year, the team nevertheless grew in number in September 2017 by welcoming twelve new in-house editors and twelve external editors. The EJLS being a peer-reviewed journal, the quality of the articles featuring in this issue is due to the editors' rigorousness and professionalism. Very soon, two Heads-of-Section will be handing over their posts to a new generation of Heads-of-Sections. Stavros Makris and Sergii Masol will be greatly missed in the Journal. We are convinced that they will do a marvelous job in accompanying the next generation of European Law and International Law Heads-of-Sections throughout the following months.

Supporting Each Other

Reiterating the essence of our Journal, a platform dedicated to and promoting excellent young scholarship, we had the pleasure of awarding a prize to Guilherme del Negro this March for his contribution on 'The Validity of Treaties Concluded Under Coercion of the State: Sketching a TWAIL Critique' featuring in the Autumn 2017 Issue's New Voices section. Thanks to the renewed support of the President of the European University Institute, Professor Renaud Dehousse, and the EUI Law Department, I have the honor to announce ahead of the forthcoming calls for submissions that for the Autumn 2018 Issue and the Spring 2019 Issue, we will be able to reward not one but two of our peers for their creativity and the quality of their work. One prize will be awarded to the best New Voices contribution, and the other to the best General Article written by a young scholar.

General Articles

Two Types of Legal Uncertainty

Orlin Yalnazov*

Law-and-economics scholars analyse legal uncertainty as a choice between rules and standards. In doing this, they focus on individual laws that regulate and sanction conduct, or what Hart would call 'primary rules'. Hart also spoke of 'secondary rules', that is, rules that determine the validity and precedence of other rules. Here, I introduce secondary rules into the law-and-economics framework. Two types of uncertainty emerge. I call the one covered in the literature 'applicative uncertainty' and the 'new' one 'hierarchic uncertainty'. I show that the two always co-exist and, further, that there is a trade-off between them. I sketch out the economics of that trade-off and I discuss its implications for legal certainty in general.

Keywords: law-and-economics, rules versus standards, legal uncertainty

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When law-and-economics scholars discuss legal uncertainty, they problematise the use of vague language in the drafting of laws.[1] But when we say that the law is uncertain, we might also mean that two (or more) laws overlap, so that we do not know which is applicable to the facts of a particular case. I call the problem that the law-and-economics literature covers one of *applicative uncertainty* and the 'new' one *hierarchic uncertainty*. I will try to show that the two always coexist, and further that there is a trade-off between them: as the law becomes more applicatively certain, it also grows more hierarchically uncertain. I sketch out the economics of that trade-off and I discuss the implications for legal certainty in general.

I also propose a refinement to the standard mode of juridico-economic analysis. There is a distinction between laws and metalaws. An 'ordinary' law defines the conditions under which the state will exercise its coercive powers: murder triggers imprisonment, breach of contract generates an enforceable obligation to pay damages, those caught speeding are forced to pay fines, and so on. The orthodox approach in law-and-economics is to take one such 'ordinary' law and to analyse its allocative implications. Metalaws, on the other hand, have been overlooked in the literature. A metalaw is a law about laws: laws made by parliaments trump laws made by courts, laws in the

[1] See for example, Louis Kaplow, 'Rules versus Standards: an Economic Analysis' (1992) 42 Duke Law Journal 557; Ian Ayres and Eric Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Trade' (1995) 104 Yale Law Journal 1027; Jason Scott Johnston, 'Bargaining under Rules versus Standards' (1996) 11 Journal of Law, Economics, and Organization 256; Russel Korobkin, 'Behavioral Analysis and Legal Form: Rules v Standards Revisited' (2000) 79 Oregon Law Review 23; Isaac Ehrlich and Richard Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 3 Journal of Legal Studies 257; Hans-Bernd Schäfer, 'Rules versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-Income Countries' (2006) 14 Supreme Court Economic Review 113; Franziska Weber, 'European Integration Assessed in the Light of the 'Rules versus Standards' Debate' (2013) 35 European Journal of Law and Economics 187; Ezra Friedman and Abraham Wickelgren, 'A New Angle on Rules versus Standards' (2014) 16 American Law and Economics Review 499.

constitution trump laws in statutes, liability in the law of tort is concurrent to liability in the law of contract. I argue that applicative uncertainty is reduced through the adoption of more specific 'ordinary' laws. But as the law grows more complex, it also grows more hierarchically uncertain. Hierarchic uncertainty can only be managed by metalaws. From this analytical scheme, I derive a speculative theory of the optimal complexity of legal systems. I also discuss the hitherto overlooked use of metalaws in legal prediction.

I. Literature Review

Legal theorists and lawyer-economists mean different things when they use the term 'uncertainty'. What I call applicative certainty is extensively covered in both strands of the literature. Hierarchic uncertainty is new to law-and-economics, but not to legal theory. To avoid confusion and to contextualise this paper, it is best that I begin with a brief summary of the main authorities on the point.

Applicative uncertainty is the uncertainty that results from the need to apply general laws to specific facts. In law-and-economics, Kaplow, among others, distinguishes between standards and rules, and says they differ in their level of generality.[2] That conceptualisation is analogous to the positivist understanding of uncertainty. Kelsen speaks of a norm's 'frame of application'.[3] All laws are written in human language, and human language is vague. Therefore, every law establishes a frame in which a number of outcomes can lie. Hart speaks of a core and a penumbra.[4] Every legal norm has a core, that is, a set of factual matrices whose correspondence, or lack thereof, to the norm's text is self-evident. Norms also have penumbrae, that is, there are always factual situations to which the applicability of the norm is essentially contestable. Raz speaks of indeterminacy on a continuum: there are legal questions to which there are true or false answers, questions to which

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[2] Kaplow (n 1) 560.

[3] Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litchewski Paulson and Stanley L Paulson trs, Oxford University Press 2002) 80.

[4] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 607-15.

there is no true or false answer, and questions to which it is unclear whether there is a true or false answer.[5]

Applicative uncertainty in law-and-economics is analogous to uncertainty in legal positivism. In the writings of Kelsen, Hart, and Raz, all laws produce uncertainty because they are partly inexact. In law-and-economics, the inevitability of uncertainty is taken as a given and the central question is how much effort ought to be exerted in limiting its scope. In Kelsenian terms, law-and-economics scholars try to find the optimal width of a law's frame of application. The same point can be translated into Hart's terminology by saying that the juridico-economic concern is with the optimal size of a law's penumbra. And in the language of Raz, the purpose of the enterprise is to ascertain the optimal number of questions to which there is a true or false answer.

I now turn to hierarchic uncertainty. Barring a footnote in Kaplow's work,[6] law-and-economics is silent on the point. In legal theory, on the other hand, hierarchic uncertainty is amply covered. Kelsen spoke of a 'chain' of legal norms which exist in a hierarchical relationship.[7] He was also of the view that higher-order norms have frames of application, leaving open the possibility of there being a number of equally plausible lower-level norms.[8] Hart distinguished between primary and secondary rules. These two types of rules correspond closely to laws and metalaws in the language of this paper.[9]

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5 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 72-4.

6 Kaplow (n 1) footnote 150 infra.

7 Kelsen (n 3) 71-5.

8 Ibid 78.

9 The correspondence is not, however, perfect. To Hart, secondary rules were sub-divided into rules of recognition, rules of change, and rules of adjudication: see HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 94-5. My concept of metalaws captures rules of recognition and some rules of change, but not rules of adjudication. A metalaw, in my framework, identifies other applicable laws. The rule of recognition does precisely that. A rule of change can serve as a metalaw indirectly: it is sometimes necessary to know who and when can change the law to determine whether some law is in fact valid at the moment. To give an example, in *Willers v Joyce* [2016] UKSC 43 & 44, the dispute turned on whether the Privy Council in *Crawford Adjusters (Cayman) v Sagicor General Insurance (Cayman)* [2014] AC 366 had overruled the House of Lords in *Gregory v Portsmouth City Council* [2000] 1 AC 419. That, in

Secondary rules serve to identify primary rules. To Hart, secondary rules were subject to the ordinary constraints of human language, including its 'open texture'.[10] Cases may arise where a choice has to be made between two primary rules by reference to a secondary rule which is too vague to guide that choice.[11] In those circumstances, there is hierarchic uncertainty: a clash of two primary rules with no indication of which ought to prevail. Raz is also alive to the problem. He posits that sometimes a legal decision must be made, even though the law supplies conflicting reasons.[12] There are situations in which the law gives no indication of the reason to be preferred, others in which the two are equally matched, and others still in which the reasons are incommensurate. Such gaps, Raz shows, are inescapable in any legal system.[13]

Here I follow Hart and Raz, that adhesion manifesting in two specific assumptions. Firstly, I assume that there are facts to which two (or more) laws apply and that those laws may point to two (or more) different outcomes. Secondly, and more controversially, I assume that such conflicts can, but need not be, resolved only through metalaws produced by a lawmaker. I treat the Sources Thesis as a given. That thesis, in short, postulates that the content of the law can be determined from its sources – no moral reasoning is necessary.[14] Why might the adoption of that thesis be controversial? Dworkin, in challenging Hart, has made the argument that although uncertainty exists, it is always soluble by reference to 'principles' immanent in the juridico-political order.[15] Principles, in Dworkin's terminology, are closely analogous to metalaws in mine. My theory, however, is not consistent

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turn, turned on a rule of change: could the Privy Council overrule the House of Lords on a point of English law? The identification of the correct rule to apply turned on the rule of change. However, rules of adjudication – say the definition of a court – do not identify the law to apply in particular cases. Therefore, they are not metalaws.

[10] Hart (n 9) 125.

[11] Ibid 134-6.

[12] Raz (n **Error! Bookmark not defined.**) 74-6.

[13] Ibid 77.

[14] See Raz (n 5) 47ff; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Review 823.

[15] See Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14; Ronald Dworkin, 'No Right Answer?' (1978) 53 New York University Law Review 1; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 87-114.

with his. If it is always possible to discover a metalaw that gives the 'correct' outcome of a case, then evidently there is in every case an ideal solution to hierarchic uncertainty. Even though there is hierarchic uncertainty, it is not a problem that needs to be solved through the creation of new metalaws. There is only the issue of finding them. I add nothing to that argument here, other than noting that full acceptance of Dworkin's thesis would, for better or for worse, render most of the law-and-economics literature on the subject meaningless.[16] Applicative uncertainty is unproblematic if whenever it arises, a canon of interpretation exists which delivers an unambiguous resolution to the controversy at hand. If one agrees with Dworkin's version of uncertainty, then one is unlikely to find the kind of analysis developed here very useful.

Lastly, I should mention another non-positivist account of law to which I think my theory applies, but to which I have not sought to contribute here. Legal realism implies, loosely speaking, that judicial ideology matters.[17] Theorists in that tradition are generally divided on the extent to which a judge's personal ideological preferences are determinative of legal outcomes. Based on a 'hard' legal realist conception, ideology preordains all judicial outcomes. To this, my account of hierarchic uncertainty has little to contribute, for the obvious reason that a 'hard' realist would have little time for the interrelationship between laws within the system. A milder realist account of judicial decision-making posits that legal materials, such as laws, can be fashioned into arguments for one outcome or another through legal work.[18] The pliability of the materials is evidently determinative, though only

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[16] That of course does not refute Dworkin's theory. Nor would Dworkin, who is highly sceptical of law-and-economics, be too troubled by it: see Ronald Dworkin, 'Is Wealth a Value?' (1980) 9 Journal of Legal Studies 191.

[17] Joseph William Singer, 'The Player and The Cards: Nihilism and Legal Theory' (1984) 94 Yale Law Journal 1; Jerome Frank, *Law and the Modern Mind* (Transaction Publishers 1930).

[18] Duncan Kennedy, 'A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' in Duncan Kennedy (ed), *Legal Reasoning: Collected Essays* (Davies Pub 2008). Kennedy rejects the notion of there being cores and penumbrae, but does not dispute that norms vary in their determinacy. At the root of his disagreement with Hart and Kelsen is their notion that indeterminacy is an inherent property of legal texts, which to him overlooks the role of the interpreter. The analysis developed here is agnostic on this point, so it might be applicable to arguments in the realist tradition.

partly, of the range of potential outcomes. Hierarchic uncertainty is thus a property of those materials that matters to judicial output. Although I think what follows might be applicable to theories grounded in that milder realist position, I do not examine the implications here.

II. Applicative and Hierarchic Uncertainty

Let me begin by defining 'a law'. By that term, I do not mean 'all law' or 'the law', nor does my usage cover the entire spectrum of statements which in ordinary parlance are called laws. Nor do I propose to build a novel theory of law in these pages. I use the term merely to denote the specific type of provision that forms the subject matter of my analysis. To my ends here, a law is a sanctionability condition. It is a description of the conditions in which the state will deploy its coercive power against some individual. This might on first impression appear to limit the analysis developed here to criminal and administrative law. That impression is misleading. For example, the law of contract guarantees that if parties choose some arrangement, the state will facilitate it through the threat of coercive enforcement, or ultimately through its execution. Many of its substantive provisions: remedies, penalty clauses, and others, refer to sanctions for non-compliance. They are laws in the sense in which I defined the word here. The same is true in torts and in property.[19]

Laws thus defined may and most commonly are positive, as is the case when the state declares that certain actions or inactions[20] will trigger some sanctions. Laws can also occasionally be negative, as they are when the state declares that some course of conduct will attract no liability. For expositional

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[19] This definition excludes a number of propositions which we would ordinarily dub legal. For example, the law of procedure does not indicate any sanctions – so it is not a law in the sense in which I use the term here. Rules which prescribe the conditions under which a marriage or a will is valid are also excluded, for the same reason. By this exclusion, I do not mean to deny that those are laws – it is merely the case that they fall outside the ambit of the analysis which I develop.

[20] English law does not generally recognise liability for 'pure' omissions: see *Stovin v Wise* [1996] UKHL 15 and *Smith v Littlewoods Organisations* [1987] 2 AC 241. The position is different in civilian countries: French law imposes criminal liability for failure to rescue: see Art 223-6 *Code pénal*.

convenience, let me now give three examples of statements that can constitute laws:

> (A) If a person negligently harms another, they shall have to pay compensation.
>
> (B) If a person causes death, they shall be liable to imprisonment.
>
> (C) If a person drives a car at an unreasonable speed, they shall be liable to a fine.[21]

Legal uncertainty, in the umbrella sense of that term, exists when it is impossible to predict whether a particular set of facts will trigger a sanction with a probability of one.[22] For example, suppose that we are told that the law of some imaginary polity comprises the three laws above, and no others. You and I are both subject to the laws of that polity. The following events transpire: I am driving my car at 45 km/h while gesticulating at my tearful girlfriend. While this is ongoing, I run over your cow. The force of the impact is such that the cow dies on the spot. The matter winds up before a court. Before the case is decided, we cannot be sure what its outcome will be. It is possible that I will be found liable for negligence, or for killing, or fined for speeding, or a combination of the three, or that I will go home free. But it is

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[21] I ask the reader to abstract, for now, from principles such as *lex certa* or the American 'void for vagueness' doctrine (*Grayner v City of Rockford* (1972) 408 US 104), which would render the last provision unenforceable.

[22] See Kaplow (n 1). On the possibility of the law being certain in this sense see Cass Sunstein, 'Problems with Rules' (1995) 83 California Law Review 953. For a different interpretation of legal certainty, see Mark Greenberg, 'How Facts Make Law' (2004) 10 Legal Theory 157, 162. I should note that ambiguously-worded laws are not the only potential source of uncertainty about the *outcome* of legal proceedings: an outcome might be uncertain because some facts are unknown, because it is unclear whether some evidence will be sufficient to prove the existence of a material fact, because private parties cannot gauge the quality of counsel they retain, because the identity and the ideological preferences of the judge are unknown, and so on. These may very well be related to vagueness: for example, if a law is perfectly clear, the ideology of the judge will not matter since he would enjoy no discretion. If a law is very vague, investments in legal representation may in the aggregate be higher because more depends on representation – see on this point Wickelgren and Friedman (n 1) 9. In this paper, I restrict myself to discussing only uncertainty which has to do with the way in which laws are drafted.

impossible to ascribe to any one of these eventualities a probability of one. Therefore, my legal position is uncertain.

1. Applicative Uncertainty

I opened with the proposition that there are two types of legal uncertainty and that the law-and-economics literature focuses on one but not the other. Let me start by describing the one which I believe to be amply covered. I call it applicative uncertainty. Suppose that I try to demystify my legal position by applying Laws A, B, and C to the facts of the case. I first check to see if I am liable to pay compensation under Law A. The word 'negligent' can mean one thing to me and quite another to someone else.[23] It is unclear whether driving while gesticulating at one's tearful girlfriend is negligent. Some may find it too dangerous, others may tolerate it, others still may say it is perfectly acceptable or even commendable. Consequently, I cannot tell with certitude whether I will be deemed to have been negligent.

I then move on to measure my behaviour against Law B, which prohibits killing. It is not in dispute that my actions have caused a death. But there may very plausibly be disagreement as to whether the killing of cows is criminal. Does 'death' in the sanctionability condition mean the death of a human or the death of any living being? Again, sensible persons may plausibly differ on the correct interpretation. I cannot know if I am liable.

Finally, was my speed unreasonable? This again depends on an unknown: unreasonable as judged by whom, against what, to which end? A speed of 45 km/h is acceptable to many. It gives pedestrians enough time to move out of the way when a vehicle approaches. Others may find it excessive – it evidently does not give distracted drivers enough time to swerve bovines. Each interpretation being as valid as the other, it is impossible to predict whether I will be fined.

What is the common trend? In all three cases, the law is vaguer than the facts. We may say that the law and the facts exist at different levels of generality,

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[23] This is true of all words – see Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, Oxford University Press 1953).

that of the law being much higher than that of the facts.[24] Applicative uncertainty arises because we cannot tell if the specific facts can be subsumed under the law. We lack information. The lawmaker has failed to provide us with enough premises to traverse the logical distance between his commands and reality.

Now, this is the very type of uncertainty which is ordinarily discussed under the rubric of rules-versus-standards. The point there is that the lawmaker can reduce the logical distance between laws and facts by producing more specific laws.[25] If, for example, the law says that 'if a person causes a death, they shall be liable to imprisonment', and then adds that 'death means the death of another human being', the additional premise makes the law less applicatively uncertain.[26] But the production of such additional premises requires the lawmaker to decide what it is that he wishes to prohibit: he must choose between a world where animals are killed and one in which they are not. To discriminate between the two alternatives, he needs information.[27]

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[24] The point is at its most explicit in Leonard Boonin, 'The Logic of Legal Decisions' (1965) 75 Ethics 179.

[25] For a model of law founded on this precept, see Vern R Walker, 'Discovering the Logic of Legal Reasoning' (2007) 35 Hofstra Law Review 1687.

[26] There is a contention here, to the effect that a premise can be as vague as the law which it defines, in which case applicative certainty remains the same. This is correct, provided that the premise is also circular. For example, Section 230(1) of the Employment Rights Act defines an employee as an individual who works under a contract of employment, and then Section 230(2) defines a contract of employment as a contract of service. Since service and employment mean the same thing, the effect is that Section 230(2) does not increase the applicative certainty of Section 230(1). Note, however, that this kind of duplication is rare, since the two vague laws must mean the exact same things. For example, if we are given a speed limit such as 'you must drive reasonably' and we are then told that 'reasonably means not too fast', then the two laws are obviously both vague. But the second still increases the applicative certainty of the first. Unreasonable driving can mean driving too slowly as well – the second law removes that interpretation from the possible set of interpretations, so that there are fewer possible interpretations in total, and the law becomes clearer.

[27] I use the term information very loosely, to denote both 'isses' and 'oughts'. For example, in the animal-killing example, the lawmaker would probably need to discover how many persons within the polity eat animals, how many animals are slaughtered, where the slaughter takes places, what methods are used to slaughter

Information being costly, it would be uneconomic to produce a set of premises sufficient for the resolution of all legal controversies. To do so, the lawmaker would have to acquire information about all possible states of the world and then decide which ones are desirable and which ones are not.[28] The cost would be prohibitive. Consequently, the optimally precise law is to some extent uncertain.

2. Hierarchic Uncertainty

I now turn to the novel approach that I advertised in the introduction. Uncertainty can also be hierarchic. It may be impossible, as between two (or more) laws, to tell which one has precedence. Suppose that I have again ran over your cow while arguing with my girlfriend, but we now have the following laws:

> (A) If a person negligently harms another, where negligence includes not paying attention to the road while driving a car, they shall have to pay compensation.
>
> (B) If a person causes the unlawful death of another, where another means any living creature, they shall be liable to imprisonment.

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the animals, and so on. Those are simply descriptions of reality – which is what is ordinarily meant by the word information. But to decide whether to introduce this law, the lawmaker would also have to decide how to weigh the welfare of meat-eaters against the welfare of animals. He must decide whether 'humans take precedence over animals', or 'animals and humans are equal', or 'animals are more important than humans'. These statements are evaluative rather than descriptive – they do not have truth-values. While I do not deny this conceptual difference, I analyse them in a similar way. The reason is that to the lawmaker, both 'ises' and 'oughts' are costly. It would be easy for a dictator to decide whose welfare he prefers, but in most modern polities the lawmaker comprises numerous individuals whose policy preferences are different. It is costly for them to coordinate, which renders evaluative statements more like descriptive ones.

[28] The point, or a version thereof, is made in the authorities cited at n 1. There is also a very obvious analogy with the literature on incomplete contracts: for a flavour, see Benjamin Klein, Robert Crawford and Armen Alchian, 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process' (1978) 21 Journal of Law and Economics 297, 303.

(C) If a person drives a car at an unreasonable speed, where unreasonable means in excess of 50 km/h in a city, they shall be liable to a fine.

The first point to note is that the law as it relates to the case under consideration is applicatively certain. It is beyond doubt that the killing of a cow falls within the remit of the amended Law B. I am definitely liable in tort. And having driven at a speed below that indicated in Law C, I am definitely not liable to a fine.

Does this make my legal position perfectly certain? I think not. The most pressing issue to me in practice is whether the death of your cow will cause me to be jailed. This in turn depends on whether the killing of the cow was 'unlawful'. The problem is that my behaviour is lawful when measured against Law C but unlawful when measured against Law A. My position, then, depends on the order of precedence between the speed limit and the negligence tort. If negligence trumps the speed limit, I go to prison; if the speed limit trumps negligence, I walk home free. But there is nothing in the text of either Law A, B, or C to suggest a ranking. The three laws are presumably equal. Therefore, one hierarchical ordering is as good as another. Accordingly, there is no way of telling whether I will go to prison. The law, even if applicatively determinate, remains uncertain.

Formally, we may define hierarchic uncertainty as the uncertainty that emerges when there are two (or more) laws which cover the same set of facts, but which point at mutually inconsistent outcomes. It may arise, as in the example just discussed, when laws refer to one another. It may also exist between a positive and a negative law. Take the following dyad:

(A) If a person expresses his view freely, they shall not be persecuted in any way.

(B) If a person blasphemes any God, they shall be liable to a fine.

It is easy to conceive of factual scenarios in which the two clash. Suppose that I am on trial for writing a newspaper article in which I claim to be a better weaver than Pallas Athena. My behaviour clearly falls within Law A. I am expressing a personal view. And my article is also quite clearly captured by Law B. It blasphemes the Greco-Roman pantheon. Whether I am liable does not depend on the construction of either law. It depends on the higher-order question of whether Law A is paramount to Law B. And since there is no

higher-order rule here telling the judge how to choose between Law A and Law B, the outcome of my trial is uncertain.

There is a lawyerly intuition here to the effect that the uncertainty is perfectly soluble. Since guarantees on free speech are usually contained in constitutions and prohibitions on blasphemy in statutes, and since constitutions usually trump statutes, a lawyer reading the foregoing passage might instinctively favour prioritising free speech over blasphemy, even if as in the hypothetical no such law is given.[29] Those intuitions are well-grounded, because laws which give the order precedence of other laws are a common feature of real-world legal systems. I said earlier that applicative certainty is solved by making laws more precise. Hierarchic uncertainty is solved through metalaws. In the hypothetical, we could not predict outcomes because we did not know the order of precedence between different laws. We would be able to make ironclad predictions if we had been given laws such as 'for the purposes of murder law, unlawful shall mean unlawful in the civil sense but not in the administrative sense', or 'free speech trumps blasphemy'. Note, however, that the statements to which I just adverted are not laws under the definition I adopted at the start. They do not contain any sanctionability conditions. They are laws about laws, or metalaws.

Hierarchic uncertainty thus arises when there is no metalaw, or when the metalaw is formulated vaguely. One may ponder why a rational lawmaker might skimp on metalaws. Metalaws are costly to produce. This might on first impression appear startling – it costs little to say that the constitution trumps statute, or that more specific laws trump more general ones. But that simplicity is illusory, since before such simple determinations can be made, one also has to consider the content of constitutions and those of statutes, and the content of specific laws and their more general counterparts, and so on. A choice has to be made between laws, and to make that choice the lawmaker needs information, and that information is costly.[30] In the

[29] Similarly, in the first example, the legally trained are instinctively moved to apply all three norms together, even though any ordering is permissible.

[30] This only holds if the choice is to be exercised meaningfully. It is possible to produce a metalaw costlessly by saying that 'if two laws clash, the one whose text is shorter prevails', or something to that effect. But to choose in this fashion, the lawmaker

examples that I gave earlier, the lawmaker would have to decide whether in the regulation of homicide civil law standards are more appropriate than administrative law ones. He would also have to choose between religion and freedom of speech as social values and between unlawfulness and intent as benchmarks of criminal culpability.[31] Choices such as these are costly to make, information-wise. Once this feature of the problem is accounted for, it becomes apparent that it is not sensible to attempt the complete elimination of hierarchical uncertainty. Like the optimal law, the optimal metalaw is not perfectly precise.

I discuss the optimal precision of metalaws in much more detail elsewhere.[32] Here, I limit myself to highlighting hierarchic uncertainty as being distinct from its applicative counterpart. There are, I think, two critical differences. Firstly, applicative uncertainty only concerns the relationship between one law and one set of facts. Hierarchic uncertainty operates between a set of facts and two laws. Defamation by itself cannot be hierarchically uncertain. It only becomes so once combined with the protection of free speech.

Secondly, applicative uncertainty is resolved by reducing abstraction; hierarchic certainty is achieved by increasing it. If we have the law 'murder is the killing of another', its applicative uncertainty is reduced by adding to it the premise 'another means human being'. The second premise is specific to the first – the new law is more precise than the old. If we have the laws 'free speech is guaranteed' and 'defamation is prohibited', their hierarchic indeterminacy is resolved by adding that 'free speech trumps defamation'. The last premise is more general than the first two. The body of laws in question gains an additional layer of abstraction.

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would have to be indifferent to the real-world implications of the law, which would in turn make it difficult to explain why he is producing laws in the first place.

[31] The problem is greatly compounded when reference is made to some changeable body of law. The lawmaker, in order to determine the appropriate hierarchy, would have to consider not only civil and administrative standards as they are at the time of setting the hierarchy, but also as they might become in the future.

[32] Orlin Yalnazov, 'Metarules versus Metastandards' (under review, manuscript available on request).

3. Penalty Clauses: An Example

The analysis has so far been built around highly unrealistic hypotheticals. For this reason, I will now pause for an example. I propose to discuss the rule on penalty clauses in English law. I will explain why it is uncertain, and how it can be rendered more certain. I will then proceed to consider it in conjunction with another rule. I do this in the hope of demonstrating how hierarchic uncertainty may arise and how it differs from applicative uncertainty.

One of the earliest statements of the penalty clause rule comes from *Lord Elphinstone v The Monkland and Iron Company*.[33] In an oft-cited dictum, Lord Halsbury described a penalty clause as a contractual provision designed to be enforced *in terrorem*.[34] For convenience, I will write this out as a sanctionability condition or, in Hart's language, a primary rule:

> Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced *in terrorem*, the promisor will suffer no sanction under that clause.

Let me now show how that law is applicatively uncertain. It has a core and a penumbra. I propose to do so by the reference to the facts of *ParkingEye v Beavis*.[35] Beavis had parked his car at a parking lot operated by ParkingEye. The contract incorporated a clause to the effect that the claimant was allowed to use the parking space for two hours. Breach of that term would trigger a charge of £85. Beavis overstayed by fifty-six minutes. He then refused to pay the charge. ParkingEye sued and at trial Beavis contended that the clause was a penalty. The law would be applicatively certain if we could match the facts of *ParkingEye* to an outcome with a probability of one.[36] I do not think we can. Consider first some of the possible applications of the Penalty Clause Law to the facts:

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[33] *Lord Elphinstone v The Monkland and Iron Company* (1886) 11 App Cas 332.

[34] Ibid 348.

[35] *ParkingEye v Beavis* [2015] UKSC 67. The case was decided along with *Cavendish Square Holding v Makdessi* and is often cited under that name.

[36] Of course, I base this on the assumption that we do not know the outcome of *ParkingEye* itself.

(1) The judge may say that the charge of £85 is vastly disproportionate to the loss likely to have been suffered by ParkingEye from Beavis overstaying by fifty-six minutes, so that the clause was intended to terrorise him into compliance. In that case, Beavis is not liable.

(2) The judge may say that the charge of £85 was intended to fund the operation of the parking lot, and although it may have had the incidental effect of scaring Beavis into compliance, that was not its main purpose. Beavis is liable.

(3) The judge may say that although £85 is a disproportionate amount, the word 'terror' indicates a degree of fright far beyond that experienced by the average citizen when faced with a large parking charge. Beavis is liable.

(4) The judge may say that even though £85 is a very high amount, it is possible that Beavis (or some other user) would value the right to remain at the parking lot for an additional fifty-six minutes at £1,000, so that they would be more than happy to pay £85. Beavis is liable.

The four interpretations are equally valid.[37] Each is a perfectly sensible way of measuring the facts against Lord Halsbury's dictum. We can only speculate about the choice that would be made if the facts of *ParkingEye* were to come before some particular judge. If we assume that one of the four interpretations listed here will eventually be chosen, then Beavis is liable under (2), (3), and (4). He is not liable under (1). Beavis is liable with a probability well short of 1.[38]

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[37] It is probably not difficult to think of more than four interpretations. But since parking charges can only hold so much fascination, I limit myself to the ones in the main text. For the purposes of my argument, it is entirely sufficient that there exists at least one interpretation under which Beavis is liable and at least one under which he is not.

[38] If the four interpretations that I set out were exhaustive and each was as likely to be chosen at trial as the other, he would be liable with a probability of 0.75. This is of course a very crude way of calculating legal uncertainty: in reality, there will be many other factors involved (see n 22 above). And I do assume that the interpretations that I have set out here are the only possible ones, which is very likely not true in practice. This does not, I think, detract too much from the utility of the example – I merely

How can this be fixed? The law becomes more certain – its penumbra shrinks – if the confidence with which a prognosis can be made is increased. The elimination of possible interpretations reduces uncertainty. When only one interpretation remains, the law is certain. Suppose that the Penalty Clause Law is amended as follows:

> Amended Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced *in terrorem*, where *in terrorem* means disproportionate to harm actually suffered, and where terror means any degree of fear irrespective of its severity, and irrespectively of whether terror was the sole intent of the party relying on the clause, notwithstanding the possibility that the promisor is in fact happy to pay rather than terrorised, then the promisor will suffer no sanction under that clause.

This dispenses with interpretations (2), (3), and (4), leaving only (1). We prune interpretations by saying what the word 'terror' does and does not mean, that is by defining it. The individual definitions, both positive and negative, are more specific than the word 'terror' itself.

Why might a rational lawmaker choose the original Penalty Clause Law over the Amended Penalty Clause Law? He may do so in order to economise on information costs. For example, the definition that I adopted above expressly sanctions the possibility that a promisor who valued the benefit from breach more highly than the penalty will nonetheless be able to escape sanction. It is unclear whether this is desirable. In order to decide whether it is, the lawmaker must inform himself of the relevant aspects of the problem, its prescience in society, and so on.[39] Acquiring such information is costly. The instances in which promisees value the use of parking lots at more than £85 are rare. The outlay in information is wasteful. It would have been better to keep the law vague.

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assume that we are given no other information other than that in the example. I do this to show how the particular types of uncertainty may be reduced, and what the interplay between the two is – those connections would be more obscure in a more realistic example.

[39] For an accessible overview of that debate, see Ugo Mattei, 'The Comparative Law and Economics of Penalty Clauses in Contracts' (1996) 43 American Journal of Comparative Law 427.

The foregoing concerns applicative uncertainty, taken in isolation. What I propose to do now is take Lord Halsbury's *in terrorem* dictum in conjunction with Lord Dunedin's pronouncement in *Dunlop Pneumatic Tyre v New Garage and Motor Company*.[40] There Lord Dunedin said that a clause is enforceable if it stipulates liquidated damages, that is, some realistic estimate of the loss likely to be suffered by the promisee. The dictum in full reads:

> The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damages.[41]

As before, I will formulate the law as a complete sanctionability condition, and I will consider it in conjunction with that announced in *The Monkland and Iron Company*:

> Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced *in terrorem*, the promisor will suffer no sanction under that clause.
>
> Liquidated Damages Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be a genuine covenanted pre-estimate of damages, then the promisor will be sanctioned as per the provisions of that clause.

Here one law defines a positive sanctionability condition and the other a negative one. The Liquidated Damages Law points to enforceability, while the Penalty Clause Law points to invalidity. The two overlap. A law can be designed to be enforced *in terrorem* while being a genuine pre-estimate of damages. Suppose that we modify the facts of *ParkingEye* slightly, so that the claimant can prove that £85 is a commercially justifiable estimate of its loss, say because even though its loss from individual infractions is small, its aggregate expenditure on administering and enforcing the system is large. At

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[40] *Dunlop Pneumatic Tyre v New Garage and Motor Company* [1915] AC 79.

[41] *New Garage* (n 40) 86, citing *Clydebank Engineering & Shipbuilding v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6. The phrase 'genuine covenanted pre-estimate of damages' denotes the idea that the parties foresaw the sum in question as a compensation of loss actually likely to be suffered, rather than as a penalty that one would have to pay to the other in the event of breach. There is a loose analogy between this and the distinction between compensatory and punitive damages: if the sum was contemplated as compensation, it is valid; if it is punitive, it is not.

the same time, for the drivers who do get caught, an £85 fine may be said to be *in terrorem*, say because average earnings in the area are £200 a week. The controversy then turns on whether the Penalty Clause Law takes precedence over the Liquidated Damages Law, or vice versa. There are two possible orderings:

(1) The Penalty Clause Law applies only when it is consistent with the Liquidated Damages Law, in which case the parking charge clause is enforceable.

(2) The Liquidated Damages Law applies only when it is consistent with the Penalty Clause Law, in which case the parking charge clause is unenforceable.

We do not know if ordering (1) or (2) is correct. Without a metalaw, or in Hart's terms a secondary rule, the uncertainty is irreducible. The outcome becomes a matter for the individual judge. The lawmaker may resolve the problem by formulating a metalaw, such as:

> Metalaw: Where two laws clash, that which points to validity shall prevail.

This serves to eliminate ordering (2). The law becomes certain. Might a rational lawmaker have good reason not to produce such a metalaw, or to produce a vague one, such as 'where two laws clash, that which points to validity shall *usually* prevail'? In order to commit himself to a specific metalaw, the lawmaker must also make a choice between the sanctity of contracts and the protection of parties with asymmetric bargaining power. Choosing between the two entails an investment in information. Making a choice is not costless – the lawmaker would have to decide whether he wants the court to upset contracts more often. He would have to study the potential economic impact of one solution or the other, its fairness implications, the availability of mechanisms for circumventing the prohibition, their cost, and so on. The evaluation, and the acquisition of the germane information, have a positive cost. The cost of information will sometimes preclude the lawmaker from specifying a metalaw. Therefore, the optimal metalaw will sometimes be less than perfectly specific.

I said that applicative and hierarchic uncertainty differ in two respects, namely origin and solutions. Regarding the former, recall that when I was discussing the Penalty Clause Law in isolation, a problem arose because the

facts of *ParkingEye* were specific and the Penalty Clause Law vague. The two could not be rendered commensurate. The Penalty Clause Law and the Liquidated Damages Law, on the other hand, are problematic because they coexist. If there had been no Liquidated Damages Law, there would have been no need to rank it against the Penalty Clause Law, and vice versa.

As regards solutions, recall that we made the Penalty Clause Law applicatively certain by adding further premises that were specific to the pre-existing ones. We solved hierarchic uncertainty in the two-law example by introducing a metalaw. The metalaw was more general than both laws. If at first a body of law contains a Penalty Clause Law and a Liquidated Damages Law and later that same body of law combines those two laws with the Metalaw, we may say that the body of law in question has become more, rather than less, abstract. Despite the increase in abstraction, however, the law become less uncertain.

III. The Relationship between Applicative and Hierarchic Indeterminacy

I will now try to postulate a relationship between applicative and hierarchic uncertainty. To this end, I argue that legal complexity increases, applicative uncertainty decreases and hierarchic uncertainty increases. I will first say what I mean by complexity. Thereafter, I will examine the connection between complexity as I define it and the two kinds of uncertainty. Lastly, I will proffer some very general arguments about the shape and structure of the optimal system.

1. Complexity

The word 'complexity' in general parlance denotes complicatedness. It might not be immediately obvious why I associate it with lower applicative uncertainty. The reason is that I use the term in a more technical sense. Complexity here denotes the existence of several elements within a system interacting with one other.[42] Since we are here concerned with laws, we may say that a legal system is complex when it comprises multiple laws that relate

[42] For a more detailed exposition see Herbert Simon, 'The Architecture of Complexity' (1962) 6 Proceedings of the American Philosophical Society 467.

to one another. This definition is meaningless in a static sense. All bodies of law comprise more than one element and those elements always relate to one another, so all law is complex. I however use the term dynamically: a legal system becomes more complex if the number of elements that compose it increases, and less complex when that number decreases.[43]

I now return to the proposition that if complexity increases, applicative uncertainty decreases and hierarchic uncertainty increases. We may say that if the number of laws within a body of law increases, each individual law will become easier to apply, but the laws in their totality will become more difficult to systematise, that is, it will become more difficult to decide which law to apply to any particular set of facts. Recall the hypothetical in which I ran over your cow while arguing with my girlfriend. I referred to two versions of a negligence law, one determinate in respect of those facts and the other indeterminate.

> Indeterminate Law: If a person negligently harms another, they shall have to pay compensation.
>
> Determinate Law: If a person negligently harms another, *where negligence means not paying attention to the road while driving a car*, they shall have to pay compensation.

The italicised part specifies the law. The definition of negligence also increases that law's complexity: where before we had only a law, we now have a law and a definition. We may equally say that we have two laws, one which says that negligence triggers compensation and another that negligence includes not paying attention to the road.[44] It may be thought that the

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[43] Consider a fictional legal system which comprises one law - 'civil wrongs shall be compensated' - and the *Bürgerliche Gesetzbuch* (BGB), which makes the same point in 2385 Articles, many of which have sub- and sub-sub-clauses. We may say that the former statement is complex, in that it comprises two elements – civil wrongs and compensation. And evidently, so is the BGB. But the BGB is more complex than the original statement, plainly because it comprises many more elements.

[44] In the examples I use in this paper, I take a somewhat cavalier attitude to the issue of whether something is 'one' or 'two' laws. This is because the point is purely semantic and does not impact on the veracity of my conclusions. Let me take an example I used earlier – suppose that blasphemy is an offence and also that freedom of speech is guaranteed. We may formulate this like two laws, like I did before, and speak of hierarchic indeterminacy. We may also formulate the two provisions as a

Determinate Law here is perfectly certain. Indeed, it is certain when it is measured against the facts that I used before. But let us suppose that another case comes to trial in which your neighbour's cow was mowed down by my neighbour, who was having a heart attack while driving. We now have hierarchic uncertainty between the law and the premise. The law dictates that negligent behaviour should be sanctioned. No-one would say that a person who is having a heart attack is negligent for failing to watch the road.[45] But the premise defines negligence as failure to watch the road. The facts fulfil that condition.

Perhaps it is helpful to rewrite the Determinate Law as two laws: [46]

> (A) If a person negligently harms another, they shall have to pay compensation.
>
> (B) If a person fails to pay attention to the road, they shall have to pay compensation.

The two laws define sanctionability conditions, but their interrelationship is unclear. It might be that (A) and (B) have to be satisfied for there to be

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single law, such as 'Freedom of speech is guaranteed and blasphemy is prohibited'. This is generally mimicked in the way lawyers speak of legal doctrines. For example, an English lawyer might describe 'the law of murder' as comprising the elements of the offence and defences such as diminished responsibility. Or he might describe 'the law of diminished responsibility' which includes elements such as substantial impairment, rational judgment, and self-control. In the former case, 'murder' is treated as one law. In the other, it is treated as being separate from defences.

45 This to some extent mirrors the argument in n 22. The difference is that Sunstein argues that to hold the stroke victim liable would be absurd, and this would make the law uncertain. My point is that even if we accept this absurdity and proceed to convict, the law will still be uncertain – the goal of perfect applicative certainty not only produces absurdity, but it also fails to guarantee that the law will become entirely certain.

46 The reader might suspect simulation: to make my point, I transform one law into two. Is there any artifice involved? This would be true if there is some fundamental difference between the meaning of 'if negligence then compensation, where negligence means failing to watch the road' and the meaning of 'if negligence then compensation; if failing to watch the road then compensation'. The only difference is that the first formulation conceals the hierarchic indeterminacy through syntax: the clause 'where' introduces the premise, but it does not make clear its relationship with the law – does 'where' mean 'if' or 'if and only if' or 'and' or 'or'.

liability, or that (A) or (B) will suffice, or (A) so far as it is consistent with (B), or (B) so far as it is consistent with (A). There being no metalaw, we cannot predict the outcome. Generalising, we may say that when we specify a law, we add more words to it. Since those words are vague, they overlap with the words we used before. The more we add, the greater the overlap, and the greater the resultant uncertainty.

2. Metalaws and the Legal System

I have so far strived to show that applicative certainty translates into hierarchical uncertainty. I have not said anything about the magnitude of the problem. It could be that a small increase in complexity brings marginal gains in applicative certainty while greatly amplifying hierarchical uncertainty. Or it might be that the gains in applicative certainty are large and the loss of hierarchic certainty negligible. My argument in this respect is that hierarchic uncertainty can be expected to rise very dramatically with every additional law, whereas investments in applicative certainty are likely to exhibit diminishing returns.[47] And this will eventually lead me to conclude that for the system to be able to sustain complexity, the lawmaker must produce very precise metalaws.

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[47] To make the law more applicatively certain, the lawmaker must invest in information. For example, it is informationally cheap to say 'drive reasonably' – the lawmaker must only know that there are some dangers from unreasonable driving. It is much more expensive to say 'drive at a speed lower than 50 km/h'. This requires the lawmaker to enumerate the dangers of driving fast, to balance them against the inconvenience from slower transportation, and to strike a balance between the two. Returns diminish because the reduction in applicative uncertainty becomes smaller with every additional clarification: we gain a lot in terms of prognostics from switching from 'driving reasonably' to 'driving under 50 km/h', but less from switching from 'drive under 50 km/h' to 'drive under 50 km/h in cities unless near a school, when you should drive at 30 km/h', less still if we switch from 'drive under 50 km/h in cities unless near a school, when you should drive at 30 km/h' to 'drive under 50 km/h in cities unless near a school, when you should drive at 30 km/h or unless visibility is poor, when you should drive at 20 km/h'. In each step, applicative uncertainty decreases, more and more facts are brought within the scope of the law. But the decrease is in each step smaller than in the previous – hence the point that investments in information exhibit diminishing returns.

It is best to begin by considering a metalaw-free system. Recall that hierarchic uncertainty arises when we are given some laws, but not their order of precedence. The probability that a particular ordering will govern in a case is given by dividing one by the number of possible orderings. And the number of possible orderings, absent metalaws, depends on the number of laws that can potentially be applied to a given case. If we are given one law, there is hierarchic certainty. If we are given two laws, A and B, they can be ordered as either A-B or B-A. Any prediction about their likely order of precedence is true with a probability of 0.5. If we are given three laws, A, B, and C, then there are six potential orderings – A-B-C, A-C-B, B-A-C, B-C-A, C-A-B, C-B-A. Any prediction is true with a probability of 0.16. If we are given four, the number of orderings rises to twenty-four, giving a probability of 0.04. Five laws can be ordered in one-hundred and twenty ways, and so on and so forth. The number of potential orderings is the factorial of the number of laws.

Let us now consider the role of metalaws. With perfectly precise metalaws, there would be no hierarchic uncertainty – the lawmaker's desired ordering would always be known in advance. A set of perfectly precise metalaws would be very expensive to produce – the lawmaker would have to anticipate every case in which two or more laws might overlap, and he would have to choose between these alternative laws for each set of facts that he identifies. A vaguer metalaw will say that one ordering will govern with some probability p and others will govern with a probability $1 - p$.[48] What becomes critical then is the probability that the default ordering will apply – the higher the value of p, the higher the hierarchic determinacy of the conflicting laws.

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[48] Real-life metalaws do not, of course, tie the application of one law or another to probabilities. For example, in precedential systems, we are told that (A) previous decisions of the courts are binding, unless there is a good reason to depart from them, and (B) if statute and precedent clash, statute prevails. (A) is a vague metalaw: it establishes a presumption that previous judgments are binding, but that presumption can be rebutted 'when it is right to do so' (*Practice Statement* [1966] 3 All ER 77). Since the criterion for departure is vague, we may say that the presumption will govern with a probability of p and the exception with a probability of $1 - p$. (B) on the other hand is precise: statute *always* prevails. Neither metalaw speaks directly of probabilities. But for both, it is possible to say that the application of a particular law is specified with some probability, and also that that probability varies between the two metalaws.

For every additional law, applicative uncertainty decreases. The question is by how much. The literature on applicative certainty suggests that the process exhibits diminishing returns.[49] If the most general law is 'if negligence then compensation', then specifying this through 'negligence includes not paying attention to the road' makes the law considerably more certain. But if we then go on to specify this further to say that 'not paying attention to the road includes driving with one's eyes closed', the gain is smaller: the second clarification prunes fewer interpretations than the first.

What, then, is the optimal number of laws? Recall that every additional law decreases applicative uncertainty but increases hierarchic uncertainty. Therefore, we may only increase the number of laws up to the point where the loss of hierarchic certainty exceeds the corresponding gain in applicative certainty. Beyond that point, further specification will result in a gain in applicative certainty which is lower than the corresponding loss of hierarchic certainty, causing uncertainty, in the aggregate, to increase rather than decrease. Accordingly, increasing complexity beyond that point will be counter-productive. In mathematical terms, if we were to plot applicative

[49] The point is at its most explicit in Ehrlich and Posner (n 1) and Korobkin (n 1). It might appear that there is a counter-argument to the effect that as refinements and exceptions are introduced to some general standards, it becomes harder for the judge to determine whether the case falls under the standard or under its exceptions. For example, we may at first have a law which prohibits driving at a speed in excess of 50 km/h, and thereafter we may introduce an exception to the effect that necessity is a defence to a charge of speeding. Once the necessity defence is introduced, there is the possibility that counsel in most cases will argue that the defendant needed to speed. The point is made at length in Sunstein (n 22). It does not refute my point here. First, in my framework, the introduction of the necessity defence simply makes the law more hierarchically uncertain, and the loss of hierarchic certainty outweighs the gain in applicative certainty. We do know something which we did not know before, namely that the limit is subject to a defence, but we also face the problem of the offence and the defence overlapping. If this is not accepted, then it is also possible to say that the necessity defence increases the cost of litigation rather than uncertainty: as cases are decided, it will become apparent what 'necessity' means, and once there is clarity, the defence will only be pleaded where it has a realistic chance of success. Litigation around that point will of course be costly, but the cost of litigation is not the same as the cost of information to the lawmaker.

and hierarchic certainty as functions of the number of laws, then the optimum point would be the intersection of the two curves.

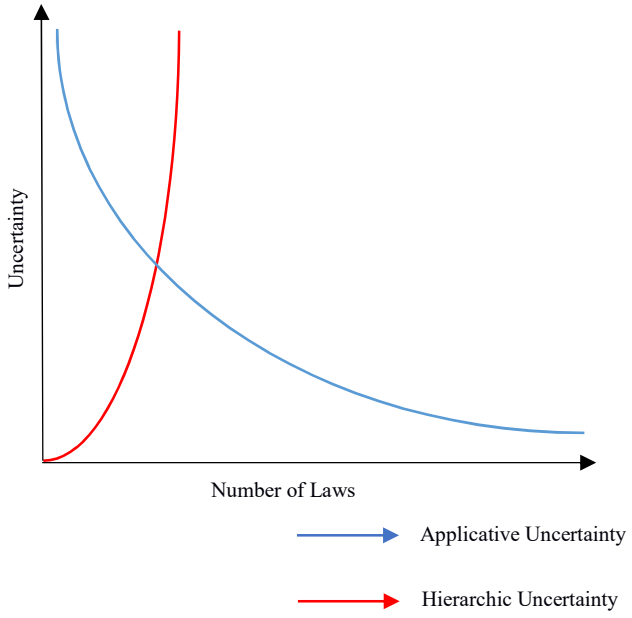

Figure 1: The Relationship between Applicative and Hierarchic Uncertainty

Now, without metalaws, hierarchic uncertainty rises factorially. The decline in applicative uncertainty is not so sharp. We may therefore expect that the optimal number of laws would be very low. A very abstract law would be preferable to a very specific one. The reader may validly ponder how it is possible for real legal systems to be as complex as the *Bürgerliches Gesetzbuch* (BGB) or the common law of property. I refer back to the discussion of metalaws – the slope of the hierarchic certainty curve is influenced by the probability with which a metalaw designates one ordering as being valid. If the metalaw is very certain, that is, if it designates some ordering as being valid with a very high probability, the law can be very complex. Two possibilities then emerge – either modern legal systems are radically indeterminate, that is, the outcome of any one case is entirely a matter for the judge,[50] or they contain very precise metalaws.[51]

[50] That would be the legal realist interpretation: see Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685.

[51] I should make a clarification here. I do not claim that any law is hierarchically indeterminate when set against another. If we say that speeding triggers a fine and also that playing loud music at night is prohibited, the two are hierarchically

I believe the latter to be true, if anything as a matter of empirics. German justice is predictable because the BGB contains a rigid hierarchy. The same is true of the common law of property. Given the high number of laws in real legal systems and the fact that hierarchic uncertainty rises at a more-than-exponential rate, a very small change in the precision of the metalaw can have a tremendous impact on aggregate certainty. Metalaws, if I am right, set the boundaries of legal complexity.

3. Penalty Clauses: A Second Example

I will now try to illustrate this theoretical point. I will begin with a very brief history of the development of the liquidated damages rule in the last century. I will then show how the various points raised in the preceding section apply to it. Let us take as our starting point the dicta of Lord Dunedin and Lord Halsbury in *Dunlop* and *Monkton* respectively. The reader will recall that I formulated these as two laws, namely:

> (To) Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced *in terrorem*, the promisor will suffer no sanction under that clause.
>
> Liquidated Damages Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be a genuine covenanted pre-estimate of damages, then the promisor will be sanctioned as per the provisions of that clause.

In *Cooden Engineering v Stanford,*[52] a car hire-purchase agreement provided that breach would entitle the claimants to repossess the car *and* to all outstanding instalments. The claimants argued that this was justified because the defendant Stanford had only paid eight instalments out of twenty-four that had been due. Lord Somervell rejected the argument. He was of the view that the determination of validity ought to be made at the time of

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determinate because speeding cannot constitute playing loud music, and vice versa. Likewise, it is impossible to conceive of a factual situation in which all of the *Bürgerliches Gesetzbuch*'s 2385 Articles are potentially applicable, or of a case which requires the application of every single rule of the common law of property. My argument is only that every law is applicable to a case with some probability. Consequently, as the number of laws in a given set increases, so does the expected number of laws which are applicable to individual cases.

[52] *Cooden Engineering v Stanford* [1953] 1 QB 86.

contracting. The defendant's actions after the contract had been signed could not be used to show that the clause was not penal.[53] Let us now rewrite the laws above to incorporate this proposition:

> (T1) Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced *in terrorem*, *where the operation of the clause is to be judged at the time at which the contract was made,* the promisor will suffer no sanction under that clause.
>
> Liquidated Damages Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be a genuine covenanted pre-estimate of damages, *where the operation of the clause is to be judged at the time at which the contract was made,* then the promisor will be sanctioned as per the provisions of that clause.

In *Campbell*,[54] the claimants argued that the disputed clause was not penal because the contract described it as 'agreed compensation'. They also argued that the defendant could not have felt any actual terror upon breaching. On the first point, Lord Racliffe said that 'the intention of the parties themselves is never conclusive and may be overruled or ignored if the court considers that even its clear expression does not represent 'the real nature of the transaction' or what 'in truth' it is to be taken to be'.[55] On the second, his Lordship pointed out that 'penalties may quite readily be undertaken by parties who are not in the least terrorised by the prospect of having to pay them and yet are, as I understand it, entitled to claim the protection of the court when they are called upon to make good their promises'.[56] Two additions were thus made to the law:

> (T2) Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced in terrorem, *where in terrorem does not mean actual terror or fear* and where the operation of the clause is to be judged at the time at which the contract was made, *irrespective of the description which the parties give to it*, the promisor will suffer no sanction under that clause.
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> Liquidated Damages Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be a genuine

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53 *Cooden Engineering* (n 52) 94.

54 *Campbell* [1962] AC 620.

55 Ibid 622.

56 Ibid.

> covenanted pre-estimate of damages, where the operation of the clause is to be judged at the time at which the contract was made, *irrespective of the description which the parties give to it,* then the promisor will be sanctioned as per the provisions of that clause.

Then came *Imperial Tobacco*.[57] There, Lord Wright observed that 'a millionaire may enter into a contract in which he is to pay liquidated damages, or a poor man may enter into a similar contract with a millionaire, but in each case the question is exactly the same'.[58] From this dictum we may distil the proposition that the wealth of the parties does not enter into the *in terrorem* test.

> (T3) Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced in terrorem, where in terrorem does not mean actual terror or fear and where the operation of the clause is to be judged at the time at which the contract was made, irrespective of the description which the parties give to it *and irrespective of their wealth*, the promisor will suffer no sanction under that clause.
>
> Liquidated Damages Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be a genuine covenanted pre-estimate of damages, where the operation of the clause is to be judged at the time at which the contract was made, irrespective of the description which the parties give to it, then the promisor will be sanctioned as per the provisions of that clause.

In *Murray v Leisureplay,*[59] the defendants argued that a provision guaranteeing a year's salary to its director in the event of dismissal was a penalty clause – it made them afraid to dismiss him. That argument was rejected because the clause was 'commercially perfectly justifiable'.[60]

> (T4) Penalty Clause Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be enforced in terrorem, where in terrorem does not mean actual terror or fear and where the operation of the clause is to be judged at the time at which the contract

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[57] *Imperial Tobacco of Great Britain and Ireland v Parslay* [1936] 2 All ER 515.

[58] Ibid 523.

[59] *Murray v Leisureplay* [2005] IRLR 946.

[60] Ibid at para [14], citing Lord Woolf in the Privy Council case *Philips Hong Kong v AG of Hong Kong* (1993) 61 BLR 49, 58-9.

> was made, irrespective of the description which the parties give to it and irrespective of their wealth, *whereas a clause which is commercially justifiable is not designed to be enforced in terrorem,* the promisor will suffer no sanction under that clause.
>
> Liquidated Damages Law: If a promisor and a promisee enter into a contract and that contract contains a clause which is designed to be a genuine covenanted pre-estimate of damages, where the operation of the clause is to be judged at the time at which the contract was made, irrespective of the description which the parties give to it, *where genuine covenanted pre-estimate means a commercially justifiable provision*, then the promisor will be sanctioned as per the provisions of that clause.

Finally, let us consider the case of *ParkingEye*. There, the Supreme Court held that the law had become too entangled and formulated a new approach. Lord Mance, with whom the rest of their Lordships agreed on this point, said that whether a clause is enforceable depends on 'whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract'.[61] We may formulate the resultant law thus:

> (T5) Enforceability Law: If a promisor and a promisee enter into a contract and that contract contains a clause which stipulates an exorbitant or unconscionable remedy, where exorbitance and unconscionability are to be measured against the innocent party's interest in performance, then the promisor shall suffer no sanction under that clause.

I now come to the substantial points. I will discuss T0-T4 first, since there is a rather obvious pattern, and then I will speak of T5, in which that pattern is reversed. First, between T0 and T4, the law becomes increasingly complex. At each step, a new element is added to the ones already present. A rather simple way of grasping this is to evaluate the position of a person minded to familiarise herself with the law of penalty clauses at T0 and at T4. Their task would obviously be much more laborious at T4.

Second, I argued previously that as complexity increases, so does applicative certainty. We may, at T0, ponder whether a person who was perfectly secure in his future when he made a contract but was reduced to fright at the time of breach would be able to escape the provision. At T1, we know that this is not

[61] *ParkingEye* (n 35), para 255.

the case – a further set of facts has been brought within the core of the provision. Likewise, we may at both T0 and T1 wonder whether the fact that the parties describe something as compensation matters – at T2, we know that wording and mentation are irrelevant. At T0, T1, and T2 we do not know whether the parties' wealth makes a difference, but at T4 we know to disregard it. In Hartian terms, with each step the core of the provision expands and its penumbra shrinks.[62]

Third, I contended earlier that specification exhibits diminishing returns. We may say that this is true if the totality of facts brought within the core of the provision between T0 and T1 is larger than that brought within its core between T1 and T2, and that one is larger than that between T2 and T3, and so on. Does this hold here? I believe so. The temporal qualification in T1 has the effect of reducing uncertainty a great deal. A clause may be *in terorrem* at some time between breach and suit and not in other times. A huge number of interpretations are possible at T0. At T1, all but one are rendered obsolete – the time of the determination is fixed. Between T3 and T4, conversely, we know a lot about what a penalty clause is– there remains only a small residue of cases in which a commercially sound clause may still be thought to potentially contravene the rule. That issue is clarified by the T4 law, but the gain in certainty is surely lower than that between T0 and T1.

I cannot, however, show this conclusively. To do so I would have to draw up a complete list of possible interpretations and discuss the applicability of each – in other words, I would have to deliver a complete representation of all possible states of the world. Information costs prevent me from doing this in the same way in which they prevent the lawmaker from writing infinitely complete laws. I nonetheless think that the argument has some intuitive appeal. One counterargument is that if facts such as those of *Murray* had come to be decided before those of *Cooden*, then the position would have been reversed: a greater gain in applicative certainty would have been made at a later stage. It is possible to argue that had the facts of *Murray* come before the courts first, there would have been argument made by counsel about the time at which a clause ought to be assessed. This is, of course, speculative. Even if it is not accepted, there is also an argument from the law-and-economics literature to the effect that the more (applicatively) uncertain the

[62] Hart (n 23) 607.

law, the likelier it is to be litigated.[63] The idea, summarised, is that if parties have the same expectations about the outcome of a lawsuit, they will always settle, since to settle is cheaper than it is to litigate. Consequently, litigation occurs because of the divergent expectations about outcomes. The more uncertain the law, the higher that divergence, and the greater the likelihood that the parties will litigate. Thus, a highly uncertain law – such as one that prohibits penalty clauses but does not fix a temporal reference point for that determination – will attract much litigation, whereas a law that does provide for such a temporal reference point but not for commercial justifications will attract less. This is of course a *ceteris paribus* argument, so that exceptions will exist, but in general it might be expected to hold.

Coming now to T5, it would appear that at that point the law becomes less certain than it was at T4 – there is an obvious reduction in complexity. The gains made between T0 and T4 are reversed. If, for example, we try to apply the T5 law to a situation in which the parties have described their agreement as 'agreed compensation', there is nothing in the text of the T5 law to guide us. Does this mean that T5 is sub-optimal? I think not. Although the law at T4 is very certain applicatively, it is also very uncertain hierarchically. How so? Even at T0, we do not know what happens when a clause is simultaneously *in terrorem* and a genuine pre-estimate of loss. Let us now add to this the T4 provisos that a clause which is *in terrorem* cannot have been commercially justifiable and that a genuine pre-estimate of loss is commercially justifiable.

Law 1: An *in terrorem* clause is unenforceable.

Law 2: A genuine estimate of loss is enforceable.

Law 3: A commercially justifiable clause is enforceable.

Like at T0, we do not know what happens if a clause is *in terrorem* and a genuine pre-estimate. But to this, Law 3 adds further perplexities. For instance, what happens if a clause is *in terrorem*, not a genuine pre-estimate, but it is commercially justifiable? The introduction of a third law expands the

[63] See, for example, Guiseppe Dari-Mattiaci and Bruno Deffains, 'Uncertainty of Law and the Legal Process' (2007) 163 Journal of Institutional and Theoretical Economics 627.

set of possible orderings. Recall that with two laws, there were two possible orderings. With three laws, there are six:

(1) If a clause is *in terrorem*, it is unenforceable, irrespective of whether it is a genuine estimate or commercially justifiable.

(2) If a clause is a genuine preestimate, it is enforceable, irrespective of whether it is a *in terrorem* or commercially justifiable.

(3) If a clause is commercially justifiable, it is enforceable, irrespective of whether it is a genuine estimate or *in terrorem*.

(4) If a clause is a genuine preestimate and commercially justifiable, it is enforceable, irrespective of whether it is *in terrorem*.

(5) If a clause is *in terrorem,* it is enforceable if it is commercially justifiable but unenforceable if it is a genuine pre-estimate.

(6) If a clause is a genuine preestimate, it is enforceable if it is commercially justifiable but unenforceable if it is *in terrorem.*

Since nothing in our setup allows to determine that one of the six is to be preferred, each is as likely to be taken up by a judge as any other. At T4, therefore, any one prediction is likely to be correct with a probability of 16.66% – a third of the confidence that we may have had at T0, where any prediction would have been true in 50% of cases.

Once applicative and hierarchic uncertainty are considered together, the legal change between T4 and T5 actually makes the law more certain. Why so? Suppose that under the simple T5 law, we know whether it applies to some facts with a probability of 20%, and under the complex T4 one, that certainty is 90%. At T4, we only know what the applicable ordering is with a probability of 16%. At T5, that probability is 1. Therefore, the compound probability of a prognosis being true under the complex T4 law is 0.9 x 0.16, which gives 0.14. Under the simple T5 law, it is 0.2 x 1, or 0.2. The T5 law is more certain in the aggregate, even on the wildly unfavourable assumption that it is three times as applicatively uncertain as the T4 law.

Lastly, consider the role of metalaws. There are several that apply here: earlier High Court judgments bind future High Courts absolutely, the Court of

Appeal cannot depart from its own case law,[64] House of Lords or Supreme Court judgments bind all courts bar the highest but not Parliament, and the highest court can only depart from its own case law 'where it is right to do so'.[65] All of these metalaws are much more abstract than the rules contained in the cases themselves: the Supreme Court's case law includes not only *ParkingEye* but also judgments on contract damages, human rights, the rule on perpetuities, and the royal prerogative. The metalaw that tells us what happens when the Supreme Court's case law clashes with that of other courts is much more general than any individual rule contained in that case law.

How do these metalaws keep the system coherent? I said earlier that between T0 and T4, there emerged three laws which could be hierarchically arranged in six different ways. Without the set of metalaws I just described, the number of possible orderings would be considerably higher: in every case, the judge would be free to disregard previous judgments and introduce interpretative principles of his own. Moreover, the T5 judgment would not reduce hierarchic uncertainty, since there would be no metalaw to indicate that if *ParkingEye* is at odds with any previous authorities, it is the former that prevails. Note, however, that the metalaws in place are not perfectly certain: the Supreme Court in *ParkingEye* was authorised to depart from the previous case law because it was 'right to do so'. But no-one could have predicted whether it would be right to depart from the previous case law before the case came before the Supreme Court. In other words, before *ParkingEye* was decided, any prediction of its outcome would have had to account for the possibility that it would be 'right' for that court to depart from precedent.[66] Thus, in the last analysis, it is metalaws that fix the boundaries of legal

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[64] *Young v Bristol Aeroplane* [1944] KB 718.

[65] *Practice Statement* (n 31).

[66] The same is true of the metalaws that govern between T0 and T4, albeit in a more subtle way. The reason those are hierarchically uncertain is that there is a metalaw that permits the judiciary to *distinguish* between cases and also another that prohibits them from overruling previous judgments. Since distinguishing is a form of lawmaking – see, for example, Kelsen (n 3) 77 and Raz (n **Error! Bookmark not defined.**) 94-101 – it is inevitable that there will be a tension between the distinction and the law as originally promulgated. The problem is that although there is a metalaw which permits the British judiciary to distinguish cases, there is no indication in that metalaw of when distinguishing is permissible and when it is not.

prediction: what is known is knowable because there are metalaws, and the unknown is unknown because those metalaws are not perfectly certain.

IV. Conclusion

My purpose here was to reframe an old problem, rather than to solve it. It is nonetheless possible to synopsise the main points. First, there are two types of legal uncertainty. One comes from the vagueness of laws. The other has to do with the relationship between laws. Although their cause is the same – the scarcity of information – the solutions come in different forms. Applicative uncertainty is reduced by introducing more specific laws, hierarchic uncertainty through more abstract ones. There is a tension between the two, and a balance to be struck – so long as information remains costly, the law must remain partly uncertain. Second, once we account for hierarchic uncertainty, it becomes obvious why in law structure matters: metalaws keep the system coherent. Without them, we would be unable to have anything but the most general laws. The ancients found vague commandments to be perfectly serviceable bases for their legal regimes. Industrialisation, however, intensified the specialisation of labour and with it the specification of law. In our era, the thrust has been to ever-increasing complexity in the economy, society, and the law. Without metalaws to keep hierarchic uncertainty at bay, the welfare gains from economic specialisation – and surely there must have been at least a few – would have remained unrealised.

TRANSLATING THE CONVENTION'S FAIRNESS STANDARDS TO THE EUROPEAN COURT OF HUMAN RIGHTS: AN EXPLORATION WITH A CASE STUDY ON LEGAL AID AND THE RIGHT TO A REASONED JUDGMENT

Lize R. Glas*

The European Court of Human Rights (ECtHR) has clarified when domestic procedures are fair, but it remains unclear when the ECtHR's own procedures are fair. Yet, clarifying the requirements of procedural fairness applicable to the ECtHR is important, especially in a context where doubts have been expressed about the fairness of some of the Strasbourg procedures. This article proposes that the fairness standards from the ECtHR's case law, which apply to domestic authorities, can be applied to the Strasbourg Court. These standards must however be adapted to or 'translated' into the ECtHR's context, because its context is so different from that of domestic authorities. This article therefore develops eleven principles of translation. The usefulness of the principles is tested by employing those principles to translate two fairness standards: the right to legal aid and the right to a reasoned judgment. Subsequently, the usefulness of the translated standards is evaluated by applying those translated standards to two aspects of the ECtHR's practice: the granting of legal aid and single-judge decisions.

Keywords: European Convention on Human Rights, European Court of Human Rights, procedural fairness, right to a fair trial, legal aid, right to a reasoned judgment, single-judge decisions

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I. INTRODUCTION

The European Court of Human Rights (ECtHR) verifies whether the states parties to the European Convention on Human Rights ('the Convention' or 'ECHR') abide by the rights protected in that document. Most complaints to the ECtHR concern the right to a fair trial (Article 6 ECHR).[1] In the resulting case law, the ECtHR has clarified when domestic civil and criminal procedures are fair. Another substantial part of the complaints concerns the right to an effective remedy (Article 13 ECHR).[2] The ECtHR has therefore also been able to elaborate on the requirements that a domestic remedy must fulfil in order to be effective. Although it is clear by which standards the

[1] ECtHR, 'Violation by Article and by State' <www.echr.coe.int/Documents/tats_violation_2016_ENG.pdf> accessed 28 September 2017 (282 of the in total 993 violations in 2016 concerned Article 6 ECHR).

[2] Ibid (135 of the in total 993 violations in 2016 concerned Article 13 ECHR).

fairness of domestic legal procedures must be assessed, it has not yet been established on which standards the fairness of the ECtHR's own procedures can be examined.

Yet, it is important to assess the fairness of the Strasbourg procedures and to establish where there is room for improvement. Fairness should be greatly relevant to the ECtHR considering that empirical research in the fields of social psychology and criminology teaches us that procedural fairness can matter more than a procedure's outcome to individuals.[3] Procedural fairness also matters to the ECtHR's legitimacy in the eyes of states parties, and legitimacy is in turn key to the effective implementation of the Court's judgments by them.[4] Moreover, as the ECtHR is tasked with safeguarding procedural fairness, defying procedural fairness would be unprincipled and hypocritical, and would give the states parties ammunition to criticise the ECtHR even more than they already do.[5]

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[3] Eg, Søren Winter and Peter May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 Journal of Policy and Analysis Management 675, 678; Tom Tyler, 'Procedural Justice', Blackwell Reference Online (2004) <www.blackwellreference.com/subscriber/uid=1008/tocnode.html?id=g9780631228967_chunk_g9780631228967&authstatuscode=202> accessed 28 September 2017; Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction' (2007) 44 Court Review 4; William Wells, 'Type of Contact and Evaluations of Police Officers: The Effects of Procedural Justice across Three Types of Police-citizen Contacts' (2007) 35 Journal of Criminal Justice 612, 612. See also, generally, Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 Human Rights Quarterly 176.

[4] Tom Barkhuysen and Michiel van Emmerik, 'Legitimacy of the European Court of Human Rights: Procedural Aspects' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (T.M.C. Asser Press 2009), 437; Brems and Lavrysen (n 3) 182; Kanstantsin Dzehtsiarou and Donal Coffey, 'Legitimacy and Independence of International Tribunals' (2014) 37 Hastings International and Comparative Law Review 269, 273; Lucas Lixinski, 'Procedural Fairness in Human Rights Systems', in Sarvarain et al (eds), *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law 2015) 325.

[5] See about the criticism, eg, Thorbjørn Jagland, 'The Convention Is Our Compass' (Parliamentary Assembly Session, Strasbourg, 25 January 2016) <www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMvl0SKOUrv/content/communication-on-the-occasion-of-the-first-part-of-the-2016-parliamentary-assembly-

In spite of the importance of procedural fairness to the ECtHR, and although the ECHR system as such is usually positively appraised, there are some doubts about the fairness of some of its procedures raised among scholars.[6] Legal aid, for example, is 'meagre, if not derisory',[7] compensation for costs is often 'significantly lower'[8] than the amounts claimed, and one cannot complain about blatantly unfair decisions. Furthermore, the ECtHR's procedures can be extremely protracted,[9] the reforms enhancing its

session> accessed 28 September 2017; Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66 International & Comparative Law Quarterly 476, 474-478; For a description of the positive appraisal, see: Lize Glas, The Theory, *Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 34-35.

6 Eg, Pietro Sardaro, 'Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court' (2003) European Human Rights Law Review 601; Barkhuysen and van Emmerik (n 4) 442-444; Janneke Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' (2014) 14 European Human Rights Law Review 148; Amnesty International, 'Amnesty International's Comments on the Interim Activity Report ...', 1 February 2014, IOR 61/005/2004, 6, 8; Lize Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14 European Human Rights Law Review 671, 674-680; Lize Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' (2016) 34 Netherlands Quarterly of Human Rights 41, 67-70; Nikos Vogiatzis, 'The Admissibility Criterion under Article 35(3)(b) ECHR: A 'Significant Disadvantage' to Human Rights Protection?' (2016) 65 International & Comparative Law Quarterly 185, 195; Janneke Gerards and Lize Glas, 'Access to Justice in the European Convention on Human Rights System' (2017) 35 Netherlands Quarterly of Human Rights 11, 29.

7 David Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press 1995) 665.

8 Philip Leach, *Taking a Case to the European Court of Human Rights* (4th edn, Oxford University Press 2017) 614.

9 To illustrate, at the end of 2011, the overall average waiting time for communication of a case was 37 months (more recent figures are not readily available), see ECtHR Registry, 'Information on Cases Pending before the ECHR', DH-GDR(2012)005.

efficiency have caused a decline in reason-giving[10] and have led to frequent decision-making by registry staff.[11]

In light of the importance of procedural fairness for the ECtHR and of the existing doubts about the fairness of some aspects of its procedures, the question arises of the standards on which the ECtHR's procedural fairness can be assessed. Different authors refer to the standards that the ECtHR has developed in its case law under Articles 6 and 13 ECHR to comment on the fairness of its procedures.[12] This practice is appealing because the ECtHR's case law on Article 6 ECHR is extensive and therefore provides many insights. Additionally, the idea of following your own practice makes it attractive to apply the ECtHR's standards to the ECtHR itself. After all, if the ECtHR, as the guardian of the Convention rights, fails to do in practice what it advocates, its legitimacy would be at stake. Furthermore, because the ECtHR formulates minimum standards for 47 states whose diversity it aims to respect,[13] its standards have a level of generality that assumedly makes them applicable to other contexts as well.

However, I propose that the practice of applying the Convention standards to the ECtHR presents some difficulties because the ECtHR and its

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[10] The overwhelming majority of decisions – about 350,000 from 2009-2015 – were not or hardly reasoned. This figure is the sum of all single-judge decisions in this period. See also Gerards (n 6).

[11] 23% of all complaints in 2014. See ECtHR, 'Report on the Implementation of the Revised Rule on the Lodging of New Applications' <www.echr.coe.int/Documents/Report_Rule_47_ENG.pdf> accessed 28 September 2017.

[12] Eg, Andrew Butler, 'Legal Aid before Human Rights Treaty Monitoring Bodies' (2000) 49 International & Comparative Law Quarterly 360, 368; *CLR on behalf of Valentin Câmpeanu v Romania* ECHR 2014-V, Concurring Opinion of Judge Pinto de Albuquerque, para 15, footnote 28; Gerards (n 6) 154; Helena De Vylder, 'Stensholt v. Norway: Why Single Judge Decisions Undermine the Court's Legitimacy' (*Strasbourg Observers*, 28 May 2014) <strasbourgobservers.com/2014/05/28/stensholt-v-norway-why-single-judge-decisions-undermine-the-courts-legitimacy-2/> accessed 28 September 2017; Edita Gruodytė and Stefan Kirchner, 'Legal Aid for Intervenors in Proceedings before the European Court of Human Rights' (2016) 2 International Comparative Jurisprudence 36, 37; Gerards and Glas 2014 (n 6) 16-17. Additionally, the ECtHR relies almost literally on Article 6(1) ECHR in Rule 63(1-2) of Court for formulating the exception to the rule that hearings shall be public.

[13] See section II.7.

procedures are very different from the domestic authorities and procedures to which these standards apply. These standards therefore need to be translated to the ECtHR's context, meaning that they must be adapted to suit the ECtHR's unique institutional context. This is what I aim to do (in section II): develop 'principles of translation' which can be relied upon to adapt fairness standards from the Strasbourg case law to suit the ECtHR's context.

In order to put the usefulness of these principles to the test, I employ them to translate two fairness standards: the right to legal aid and the right to a reasoned judgment (in sections III.1-2 and IV.1-2). Subsequently, I test the usefulness of the translated standards by using them to analyse the fairness of two aspects of the ECtHR's practice: the granting of legal aid and single-judge decisions (in sections III.3 and IV.3).

II. Principles of Translation

I argue that the fairness standards in the ECtHR's case law can be used to evaluate the fairness of the ECtHR's procedures. However, these standards cannot be directly applied to the ECtHR because the context in which the ECtHR functions is rather different from the domestic context to which the ECHR standards apply. To illustrate these differences this section will analyse, for example, how the ECtHR unlike most domestic courts is neither a court of first, nor of last instance. Due to these differences, the standards must be 'translated'. This requires that the Convention standards are adapted so they suit the ECtHR's institutional context. Additionally, they must be stripped off features that are only of relevance to the domestic context, which is the context for which the ECtHR developed the standards. The process of translation therefore involves both taking into consideration the Court's context and 'disregarding' the domestic context to which the standards used to apply.

The question that follows is: how can the fairness standards be translated to the ECtHR's context? To answer this, I will present eleven principles of translation. The principles highlight the differences between the context of the domestic authorities and that of the ECtHR; they point out features of the domestic authorities' tasks and functioning that the ECtHR does not possess, and features of the ECtHR's tasks and functioning that the domestic

authorities do not possess. By taking into consideration the relevant differences that the principles help to identify, the fairness standards can be translated to suit the ECtHR's context.

I have developed the translation principles based on how the ECtHR's tasks and functioning are defined (and differ from the domestic authorities' task and functioning) in the Convention, the Rules of Court and the Strasbourg case law in relation to individual applications. Consequently, I did not take into consideration that the ECtHR exceptionally deals with inter-state cases[14] and that it can adopt advisory opinions,[15] because this is only incidental to its task and functioning, whereas deciding individual applications has become its 'daily bread'.[16]

This section will first present the principles of translation (sections II.1-11). Although I discuss the principles as eleven distinct principles in eleven different sections, they are sometimes related to each other, as I will point out where relevant. Subsequently, this section makes some general observations about the principles (section II.12).

1. Principle I: Subsidiary Protection

The states parties to the Convention undertake to respect the Convention rights;[17] the ECtHR only verifies whether the contracting states abide by this obligation.[18] In other words, the states are primarily responsible for securing these rights, while the ECtHR is 'subsidiary to the national systems safeguarding human rights'.[19] As a consequence of the principle of subsidiarity, the role of the Strasbourg Court is different from the role of domestic authorities when protecting human rights, and the Strasbourg

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[14] Article 33 ECHR.

[15] Article 47 ECHR.

[16] Luzius Wildhaber, 'Rethinking the European Court of Human Rights', in Jonas Christoffersen and Michael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 208.

[17] Article 1 ECHR.

[18] Article 19 ECHR; *Weixelbraun v Austria* App no 33730/96 (ECtHR, 20 December 2011), para 27; Janneke Gerards, 'The Prism of Fundamental Rights' (2012) 8 European Competition Law Review 173, 184-186.

[19] *Kudla v Poland* ECHR 2000-XI, para 152; Article 1 Protocol 15 ECHR.

Court may defer to the national authorities when performing its role. Some of the other principles of translation will illustrate these consequences.

2. Principle II: Effective Protection

Because the Convention 'is an instrument for the effective protection of individual human rights', the ECtHR interprets and applies the document 'in a manner which renders its rights practical and effective, not theoretical and illusory'.[20] In exceptional cases, the ECtHR goes beyond its subsidiary task to provide effective protection, as other principles of translation will clarify.

3. Principle III: Individual Justice

The ECtHR will occasionally emphasise that its primary task is to provide justice to individuals.[21] However, individual justice is neither the ECtHR's sole task, as the next principle highlights, nor boundless for at least two reasons.[22] First, the ECtHR considers it incompatible with its role to deliver 'continually, individual decisions in cases where there is no longer any live Convention issue'.[23] To illustrate, the ECtHR may decide to reject pending applications after the ECtHR has already ordered general measures in a pilot judgment.[24] Second, a recently added admissibility criterion requires the ECtHR to declare cases inadmissible if the applicant has not suffered a significant disadvantage.[25] Therefore, the ECtHR no longer has to deal with all meritorious applications, but only with those alleging violations that 'attain a minimum level of severity'.[26]

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[20] *Opuz v Turkey* ECHR 2009-III, para 165; See also *Magyar Helsinki Bizottság v Hungary* ECHR 2016, paras 120-121*; Al-Saadoon and Mufdhi v UK* ECHR 2010-II, para 127.

[21] *Rantsev v Cyprus and Russia* ECHR 2010-I*,* para 197; *Djokaba Lambi Longa v the Netherlands* App no 33917/12 (ECtHR, 9 October 2012), para 58.

[22] See also Glas 2014 (n 6) 674-680.

[23] *E G and Others v Poland* App no 50425/99 (ECtHR, 23 September 2008). See also *Yuriy Nikolayevich Ivanov v Ukraine* App no 40450/04 (ECtHR, 15 October 2009), para 82; *Pantusheva and Others v Bulgaria* App no 40047/04 (ECtHR, 5 July 2011), para 57.

[24] Rule 61(6) of Court.

[25] Article 35(3)(b) ECHR. See for a future amendment Protocol 15 ECHR.

[26] *Korolev v Russia* App no 38112/04 (ECtHR, 21 October 2010).

4. Principle IV: General Justice

Instead of focusing on its mission to provide individual justice, the ECtHR may consider that the core of its activity consists in 'passing public judgments that set human-rights standards across Europe'.[27] For that reason, the ECtHR may deal with a case even though the applicant has no interest in it anymore.[28] The ECtHR's task is therefore twofold: 'to render justice in individual cases by way of recognising violations' and 'to elucidate, safeguard and develop the rules instituted in the Convention thereby contributing in those ways to the observance by the states of the engagements undertaken by them'.[29]

5. Principle V: In Concreto Review

The ECtHR normally determines *in concreto* whether the manner in which a law affected the applicant caused a violation.[30] Thus, applicants cannot bring an *actio popularis*: they cannot complain against domestic laws or practices 'simply because they appear to contravene the Convention'.[31] Instead, they must prove that they are a victim of or directly affected by a specific measure for the ECtHR to evaluate how such a measure affected them.[32]

However, the ECtHR's review is not always exclusively focused on the specific case brought before it, as it sometimes also looks into the domestic context that caused the violation. For instance, the ECtHR can emphasise that a structural problem causes many repetitive applications and that the

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[27] *Kharuk and Others v Ukraine* App no *703/05* (ECtHR, 26 July 2012), para 23. See also *Goncharova and Others v Russia* App no 23113/08 (ECtHR, 15 October 2009), para 22; Gerards and Glas (6) 18.

[28] Article 37(1) ECHR. Eg, *Rantsev* (n 21), para 197. See also Explanatory Report to Protocol 14 ECHR, para 39.

[29] *Nagmetov v Russia* App no 35589/08 (ECtHR, 30 March 2017), para 64.

[30] *N C v Italy* App no 24952/94 (ECtHR, 18 December 2002), para 56; *Goranova-Karaeneva v Bulgaria* App no 12739/05 (ECtHR, 8 March 2011), para 43; CDDH, CDDH report on the longer-term future of the system of the European Court of Human Rights, CDDH(2015)R84 Addendum I 2015, 11 December 2015, para 91.

[31] *CLR on behalf of Valentin Câmpeanu* (n 12) para 101.

[32] *Roman Zakharov v Russia* ECHR 2015, para 164; Article 34 ECHR.

respondent state should address this problem.[33] This procedure, referred to as the pilot-judgment procedure, is a prime example of *in abstracto* review. In a pilot judgment, the ECtHR identifies a structural problem and orders the measures that the respondent state must take to remedy the problem.[34]

6. Principle VI: Autonomy

The ECtHR's jurisdiction extends to all matters concerning the interpretation and application of the Convention, including disputes concerning its own jurisdiction.[35] The ECtHR therefore decides autonomously over its jurisdiction. Moreover, it has 'full jurisdiction' once 'a case is duly referred to it'.[36] This means that the ECtHR is also autonomous in other respects. It may 'take cognisance of all questions of fact and law which may arise in the course of consideration of the case'.[37] Further, the ECtHR is 'master of the characterisation to be given in law to the facts of the case'[38] and decides autonomously on the scope of the facts that it examines and the evidence that it relies upon.[39] Because it is for the ECtHR to characterise the facts of a case, the ECtHR has decided, for example, on complaints under provisions that were not originally relied upon by the applicant.[40] It has also taken into consideration facts unknown to the highest

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33 Robert Harmsen, 'The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform', in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition and Human Rights Cultures* (Oxford University Press 2011) 41. Eg, *Statileo v Croatia* App no 12027/10 (ECtHR, 10 July 2014), para 165.

34 Rule 61(3) of Court.

35 Article 32 ECHR.

36 *De Wilde, Ooms and Versyp v Belgium* (1971) Series A no 12, para 49.

37 Ibid. See also *Handyside v UK* (1976) Series A no 24, para 41; *Tønsbergs Blad AS and Haukom v Norway* App no 510/04 (ECtHR, 1 March 2007), para 53.

38 *Guerra and Others v Italy* ECHR 1998-I, para 44.

39 *UMO Ilinden – PIRIN and Others v Bulgaria (no 2)* App nos 41561/07 and 20972/08 (ECtHR, 18 October 2011), para 60.

40 Ibid. See also *Akdeniz v Turkey* App no 25165/94 (ECtHR, 31 May 2005), para 88; *A.K. and L. v Croatia* App no 37956/11 (ECtHR, 8 January 2013), para 94; *Jashi v Georgia* App no 10799/06 (ECtHR, 8 January 2013), para 60.

domestic judge.[41] Finally, the ECtHR autonomously defines the concepts referred to in the Convention, such as 'victim'.[42]

7. Principle VII: Deference to Domestic Authorities

In conformity with the subsidiarity principle,[43] the domestic authorities enjoy a margin of appreciation in 'how they apply and implement the Convention'.[44] They also have discretion because they are in 'direct and continuous contact with the vital forces of their countries, their societies and their needs', and therefore 'better placed' to assess what is required in the circumstances of a specific case.[45] The margin of appreciation can be regarded as a 'tool to define relations between the domestic authorities and the [ECtHR]'.[46] The breadth of the margin depends on different factors,[47] including 'the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference'.[48] Further, the margin is relatively broad when the states parties disagree on the relative importance of the interest at stake or how to best protect it.[49] Either way, the states do not have an unlimited power of discretion, as the margin of appreciation 'goes hand in hand with a European supervision'.[50]

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41 *Salah Sheekh v the Netherlands* App no 1948/04 (ECtHR, 11 January 2007), para 136. Unless such facts alter the subject matter of the applicant's complaint, see *Tønsbergs Blad AS and Haukom* (n 39) para 54; *Procedo Capital Corporation v Norway* App no 3338/05 (ECtHR, 24 September 2009), para 42.

42 *Engel and Others v the Netherlands* (1976) Series A no 22, para 81; *L.Z. v Slovakia* App no 27753/06 (ECtHR, 27 September 2011), para 71.

43 Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 The American Journal of International Law 38, 70; *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012), para 64.

44 Explanatory Report to Protocol 15 ECHR, para 9.

45 *Animal Defenders International v UK* App no 48876/08 (ECtHR, 22 April 2013), para 111.

46 *A and Others v UK* ECHR 2009, para 184.

47 *Dubská and Krejzová v the Czech Republic* ECHR 2016, para 178.

48 *S and Marper v UK* ECHR 2008-V, para 102.

49 Ibid.

50 *Ceylan v Turkey* ECHR 1999-IV, para 32.

8. Principle VIII: No Fourth-Instance Court[51]

Another consequence of the subsidiarity principle is that the ECtHR, in principle, does not deal with applications alleging that the decision of a domestic judge was erroneous on points of domestic law.[52] The ECtHR is 'not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them'.[53] Nor does the ECtHR re-assess the facts relied upon by domestic judges, analyse whether they appraised the evidence correctly or whether the evidence was obtained unlawfully.[54] The ECtHR only deals with these matters 'unless and in so far as they may have infringed' the Convention rights.[55] It may, for example, establish whether unlawfully obtained evidence resulted in the infringement of the right to a fair trial (Article 6 ECHR).[56] Only in exceptional circumstances will the ECtHR question the domestic authorities' assessment of the facts or domestic law, namely when their

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[51] The margin of appreciation and the fourth-instance doctrine both imply that the states have discretion due to the subsidiarity principle. The latter doctrine is nevertheless distinguished because it is to be preferred 'as far as the Court's review of errors of fact and errors of domestic law is concerned', see Johan Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009), 238. The fourth-instance doctrine may therefore 'be seen as part of the larger construct of the margin of appreciation', see Oddný Mjöll Arnardóttir and Dóra Guðmundsdóttir, 'Speaking the same language? Comparing judicial restraint at the ECtHR and the ECJ', in Oddný Mjöll Arnardóttir and Antoine Buyse (eds*), Shifting Centres of Gravity in Human Rights Protection: Rethinking ECHR, EU, and National Legal Orders* (Routledge 2016), 173; The ECtHR does not always distinguish the two doctrines clearly, see Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 European Constitutional Law Review 27, 32.

[52] Maija Dahlberg, '"It Is Not its Task to Act as a Court of Fourth Instance". The Case of the ECtHR' (2014) 2 European Journal of Legal Studies 77, 78; see also *Mehmet and Suna Yiğit v Turkey App no* 52658/99 (ECtHR, 17 July 2007), para 37; *Kononov v Latvia* App no 36376/04 (ECtHR, 24 July 2008), para 108; *L.H. v Latvia App no 52019/07 (ECtHR, 29 April 2014),* para 49.

[53] ECtHR Jurisconsult, 'Interlaken Follow-up. Principle of Subsidiarity', 8 July 2010, para 28.

[54] *Ramanauskas v Lithuania* ECHR 2008-I, para 52.

[55] *L H* (n 52), para 49.

[56] *Ramanauskas* (n 54), para 52.

assessment is 'flagrantly and manifestly arbitrary'.[57] In this respect, the ECtHR scrutinises allegations of a violation of the right to life (Article 2 ECHR) or the prohibition of torture (Article 3 ECHR) particularly thoroughly.[58]

9. Principle IX: No First-Instance Court

Unlike the 'fourth-instance doctrine', which is a common term in literature, the term 'first-instance doctrine' is not used very often to delineate the ECtHR's role. Nevertheless, this doctrine exists in the Strasbourg case law. In one case, the ECtHR stated that:

> [the ECtHR] cannot emphasise enough that [the ECtHR] is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdiction.[59]

The ECtHR has further elaborated the point of compensation explaining that its 'principal task is to secure the respect for human rights, rather than to compensate applicants' losses minutely and exhaustively'.[60] Consequently, it may choose not to award compensation, also because a public judgment finding a violation may already provide redress.[61] It can also award standardised amounts in repetitive cases.[62] Moreover, even when the ECtHR awards individualised amounts, it is guided by the principle of equity, which 'involves flexibility and an objective consideration of what is just, fair and

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[57] *Kononov* (n 52), para 108. See also *Sokurenko v Russia App no* 33619/04 (ECtHR, 10 January 2012), para 52.

[58] *Aktaş v Turkey* App no 24351/94 (ECtHR, 24 April 2003), para 271; *Savriddin Dzhurayev v Russia* App no 71386/10 (ECtHR, 24 April 2013), para 53.

[59] *Demopoulos and Others v Turkey* App no 46113/99 (ECtHR, 1 March 2010), para 69; See also *Winterwerp v the Netherlands* (1979) Series A no 33, para 46; *Kazali and Others v Cyprus* App no 49247/08 (ECtHR, 6 March 2012), para 132.

[60] *Kharuk and Others* (n 27), para 23; *Salah Sheekh* (n 41), para 70.

[61] *Varnava and Others v Turkey* ECHR 2009-V, para 224.

[62] Eg, *Witkowska-Tobola v Poland* App no 11208/02 (ECtHR, 4 December 2007), para 78; *Ryabov and Others* App no 4563/0 (ECtHR, 17 December 2009), paras 21-22; *Kharuk and Others* (n 27) paras 24-25.

reasonable in the circumstances of the case'.[63] The ECtHR therefore does not 'function akin to a domestic tort mechanism court in appointing fault and compensatory damages between civil parties'.[64] Consequently, from the perspective of compensation, the ECtHR's task to provide individual justice is not boundless either.

The applicant is required to exhaust domestic remedies before bringing the case. This requirement enables domestic courts to engage in fact-finding before a case reaches Strasbourg and prevents the ECtHR from becoming a fact-finding court of first instance.[65] However, because the ECtHR intends to provide effective protection,[66] it often considers the circumstances of a case[67] and applies this requirement[68] with a 'degree of flexibility and without excessive formalism'.[69] Accordingly, the applicant must only exhaust remedies that are 'likely to be effective, adequate and accessible' and whose existence is 'sufficiently certain' in theory and practice.[70]

10. Principle X: No Criminal or Civil Court

The ECtHR not only excludes acting as a court of first or fourth instance, but it has also reiterated that its 'role is not to rule on criminal guilt or civil liability but on the responsibility of the Contracting States under the Convention'.[71] This implies, for example, that there 'are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment',[72] that the ECtHR does not deliver 'guilty or non-guilty verdicts on the individual' and that it does not determine the required penalty.[73] With

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63 *Varnava and Others* (n 61), para 224.

64 Ibid.

65 Article 35(1) ECHR.

66 See section II.2.

67 *D H and Others v the Czech Republic* ECHR 2007-IV, para 116.

68 And some other admissibility requirements, see *Harkins v UK* App no 71537/14 (ECtHR, 15 June 2017), para 53.

69 *D H and Others* (n 67) para 116. See also *Aksoy v Turkey* ECHR 1996-VI, para 53; *Ananyev and Others v Russia* App no 42525/07 (ECtHR, 10 January 2012), para 95.

70 *Scoppola v Italy* (no 2) App no 10249/03 (ECtHR, 17 September 2009), para 70.

71 *Zamferesko v Ukraine* App no 30075/06 (ECtHR, 15 November 2012), para 44.

72 Ibid.

73 *Cestaro v Italy* App no 6884/11 (ECtHR, 7 April 2015), para 207.

reference to the principle of effectiveness, the ECtHR will intervene in the above matters in exceptional circumstances, including when there is a 'manifest disproportion between the gravity of the act and the punishment imposed'.[74]

11. Principle XI: No Involvement in Execution Matters

The primary obligation of the states parties does not only mean that they have discretion regarding the protection of the Convention rights,[75] but also that they have discretion regarding the manner of execution of a judgment finding a violation.[76] This discretion applies at an individual level and the level of general execution measures.[77] In principle, the ECtHR therefore does not make 'consequential orders or declaratory statements' as to how a state should execute a judgment.[78]

Exceptionally, the ECtHR goes beyond its subsidiarity task by indicating which individual or general measures a state must take, sometimes even in the operative provisions – the binding part – of a judgment.[79] It thus leaves less room for a state to decide how to execute a judgment. According to the ECtHR, the purpose of these indications is 'to aid or encourage the national authorities in taking the steps required to execute a judgment';[80] in other words, to provide effective protection. More precisely, the ECtHR may specify individual measures due to the urgent need to end a violation[81] or the

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74 *Gäfgen v Germany* ECHR 2010-IV, para 123.

75 See sections II.7 and II.8.

76 Article 46(1) ECHR; *Salah Sheekh* (n 41) para 73.

77 *Salah Sheekh* (n 41) para 73.

78 *Ülkü Ekinci v Turkey* App no 27602/95 (ECtHR, 16 October 2002), para 179.

79 Eg *Assanidze v Georgia* ECHR 2004-II, para 14(1) operative provisions; *Broniowski v Poland* ECHR 2004-V, para 4 operative provisions.

80 ECtHR, 'Contribution of the ECtHR to the Brussels Conference', 26 January 2015 <www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf> accessed 28 September 2017, para 14; See also *Scoppola (no 2)* (n 70) para 148; *Stanev v Bulgaria* ECHR 2012-I, para 255.

81 Eg, *Al-Saadoon and Mufdhi* (n 20), para 171; *M S S v Belgium and Greece* ECHR 2011-I, para 402; *Gluhaković v Croatia* App no 21188/09 (ECtHR, 12 April 2011), para 89.

nature of a violation.[82] The ECtHR proposes general measures in order to stimulate states to rapidly and effectively suppress a systemic problem,[83] which may otherwise undermine the effective functioning of the Convention system.[84] Another reason to propose general measures is because the ECtHR's task 'is not necessarily best achieved by repeating the same findings in large series of cases'.[85]

The ECtHR does not only abstain from indicating execution measures in principle, it also considers that it has no jurisdiction to verify whether a respondent state has complied with a judgment.[86] The Convention makes the Committee of Ministers responsible for this.[87] Nevertheless, applicants sometimes complain about the effects of general measures taken to execute a previous judgment. In these circumstances, the ECtHR becomes involved in supervising execution to some extent, although it evaluates only how the general measures affected the individual.[88] The ECtHR evaluates general measures more directly when it establishes whether a state has implemented the measures ordered in a pilot judgment, although its level of scrutiny is usually not very high.[89] In this way, the ECtHR does become involved in verifying whether a respondent state has executed a judgment or not.

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[82] *Assanidze* (n 79) para 202; *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 236; *Sławomir Musiał v Poland* App no 28300/06 (ECtHR, 20 January 2009), para 107. See, more elaborately, Glas (n 5) 387.

[83] *Burdov v Russia (no 2)* ECHR 2009-I, paras 126-127; *Karelin v Russia* App no 926/08 (ECtHR, 20 September 2016), para 94.

[84] *Scordino v Italy (no 1)* ECHR 2006-V, para 236.

[85] *Burdov (no 2)* (n 83), para 127.

[86] *UMO Ilinden – PIRIN and Others (no 2)* (n 39), para 66.

[87] Article 46(2) ECHR; *Kurić and Others v Slovenia* ECHR 2012-IV, para 406.

[88] Eg, *Von Hannover v Germany (no 2)* ECHR 2012-I, paras 124-126; *O H v Germany* App no 4646/08 (ECtHR, 24 November 2011), paras 51-55; *Gaglione and Others v Italy* App no 45867/07 (ECtHR, 21 December 2010), paras 40-45. See, more elaborately, Glas (n 5) 449-452.

[89] Eg, *Association of Real Property Owners in Łódź and Others v Poland* App no 3485/02 (ECtHR, 8 March 2011), para 81; *Hutten-Czapska v Poland* App no 35014/97 (ECtHR, 28 April 2008), paras 37-44; *Balan v Moldova* App no 44746/08 (ECtHR, 24 January 2012), para 19. See also Glas 2016 (n 6) 63-64.

12. General Observations on the Principles of Translation

Sections II.1-II.11 presented eleven principles of translation. These principles underline that the ECtHR's task is fundamentally different from that of domestic courts and other domestic authorities. As already noted, the Strasbourg Court is neither a first/fourth-instance court, nor a criminal/civil court, and, unlike domestic authorities, it does not decide on execution matters. In essence, it is the ECtHR's task to establish whether the state was responsible for a violation of a Convention right in the circumstances of an individual case and to develop the Convention standards. When fulfilling this task, the ECtHR functions in an autonomous manner and grants a degree of discretion to the domestic authorities as to how they protect the Convention rights and specifically as to how they interpret domestic law, establish the facts and execute a judgment. These differences confirm that, as I already proposed above, it is necessary to translate the fairness standards developed in the ECtHR's case law for domestic authorities, to the ECtHR's context.

I submit that these eleven principles of translation cannot be applied mechanically, because, first, the features of the ECtHR's task and functioning are equivocal and, second, some features of the ECtHR do not apply in certain exceptional circumstances. The ECtHR's features are equivocal because the ECtHR provides subsidiary and effective protection. Yet, these two types of protection, subsidiarity and effective, are sometimes incompatible. Indeed, in order to provide effective protection, the judges might have to go beyond their subsidiary role. While the ECtHR provides mainly individual justice, it may also provide general justice. Exceptionally, the ECtHR does more than conducting *in concreto* review. This happens when the ECtHR engages *in abstracto* review. Furthermore, the ECtHR occasionally disregards the principle that it rejects tasks of a fourth-instance court when it questions the assessment of the facts or domestic law by domestic authorities. A last illustration of the ECtHR's diverse features is that the Court sometimes indicates execution measures or verifies whether execution measures have been implemented. It thus defies the principle that it does not become involved in execution matters.

In the following sections III and IV, I will use the principles of translation that I presented in this section. These principles will be used to translate the right to legal aid and the right to a reasoned judgment as the ECtHR has

developed them in its case law to standards that suit the Strasbourg Court's context.

III. The Right to Legal Aid

The right to legal aid is a well-known fairness standard in the ECtHR's case law on Article 6 ECHR. While ECtHR's practice of granting legal aid 'has not attracted significant academic interest',[90] I have selected this standard for translation because a lack of legal aid may pose an important impediment to the applicant's ability to bring a case. Additionally, other authors claim that the available legal aid from the ECtHR is insufficient[91] and the translated standard can help verify this claim. Furthermore, the ECtHR's practice of granting legal aid is rather straightforward and therefore a good test case for applying the principles of translation.

This section first describes the application of the right at the national level in accordance to the ECtHR case law (section III.1). Then, it translates this standard to the ECtHR's context (section III.2). I thus propose some rules for how legal aid should be made available for Strasbourg cases. Lastly, this section describes the ECtHR's practice of granting legal aid and analyses that practice in light of the translated standards (section III.3).

1. The Convention Standard

Article 6(3)(c) ECHR gives everyone charged with a criminal offence an automatic right to free legal aid on the condition that, first, one does not have sufficient means and, second, legal aid is required in the interest of justice.[92] Domestic authorities determine the requisite financial threshold[93] and the

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[90] Butler (n 12) footnote 6. Butler is the exception. For an article about legal aid for interveners, see specifically Gruodytė and Kirchner (n 12).

[91] Harris (n 7) 665.

[92] *Artico v Italy* (1980) Series A no 37, para 34; *Monnell and Morris v UK* (1987) Series A no 115, para 67.

[93] Open Society Justice Initiative, 'European Court of Human Rights Jurisprudence on the Right to Legal Aid', 2007, <www.legalaidreform.org/european-court-of-human-rights/item/39-european-court-of-human-rights-jurisprudence-on-the-right-to-legal-aid-by-open-society-justice-initiative-and-the-public-interest-law-institute> accessed 28 September 2017, para 5.

applicant must prove a lack of sufficient means by providing 'some indications' for this.[94] To establish if legal aid is in the interest of justice, the ECtHR considers the potential severity of the sanction, the complexity of the case, and the applicant's personal situation, including the applicant's capacity to defend himself or herself on account of, for example, the language used during court proceedings.[95] When the applicant might be deprived of his or her liberty, legal aid is required in any case.[96] Because legal aid must be effective, the mere nomination of a lawyer does not necessarily ensure Convention compliance.[97]

Article 6 ECHR does not explicitly lay down a right to legal aid in civil cases. The ECtHR has nevertheless accepted that the right to a fair trial may be engaged in civil cases under two interrelated circumstances.[98] First, the right to access to court may be breached if assistance is indispensable for effective access to court but not granted. Second, not providing legal aid may raise the question of whether the procedure was fair,[99] because a fair trial requires that one can present a case effectively and that one enjoys equality of arms with the opposing side.[100] The states are not obliged to make legal aid available in all civil cases, since the Convention does not lay down such a right explicitly.[101] Whether legal aid is required depends on, *inter alia,* the importance of what is at stake for the applicant, the complexity of the law and the procedure, whether legal representation is required, and on the

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[94] *Pakelli v Germany* (1983) Series A no 64. See also David Harris et al, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014), 478; Maurits Barendrecht et al, 'Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?', 21 February 2014 <www.hiil.org/data/sitemanagement/media/Report_legal_aid_in_Europe.pdf> accessed 28 September 2017, para 156.

[95] ECtHR, *Guide on Article 6 of the European Convention on Human Rights. Right to a Fair Trial (criminal limb)* (Council of Europe 2014), para 292.

[96] *Benham v the UK* ECHR 1996-III, para 61.

[97] *Artico* (n 92) para 33.

[98] *P, C and S v UK* ECHR 2002-VI, para 88.

[99] Ibid, paras 89 and 91.

[100] *Airey v Ireland* (1979) ECHR Series A no 32, para 26; *Steel and Morris v UK* ECHR 2005-II, para 59.

[101] *Airey* (n 100) para 26; *Urbšienė and Urbšys v Lithuania* App no 16580/09 (ECtHR, 8 November 2016), para 45.

applicant's capacity to represent himself or herself effectively.[102] Importantly, the right of access to court is not absolute and can be limited providing that the limitation respects the essence of the right, pursues a legitimate aim and is proportionate.[103] Factors concerning the administration of justice, including the limited public funds available, the necessity of expedition and the rights of others can be reasons to limit the right.[104] Because the right is not absolute, it is also acceptable to make legal aid conditional on the litigant's financial situation or his or her prospect of success.[105]

In sum, legal aid may be required in criminal and civil cases, although the applicable standards are stricter under the civil than the criminal limb of Article 6 ECHR.[106] Legal aid is required in criminal cases if the applicant has insufficient means and if legal aid is in the interest of justice. Whether legal aid should be granted in civil cases depends on various factors. Furthermore, the provision of legal aid in such cases may be limited and subjected to conditions. The ways this standard can be adapted to the ECtHR's context is addressed in the next section.

2. The Convention Standard Translated to the ECtHR's Context

As section III.1 clarified, Article 6 ECHR requires that legal aid is made available in certain criminal and civil cases. Strasbourg cases are neither criminal nor civil (see principle X – 'no criminal or civil court'). The question therefore arises whether legal aid should be made available in Strasbourg cases at all, especially considering that the Convention is silent on this matter, even though its Section II specifically regulates procedural matters and rights. This consideration does not need to be a bar to legal aid, since the Convention is also silent on legal aid in civil cases and the ECtHR has nevertheless recognised that legal aid must sometimes be granted in such cases. I propose that legal aid should also be available in Strasbourg proceedings, in order to provide effective access to the ECtHR and to

[102] *Airey* (n 100) para 26; *P, C and S* (n 98) para 89; *Steel and Morris* (n 100) para 60.
[103] *P, C and S* (n 98) para 90; *Steel and Morris* (n 100) para 62.
[104] *P, C and S* (n 98) para 90.
[105] *Steel and Morris* (n 100) para 62.
[106] OSJI (n 93) para 2.

guarantee the fairness of these proceedings by ensuring that the applicant can present his or her case effectively, regardless of the means available.[107] Translated into Convention terms, legal aid may be necessary to ensure effective protection of the individual applicant (see principles II 'effective protection'; and III 'individual justice').

Other reasons to provide legal aid in Strasbourg cases can be found in the four factors that help determine whether legal aid is necessary in civil cases, as these factors argue in favour of legal aid in Strasbourg cases.[108] First, the importance of what is at stake for the applicants is great in Strasbourg cases. After all, they complain about a violation of their human rights, although the gravity of a violation may differ depending on the nature of the alleged violation and the right at stake. Second, the complexity of the applicable law is considerable too, because the ECtHR has produced an elaborate and nuanced body of case law that is often only available in English or French.[109] Moreover, it is often also useful to have knowledge of the relevant domestic (case) law. Third, legal representation before Strasbourg is required after the ECtHR has communicated an application to the respondent state.[110] Fourth, the capacity of applicants to represent themselves is very limited, considering that the Strasbourg procedure is so exceptional and different from domestic procedures (see principles VIII 'no fourth-instance court; IX 'no first-instance court'; and X 'no criminal or civil court'). Their capacity is also limited due to the complexity of the applicable law, as was noted above, and the vulnerability of many applicants.

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[107] In *Young, James and Webster v UK* (1982) Series A no 55, para 15 the ECtHR also noted, albeit in the context of Article 50 ECHR (currently Article 41 ECHR): 'It is important that applicants should not encounter undue financial difficulties in brining complaints under the Convention'.

[108] See section III.1.

[109] The applicant is also required to communicate with the ECtHR in one of those languages after communication. Before that, (s)he can correspond with the ECtHR in one of official languages of the Contracting Parties, see Rule 34(2) of Court.

[110] Unless the President of the (Grand) Chamber decides otherwise. The requirement of representation also applies to hearings. Rules 36(1-3), 71 of Court.

Now that it is clear that legal aid should be made available in Strasbourg cases,[111] the ensuing question is under which conditions it should be granted. I propose that, in line with the subsidiarity principle, domestic authorities should be primarily responsible for providing legal aid, and that the ECtHR should only grant legal aid from its own budget[112] when it is not available at the domestic level from domestic resources (see principle I 'subsidiarity protection'). I do not propose that the ECtHR should require domestic authorities to provide legal aid in Strasbourg cases; I only propose that domestic authorities themselves should take responsibility for providing legal aid in Strasbourg cases. In response to my proposal, one could critically remark that the subsidiarity principle relates to the protection of the Convention rights and that there is no Convention right to legal aid in Strasbourg cases.[113] I argue, however, that the basic idea underlying the Convention applies here too: the ECtHR should not do what domestic authorities can do.[114] Further, although there is no Convention right to legal aid in Strasbourg cases, the ECtHR also protects the Convention rights, albeit in second instance, by supervising the effects of the states parties' implementation of the Convention in individual cases. Therefore, providing legal aid in such cases is only logical.

I suggest that the actual granting of legal aid by the ECtHR should at least be made conditional on the fulfilment by the applicant of the requirements that apply to criminal cases. This implies that legal aid should only be made available if the applicant has insufficient means and can provide some evidence for this. Domestic authorities are better placed to verify this and should therefore be responsible for it (see principle VII 'deference to

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[111] Shelton comes to the same conclusion for international human rights cases generally but uses arguments based on, *inter alia,* the law of restitution. See Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2006) 368-370. See also Donna Gomien, David Harris and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing 1996), 52.

[112] The Court annual budget covers legal aid, see <www.echr.coe.int/Documents/Budget_ENG.pdf> accessed 17 October 2017.

[113] The ECtHR adopted a new procedure because the backlog of clearly inadmissible cases had been eliminated.

[114] ECtHR, 'Interlaken Follow-up, 8 July 2010', para 2 <www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf> accessed 28 September 2017.

domestic authorities'). The foregoing also implies that legal aid must be in the interest of justice, which can be individual justice (see principle III 'individual justice') or general justice (see principle IV 'general justice'). Legal aid will usually be in the interest of individual justice, considering the complexity of the Strasbourg case law and the applicants' limited capacity to defend themselves. Legal aid can also be for the sake of general justice if the case potentially results in a judgment that solves important questions of the application or interpretation of the Convention.[115]

In civil cases, the ECtHR accepts that legal aid may be granted provided that the case has some prospect of success. It is proposed to accept this as a permissible condition for Strasbourg cases as well, considering that, as in civil cases, the Convention does not expressly lay down a right to legal aid. For the same reason, the provision of legal aid may be limited for reasons relating to the administration of justice, including limited public funds. Limitations must, however, respect the essence of the standard, pursue a legitimate aim and be proportional.

To conclude, based on the right to legal aid from the Strasbourg case law and the principles of translation, I have developed a fairness standard for the ECtHR. The summarised standard is that the ECtHR should take care of making legal aid available when domestic authorities fail to do so, in accordance with the subsidiarity principle. The ECtHR should only provide legal aid when the applicant has insufficient means (as verified by domestic authorities), when legal aid is in the interest of individual or general justice, and when the case has some prospect of success. The Strasbourg Court may limit the provision of legal aid for reasons relating to the administration of justice, as developed in the following section, which uses the translated standard in order to analyse the Court's practice.

3. The Translated Standard Applied to the ECtHR's Practice[116]

One part of the standard, as translated in the previous section, requires that legal aid should be available in Strasbourg cases and that domestic authorities

[115] Cf Articles 30 and 43(2) ECHR.

[116] The ECtHR may award costs and expenses under Article 41 ECHR if the applicant requests just satisfaction and when the ECtHR finds a violation of the Convention.

should provide this before the ECtHR does. Practice is not in full conformity with the translated standard as legal aid is rarely available from domestic resources.[117] Although this article is concerned with scrutinising the ECtHR, it now appears that the translated standards may also point out where there is room for improvement at the domestic level. For its part, the ECtHR explains in its practical guide on legal aid that legal aid is available: Chamber Presidents may, at the applicant's request or on their own motion, grant legal aid for the reimbursement of part of the legal costs and expenses in proceedings before the ECtHR.[118] Importantly, the granting of legal aid does not mean that the ECtHR appoints a representative; finding a representative remains the applicant's responsibility.[119] It is unclear whether the ECtHR, as proposed, only grants legal aid if the domestic authorities do not.

Further, I suggested in section III.2 that the ECtHR should grant legal aid when the applicant fulfils three conditions. First, the applicant should have insufficient means. The ECtHR indeed only grants legal aid if this is the case,[120] and makes domestic authorities responsible for verifying this, as I proposed.[121] Second, legal aid should be in the interest of justice. The ECtHR seems to employ a different standard: it provides legal aid when it is 'necessary for the proper conduct of the case'.[122] The conditions can, however, also be regarded as comparable, because if something is necessary for the proper conduct of the case, it is probably also in the interest of individual justice. Whether this is the case depends on the ECtHR's interpretation of what is necessary for the proper conduct of the case. It is unknown if considerations of general justice play a role. Third, the ECtHR should provide legal aid if the applicant has some prospect of success. The ECtHR indeed applies this condition because the applicant can only request legal aid after the ECtHR

This possibility is not considered in this section because it is only available after the ECtHR adopted a judgment and when the ECtHR finds a violation.

[117] Butler (n 12) 365; Leach (n 8) 27.

[118] Court, 'Legal Aid. Practical Guide', #1895316, 11 March 2015, 2. The Chamber Presidents decide more precisely.

[119] Ibid.

[120] Rule 101(b) of Court.

[121] Rule 102(1) of Court.

[122] Rule 101(a) of Court.

communicated a case to the respondent state,[123] which means that a case has some prospect of success; clearly inadmissible cases are not communicated.[124]

Finally, it was proposed that additional limitations apply to legal aid made available by the ECtHR. Two limitations already apply, as I will now explain.

First, the ECtHR 'usually' only grants legal aid 'in cases involving complex issues of fact and law and not in cases of a repetitive nature'.[125] Because public funds are limited at any rate, this limitation can be justified. Moreover, the ECtHR applies well-established case law to repetitive cases and the procedure may be relatively straightforward for such cases.[126] Two reasons for requiring legal aid therefore do not apply here: complexity of the law, as the ECtHR applies well-established case law, and the limited ability of the applicants to represent themselves, as both the law and the procedure are not very complex. Because two reasons for requiring legal aid do not apply to repetitive cases, not providing legal aid can be justified.

The second limitation is that the amounts allocated are low; these amounts are merely a contribution towards the legal costs.[127] This is also apparent from the fact that the legal aid rates consist of a lump sum per case (€850) and fixed amounts for additional tasks.[128] Limiting the amounts may be necessary considering the limited public funds available and may be a way to discourage

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[123] Rule 101 of Court.

[124] Eg Article 27(1) ECHR; Rule 52A(1) of Court.

[125] Court, 'Information to applicants on the proceedings after communication of an application', #1723569, 1 June 2010; cf Leach (n 8) 50: 'if the domestic authority certifies a client's financial eligibility, then it is very likely that legal aid will be granted'.

[126] For a description of this procedure, see Leach (n 8) 45-46.

[127] Council of Bars and Law Societies of Europe, 'The European Court of Human Rights. Questions and Answers for Lawyers' (2014) 14 <www.echr.coe.int/Documents/Guide_ECHR_lawyers_ENG.pdf> accessed 28 September 2017.

[128] I.e. appearing at hearing and assisting in friendly settlement negotiations. Only traveling costs are reimbursed according to receipts, see ECtHR, 'Legal Aid Rates', 31 July 2013, #2588700; These costs are not made often because there are only few hearings. In the 1980s, this was no different. The ECtHR noted in *Le Compte, Van Leuven and De Meyere v Belgium* (1982) Series A no 54, para 23, that under the scale adopted by the former European Commission of Human Rights for the purposes of free legal aid 'no more than reduced fees can be paid'.

lawyers from employing high fees.[129] However, because the relatively low amount is the same in each case, it is hard to imagine that the amount is always proportional, considering that cases differ in complexity and procedures vary in length. Furthermore, the economic circumstances differ widely in the 47 states parties.[130] It is questionable whether the ECtHR respects the essence of the 'right' or standard, if the actual costs are multiples of what the applicant can receive in terms of legal aid.[131] That essence would not be guaranteed if the applicant did not have effective access to the ECtHR, and if the applicant was not able to present the case effectively because of limited means. Whether this happens depends on the circumstances in which the individual applicants find themselves and would require additional research to be established.

The discussion in this section demonstrates that applying the translated standard to the ECtHR's practice leads to various observations and an insightful analysis of the ECtHR's practice. The ECtHR provides legal aid but it is unclear if it only does so when the domestic authorities do not. Furthermore, the Strasbourg court provides legal aid in line with the limitations proposed. Yet – and this is the most important insight – it is questionable whether one of the limitations (the low amount) respects the essence of the standard in each case.

IV. The Right to a Reasoned Judgment

This section concerns another notable standard from the ECtHR's case law on Article 6 ECHR: the right to a reasoned judgment. I have selected this standard because the ECtHR recently changed its practice of reasoning single-judge decisions. Its previous practice had been criticised heavily because single-judge decisions were not at all or hardly reasoned.[132] The translated standard can help verify whether the ECtHR's new practice is fair.

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[129] *Young, James and Webster* (n 107) para 15.

[130] When awarding just satisfaction the ECtHR *does* 'normally take into account the local economic circumstances', see ECtHR, 'Practice Direction on Just Satisfaction', para 2.

[131] See also Harris (n 7) 665; Butler (n 12) 363, 368.

[132] *CLR on behalf of Valentin Câmpeanu* (n 12), Concurring Opinion of Judge Pinto de Albuquerque, para 15; Gerards (n 6); De Vylder (n 6).

This practice is, like that of legal aid, rather straightforward and therefore a good test case for using the translation principles in this short contribution.

This section follows the same structure as section III: it describes the right to a reasoned domestic judgment as formulated in the ECtHR case law on Article 6 ECHR (section IV.1) and then translates it to the ECtHR's context (IV.2). The last section describes the ECtHR's practice of reasoning single-judge decisions and analyses that practice in light of the standard (section IV.3).

1. The Convention Standard

Reasoning a judgment is in the interest of the 'proper administration of justice'.[133] More specifically, it demonstrates to the parties that they have been heard. This, in turn, contributes 'to a more willing acceptance of the decision on their part',[134] justifies the activities of an authority and makes public scrutiny of the administration of justice possible.[135]

For the aforementioned reasons, the ECtHR requires by virtue of Article 6 ECHR that domestic judgments state 'adequately' the reasons on which they are based.[136] However, judges are not requested to give a 'detailed answer to every argument'.[137] The extent to which reasons must be given 'may vary according to the nature of the decision and must be determined in the light of the circumstances of the case'.[138] To determine the acceptable degree of variation, the ECtHR takes into consideration '*inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of

[133] *Tatishvili v Russia* ECHR 2007-I, para 58.

[134] *Taxquet v Belgium* ECHR 2010-VI, para 91.

[135] *Tatishvili* (n 133) para 58.

[136] See also *Hadjianastassiou v Greece* App no 12945/87 (ECtHR, 16 December 1992), para 33.

[137] *Van de Hurk v the Netherlands* (1994) Series A no 288, para 61; *Tatishvili* (n 133) para 58.

[138] *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005), para 63; See also *Ruiz Torija v Spain* (1994) Series A 303-A, para 30; CCEJ, 'Opinion No 11 on the Quality of Judicial Decisions', CCJE (2008) 5, 18 December 2008, para 41; ECtHR, *Guide on Article 6 of the [ECHR]. Right to a fair trial (civil limb)* (2013 Council of Europe), para 241.

judgments'.[139] Domestic courts must at least reply expressly to submissions decisive for the outcome of proceedings.[140] They must also properly examine and respond to the main pleas, especially when the pleas concern Convention rights.[141]

In *Hiro Balani v Spain*, for example, the ECtHR found a violation of Article 6 ECHR on account of insufficient reasoning, when it remained unclear whether the domestic judges had neglected to consider a submission or whether they had intended to dismiss it.[142] In *Pronina v Ukraine*, the ECtHR concluded that the domestic judges had committed the same violation when they did not analyse the applicant's claim from the perspective of a constitutional provision on which the applicant had explicitly relied upon before every judicial instance.[143] As a final example, the ECtHR held in *Georgiadis v Greece* that a domestic court also causes a violation when it bases its decision on an unclear concept that requires assessing the facts (e.g. 'gross negligence') and without engaging in such an assessment.[144]

Lower domestic courts must indicate sufficiently clearly the grounds on which they base their decision,[145] so that the parties can appeal effectively.[146] In addition to the functions outlined above, judicial reasoning should therefore also facilitate a possible effective appeal.[147] If this function is not fulfilled, the ECtHR can find a violation of Article 6 ECHR.[148]

The manner of application of Article 6 ECHR to appellate courts depends on the features of the proceedings.[149] The ECtHR considers the entirety of the proceedings and the role of the appellate court therein.[150] When

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[139] *Pronina v Ukraine* App no 63566/00 (ECtHR, 18 July 2006), para 23.

[140] ECtHR (n 138) para 241; *Ruiz Torija* (n 138), para 30.

[141] *Wagner and J M W L v Luxembourg* App no 76240/01 (ECtHR, 28 June 2007), para 96; See also ECtHR (n 138) para 242.

[142] *Hiro Balani v Spain* (1994) Series A 303-B, para 28; *Ruiz Torija* (n 138) para 29.

[143] *Ruiz Torija* (n 138), para 25.

[144] *Georgiadis v Greece* ECHR 1997-II, para 43.

[145] *Hadjianastassiou* (n 136), para 33.

[146] *Hirvisaari v Finland* App no 49684/99 (ECtHR, 27 September 2001), para 30.

[147] *Tatishvili* (n 133), para 58.

[148] *Suominen v Finland* App no 37801/97 (ECtHR, 1 July 2003), para 38.

[149] *Hansen v Norway* App no 15319/09 (ECtHR, 2 October 2014), para 73.

[150] Ibid.

dismissing an appeal, appellate courts may 'simply endorse the reasons for the lower court's decision'[151] or 'without further explanation' 'simply [apply] a specific legal provision to dismiss an appeal on points of law as having no prospects of success'.[152] Nevertheless, when an appeal court gives 'spare reasons', the notion of a fair procedure requires that the appeal court addresses the 'essential issues' submitted to it and that it does not, for example, 'merely endorse without further ado' the findings of a lower court.[153]

When rejecting an application for leave for appeal,[154] the judges are not required to give detailed reasons either and the reasons may even be implied from the circumstances.[155] Comparably, the former European Commission of Human Rights noted that, if granting leave depends on whether the appeal raises a legal issue of fundamental importance and whether the appeal has any chance of success, 'it may be sufficient [...] simply to refer to the provision authorising this procedure'.[156]

In other preliminary procedures for examining and admitting appeals on points of law, appellate courts are not required 'to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal [...] as having no prospects of success, without further explanation'.[157] A good illustration of the relatively low standards imposed by the ECtHR is *Sawoniuk v UK*. The ECtHR here did not find a violation of Article 6 ECHR when the UK House of Lords refused a leave to appeal without giving any reasons, taking into consideration that there was no right of appeal, that the level of appeal was second and exceptional, that special requirements of public importance were imposed for leave and that the Court of Appeal had examined the first appeal exhaustively.[158] In a case where an appeal court's jurisdiction is not limited to questions of law and procedure but extends to

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[151] *Garcia Ruiz v Spain* ECHR 1999-I, para 26.

[152] ECtHR (n 138) para 243; See also Harris (n 94) 431.

[153] *Helle v Finland* ECHR 1997-VIII, para 60.

[154] Ie the precondition for a hearing of the claims by superior courts and the eventual issuing of a judgment.

[155] *Kukkonen v Finland (no 2)* App no 20772/92 (ECtHR, 19 December 1997), para 24.

[156] *X v Germany* App no 8769/79 (European Commission for Human Rights, 16 July 1981).

[157] *Nersesyan v Armenia* App no 15371/07 (ECtHR, 19 January 2010), para 23.

[158] *Sawoniuk v UK* App no 63716/00 (ECtHR, 29 May 2001).

questions of fact, the ECtHR did not accept the 'no prospect of success reason'. The ECtHR was not convinced that the domestic court's refusal to admit for examination a civil appeal subjected to a filtering procedure addressed the 'essence of the issue to be decided by it [...] in a manner that adequately reflected its role at the relevant procedural stage as an appellate court entrusted with full jurisdiction and that it did so with due regard to the applicant's interests'.[159]

In short, domestic courts must reason their judgments adequately, because reasoning is in the interest of the proper administration of justice. The extent to which reasoning is required differs depending on various factors, including the level of jurisdiction. The way in which this standard may be applied to the ECtHR is the subject of the next section.

2. The Convention Standard Translated to the ECtHR's Context

The insight gained from the above description of the standard, i.e. that reasoning is in the interest of the proper administration of justice, is so general that it should also apply to the ECtHR's judgments.[160] The more specific reasons advanced by the ECtHR for requiring that domestic courts engage in adequate reasoning, as described in the previous section as well, can also be invoked in the ECtHR's context. Demonstrating to the parties that the ECtHR has heard them is particularly important because the ECtHR provides, *inter alia,* individual justice (see principle III 'individual justice'). Further, justifying its activities is of great relevance to the ECtHR because the ECtHR is not involved in execution matters (see principle XI 'no involvement in execution matters'). The ECtHR explains in its Article 6 case law that reasoning helps the parties involved in a case to accept the outcome of domestic proceedings. Comparably, the persuasiveness of the ECtHR's judgments is an important means by which the Strasbourg Court can help ensure that states indeed execute its judgments.[161]

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[159] *Hansen* (n 149) para 81.

[160] See also De Vylder (n 6).

[161] See here, Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 The Yale Law Journal 273, 308; Gerards (n 6) 154-155; Dzehtsiarou and Coffey (n 4) 273.

However, one of the more specific reasons advanced by the ECtHR for requiring that domestic courts reason their judgments does not apply to the ECtHR itself: lower domestic courts reason their judgments to make an effective appeal possible. Since the ECtHR is not a first-instance court whose judgments can be appealed (see principle IX 'no first-instance court'), this reason is hardly relevant. Nevertheless, the ECtHR may restore or reopen a case that it struck out or declared inadmissible previously because of an administrative error.[162] Although restoral or reopening happens only exceptionally, reason-giving can be important to make restoral or reopening possible.[163]

An additional justification for the ECtHR to reason its judgments thoroughly, is that its task of providing general justice requires judgments that elucidate the Convention standards, something that inevitably necessitates good reasoning (see principle IV 'general justice'). In short, it is clearly important that the ECtHR provides reasons for its judgments and decisions.[164] The Convention also reflects this, as it requires that '[r]easons shall be given for judgments as well as decisions declaring applications admissible or inadmissible'.[165]

A more complex matter is the extent to which the ECtHR should engage in reason-giving. Generally, what the ECtHR expects of domestic courts can also be expected of the ECtHR: that it provides adequate reasons. The expectation that the Court provides adequate reasons does not imply that it gives a detailed answer to each argument, nor that it replies expressly to submissions that are not decisive for the outcome of a case. Further, the ECtHR accepts that the extent to which a domestic court gives reasons for a judgment varies. This flexibility can be accepted for the ECtHR's judgments as well.

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[162] Article 37(2) ECHR; Eg *Noé and Others v Hungary* App no 24515/09 (ECtHR, 13 March 2012).

[163] De Vylder (n 6).

[164] See also Helfer and Slaughter (n 161) 318-322; Gerards (n 6) 154; *CLR on behalf of Valentin Câmpeanu* (n 12), Concurring Opinion of Judge Pinto de Albuquerque, para 15; De Vylder (n 6).

[165] Article 45(1) ECHR.

The question now is which variables can be used to determine the acceptable degree of variation. For domestic courts, the ECtHR takes into consideration, *inter alia*, the nature of the decision. Applicants to the ECtHR complain about a violation of their human rights, which may imply that reason-giving is always of great importance. Nevertheless, it was also established that the ECtHR's task of providing individual justice is not boundless: it only reviews complaints about violations of a minimum level of severity and its task is not to endlessly repeat its findings in cases where there is no longer a live Convention issue (see principle III 'individual justice'). Besides, it is not the ECtHR's task to calculate monetary compensation as precisely as domestic first-instance courts (see principle IX 'no first-instance court') or to solve issues that are more appropriately solved by domestic civil or criminal courts (see principle X 'no criminal or civil court'). The ECtHR can therefore formulate its reasoning regarding these matters comparably less elaborately than regarding matters that concern the core of its task: providing effective human rights protection. The Strasbourg Court must, however, reason its judgments relatively thoroughly if its judgments set standards that help clarify the meaning of the Convention provisions and that are therefore of relevance to other states as well (see principle IV 'general justice').

Section IV.1 described that the ECtHR has formulated separate standards for appellate courts, which may engage in limited or even no reason giving depending on whether they endorse a lower court's decision. Because the ECtHR is not a fourth-instance court (see principle VIII 'no fourth-instance court'), it cannot pretend to endorse the highest domestic court's judgment. Domestic appellate courts can also give limited reasons if they dismiss an appeal or request for leave to appeal because the appeal has no prospect of success. The ECtHR is often confronted with applications that have little prospect of success. It can therefore be imagined that the ECtHR, like domestic courts, may simply refer to a relevant legal provision when confronted with such applications. It may do so, especially considering that its task of providing individual justice is not boundless (see principle III 'individual justice'). As in the case of higher domestic courts, the ECtHR would need to engage in more elaborate reasoning if necessary to address the essence of the complaint.

This section explored the way in which the fairness standard of the right to a reasoned judgment can be translated to the ECtHR's context. The translated standard requires the ECtHR to give adequate reasons. The extent to which giving reasons is required depends on the type of complaint and the content of the complaint and the judgment. The ECtHR can just refer to a relevant Convention provision if a complaint has little prospect of success. The next section will apply the translated standard to evaluate the ECtHR's practice of reasoning single-judge decisions.

3. The Translated Standard Applied to the ECtHR's Practice

When deciding a case, the ECtHR sits in different formations, as a single judge, Committee (three judges), Chamber (seven judges) or Grand Chamber (seventeen judges).[166] As explained above, this section focuses on single judges. In this context, judges examine applications that can be decided without communication to the respondent state.[167] This is possible when an application on its own already discloses that it is inadmissible or should be struck out, unless there is a special reason to the contrary.[168] A manifestly inadmissible application is, for example, an application that an applicant re-submits outside the six-month time limit.[169] If a single judge cannot determine the application, a Committee or Chamber examines it.[170] Single judges, in other words, dismiss applications that clearly have no prospect of success. As such, the judges do not need to reason their decisions as elaborately as other formations of the ECtHR and can simply refer to the relevant legal provision for dismissal.

Before June 2017, single judges rejected applications 'in a global manner'.[171] They used to state without specifying the relevant criterion that 'the [ECtHR] found that the admissibility criteria set out in Articles 34 and 35

[166] Article 26(1) ECHR.

[167] Article 27(1) ECHR; Leach (n 8) 44.

[168] Rule 49(1) of Court.

[169] Harris (n 94) 119.

[170] Article 27(3) ECHR; Rule 52A(3) of Court.

[171] ECtHR, 'Launch of new system for single judge decisions with more detailed reasoning', ECHR 180 (2017), 1 June 2017.

have not been met'.[172] In other words, no reasons for dismissal were given at all. Thus, this practice did not conform with the translated standard. To recall, in *Sawoniuk v UK*, the ECtHR once accepted that the UK House of Lords did not give any reason at all.[173] However, because the circumstances of that case were so particular and different from those in which single judges adopt a decision, they cannot be an excuse for them to do the same.

Since June 2017, the ECtHR changed its policy: single judges now have to include a reference to a specific inadmissibility criterion.[174] They may continue to issue global rejections, however, when 'applications contain numerous ill-founded, misconceived or vexatious complaints'.[175] This practice seems to comply with the translated standard: as a rule, single judges must refer to the specific legal provision for dismissing an application that clearly has no prospect of success. Considering that the ECtHR's task of providing individual justice is limited, especially with respect to 'ill-founded, misconceived or vexatious complaints',[176] it also seems to be acceptable that the ECtHR does not refer to a specific inadmissibility ground when dismissing an application containing such complaints.

In this section, as in section III.3, the translated fairness standard could be usefully applied to analyse an aspect of the ECtHR's practice. The analysis has led to the conclusion that the ECtHR's current practice of providing limited reasons in single-judge decisions is in line with the translated standard.

V. Conclusion

The introduction asked on which standards the ECtHR's procedural fairness can be assessed. The analysis in sections III and IV demonstrates that it is useful to apply the standards developed in the ECtHR case law to the ECtHR's own proceedings, provided they are translated to the ECtHR's unique context. Translation is, however, not always necessary. The reasons

[172] See, for example, Lize Glas, *ECHR Case Files. The Case Files of the Lawyer and of the Intervener before the European Court of Human Rights* (Ars Aequi 2017) 213.

[173] *Sawoniuk v UK* (n 158).

[174] See n 113.

[175] ECtHR (n 171).

[176] Ibid.

behind the need to require a standard can be directly applied to the ECtHR's context when they are of a general nature (e.g. reasoning is in the interest of the proper administration of justice). The same analysis also demonstrates the usefulness of the principles of translation that I developed in this article. The usefulness is apparent because all but two principles (*in concreto* review and autonomy) were relied upon in sections III.2 and IV.2. Moreover, the translated standards could be used to analyse the ECtHR's practice in sections III.3 and IV.3. Because only two standards were translated (the right to legal aid and the right to a reasoned judgment), the fact that two principles were not used does not necessarily lead to the conclusion that they are irrelevant. This conclusion can only be drawn when more standards are translated and when these principles still remain unused then.

As for the two practices of interest, the provision of legal aid and reasoning by single judges, the ECtHR largely follows its own practice, although parts of the ECtHR's practice remain unknown. It is, for example, unclear how judges exactly interpret the 'necessary for the proper conduct of the case' standard for legal aid. To establish this, additional research would be required.

Nevertheless, this article has highlighted two problematic aspects of the practice of legal aid. First, only few states provide for legal aid in Strasbourg cases from domestic resources. The translated standards can therefore also function to point out that there is room to improve the states parties' practice. Second, the ECtHR uses fixed amounts for legal aid. It is unlikely that these amounts are proportional and respect the essence of the standard in each case, although, again, additional research would be required to establish what the exact consequences of the fixed amounts are for the ability of applicants to bring a case.

The ECtHR alone cannot address those two difficulties. It cannot ensure that the states parties provide legal aid to applicants for Strasbourg cases from domestic resources.[177] However, the Parliamentary Assembly (PACE) and the Committee of Ministers could issue a (non-binding) recommendation to the states parties to the Convention to call upon them to

[177] The ECtHR cannot find a violation of Article 6 ECHR because Strasbourg cases do not fall within the scope of Article 6 ECHR.

provide sufficient budget for legal aid to Strasbourg applicants.[178] ECtHR also cannot increase its own budget, so it can allocate more legal aid if necessary. The Council of Europe bears the expenditure on the ECtHR[179] and its member states finance the organisation.[180] Therefore, the problem of the modest legal aid is, also according to the ECtHR, a 'problem lying within the competence of the organs of the Council of Europe'.[181] This is also a point that the PACE and the Committee of Ministers could raise,[182] although the latter is unlikely to be in favour of increasing the ECtHR's budget, considering that the budget has been hardly increased during the few past years.[183] Nevertheless, this is a point worth raising, so as to ensure that the ECtHR indeed follows its own practice.

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[178] See for other recommendations of the Committee of Ministers to the states parties regarding the Convention: Committee of Ministers, 'General Recommendations and Resolutions' <www.coe.int/en/web/execution/recommendations> accessed 28 September 2017. The resolution of the Committee of Ministers on domestic legal aid and advice does not concern legal aid for Strasbourg cases, see: Committee of Ministers, 'Resolution (78) 8 On Legal Aid and Advice', 2 March 1978.

[179] Article 50 ECHR.

[180] ECtHR, 'ECHR Budget' <www.echr.coe.int/Documents/Budget_ENG.pdf> accessed 28 September 2017.

[181] *Luedicke, Belkacem and Koç v Germany* (1980) Series A no 36, para 15.

[182] It did so more generally in an explanatory memorandum annexed to a resolution, see Marie-Louise Bemelmans-Videc, 'Effective implementation of the European Convention on Human Rights: the Interlaken process', Doc 12221, 27 April 2010, para 10.

[183] The ordinary budget increased from €67,206,800 in 2012 to €71,279,600 in 2017, see Council of Europe, *Council of Europe Programme and Budget 2012-2013* (Council of Europe 2011) 3; Council of Europe, *Council of Europe Programme and Budget 2017-2016* (Council of Europe 2015) 3. This is an increase of 5,71%, while the prices increased with 3,9% in 2017 compared to 2012 in the euro area, making the actual increase even smaller, see <www.in2013dollars.com/2012-euro-in-2017?amount=67206800> accessed 28 September 2017. To also illustrate the unwillingness of the Committee of Ministers and the states parties generally in this regard, in the draft version of the Interlaken Declaration it was proposed to invite the Committee of Ministers to 'determine whether additional budgetary means need to be provided to the ECtHR and to the Committee of Ministers in order to ensure that the [case-law] backlog can be reduced and that new cases can be decided within a reasonable time'. This text was deleted from the final version, see Bemelmans-Videc (n 182), para 10.

Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights

Vladislava Stoyanova*

The recent populist turn in national and international politics poses a threat to the rights of migrants. In this context, the key question that this article addresses is whether and how the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), can be a point of resistance against populism. More specifically, how might the ECtHR respond to the anti-migration dimension of the populist politics when adjudicating cases implicating the rights of migrants (with a focus on the right to family life)? In this article, I acknowledge that the Court, through its adjudicative function, has created a space where the state has to advance reasoned arguments to justify disruptions of family life in pursuit of immigration control objectives. At the same time, however, I also demonstrate that this space does not reflect the usual rigor of scrutiny conducted by the Court in cases that do not concern immigration policies (i.e. the proportionality reasoning with its distinctive subtests is applied with serious aberrations). The Court acts with restraint when called upon to uphold the rights of migrants; it sides with the sovereign states and, therefore, any populist attacks against the Court are unsubstantiated. I would like to also inject a note of caution for the Court itself about how it reasons. More specifically, in its restraint to exercise resistance against the sovereign states' entitlements in the area of migration, the Court is getting dangerously close to utilizing populist tools. Finally, I explain the 'procedural turn' taken by the Court when adjudicating the right to family life of migrants. While I acknowledge that this is a useful tool for the Court to maintain its standing in the sensitive area of migration, I also indicate the dangers that might emerge from its application. In particular, controversial decisions are left to be taken at the national level and the Court will be reluctant to examine them unless the quality of the national decision-making process is suspect.

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Keywords: populism, ECHR, migrants, family life, proportionality, exceptionality, positive human rights obligations

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> [...] the European Court of Human Rights has to ensure, in particular, that State interests do not crush those of an individual, especially in situations where political pressure – such as the growing dislike of immigrants in most member States – may inspire State authorities to harsh decisions.[1]

I. INTRODUCTION: POPULISM AS A SOURCE OF CONCERN AND THE SOLUTIONS ADVANCED WITHIN THE COUNCIL OF EUROPE

In the 2017 report on populism, the Secretary General of the Council of Europe (CoE), Thorbjørn Jagland, identified the denigration of international institutions, including the European Court of Human Rights (ECtHR), as

[1] Dissenting Opinion of Judge Martens, approved by Judge Russo, in *Gül v Switzerland* (1996) 22 EHRR 93, para 15.

one of the main features of the populist and illiberal swerve.[2] As the Secretary General clarified, a central charge of populism is that 'international organizations, courts and treaties rob "the people" of their sovereignty'.[3] Jagland explained that '[b]y claiming exclusive moral authority to act on their [the people's] behalf, populism seeks to delegitimize all other opposition and courses of action'.[4] Populism presents 'the people' as 'a single, monolithic entity with one coherent view'.[5] In this context, populism exploits public anxieties over migration and creates the image of the 'other', i.e. the migrant that has to be confronted. Other central features of populism identified by the CoE report are the spread of misinformation (also labelled 'fake news'), the invocation of unsubstantiated facts, and the related advancement of simplistic solutions to complex social problems.

Migrants are vulnerable to the consequences of such invocations and oversimplifications since, in general, the populist turn in national and international politics is expressed through one common trend across countries and jurisdictions: curbing immigration and restricting the rights of migrants.[6] Migrants are thus excluded from 'the pure people' that populists claim to *exclusively* represent.[7] In this way, the populist turn paves the way to

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[2] Report by the Secretary General of the Council of Europe, 'State of Democracy, Human Rights and the Rule of Law. Populism How Strong are Europe's Checks and Balances?' (2017) ('CoE Populism Report').

[3] Ibid 4. The definition of populism can raise controversies. Jan Werner Müller has captured one common core for describing populism: 'a particular moralistic imagination of politics, a way of perceiving the political world that set a morally pure and unified – but [...] ultimately fictional – people against elites who are deemed corrupt or in some other way morally inferior', Jan Werner Müller, *What is Populism?* (University of Pennsylvania Press 2016) 19-20.

[4] CoE Populism Report (n 2) 6.

[5] Ibid.

[6] Speech by the CoE Secretary General, Understanding Populism and Defending Europe's Democracies, 27 January 2017 <www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMvl0SKOUrv/content/understanding-populism-and-defending-europe-s-democracies-the-council-of-europe-in-2017?inheritRedirect=false> accessed 26 February 2018.

[7] Cas Mudde, 'Populism: An Ideational Approach' in Cristobal Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 28, 34. The exclusion of migrants can be also related to the fact that populism understands 'the people' as 'a homogenous community with shared collective identity'. Stefan

more restrictive migration policies whose compliance with human rights law might be questionable.

In his report, the Secretary General is adamant '[t]hat pluralism, inclusive debate and the protection of minority interests against aggressive majoritarianism are essential for maintaining stable societies and democratic security'.[8] As a response to populism, Jagland proposes, *inter alia,* 'to manage migration and diversity in ways which foster respect, *while* guaranteeing social rights for all citizens'.[9] He also recommends to reiterate our commitment to the European Convention on Human Rights (ECHR or the Convention).[10]

One of the proposed solutions against populism is strengthening the role of courts, including international courts, which in the European context implies placing a renewed trust in the ECtHR. Another recommended solution is the renewed emphasis on socio-economic rights. Most importantly, the commitment to socio-economic rights is presented as being in tension with 'migration management'. A central message in the Secretary General's report seems to be that there is a conflict between promoting and ensuring socio-economic rights of the population at large, on the one hand, and ensuring the rights of migrants, on the other.[11]

In light of the above features of populism and the counter-measures invoked by the CoE, the question this article seeks to address is to what extent the ECHR, as interpreted by the ECtHR, is and can be used as a point of resistance against populism. More specifically, how has the ECtHR responded to the exclusionary, nationalist, anti-migrant dimension of

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Rummens, 'Populism as a Threat to Liberal Democracy' in Cristobal Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 555. The same argument has been also made in Paul Taggart, 'Populism in Western Europe' in Cristobal Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 249, 251. See also Jürgen Bast and Liav Orgad, 'Constitutional Identity in the Age of Global Migration' (2017) 19(7) German Law Journal 1587.

8 CoE Populism Report (n 2) 6.

9 Ibid (emphasis added).

10 Ibid 5.

11 For a similar suggestion see Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1, 6.

populist politics when adjudicating cases implicating the rights of migrants?[12] Since, as an institution, the Court has generally been under a great strain and an object of attacks,[13] a related question is how the Court has managed to maintain its standing as an international adjudicative body in the sensitive area of migration. In particular, how has the Court responded to the above-mentioned tension between the rights of migrants and the rights of the host population?

I will answer these questions by looking into the details of the Court's argumentation, the analytical steps that it follows, and the tests that it applies. In this sense, my review is technical in nature.[14] In terms of

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[12] The concepts of populism and nationalism might be difficult to disentangle. For a useful analysis here, see Benjamin de Cleen, 'Populism and Nationalism' in Kaltwasser et al (eds) *The Oxford Handbook of Populism* (Oxford University Press 2017), 343. De Cleen explains that nationalism is 'structured around 'the nation'' and through 'an in/out (member/non-member) opposition'. In contrast, populism is 'structured around a down/up antagonism between "the people" as a large powerless group and "the elite" as a small and illegitimately powerful group, with populist claiming to represent "the people"'. Although populism and nationalism should not be conflated, de Cleen observes that 'populist politics operate within a national context' and 'revolve around the identity, interests, and sovereignty of the nation'. 'The people' invoked by populists are defined on the level of the nation-state and are 'pitted *against* migrants and other national(ist) outgroups'. Mudde has also explained that one of the central claims of populism is that 'the elite' has furthered the rights of immigrants to the disadvantage of 'the people'. See Cas Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press 2007). Therefore, in the context of the populist arguments against 'the elite', 'the nationalist distinction between the nation and its outsiders serves as the main explanatory framework', De Cleen (p 351). De Cleen also adds that 'the populist signifiers "the people" and "the elite" acquire meaning through their articulation with nationalism. The people-as-underdog becomes equated with the nation, and "the elite" is opposed to the nation and its interests'.

[13] Andreas Follesdal, 'Much Ado about Nothing? International Juridical Review of Human Rights in Well-Functioning Democracies' in Andreas Follesdal, Johan Schaffer and Geir Ulfstein (eds) *The Legitimacy of International Human Rights Regimes* (Cambridge University Press 2014) 272, 276.

[14] For further elaboration see Thomas Spijkerboer, 'Analyzing European Case-Law on Migration. Options for Critical Lawyers' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 189.

methodology, my review draws on Spijkerboer's strategies for critical lawyers in the field of immigration law: identifying inconsistencies in the legal reasoning, exposing choices (i.e. when the 'legal reasoning allows for more than one legitimate outcome'), and revealing background rules.[15] The application of these strategies will emerge with more clarity in the forthcoming analysis. Besides, my objective is not to survey all relevant judgments (this is unmanageable for the scope of this article), but to focus on the basic structure of enquiry followed by the Court. For this purpose, I have selected judgments that reflect the general principles applied consistently by the Court in its case law. The selected judgments are thus representative of how the Court generally reasons in this area of human rights law.

To respond to the questions posed above, I will take the following steps. First, I will introduce pertinent analytical distinctions that allow me to suggest differences between anti-migration populist attacks, on the one hand, and other types of critique against the Court, on the other. Many of the latter have their origins in the tensions and weaknesses that generally characterize the application of human rights law to migrants and feed the populist turn (Section II). The tension between states' migration control prerogatives and migrants' interests finds a very concrete manifestation in the Court's approach to the right to family life under Article 8 of the ECHR, which, as I explain in Section III, is one of the main reasons to focus on the latter provision. As the text of Article 8 suggests, this tension ought to be resolved through the application of a proportionality test. I will then briefly describe the classic proportionality analysis for adjudicating qualified rights, such as the right to family life (Section IV). While acknowledging the specificities of the ECHR, I will juxtapose the classic proportionality model with the Article 8 reasoning in migration cases. I will point out the divergences and the additional layers of restrictiveness added by the Court (Sections V and VI). Finally, I will discuss the tool of procedural review, which the Court has used to avoid engagement with politically sensitive issues. While acknowledging its benefits, I will also highlight the risk of using this tool (Section VII).

The central argument that emerges is that the Court is very restrained when it adjudicates the right to family life of migrants, and any populist attacks

[15] Spijkerboer (n 14) 199.

against it are unsubstantiated. The Court sides with the sovereign states' migration control prerogatives. I also inject a note of caution for the Court itself about how it reasons. In its restraint to exercise resistance against the sovereign, it is getting dangerously close to utilizing populist tools. More specifically, these tools have the following manifestations: they assume that there necessarily is a conflict between the rights of migrants and the interests of the host community; they do not require the state to articulate its aims beyond a general and abstract invocation of immigration control prerogatives; they do not subject the aim pursued by the state to any rational or factual scrutiny; and, they represent the rights of migrants as an exception by applying the 'most exceptional circumstances' test. Each one of these aspects will be elaborated below.

II. Contextualizing and Distinguishing

When discussing the rights of migrants and the dangers posed by populism, it is important to first put things in perspective by contextualizing the anti-migration dimension of the populist turn within the broader human rights framework, and its weaknesses in addressing the rights of migrants. More specifically, with or without populism, the rights of migrants have been a weak point of international human rights law.[16] The ECtHR, in particular, has been struggling to navigate a course between a progressive position (less space for state sovereignty and more protection for individual rights) and state-oriented position (not challenging states' restrictive practices in the area of migration).[17] Accordingly, there has been a continuing tension between statism (state sovereignty as fundamental and conclusive in immigration matters) and cosmopolitanism (protection of the rights of all human beings, including migrants, as the fundamental starting point). Against the background of this instability, one can expect populism to be

[16] Gregor Noll, 'Why Human Rights Fail Undocumented Migrants?' (2010) 12 European Journal of Migration and Law 241; Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004); Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press 2012).

[17] Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion' (2009) 11 European Journal of Migration and Law 271.

conducive to tipping the balance in favor of statism.[18] In this context, it has to be acknowledged that populism is part of the European socio-political environment, in which the Court is embedded;[19] this environment influences the ECtHR. Although the Court has a broad power in relation to the interpretation of the ECHR and has historically maintained a strong institutional standing,[20] it cannot be viewed as an institution that is isolated from political forces.[21] Therefore, we should not be dismissive of populist attacks. In fact, they should be a reason for concern and we should try to seriously address them in a reasoned manner. The CoE, within whose institutional structure the Court occupies a prominent place, has accordingly identified 'responding to the populist threat' as one of the three priorities of the organization.[22]

At this junction, it should be clarified that the Court has also been an object of critique from other quarters, in terms of the stringency of its review and the degree of appreciation it should leave to states in the area of human rights protection.[23] The question that emerges is how this critique can be distinguished from any attacks that might be characterized as populist. A

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[18] Blokker explains that as opposed to liberal constitutionalism that emphasizes 'court-centric rights-based constitutionalism', populism emphasizes community interests: 'the collectivity comes prior to the individual, and, hence, an unmediated endorsement of individualistic and universalistic human rights is viewed with suspicion'. Paul Blokker, 'Populist Constitutionalism' (*Verfassungsblog*, 4 May 2017) <https://verfassungsblog.de/populist-constitutionalism/> accessed 16 March 2018.

[19] Jonas Christoffersen and Mikael Rask Madsen, 'Introduction', *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 1, 5.

[20] Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' (2011) 7 European Constitutional Law Review 173, 176.

[21] Mikael Rask Madsen, 'The European Court of Human Rights and the Politics of International Law' in Wayne Sandholtz and Christopher Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar Publishing 2017) 227, 265. Madsen explains how the Court seeks the approval of its constituencies (ie, the state parties) and how the Court might be 'currently going through a transformative moment in the interface of law and politics'.

[22] Budget and Priorities of the Council of Europe for the Biennium 2018-2019, Parliamentary Assembly Opinion 294 (2017), para 4.1.

[23] See Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Convention: Political Constitutionalism and the European Convention on Human Rights' (2015) 25(4) European Journal of International Law 1019.

proper engagement with this analytical distinction requires a short foray into the relationship between populism and liberal constitutionalism. As Müller explains, the latter is inherently pluralistic. Liberal constitutionalism is 'pluralism-preserving and rights-guaranteeing'.[24] In contrast, populists are 'necessary anti-pluralist', since they make the claim that only they 'properly represent the authentic, proper, and morally pure people'.[25] This 'exclusive moral representation of the real and authentic people'[26] also implies a delegitimization of any opposition and alternative views,[27] including views about human rights.

In this context, the reasons why international courts, such as the ECtHR, are objects of populist attacks crystallize further;[28] namely, as an institution embedded in liberal constitutionalism, the Court is a space for open contestations about the meaning of human rights and the scope of the corresponding obligations.[29] Various actors try to influence this space by, for example, proposing modifications as to the stringency of the Court's review, the power and structure of the Court's legal reasoning.[30] This has been an on-

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[24] Jan Werner Müller, 'Populism and Constitutionalism' in Kaltwasser et al (n 7) 591, 592.

[25] Ibid 594.

[26] Ibid.

[27] In Rummens' view, 'the tendency of populist to delegitimize their opponents is underappreciated as both a defining taint of populism and a core aspect of the threat populism poses to democracy'. Rummens (n 7) 563.

[28] See Müller (n 24) 599 where he clarifies that 'populist are not generally "against institutions."' He adds that '[p]opulists are only against specific institutions – namely those which, in their view, fail to produce the morally (as opposed to empirically) correct political outcomes'.

[29] The ECtHR can be perceived as having a constitutional status in Europe. See Steven Greer and Luzius Wildhaber, 'Revising the Debate about "Constitutionalizing" the European Court of Human Rights' (2012) 12(4) Human Rights Law Review 655. At the same time, the Court also has an 'international law identity'. See Stephanie Hennette-Vauchez, 'Constitutional v International? When Unified Reformatory Rationales Mismatches the Plural Path of Legitimacy of the ECHR Law' in Jonas Christoffersen and Mikael Rask Madsen (eds) *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 145.

[30] An example of such an attempt is the Brighton Declaration. See Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2017) Journal of International

going process of contestation and uncertainty. This form of critique, however, needs to be distinguished from populist attacks that make *categorical* claims about the meaning of human rights and delegitimize the institution of the Court *as such*.[31] At the same time, it should also be acknowledged that the different forms of critique can be entangled and can mutually reinforce each other.[32]

This interrelationship of the different forms of critique is highlighted in the argument advanced by both Walker and Rummens, that populism is a symptom of the difficulties inherent in some of the unresolved tensions within the dominant tradition of liberal constitutionalism, such as the tension between the interests of the individual and the collective.[33] Populism can be seen as 'a product of and response to a stress that is intrinsic to the modern constitutional condition'.[34] Although we might be unsympathetic to this response, 'our preoccupation with that response betrays a wider concern with the underlying tension in question, and an awareness that populism exposes modern constitutional method to searching questions to which there are no easy answers'.[35] These answers appear to be even more difficult when the individual standing on one side of the equation happens to be a migrant. Liberal constitutionalism, in particular, has been struggling with the question of how to accommodate migrants, who are not formally members of the host

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Dispute Settlement 1. In terms of scholarship, see, for example, Eva Brems (ed) *Diversity and European Human Rights. Rewriting Judgments of the ECHR* (Cambridge University Press 2013) where reasoning that is alterative to the one adopted by the Court is proposed.

[31] See Müller (n 24) 602: '[a]nyone can criticize existing procedures, fault them for moral blind spots, and propose criteria and means for further inclusion'. This type of criticism is inherent in a democratic society. A problem emerges when 'the critic and only the critic can *counterfactually* speak for "the people"' (emphasis added).

[32] See, for example, Barbara Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20(3) International Journal of Human Rights 407, 416, who takes account of the correlation between the critique against the Court and the rise of populism.

[33] Neil Walker, 'Populism and Constitutional Tension' *International Journal of Constitutional Law* (forthcoming); Rummens (n 7).

[34] Walker (n 33); Rummens (n 7) 565.

[35] Walker (n 33).

community (i.e. the nation state),[36] without forsaking its liberal values.[37] Importantly, this instability and difficulty is not only ideological in its nature, but it also pervades the applicable legal standards, i.e. the weakness of the human rights framework in protecting the rights of migrants, as already mentioned in the beginning of this section and as I will describe in detail below in the context of the right to family life. The uncertainty at the level of technical legal argumentations employed in the judgments regarding family life is one of the major concerns in this article.

III. The Right to Family Life as a Site of Contestation

The rights of migrants have entered the ECHR through various channels, which in itself is an indication of the progressive role of the Court in this area. More specifically, the provisions of the Convention that have become sites of contestation of migrants' rights and states' migration control interests are: Article 3 (prohibition of torture, inhuman and degrading treatment) that incorporates an implied prohibition on *refoulement*;[38] Article 4 (prohibition of slavery, servitude and forced labor);[39] Article 5(1) (introducing safeguards in the context of immigration detention);[40] Article 8 (protection of private and

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[36] Gregor Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 489. Noll explains that '[t]he effectiveness of the state as a guarantor of rights and freedoms presupposes the idea of a bounded community. Thus, immigration control is a means to secure not only the interests, but also the human rights of citizens and denizens'. At the same time, however, imposition of immigration control and restrictions upon the rights of migrants can lead to severe human suffering (e.g. separating children from parents).

[37] Bast and Orgad (n 7) 1587, where the authors ask '[h]ow can liberal states, or a supranational Union formed by such states, welcome immigrants and treat refugees as future denizens without fundamentally changing their constitutional identity, forsaking their liberal tradition, or slipping into populist nationalism?'

[38] *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21.

[39] See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017); Vladislava Stoyanova, 'Sweet Taste with Bitter Roots. Forced Labour and *Chowdury and Others v Greece*' (2018) 1 European Human Rights Law Review 67.

[40] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 279.

family life), and Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsion of migrants).[41]

These provisions raise complex questions about the standards applied and the structure of the legal reasoning followed. To make the analysis manageable and to engage with the questions posed in the introduction in a sufficiently detailed way, I will focus on the right to family life of migrants as protected by Article 8 ECHR. While the significant rise of the populist agenda in Europe is usually associated with the mass influx of asylum-seekers during the period of 2015 and 2016,[42] this agenda has had a much wider scope than simply limiting the ingress of foreigners, who might seek asylum or employment.[43] Limiting the right to family life of migrants has also been a key target of populism.[44]

I choose to focus on Article 8 ECHR for a number of reasons. First, the right to family life is a qualified right that prompts a proportionality analysis. Within the framework of this analysis, state interests have to be identified and weighed up against the interests of the individual. This offers us a clear picture of how the confrontation of these interests plays out in the structure

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[41] *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (ECtHR, 3 October 2017).

[42] CoE Populism Report (n 2) 107. See also Nations in Transit 2017, The False Promise of Populism (Freedom House 2017). For an analysis of this influx see, Dimitris Skleparis, 'European Governments' Responses to the "Refugee Crisis"' (2017) 41 Southeastern Europe 276; Tanja Börzel and Thomas Risse, 'From the Euro to the Schengen Crisis: European Integration Theories, Politicization, and Identity Politics' (2017) 25(1) Journal of European Public Policy 83; Vladislava Stoyanova and Eleni Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill, forthcoming) .

[43] See generally, CoE Populism Report (n 2).

[44] See Pontus Odmalm, 'Concluding Remarks' in Pontus Odmalm and Eve Hepburn (eds), *The European Mainstream and the Populist Radical Right* (Routledge 2017) 153, 155 (his analysis of populist radical right parties reveals that 'parties are more likely to adopt restrictive positions on family reunification than on asylum and labour migration'). Rebecca Partos also suggests that the failure of mainstream parties to 'set out policies on family reunification may well have been a strategic miscalculation, which enabled UKIP [UK Independence Party] to portray the mainstream as ignoring the concern of the public'. Rebecca Partos, 'The European Mainstream and the Populist Radical Rights. The British Case' in Pontus Odmalm and Eve Hepburn (eds), *The European Mainstream and the Populist Radical Right* (Routledge 2017) 28, 36.

of the Court's technical reasoning. In this way, the above-mentioned tension between the interests of the individual and the collective that, as Walker and Rummens have explained, liberal constitutionalism has been struggling to resolve, finds a very concrete manifestation.[45] In other words, this tension materializes in very tangible terms within the framework of the proportionality test under Article 8, where the interests of the particular migrant are balanced against the state interests.[46]

Second, since Article 8 has produced a rich judicial output in areas unrelated to the rights of migrants, it is possible to compare the structure of reasoning and the analysis in cases where migration is not an issue. This allows me to have a critical comparative lens through which to view the applicability of Article 8 to migrants.

Third, the right to family life of migrants has been shaped by a unique judicial tool used by the Court: the test of exceptionality that is used in favor of the state in the substantive reasoning of the Court. This test, which leads to guaranteeing protection only in exceptional circumstances, has not received sufficient scholarly attention so far. This article addresses this gap.[47]

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[45] Walker (n 33); Rummens (n 7).

[46] Arguably, under Article 3, Article 4, Article 5(1)(f) and Article 4, Protocol 4 of the ECHR, no balancing between migrants' interests and state interests is allowed in the Court reasoning. For arguments about covert balancing in the context of Article 3 of the ECHR, see Vladislava Stoyanova, 'How Exceptional Must "Very Exceptional" Be? *Non-refoulement*, Socio-Economic Deprivation, and *Paposhvili v Beligum'* (2017) 29(4) International Journal of Refugee Law 1. For arguments about balancing in the context of Article 4 of the ECHR, see Stoyanova, *Human Trafficking and Slavery Reconsidered* (n 39) 279-285. For how the Court has rejected to scrutinize the proportionality of immigration detention under Article 5(1)(f), see Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68(1) Current Legal Problems 143.

[47] The application of such a test is not limited to the right to family life of migrants. The Court has also invoked it in cases where migrants try to resist their deportation under Article 3 ECHR to continue to receive medical assistance in the returning state. See Stoyanova, 'How Exceptional Must "Very Exceptional" Be?' (n 46). The invocation of exceptional circumstances as a test in the Court's case law is not limited to the area of migration either. This test has been used in the Court's substantive reasoning in other areas. In these areas, however, the test operates in favor of the individual applicant and thus places the state in a weaker position. See, for example, *Frobrich v*

Fourth, migrant cases under Article 8 very often involve individuals who, in practical terms, are part of the fabric of the host society and, in this sense, it could be argued that their deportation raises serious moral issues.[48] Here, the values underpinning liberal constitutionalism as discussed in Section II seem to be under a great challenge. Concretely, the cases on Article 8 often involve migrants, who are well-integrated into the host society and have children that might even be nationals of the host state. Accordingly, these individuals are already inside the bounded community and, as Bosniak has argued, the fact of being a co-resident is a privilege and a reason for greater solidarity.[49] This is also reflected in the standards employed by the Court, since the extent of the migrant's ties and integration in the host society is a relevant consideration in its reasoning (see Section VI.5 below).

Fifth, more often than not, the interests of formal members (i.e. citizens) of the host country are affected by the exclusion and deportation of their migrant family members, which not only exacerbates the moral issues, but also influences the technical legal argumentation. In light of these clarifications, it should be noted that the judgments on Article 8 concerning migrants involve different scenarios.[50] In this article, I will focus only on cases involving migrants, who try to prevent their removal when they are already in the territory of the host state where they have a family.

Finally, the right to family life takes us away from emergency type of situations (e.g., a mass influx of migrants), where it might be easier to argue

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Germany App no 23621/11 (ECtHR, 16 March 2017), para 34 (Article 6(1) ECHR 'entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing') and *Musila v Poland* (2001) 31 EHRR 29, para 44 (Article 5(4) requires speedy review of detention by a court and 'one year, eight month and eight days, will be incompatible with the notion of speediness [...] unless there are exceptional grounds to justify it').

[48] Here I draw from Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press 2006). See also Stoyanova, *Human Trafficking and Slavery Reconsidered* (n 39) 433.

[49] Bosniak (n 48) 135.

[50] I will not discuss cases that concern migrants who have committed criminal offences, and where the state invokes protection of national security or public order as the legitimate aims pursued with their expulsion. See, for example, *Űner v the Netherlands* (2007) 45 EHRR 14.

that the sway of the states' migration interests should be prioritized. Article 8 thus helps us to analyze how the rights of migrants are adjudicated normally. In this sense, no exceptional circumstances can be invoked, and no crisis arguments can be used for more restrictive approaches.[51]

IV. Proportionality: The Core of Human Rights Law

Article 8 of the ECHR stipulates that,

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This provision has a bifurcated structure that channels the analysis into two steps: (1) whether the definitional threshold has been triggered through an interference with the applicant's family life (a threshold that is usually passed); and (2) whether this interference can be justified. The second question prompts a proportionality analysis. In their influential works, Alexy,[52] Barak,[53] and more recently Möller,[54] have developed a theoretical model of the steps that need to be incorporated in this analysis. More specifically, this model prompts an enquiry of four questions in the context of Article 8. First, for what purpose has the right been limited (national security, public safety, economic well-being of the country, etc.)? Second, is

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[51] Emergency situations like a mass influx of migrants could be used as a justification for the imposition of more intrusive restrictions upon the rights of migrants. See, for example, James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 421 and 705. The judgments discussed below do not concern emergency situations.

[52] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010); Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16(2) Ratio Juris 131.

[53] Aharon Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012).

[54] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

there a rational connection between the purpose and the means used for restricting the right (the test of suitability)? Third, are there any less intrusive means that would achieve the same end (the less-restrictive-means test)? Fourth, is there a proportional relation between the benefits gained by fulfilling the purpose and the harm caused to the right from achieving that purpose?[55]

The less-restrictive-means test merits some further elaboration. It presupposes a comparison of different suitable means and an evaluation as to which is less restrictive.[56] The rationale behind the less-restrictive-means test is to prevent unnecessary restrictions when the general interests (as outlined in the limitation clause of Article 8(2) ECHR) can be equally well protected through other means. Although a means can be effective in terms of satisfying competing rights or public interests, it might be too intrusive given the availability of other less intrusive means.[57] There is thus a variety of means to protect public interests and the test presupposes choosing a less restrictive (more protective) one from the perspective of the right affected.

The test imposes no requirement that the *least* intrusive or best possible option must be chosen.[58] As Hickman explains, the test only applies where 'there are alternative means available that better advance the objective of the law or decision in question, or where it will achieve the objectives equally as

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[55] Barak (n 53) 340.

[56] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 114; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-2009) 47 Columbia Journal of Transnational Law 72, 95; Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 3(2) International Journal of Constitutional Law 574, 580; Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139, 142.

[57] Jeremy T Gunn, 'Deconstructing Proportionality in Limitation Analysis' (2005) 19 Emory International Law Review 465, 495.

[58] Tom Hickman, 'Proportionality: Comparative Law Lessons' (2007) 12(1) Judicial Review 31, 42; Sujit Choudhry, 'So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 Supreme Court Review 501, 507.

well'.[59] In other words, no alternative would be acceptable unless it is considered as effective as the means already adopted.[60] This relates to the lurking danger that the least-intrusive-means test could be an assault against the state's purpose, since the existing alternatives might be so impractical as not to afford the state any choice but to abandon its purpose.[61] In addition, decisions concerning alternatives and their effectiveness are taken from the perspective of a particular applicant in a particular case; the alternatives, however, can have wide-ranging repercussions for other individuals and, in this sense, be multidimensional since a myriad of interests might be affected.[62] The search for alternatives requires choices that are well-suited to the interests of a multitude of parties, and cannot merely be the most solicitous choice for the rights of the individuals in a particular case.

Finally, the fourth step in the proportionality analysis is the so-called test of proportionality *stricto sensu* that implies direct balancing between interests. The guiding principle here is: the greater the detriment to the right, the greater the importance of satisfying the state's objective must be.[63] This last step can be distinguished from the less-restrictive-means test as follows: 'a measure may be the least intrusive means to achieve a certain end, and yet even the least intrusive measure may be too high a price to pay in terms of the interference with other legally recognized interests'.[64]

The ECtHR does not strictly follow this four-step model. However, the model can be partially reconstructed in the practice of the Court. To determine whether an interference with family and private life is justified under Article 8(2) in cases not implicating migrants, the Court examines whether the interference is 'necessary in a democratic society' for one of the

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[59] Hickman (n 58) 51.

[60] Gratuitous interferences with individual rights will not be tolerated; if the means advanced by the state can be less onerous with no sacrifice of the ends pursued by the state, the less onerous means must be deployed. Barak (n 53) 321.

[61] Robert Bastress, 'The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria' (1974) 27 Vanderbilt Law Review 971, 1020.

[62] Alexy (n 52) 309.

[63] Alexy (n 52) 102.

[64] Ibid xxxi.

legitimate aims specified in Article 8(2).[65] This question prompts an examination as to,

> whether there existed a *pressing social need for the measure in question* and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation.[66]

The Court has added that it must decide whether 'the reasons given by the national authorities to justify [the interference] are "relevant and sufficient"'.[67] If a measure does not substantially contribute to the achievement of a certain goal, the reasons for introducing it will probably not be 'relevant and sufficient'.[68] In sum, the test of suitability and the final stage of balancing, as analytical steps from the theoretical model, can be reconstructed in the practice of the Court.

In contrast, the Court does not *consistently* apply the less-restrictive-means test.[69] Rather, it applies proportionality analyses in a holistic, general, and

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[65] *A., B. and C. v Ireland* (2011) 53 EHRR 13, para 218 (The third applicant alleged that the failure of the state to implement legislation introducing a procedure by which she could have established whether she qualified for a lawful abortion, was in violation of Article 8. The Court found in her favour). I will not discuss 'in accordance with the law' requirement. For a reference to these standards in a judgment addressing Article 8 and migrants, see for example, *Krasniqi v Austria* App no 41697/12 (ECtHR, 25 April 2017), para 46.

[66] *A., B. and C. v Ireland* (n 65), para 229; *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012), para 123 (The applicants, who were a Roma community, alleged that the decision of the state to remove them from their homes was in violation of Article 8. The Court found in their favour).

[67] *Nada v Switzerland* (2013) 56 EHRR 18, para 181; *S and Marper v United Kingdom* (2009) 48 EHRR 50, para 101 (The applicants complained that the continued retention of their fingerprints and DNA profiles was in violation of Article 8. The Court found in their favor); *Coster v United Kingdom* (2001) 33 EHRR 20, para 104 (The applicants complained that the planning and enforcement measures taken against them in respect of their occupation of their land in their caravans violated Article 8. The Court found no violation).

[68] Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466, 467.

[69] Brems and Lavrysen (n 56) 144; Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) Human Rights Law Review 349, 363.

compressed way, looking at all the events and factors together.[70] Still, judgments (not dealing with the rights of migrants) can be identified, where the Court's enquiry includes an assessment as to whether there are alternative measures that cause less damage to the individual interests. For example, in *Nada v Switzerland*, where the restrictions on the applicant's freedom of movement were found not to have struck a fair balance between his right under Article 8 and the state's legitimate aim of crime prevention, the Court highlighted that,

> for a measure to be regarded as a proportionate and as necessary in a democratic society, the possibility of recourse to an *alternative measure* that would cause less damage to the fundamental right in issue whilst fulfilling the same aim must be ruled out.[71]

Similarly, in *Yordanova and Others v Bulgaria*, where the eviction of a Roma community from their home was found to be a disproportionate measure in violation of Article 8, the Court observed that,

> in the absence of proof that *alternative methods* of dealing with these risks [sanitary and health-related risk posed by the conditions under which the Roma community lived] have been studied seriously by the relevant authorities, the Government assertion that the applicants' removal is the appropriate solution is weakened and cannot in itself serve to justify the removal order.[72]

Despite the clear divergences between the theoretical model and the practice of the Court, the analytical steps incorporated in the model provide a helpful lens through which to view the work of the ECtHR. The theoretical model is an important yardstick for analytical correctness against which the practice of the Court can be juxtaposed. The proportionality model developed by

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[70] Alistair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289, 315-6.

[71] *Nada v Switzerland* (n 67), para 183 (emphasis added).

[72] *Yordanova and Others v Bulgaria* (n 66), para 124 (emphasis added).

Alexy, Barak, and Möller 'shed[s] light on human and constitutional rights practice more generally,'[73] including the ECHR rights.[74]

Finally, although the theoretical model has been tailored to scrutinize interferences by the state (i.e. violation of negative obligations), it has also been adapted for the purposes of examining state omissions (i.e. failure to fulfill positive obligations).[75] This is important because Article 8 ECHR also triggers positive obligations and, as it will become clear below, the Court frames certain types of migration cases as cases invoking positive, rather than negative, obligations. Accordingly, prior to examining how the proportionality model is reflected in these cases, the binary between positive and negative obligations demands some further elucidation.

V. The Positive versus Negative Obligations Dichotomy

Does the Court examine the migrant cases under Article 8 from the perspective of negative or positive obligations? And does the particular perspective adopted make any difference? In *Jeunesse v the Netherlands*, the Grand Chamber of the ECtHR clarified that, in relation to persons with formal residence permits in the host country that have subsequently been withdrawn, cases will be reviewed as negative obligation cases. In such cases, the Court will examine whether the interference (i.e. withdrawal of the residence permit) is justified under Article 8(2).[76] These cases are distinguished from cases where a migrant is present (even for a long period of time) in the host country, but his or her presence has never officially been authorized.[77] In the latter type of circumstances, the Court examines whether the host state authorities were under positive obligations pursuant to Article 8 to allow the person to stay, and thus enabling the person to

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[73] Mattias Kumm, 'Political liberalism and the structure of rights: on the place and limits of the proportionality requirement' in George Pavlakos (ed), *Law, Rights and Discourse – The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) 136.

[74] Steven Greer, 'Balancing and the European Court of Human Rights: a Contribution to the Habermas – Alexy Debate' (2004) 63 Cambridge Law Journal 412, 433.

[75] Alexy (n 52) 288; Barak (n 53) 429-434; Möller (n 54) 179.

[76] *Jeunesse v the Netherlands* (2015) 60 EHRR 17, para 104.

[77] Ibid, para 105. See also *Ahmut v the Netherlands* (1997) 24 EHRR 62, para 63; *Butt v Norway* App no 47017/09 (ECtHR, 4 December 2012), para 78.

exercise his or her right to family life. The existence of such an obligation depends on whether 'a fair balance' can be struck between the competing interests of the individual and the community as a whole.[78] In sum, the formal migration status of the person is used as the benchmark to determine how the case will be approached: as one of interference where state actions have to be scrutinized from the perspective of proportionality analysis, or one where it needs to be determined whether a positive obligation should be imposed on the state *in the first place*.[79]

It can be remarked that the specific framing of a case, as involving positive or negative obligations, is mere rhetoric that has no impact on the substantive reasoning. Indeed, on some occasions, the Court has refused to specify the lens through which it will examine a case.[80] In addition, the Court has used as a standard assertion that,

> the boundaries between the State's positive and negative obligations under this provision [Article 8] do not lend themselves to precise definition. The applicable principles are, nonetheless, the same. In both context regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.[81]

Despite this assertion, the case law generally suggests that when the case is framed as involving positive obligations, the Court is less scrutinizing, and the judicial review is less structured.[82] The reasoning in the positive obligation cases seems to be more fluid. In contrast, when the case is casted as a negative obligation case, the expectation is that higher scrutiny will be exercised.

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[78] *Jeunesse v the Netherlands* (n 76), para 106.

[79] '[...] in the context of positive obligations, the margin of appreciation might already come into play at the stage of determining the existence of the obligation, whilst in the context of negative obligations it only plays a role, if at all, at the stage of determining whether a breach of the obligation is justified'. Dissenting Opinion of Judge Martens in *Gül v Switzerland* (n 1), para 8.

[80] *Nunez v Norway* (2014) 58 EHRR 17, para 69; *Arvelo Aponte v the Netherlands* App no 28770/05 (ECtHR, 3 November 2011), para 35.

[81] *Jeunesse v the Netherlands* (n 76) para 106.

[82] Laurens Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 213.

The framing of the case, moreover, has a communicative purpose – the Court assures states that Article 8 ECHR does not *per se* trigger obligations in relation to migrants, who do not have the right to stay on their territory. This is equally valid for individuals who are only temporarily allowed to stay (e.g. applicants for international protection) and whose status is uncertain.[83] This is even more vehemently expressed in the assertion consistently repeated by the Court that 'Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory'.[84]

In the migration cases on Article 8, the distinction between positive and negative obligations is a device that distorts reality. In these cases, the applicants try to resist expulsion since this measure would result in the disruption of their family life. The act of expulsion itself is a clear action attributable to the state irrespective of the formal migration status of the person. When the case is framed as a positive obligation case, the Court simply negates this reality.

This negation is intimately related with the starting point in the reasoning of the Court:

> the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there.[85]

The Court introduced this precept in *Abdulaziz, Cabales and Balkandali v United Kingdom*, the first judgment addressing the rights of migrants under Article 8.[86] In the subsequent cases, it referred to this principle of state entitlement as one of the factors in the balancing analysis.[87] In more recent judgments,[88] the principle has been the starting point that not only explains the legitimate aim pursued by the expulsion measure (see Section VI.1 below), but also shapes the rest of the Court's analysis. In particular, if the

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[83] *A.S. v Switzerland* App no 39350/13 (ECtHR, 3 June 2015), paras 44-49.

[84] *Nunez v Norway* (n 80), para 70; *Jeunesse v the Netherlands* (n 76), para 107.

[85] *Nunez v Norway* (n 80), para 66.

[86] *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) 7 EHRR 471 .

[87] See, for example, *Berisha v Switzerland* App no 948/12 (ECtHR, 30 July 2013), para 49.

[88] *Nunez v Norway* (n 80), para 6 (emphasis added); See also, *Antwi and Others v Norway* App no 26940/10 (ECtHR, 14 February 2012), para 88.

right to family life of migrants were to be applied in the same way as the right to family life is generally applied by the Court, then the starting assumption would be a very different one. It would be that family members can make choices about where to reside, and this freedom could only be limited in so far as it permitted by Article 8(2).[89] The less-restrictive-means test would then prompt the decision-maker to search for alternatives that are less intrusive for the applicant. Admittedly, in the migration context, it might well be the case that there is no such alternative that can protect general interests equally as well (i.e. the only effective measure is expulsion). However, if the theoretical model were to be followed, it would be important that this unavailability of an acceptable less restrictive alternative would be made obvious in the reasoning concerning the *specific* person. As I will explain in section VI.2 below, the Court avoids this type of reasoning.

Returning to the dichotomy between positive and negative obligations and the weaker scrutiny in the context of the former, when cases are conceptualized as implicating positive obligations, the starting point in the reasoning is that family life can be ensured through various means.[90] Allowing the person to stay is one alternative. Another is moving the whole family to another country, or maintaining the family life from a distance. These latter two alternatives are not simply placed on an equal footing, but they are given priority (see section VI.4 below). If there is a possibility for the family to move to another country, it is likely that no violation is found. Disturbingly, the alternative possibility of moving to another country needs to only be possible in theory, and its practical difficulties are not closely scrutinized.[91] The assessment of the alternative by the Court is thus often 'reality-disconnected'.[92] The option of moving to another country might imply severe

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[89] Marie-Benedicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpart* (Oxford University Press 2015) 103.

[90] Theoretically, this relates to the alternative and disjunctive structure of positive rights. See Alexy (n 52).

[91] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Hart Publishing 2016).

[92] Dissent by Judge Kovler in *Omoregie v Norway* App no 265/07 (ECtHR, 31 July 2008). See also *Useinov v the Netherlands* App no 61292/00 (ECtHR, 11 April 2006), where the Court invoked the standard of 'virtually impossible'. In this way, the Court has

costs for the individual; however, since 'Article 8 does not guarantee a right to choose the most suitable place to develop family life',[93] an alternative that is *less protective* for the individual is accepted. This is in clear contrast with the model described in section IV above, where I have shown that human rights law demands a search for an alternative that is less intrusive and more protective for the individual.

As I alluded to in section IV, the more-protective-alternative test raises many questions, and is not consistently applied by the Court. Still, it constitutes an important signpost of human rights law reasoning, that has been not only ignored, but in fact reversed in migration cases. In the following sections, the aberrations in the reasoning in migration cases will be further highlighted.

VI. Proportionality under Article 8 ECHR in Migration Cases

1. The Assumed Legitimate Aim

What is the legitimate aim that the state pursues when it decides to remove a migrant, who has family in the host state? Exercise of effective immigration control is not among the objectives explicitly enumerated in Article 8(1). However, there are powerful arguments that this is an objective that states can self-evidently pursue.[94] The state is thus generally not required to clearly articulate its aims beyond a general and abstract invocation of immigration control prerogatives.

In some instances, however, a more concrete aim can be identified in the reasoning. An example here is *Nunez v Norway*, a case about a migrant woman, who obtained a residence permit under a false identity and whose expulsion would have implied the separation from her two young daughters. The Court stated that 'the possibility for the authorities to react with expulsion would constitute an important means of *general deterrence* against

alluded that any contacts between the applicant and his children after his deportation will have to be 'virtually impossible' so that the deportation could be averted.

[93] *Ahmut v the Netherlands* (n 77), para 71.

[94] The inherent right of the state to control immigration.

gross and repeated violation of the Immigration Act'.[95] General deterrence against breaches of immigration legislation has thus been accepted as a legitimate aim. As a response to Nunez's argument that she had not committed any serious offences, the Court clarified that:

> In the Court's view, a scheme of implementation of national immigration law which, as here, is based on administrative sanctions in the form of expulsion does not as such raise an issue of failure to comply with Article 8 of the Convention. Against this background, the applicant's argument to the effect that the public interest is an expulsion would be preponderant only in instances where the person concerned has been convicted of a criminal offence, be or serious or not, must be rejected.[96]

Berrehab v the Netherlands is illustrative of how the economic well-being of the country can be used as a legitimate aim. The applicant was a Moroccan national, whose daughter and former wife were Dutch. His application for renewal of a residence permit was refused since,

> it would be contrary to the public interest to renew the permit, regard being had to the fact that Mr. Berrehab had been allowed to remain in the Netherlands for the sole purpose of living with his Dutch wife, which condition was no longer fulfilled on account of the divorce.[97]

The Dutch government very generally invoked 'public order' as a justification. The Court itself reformulated the objective pursued in the following way:

> the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 1 of Article 8 [...], the Government were in fact concerned, because of the population density, to regulate the labour market.[98]

In sum, beyond the few judgments where the legitimate aim pursued is more clearly identified, a general invocation of immigration control prerogatives will suffice. This certainly has an impact on how the subsequent analytical

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[95] *Nunez v Norway* (n 80), para 71 (emphasis added); See also, *Antwi and Others v Norway* (n 88), para 90; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 23, para 79.

[96] *Nunez v Norway* (n 80), para 71; see also *Omoregie v Norway* (n 92), para 67.

[97] *Berrehab v the Netherlands* (1989) 11 EHRR 322, para 10.

[98] *Berrehab v the Netherlands* (n 97), para 26

steps in the reasoning are applied. More concretely, the proportionality analysis is sapped of its rigor because a very abstract aim is accepted, which makes it difficult to meaningfully scrutinize whether and how the concrete measure (i.e. expulsion of the concrete person) is suitable. The source of this difficulty is that any measure can be suitable for achieving the abstract objective. As I will show below, the Court has avoided this difficulty by simply not applying the suitability test.

2. The Suitability Ignored

In no way does the Court scrutinize whether there is a rational connection between the measure (i.e. deportation of a family member) and the state objectives (economic well-being of the country or general deterrence against breaches of immigration law). The objective pursued by the state is taken for granted. It is a factor that is not challenged and is not subjected to any rational or factual scrutiny. The national interest in controlling migration is uniform, stable, and inflexible. It is impermeable and irresistible to any factual assessment. No rational connections between the measure and the purpose are scrutinized.[99] Immigration control is a goal in itself.

The state is not expected to furnish any evidence that the deportation of, for example, Mr. Berrehab (who was employed and supported himself and his child) contributes to the preservation of the economic well-being of the Netherlands. Accordingly, no legal justification is required. Moreover, it is not even expected from the state to justify the rational connection between the measure and the objective. The state is therefore relieved from advancing any specific justification for its action, besides the general and abstract objective of migration control. The state is also not required from explaining whether there are any individual reasons that justify the expulsion of this person.

The state's interest in the Court's reasoning is invariable. In this context, it means that no specific weight and value is attached to it. Consequently, the economic well-being of the country can be the objective pursued by the state

[99] See Eva Hilbrik, 'The Proportionality Principle: Two European Perspectives. How Serving the Community Interest Ends up to be in the Individual's Best Interest' (Working paper, 2010) <http://dare.ubvu.vu.nl//handle/1871/15826> accessed 26 February 2018.

with the expulsion of an unemployed migrant, or an economically active migrant, who provides for himself or herself and his or her family. The contribution of the migrant to the labor market seems to be irrelevant since, pursuant to the reasoning deployed, his or her deportation serves the objective of preserving the national economic well-being in any case. Whether the migrant receives social benefits and thus poses a risk of undermining the financial balance of the social security system, is also not pertinent. The existing economic situation in the host country and the unemployment rate do not figure in the analysis as they are accepted to be invariables.

Since the objective of the state and the rational connection between the means used and this objective are not susceptible to factual assessment, the resolution of the case depends on the individual circumstances of the migrant. Therefore, the burden is shifted entirely on to the migrant, who must demonstrate some individual distinguishing features that could tip the balance in his or her favor. As opposed to the state that does not have to furnish anything close to factual justifications for its actions, the individual must demonstrate the specificities of his or her case.

The wider implication of this is that the significance of the judgment is limited to the particular applicant and does not extend more broadly. Each case is different because the individual circumstances of each applicant are different. From the perspective of the respondent state, even if a violation of Article 8 is found, the message to the state is that the circumstances of one individual were exceptional, and more general, structural changes are not necessary.

It should be acknowledged that if a test of suitability were to be seriously applied, it would raise many intricate issues. It would need to be assessed to what extent state measures would need to contribute to the aim to pass as suitable, and how certain the empirical facts underpinning the suitability assessment would have to be.[100] Such level of scrutiny might only be remotely feasible in practical terms. It can be also objected that such an assessment is

[100] As to the question how certain the suitability assessment must be, Alexy has suggested that 'legislators may rely on uncertain but not "evidently false" claims'. Robert Alexy, 'Formal Principles: Some Replies to Critics' (2014) 12 International Journal of Constitutional Law 520-22.

not within the Court's capacity. Alexy's solution to these problems is setting a low threshold for passing the suitability stage and deferring final answers to the balancing stage.[101] Pursuant to the theoretical model, at this stage, the degree of certainty required that a measure achieves certain objectives depends on the severity of the harm caused to the individual. The more severe the harm caused, the more reliable the underlying empirical evidence must be. In the Court's reasoning in the migration cases under Article 8, the severity of the harm inflicted is indeed part of the calculus (see section VI.5); however, this is in no way placed in proportionate relation with the reliability of the empirical evidence substantiating the aim pursued with the expulsion.

The problem that I underscore here is that not even a low empirical certainty threshold is applied in the Court's reasoning in the migration cases. The Court does not require the national authorities to engage in any form of empirical enquiry.[102] This should make us pause given the existence of empirical data that contradicts the assertions that removals unequivocally serve the economic well-being of the country or act as a deterrence.[103]

The goal of removing a migrant in the exercise of effective immigration control is legitimate since for the state to secure the interests and the well-being of its citizens and denizens, a bounded community is necessary. In particular, the effectiveness of the state as a guarantor of rights and freedoms for its citizens and lawful residents presupposes the idea of a bounded community.[104] This seems to also be the reasoning endorsed in the report of the CoE's Secretary General quoted at the beginning of this article, where the right of migrants and the social rights of citizens are placed in opposition to each other. The interests of the migrant at risk of deportation can thus be placed diametrically opposite to the cluster of individual interests.

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[101] Alexy (n 52) 395.

[102] When the objective pursued by the State with the expulsion is preservation of public safety and order, the ECtHR requires that the national authorities evaluate the extent to which the particular migrant actually endangers public safety and order. *Alim v Russia* App no 39417/07 (ECtHR, 27 September 2011), para 96.

[103] Florence Jaumotte, Ksenia Koloskova and Sweta Sazena, *Impact of Migration on Income Levels in Advanced Economies* (International Monetary Fund 2016).

[104] Noll (n 36).

Such an opposition and rigid division between the migrant and the members of the bounded community, however, can be challenged depending on the particular circumstances. Two pertinent examples come to mind. First, it is hardly in the community's interest to have children growing up without a parent because he or she has been deported. This kind of damage to the community interest, however, is not at all part of the legal analysis. It is true that the best interests of the child principle provides a legal path for acknowledging any damage to the children (see section VI.5). Nevertheless, it needs to also be considered that when children grow up without one of their parents, this has wider societal implications.

A second pertinent example that illustrates that the rigid opposition between the migrant's interests and the community's interests might be hard to sustain, relates to the phenomenon of aging populations. More specifically, given the aging of the host population, it might not be in the community's interest to deport young, well-integrated, and productive migrants.[105]

In sum, the position of the state tends to be endorsed by the Court in a blanket manner and is not subjected to any form of scrutiny. The rational connection between the aims and the means is simply assumed. This can be especially disturbing when the values professed by the state are controversial, and the good faith of the state to comply with its international obligations is questionable. Given that these are precisely the problems that characterize populist policies, the Court might not be equipped to resist because of the wholesale and blanket acceptance of the state position. In the light of the Court's unwillingness to engage in any empirical assessment, the Court thus accepts the state's position that expulsions are the only means for immigration laws to be meaningful.[106] Expulsions here are the objective pursued and the means used. When these two collide, the proportionality analysis, as a procedural tool (even the more flexible version followed by the

[105] OECD Migration Policy Debates, 'Is Migration Good for Economy?' (2014) <www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%22.pdf?TSPD_101_R0=fd61111f38e5e348b40d2113e44d420cy060000000000000000460084cc0ffff0000000000000000000000000005a944331002e18351f> accessed 26 Feburary 2018; The Data Team, 'Why Europe Needs More Migrants?', The Economist (12 July 2017) <www.economist.com/blogs/graphicdetail/2017/07/daily-chart-6> accessed 26 February 2018.

[106] See also Costello (n 40) 127.

Court) for structuring the human rights law reasoning, is undermined. In addition, the judgments appear to reproduce the very same feature that characterizes populism: absence of reasoned policies.[107]

Finally, it should be specified that there is one situation where the Court has challenged the state's position that expulsion measures serve the purposes of immigration control: when the state has tolerated the irregular presence of a migrant for a long time. Where the state has failed to effectively apply its own immigration laws, the Court is willing to question whether the expulsion measure serves any immigration control objectives.[108] For example, in *Nunez v Norway*,[109] *Kaplan and Others v Norway*,[110] *Antwi v Norway*[111] and *Jeunesse v the Netherlands*,[112] the delay by the state in acting to remove the migrant weighed in favor of finding a violation of Article 8. In particular, the Court has held that in case of such a delay, it is not persuaded that 'the impugned measures [the expulsion] to any appreciable degree fulfilled the interest of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures'.[113]

3. The Inverted Less-Intrusive-Means Test

As mentioned above, the Court does not search for more protective alternatives in the migration cases; in fact, a less protective and more intrusive alternative (maintaining family life by relocation to another country or from distance) is easily accepted and in fact given preference to. Not only does the Court never engage with an assessment of whether there are alternatives that are less damaging from the perspective of the individual and more protective of the right to family life of migrants, but it has incorporated a test in its reasoning that has entirely reversed the logic of the classic

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[107] Cesare Pinelli, 'The Populist Challenge to Constitutional Democracy' (2011) 7(5) European Constitutional Law Review 5, 8.

[108] See Partly Dissenting Opinion of Judge Pejchal in *Paposhvili v Belgium* App no 41738/10 (ECtHR, 17 April 2014).

[109] *Nunez v Norway* (n 80), para 82.

[110] *Kaplan and Others v Norway* App no 32504/11 (ECtHR, 24 July 2014), paras 95-6.

[111] *Antwi v Norway* (n 88), para 102.

[112] *Jeunesse v the Netherlands* (n 76).

[113] *Jeunesse v the Netherlands* (n 76); *Nunez v Norway* (n 80), para 82; *Kaplan and Others v Norway* (n 110), paras 95-6; *Antwi v Norway* (n 88), para 102.

proportionality analysis. This is the 'insurmountable obstacles' test that prompts the Court to enquire 'whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned'.[114] This alternative measure (moving the whole family to a different country) is clearly more intrusive and less protective from the perspective of the individual. At the level of the theoretical model, the existence of a more intrusive and less protective measure cannot be part of the analysis, which signals not simply a departure, but also a reversal of the classic proportionality reasoning.

Reassuringly, the 'insurmountable obstacles' test is not conclusive. It is just one element in the balancing exercise, and can be counter-balanced by other considerations (these will be further explained in Section V below). Disquietingly, however, the weight attached to the test, in comparison with other relevant factors in the balancing exercise, is clouded with uncertainty.

Prior to engaging with the 'fair balance' test, it is important to highlight that the Court has imposed an additional standard in its assessment of the right of family life of migrants under Article 8, which is also symptomatic of the inversion of the classic proportionality test. The standard has been framed as the 'exceptional circumstances' test.

4. The Protection of the Right as the Exception

The Court has held that,

> the extent of a State's obligations [...] will vary according to the particular circumstances of the persons involved and the general interest. [...] important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in *the most exceptional circumstances* that the removal of the non-national family member will constitute a violation of Article 8.[115]

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[114] *Jeunesse v the Netherlands* (n 76), para 107; *Arvelo Aponte v the Netherlands* (n 80), para 60.

[115] See *Rodrigues da Silva and Hoogskamer v the Netherlands* (2007) 44 EHRR 34, para 39; *Jeunesse v the Netherlands* (n 76), para 108 (emphasis added).

Rodrigues da Silva and Hoogskamer is the first judgment in which the Court referred to 'the most exceptional circumstances' test. This standard has been repeated in subsequent judgments.[116] In later judgments, the Court has softened the standard to 'exceptional circumstances'.[117] This change in language has never been explained by the Court. It is difficult to answer whether the change from 'the most exceptional circumstances' to 'exceptional circumstances' signifies a change as to the standard of review.

The 'exceptional circumstances' test is triggered when the individual had been aware of the precariousness of his or her migration status, which implies that he or she had also been aware that the family life might not persist on the territory of the host state. The Court has never come forward with any explicit explanation to justify this standard that places an additional burden on the applicant and practically renders the protection of the right to family life the exception. Given the conditions under which the test is triggered (i.e. undocumented migration status), it can be assumed that state interests in exercising effective migration control that presupposes removal of those without the right to stay, justifies the 'exceptional circumstances' standard. Accordingly, the state's aim is given prominence not only in the first stages of the Court's reasoning, which initially weakens the individual's position versus that of the state (see sections VI.1, VI.2 and VI.3 above), but the aim of exercising effective migration control is reintroduced at later points in the Court's reasoning. This reintroduction again works to the disadvantage of the individual.

It is the host state that ultimately produces the conditions of when the 'exceptional circumstances' standard can be triggered, since this very state creates precarious migration statuses,[118] or imposes conditions that make migrants susceptible to falling into illegality.[119] In certain circumstances, the

[116] *Arvelo Aponte v the Netherlands* (n 80), para 55.

[117] *Jeunesse v the Netherlands* (n 76), para 108.

[118] Catherine Dauvergnes, *Making People Illegal. What Globalization Means for Migration and Law* (Cambridge University Press 2008).

[119] This danger emerges from the factual circumstances of *Rodrigues da Silva and Hoogskamer v the Netherlands* (n 115), para 9: the applicant could have applied for a residence permit to reside with her partner in the Netherlands, but owing to the unavailability of documents concerning her partner income, she never made the application.

host state intentionally creates precariousness to keep migrants in volatile and uncertain situations.[120] During this timeframe of precariousness, migrants form connections with the host community, have families and children.[121] Pursuant to the Court's reasoning, however, these will only be protected under Article 8 ECHR in 'exceptional circumstances'.

This is also evident from the way the Court has framed its task in the examination of the migration cases under Article 8. For example, in *Jeunesse v the Netherlands,* the Court examined whether 'there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands'.[122] Jeunesse was a Surinamese woman, who entered the Netherlands with a tourist visa that she then overstayed. Her requests for residence permits were rejected, while in the meantime she got married and had three children, all Dutch nationals. By the time her case was decided by the ECtHR, she had resided in the Netherlands for sixteen years. Although the Court found exceptional circumstances that amounted to a violation of Article 8,[123] the above quotation suggests that a fair balance is in principle struck by denying residence permits in such cases. Within this logic, only exceptional circumstances will disrupt this balance and, consequently, result in a violation of the right to family life.

The 'exceptional circumstances' test can be linked with another principle that the Court has introduced in its reasoning in the migration cases: 'persons who, without complying with the regulations in force, confront the

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[120] A pertinent example is the extension of temporary and contingent residence permits to migrant women for the purpose of family unification or family formation. See Vladislava Stoyanova, 'A Stark Choice: Domestic Violence or Deportation? The Immigration Status of Victims of Domestic Violence under the Istanbul Convention' (2018) 20 European Journal of Migration and Law 52.

[121] See, for example, *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016), para 149, where the applicant lived in the country for fifteen years without being in possession of a valid residence permit.

[122] *Jeunesse v the Netherlands* (n 76), para 114.

[123] She lost her Dutch nationality when Suriname became independent; her presence was tolerated for a considerable period of time by the Dutch authorities; she had three children who did not have any links to Suriname; she was the main care-taker of the children and the homemaker.

authorities of a Contracting State with their presence in the country as a *fait accompli* do not, in general, have any entitlement to expect that a right of residence will be conferred upon them'.[124] The *fait accompli* argument implies that migrants cannot benefit from their own irregular presence in the country. This is in response to the generally held expectation that migrants engage in strategic behavior to circumvent the national immigration legislation. To limit the possibilities for such circumventions and to ensure that migrants do not benefit from breaches of immigration control rules, the Court has invoked the 'exceptional circumstances' test.

5. Balancing

Since the first steps in the review conducted by the Court do not play any restraining role, the only possibility for the applicant to sway the judgment in his or her favor is offered at the final review stage of balancing. The Court has identified certain factors of relevance for the balancing of the migrant's interest and the general interest.[125] Some of these factors that have been consolidated in the case law have already been mentioned in my analysis above: the 'insurmountable obstacles' test and the 'exceptional circumstances' test. Since these two tests are not treated as separate and conclusive by the Court, they are also included in combination with other factors in the final balancing exercise.

One of these other factors is 'the extent to which family life will be effectively ruptured'.[126] This rupture reveals the severity of the harm caused with the expulsion measure. The possibility for relocating the whole family is of importance here since, if such a possibility is available, the family life will not be ruptured. This explains why a migrant parent is more likely to succeed in having a favorable judgment to be able to maintain contacts with his or her children when the couple has separated. In case of separation, the other parent cannot be expected to follow him or her to the country of intended removal.[127] The severity of the harm caused with the expulsion can be also

[124] *Rodrigues da Silva and Hoogskamer v the Netherlands* (n 115), para 43.

[125] *Jeunesse v the Netherlands* (n 76), paras 107-109.

[126] *Nunez v Norway* (n 80), para 70.

[127] *Udeh v Switzerland* App no 12020/09 (ECtHR, 16 April 2013), para 52. *Arvelo Aponte v the Netherlands* (n 80), para 60.

related to another factor used by the Court: 'the extent of the migrant's ties in the host country'.[128] The more substantial the extent of these ties is, the more harm their disruption causes.

The Court furthermore considers 'whether there are factors of immigration control (for example history of breaches of immigration law) or consideration of public order weighing in favor of exclusion'.[129] This factor reintroduces the states' aim to maintain effective immigration control, which dominates the previous stages of the reasoning.

A factor that often transpires to be decisive is the best interests of the child. The Court has, however, warned that '[w]hile alone they cannot be decisive, such interests certainly must be afforded significant weight'.[130] Children are certainly not a trump card since in many cases the immigration control aim of the state supersedes their interests.[131] In relation to children, the Court has clarified that,

> Weighty immigration policy considerations [...] militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that the parents exploit the situation of their children in order to secure a residence permit for themselves and their children.[132]

This principle is yet another manifestation of how immigration control concerns shape the analysis under Article 8. It implies that in circumstances where children have spent long and important parts of their lives in the host country, at the time when their parents' and their own migration statuses were precarious, they can be still deported even if this is clearly not in their best interest.[133] Such deportations can only be prevented in 'exceptional circumstances'. *Butt v Norway* is illustrative. The applicants were a sister and a brother, born in Pakistan and residing in Norway since the ages of ten and eleven, respectively. They went to school in Norway and, at the time of the

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[128] *Nunez v Norway* (n 80), para 70.

[129] *Jeunesse v the Netherlands* (n 76), para 107.

[130] Ibid, para 109.

[131] *Omoregie v Norway* (n 92), para 66, where the Court observed that the child could adopt if she were to move to Nigeria with the parents; *Antwi v Norway* (n 88), para 101.

[132] *Butt v Norway* (n 77), para 79; *Kaplan and Others v Norway* (n 110), para 86.

[133] *Kaplan and Others v Norway* (n 110), para 86.

ECtHR's judgment, were still in the country. In 1995, they received residence permits upon their mother's application that was based on false information provided to the national authorities. Since the children were identified with the illegal conduct of their mother, their presence in Norway was regarded as precarious despite the absence of any fault on their part. Consequently, the Court applied the 'exceptional circumstances' test that, as mentioned, raises the bar very high for finding a violation of Article 8.[134]

VII. The Procedural Twist

In its analysis, the Court uses the above-mentioned factors to build a 'net' of arguments that, taken as a whole, buttress the outcome. The Court does not follow a strict structure in its argumentation, and it is unclear how much weight each factor has. This argumentative style has been criticized, particularly for the erratic and arbitrary way in which the Court balances competing interests.[135] This way of balancing creates the impression that the Court can always reframe the factual substratum of a case to fit into a certain outcome, to distinguish a case from previous cases to find no violation, or to highlight some exceptional features that warrant the finding of a violation. This unpredictability is not very surprising given the awareness of the severe consequences for the human lives involved, on the one hand, and the politically sensitive issues that the cases raise, on the other. More specifically, the deportation of a family member might lead to the destruction of a family and cause the lives of the involved family members to be gravely impacted. At the same time, as suggested already in the introduction to this article, the rights of migrants, including the circumstances under which they can remain on the territories of host states, are at the epicenter of political debates.

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[134] *Butt v Norway* (n 77), para 79. In the subsequent paragraph in the judgment (para 80), the Court added that 'the need to identify children with the conduct of their parents could not always be a decisive factor'.

[135] Spijkerboer (n 17) 280; 'National administrations and national courts are unable to predict whether expulsion of an integrated alien will be found acceptable or not. The majority's case-by-case approach is a lottery for national authorities and a source of embarrassment for the Court.' Dissenting Opinion of Judge Martnes in *Boughanemi v France* (1996) 22 EHRR 228, para 4.

A further layer of sophistication to the political sensitivity of the issue is added with the doctrine of subsidiarity. The standard assertion made by the Court is that, in striking a fair balance between the interests of the individual and of the community, 'the State enjoys a certain margin of appreciation'.[136] The implied presumption is that national authorities have the primary legitimacy, knowledge, and expertise to carry out the delicate balancing of competing interests.[137] An approach that can mitigate the political sensitivity and, at the same time, respond to concerns about the subsidiary role of the Court, is to proceduralize the issue. The Court has manifested a tendency to attach value to the quality of the decision-making process at the national level in hard, politically sensitive cases.[138] Two aspects of the Court's 'procedural turn' can be observed:[139] (1) relying on the quality of national decision-making in the review of the justifications for interferences with Convention rights; and (2) setting positive obligations of a procedural nature. Both aspects can be seen in the migration cases on Article 8.

As to the first aspect – the Court's reliance on the quality of the national review process – the Court considers whether the domestic process has included an assessment and weighing up of the relevant factors raised by the particular case. The Court uses evidence of such procedural protection at the national level as an argument to support its own reasoning in favor of finding no violation.[140] Alternatively, when national authorities fail to consider a relevant factor, the Court might draw negative inferences from this, which supports the finding of a violation of Article 8. This can be widely observed in the case law, especially in relation to the application of the best interests of the child principle, which might not have been considered in the national

[136] *Nunez v Norway* (n 80), para 68.

[137] Patricia Popelier and Catherine van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 Leiden Journal of International Law 5, 9.

[138] Janneke Gerards, 'Procedural Review by the ECtHR: A Typology' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 127, 146.

[139] Ibid 129.

[140] See, for example, *Khan v Germany* App no 38030/12 (ECtHR, 23 April 2015), para 55; *Palanci v Switzerland*, App no 2607/08 (ECtHR, 25 March 2014), para 63.

proceedings.[141] This first aspect of the 'procedural turn' implies that the availability of procedural guarantees at the national level influences the stringency with which the Court conducts the proportionality analysis at international law level. When the national procedural protection is robust, the Court will be more lenient towards the state and thus more likely to find no violation.

The second aspect of the 'procedural turn' is about the imposition of an obligation upon the national authorities to balance the competing interests within the national procedure that takes into account the relevant factors as developed in the ECtHR case law (see the factors explained in Section VI above). If such a balancing has been done at national level, the Court can refrain from engaging in substantive review given its subsidiary role.[142] In this sense, the Court abstains from questioning and overruling the proportionality analysis conducted at national level by the responsible authority.

The relatively recent judgment of *Paposhvili v Belgium* illustrates this second approach. The applicant complained, *inter alia*, that his removal would result in his separation from his family. When his case was reviewed by the Chamber of the Court, a substantive balancing analysis was conducted based on the general principles established in the case law. No exceptional circumstances were found, and the Chamber concluded that Mr. Paposhvili's removal of would not be a disproportionate measure in breach of Article 8.[143] As opposed to the Chamber that did the balancing exercise on its own,[144] the Grand Chamber avoided the substantive balancing and proceduralized the issue:

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[141] *M.P.E.V. and Others v Switzerland* App no 3910/13 (ECtHR, 8 July 2014), paras 57-58: 'The Court puts emphasis on the fact that the Federal Administrative Court, when considering the first applicant's case, did not make any reference to the child's best interest'.

[142] Oddny Mjöll Arnardottir, 'The "procedural turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) International Journal of Constitutional Law 9.

[143] *Paposhvili v Belgium* (n 121), paras 145-55.

[144] See Concurring Opinion of Judge Lemmens to *Paposhvili v Belgium* (n 121), para 4.

> it is not for the Court to conduct an assessment, from the perspective of Article 8 of the Convention, of the impact of removal on the applicant's family life in the light of his state of health. In that connection the Court considers that this task not only falls to the domestic authorities, which are competent in the matter, but also constitutes a procedural obligation with which they must comply in order to ensure the effectiveness of the right to respect for family life. As the Court as observed above (see paragraph 184), the machinery of complaint to the Court is subsidiary to national systems safeguarding human rights.[145]

The Grand Chamber added that the Belgium authorities,

> would have been required, in order to comply with Article 8, to examine [...] whether, in the light of the applicant's specific situation at the time of removal [references omitted], the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.[146]

The Grand Chamber concluded that had the applicant been removed without the national authorities having made an assessment of the relevant factors, there would have been a violation of Article 8.[147]

From the perspective of the rights of migrants, the explicit turn to proceduralization of the Grand Chamber in *Paposhvili v Belgium* has its advantages and disadvantages. An advantage is that, if no substantive balancing has been done at the national level, the Court can directly find a violation of Article 8. Such a finding is not very problematic from the perspective of the Court's subsidiary role since ultimately the national authorities have to do the balancing. A disadvantage is that the migrant's fate remains undetermined, because the balancing at the national level might not turn up in his or her favor.

The greatest danger emerging from the procedural approach endorsed by the Grand Chamber manifests itself in circumstances when national authorities

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[145] *Paposhvili v Belgium* (n 121), para 224. For an analysis of a similar reasoning under Article 3 of the ECHR, see Stoyanova, 'How Exceptional Must "Very Exceptional" Be?' (n 46).

[146] *Paposhvili v Belgium* (n 121), para 225.

[147] Practically, this did not make a difference for this particular applicant and his family, since he passed away before the ECtHR Grand Chamber delivered its judgment.

have done the balancing, but their assessment is ultimately incorrect. If the Court draws positive substantive inferences simply from good national procedural practices, but does not engage in a substantive review of the balancing processes, human rights protection at the international level could be undermined. When procedural review is used to replace or bar substantive review at the international level, there is a risk that substantive rights protection is weakened.[148] This could constitute a further diminishment of the rigor of review that adds to the weaknesses identified in Section VI. It also signals a reluctance by the Court to deal with difficult and controversial issues, and its preference to push the resolution of these issues to the national level.

The preference of the procedural review, furthermore, should be viewed with great degree of caution, as the procedural protection at national level in immigration proceedings is generally more limited in comparison with other proceedings.[149] Therefore, strong reliance on national procedures that are innately weakened due to the absence of robust guarantees is problematic.

At the same time, the 'procedural turn' could also incentivize national authorities to boost their efforts to provide for better regulation and evidence-based decision-making.[150] This trust in the national authorities, however, could be controversial when these authorities themselves are not willing to fulfill their international obligations, or are likely to waive the standards due to populist pressure by making *pro forma* procedural assessments. Therefore, placing the burden on national authorities to adopt unpopular decisions (preventing deportation due to possible disruption of family life) might once again lead to diminishment of substantive human rights protection.

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[148] Eva Brems, 'The 'Logics' of Procedural-Type Review by the European Court of Human Rights' in Gerards and Brems (n 138) 17, 21-2.

[149] As the Court determined in *Maaouia v France* (2001) 33 EHRR 42, para 40, Article 6 (the right to fair trial) does not apply to deportation proceedings. Comparative protection is, however, afforded by Article 13 (the right to effective remedy).

[150] Janneke Gerards and Eva Brems, 'Procedural Review in European Fundamental Rights Cases: Introduction' in Gerards and Brems (n 138) 1, 13.

The turn towards proceduralization is relatively new; it is still in need of development and it raises disagreements among judges.[151] Some judges at the Court clearly favor a review that involves an assessment of the procedure followed at the national level, without engaging with substantive balancing under Article 8.[152] *Paposhvili v Belgium* was unanimously adopted and no judge objected to the reasoning, which suggests that the Court will eschew substantive balancing.[153] It remains to be seen whether *Paposhvili* laid the basis for a reversal of the Court's long-standing practice of conducting its own balancing.

VIII. Conclusion

Returning to the CoE Secretary Report on populism and the proposed remedy therein of strengthening the role of the ECtHR, it needs to first be acknowledged that in the context of the rights of migrants (which is one of the main targets of populism), the Court has played an important role. The Court has offered a space where reasoned arguments can be advanced as to whether disruption of family life in pursuit of immigration control can be justified. This is a space where state actions are an object of scrutiny. At the same time, however, the space is very limited, which makes it difficult to expect the Court to offer a strong resistance against national populist policies. It is also difficult to expect the Court to resist restrictive trends. The Court is prepared to condone harsh decisions against migrants and, in this sense, any populist critique against the Court itself and its reasoning is out of

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[151] Thomas Kleinlein, 'Consensus and Contestability. The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) 28(3) European Journal of International Law 871.

[152] This could be positive for the applicant. See Joint Dissenting Opinion of Judges Ziemele, Tsotsoria and Pardalos in *Arvelo Aponte v the Netherlands* (n 80). It could be also negative for the applicant see Joint Dissenting Opinion of Judges Villiger, Mahoney and Silvis in *Jeunesse v the Netherlands* (n 76). Marc Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers' (2010) 3 Inter-American and European Human Rights Journal 3, 48 (arguing that the Court should limit its role to procedural review).

[153] It can be argued that the Grand Chamber's approach in *Paposhvili v Belgium* (n 121) will be restricted to Article 8 cases where migrants try to avoid expulsion due to disruption of family life combined with deterioration of their health.

touch with the actual practice of this institution. This is essential for responding to any populist attacks against the ECtHR.

Despite the laudable space offered to examine state actions on immigration matters, I showed that the Court does not apply its usual scrutiny in such cases. One of the main objectives of this article was precisely to demonstrate the aberrations in the technical legal reasoning in the migration cases under Article 8 ECHR. The proportionality model with its subtests was used as the benchmark to highlight these aberrations and expose the lenient position of the Court regarding state decisions on cases concerning the family life of migrants.

Four anomalies have been discussed. First, the Court does not question the rational connection between a measure (i.e. expulsion of a family member) and the aim that the state pursues. The connection is not subjected to any rational or factual scrutiny. Rather, immigration control is the objective in itself; the rational and factual relation between the expulsion of a *particular* person and some of the legitimate objectives indicated in Article 8(2) is simply assumed. With this assumption and the implied premise that the rights of migrants and the rights of others are necessary in opposition, the Court is getting close to utilizing populist tools. After all, some of the tools that populism resorts to are precisely unreasoned policies based on uncorroborated facts, which are buttressed by the supposition that there is an inevitable conflict between 'us' and 'them'.

Second, the less-intrusive-means test has been inverted to the effect that a less protective and more intrusive alternative (maintaining family life by relocation to another country or from distance) is not only easily accepted, but also preferred. Third, the Court has introduced a test, i.e. the 'exceptional circumstances' test, that has rendered the protection of the right of migrants to enjoy family life the exception, rather than the starting point.

Lastly, since the interests of the state in exercising immigration control by expulsions are invariable, the outcome of the balancing exercise is entirely contingent on the individual circumstances of the particular migrant. In the adjudication of migrant cases, the ECtHR assumes that, in principle, the right balance is struck at the national level, and that only some specific features of the individual circumstances could disrupt that balance. When

considering these individual circumstances, the Court has usefully identified relevant factors to consider; however, since different weight can be attached to different factors in different cases, and since it is not entirely clear how the different factors relate to each other, the outcome of specific cases is unpredictable. This, combined with the above-discussed weakening of the proportionality analysis, leads to the impression that opposite outcomes are legally possible and, ultimately, that political pressures can influence the outcome in the cases before the ECtHR.

To avert the impression that the Court entirely bows to political pressure and to maintain its standing as a guardian of human rights in the difficult area of migration, the Court can proceduralize the issue. Under this approach, the quality of the national decision-making process is key for the ECtHR to decide whether an expulsion measure violates Article 8. Despite its advantages, in its extreme form, this approach might mean that the Court abdicates from carrying out a substantive balancing of conflicting interests and, instead, leaves this difficult and controversial task to the national authorities. This would be another manifestation of the extreme caution with which the Court treads in the field of migration, since it would wait to see how the principles that it has developed so far are applied at the national level. At the national level, however, unpopular decisions in favor of migrants' rights might be difficult to take, due to the political environment that might be hostile towards migrants. More cases can, therefore, be expected, where despite the observance of procedural guarantees (that are in any case weakened in the field of migration) and the due consideration of the relevant factors (that are in any case moldable and susceptible to opposite outcomes), the national decision-making process reaches incorrect conclusions. This needs to be taken note of by the ECtHR judges in the current uncertainty at the level of the Court, as to when and how the procedural approach is to be applied and developed.

The Right to Preimplantation Genetic Diagnosis: Biological Citizenship and the Challenge to the Italian Law on Medically Assisted Reproduction

Volha Parfenchyk[*†]

In 2004, the Italian Parliament passed a restrictive law on medically assisted reproduction 40/2004 outlawing the use of preimplantation genetic diagnosis (PGD) in Italian fertility clinics. The adoption of the law triggered a massive wave of lawsuits filed by Italian citizens and medical associations against the law, leading to the invalidation by the Constitutional Court of the impugned provisions as violating constitutional rights and to the legitimization of PGD. Drawing on the concept of biological citizenship and the critical approach to legal rights, this article explores the extent to which rights litigation can ensure the recognition of biological citizens' values and interests in using new biomedical technologies. It argues that countries' dominant institutionalized ways of constitutional interpretation and reasoning play a key role in how courts resolve rights disputes. This limits the scope of rights, and the values that underpin the claimed rights, based upon which citizens can claim access to new biomedical technologies. In Italy, due to these dominant institutionalized ways of constitutional interpretation and reasoning, the Italian Constitutional Court recognized that only the right to health of the woman, and not the rights to reproductive self-determination and to respect for private and family life, legitimized access to PGD. As a result, it failed to recognize citizens' relational values of parental responsibility and care that underpinned these rights. As such, biological citizenship in the form of rights claiming therefore provides limited potential for biological citizens to have their values and interests in using new biomedical technologies recognized by the state.

Keywords: rights, Italy, preimplantation genetic diagnosis, relational values, biological citizenship, assisted reproduction

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I. INTRODUCTION

In recent years, there has been an increased interest in the ideas of 'genetic'[1] and 'biological citizenship'.[2] These terms were introduced into academic literature to conceptualize the type of relationships between authorities and citizens that build upon the recognition of citizens as biological creatures whose health, treatment, maintenance and improvement are the key value. Unlike the traditional concept of citizenship, understood as a link between individuals and the state, biological citizenship may not necessarily have a 'nationalized form' and involve state apparatus. Instead, it may encompass different forms of political participation, civic engagement as well as a

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1 Deborah Heath, Rayna Rapp and Karen-Sue Taussig, 'Genetic Citizenship' in David Nugent and Joan Vincent (eds), *A Companion to the Anthropology of Politics* (Blackwell Publishing 2007).

2 Nikolas Rose and Carlos Novas, 'Biological Citizenship' in Aihwa Ong and Stephen Collier (eds), *Global Assemblages: Technology, Politics, and* Ethics *as Anthropological Problems* (Blackwell Publishing 2004). Adriana Petryna, *Life Exposed: Biological Citizens After Chernobyl* (Princeton University Press 2002). Nikolas Rose, *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century* (Princeton University Press 2006).

pluralization of political spaces in which the activities aimed at improving citizens' health take place. On the individual level, biological citizenship encompasses the 'regime of the self', that is, citizens' relations to themselves, their intuition of who they are and who they want to be, as well 'the actions they [take] upon themselves ... in the light of those understandings'.[3] As such, it represents an outcome of various practices of subjectification and the construction of citizens' identities. The contemporary regime of the self includes the feeling of being personally entitled to, and responsible for, enhancing and maintaining their vitality.[4] Using Rose's apt expression, in the contemporary 'regime of the self', health has become 'a desire, a right and an obligation'.[5] In addition, and mainly due to the developments in genetic science, the regime of the self includes the feeling of entitlement to and responsibility for, not only their own health, but also the health of their existing and future family members. As Rose argued, when an illness has genetic roots, 'it is no longer an individual matter. It has become familial, a matter both of family histories and potential family futures'.[6] As a result, to ensure better prospects of their health, the one of their children and of other family members, individuals for example strive to manage their genetic risks and use new biomedical and genetic technologies for this purpose. On the collective level, biological citizenship may include the formation of biosocial communities such as patient and self-help groups.[7] These communities make alliances with scientists to shape the direction of scientific research and lobby their governments to assign more funds for financing research on their health condition.

Other scholars, however, emphasize that biological citizenship can and does have more traditional forms and involve state apparatus. Specifically, biological citizens actively formulate and make rights claims upon their

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3 Miller Pete and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life* (Polity 2008) 7. Michel Foucault, *Histoire de La Sexualité* (Gallimard 1976).

4 Paul Rabinow and Nikolas Rose, 'Biopower Today' (2006) 1 BioSocieties 195. Rose and Novas (n 2). Rose (n 2).

5 Nikolas Rose, 'Molecular Biopolitics, Somatic Ethics and the Spirit of Biocapital' (2007) 5 Social Theory & Health 3, 11.

6 Rose (2) 108.

7 Paul Rabinow, *Essays on the Anthropology of Reason* (Princeton University Press 1996).

governments in the name of their life and health and demand the state to protect their 'vital rights', for example by providing better access to biomedical benefits. Rights litigation is one of the most frequent mechanisms used by citizens against the state. For example, in her research, Petryna showed how citizens of post-Chernobyl Ukraine demanded compensation for their damaged health through litigation.[8] Further, Biehl showed how by litigating in Brazil, 'patients-citizens' achieved 'a democratization of medical sovereignty' enabling alternative health care practices to thrive.[9] Finally, Hanafin explored rights litigation in Italy against a restrictive law on medically assisted reproduction (Law 40/2004)[10] initiated by Italian couples with various genetic pathologies to gain access to preimplantation genetic diagnosis (PGD) forbidden by Law 40/2004.[11] Hanafin concluded that the use of rights litigation helped citizens to resist the 'politics from above' and have their interests, while ignored by Parliament, recognized by Italian courts.[12]

Hence, for these authors, rights litigation was employed by citizens to fulfill their hopes and have their claims 'in the name of their damaged biological bodies'[13] satisfied, whether it was a claim for financial compensation, as it was in the case of Chernobyl workers, or for access to a forbidden technology, as it was in Italy. As researchers argue, hope to find cure for one's illness is

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8 Petryna (n 2).

9 Joao Biehl, *Will To Live: AIDS Therapies and the Politics of Survival* (Princeton University Press 2007) 135.

10 Legge 19 febbraio 2004, n.40, in G.U. 24 febbraio 2004, n.45 (Law 40/2004).

11 Usually PGD is performed to search and detect genetic mutations in genes responsible for either monogenic diseases (cystic fibrosis, beta thalassemia, Huntington's disease) or for certain polygenic diseases (such as breast and ovarian cancer).

12 Patrick Hanafin, 'Rights, Bioconstitutionalism and the Politics of Reproductive Citizenship in Italy' (2013) 17 Citizenship Studies 942. Patrick Hanafin, 'The Embryonic Sovereign and the Biological Citizen: The Biopolitics of Reproductive Rights' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012).

13 Ingrid Metzler, 'Between Church and State: Stem Cells, Embryos, and Citizens in Italian Politics' in Sheila Jasanoff (ed), *Reframing Rights: Bioconstitutionalism in the Genetic Age* (MIT Press 2011).

another key aspect of biological citizenship.[14] Hope grounds political activism in all its forms, whether this be the making of alliances with scientists to shape the direction of scientific research, political participation through lobbying, or the organization of public referenda. Furthermore, and importantly, biological citizenship operates within what Rose called the 'political economy of hope'.[15] The hope of patients to find cures for their illness triggers the funding of research and treatment institutions and fuels the commercial aspirations of companies involved in procuring the relevant services and products. Thus, because of hope, 'life itself is increasingly locked into an economy for the generation of wealth',[16] or indeed bio-value.[17]

Yet, while hope might well drive biological citizens to look for cures for their illnesses, the hope that rights is an appropriate instrument to attain this goal needs further exploration. In this article, I explore the extent to which rights litigation can ensure the recognition of biological citizens' values and interests in using new biomedical technologies, as well as the costs and disadvantages of using rights to achieve these ends. To do so, I reconstruct the story of Italian litigation for citizens' access to PGD, paying particular attention to how the values and interests of citizens in using new biomedical technologies were recognized through rights litigation. I argue that countries' dominant institutionalized ways of constitutional interpretation and reasoning play a key role in how courts resolve rights disputes and thereby limit the scope of rights and underlying values, upon which citizens can claim access to new biomedical technologies. As I illustrate, adhering to its own doctrine on abortion, the Italian Constitutional Court ruled that only the right to health of the woman, and not the rights to reproductive self-determination and to respect for private and family life, legitimizes access to PGD. Thereby it reiterated its principle of a high value attributed to unborn human life and rejected to recognize citizens' relational values of parental responsibility and care for the health of their future children, important elements of their identity. To some, despite that access to PGD was formally

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[14] Rose (n 2). Rose and Novas (n 2).

[15] Ibid.

[16] Rose and Novas (n 2) 452.

[17] Catherine Waldby, 'Stem Cells, Tissue Cultures and the Production of Biovalue' (2002) 6 Health 305.

legitimized, the failure to recognize biological citizens' relational values and allow PGD to protect them might mean that only a partial success was achieved.

I will proceed as follows. In Section II, I will describe the problem of using rights to achieve the desired social and legal transformations. In Section III, I will describe how the Italian Constitutional Court interpreted the Italian Constitution regarding the issue of the status of human fetuses and state obligations with respect to them as well as how this interpretation was consolidated in its subsequent jurisprudence. In Section IV, I will show how Law 40/2004 was deliberated and adopted. In Section V, I will discuss the first legal cases launched by Italian couples with genetic pathologies seeking access to PGD and how they were decided by local judges, illustrating the importance of the principle of state protection of unborn life for their success. In Section VI, I will attend to the first judgments of the Italian Constitutional Court regarding the admissibility of PGD. In Section VII, I will show how the Court refused to recognize relational values of the plaintiffs due to the positive obligation of the state to protect unborn human life. In Conclusion, I will add some final remarks.

II. Rights Critique and the Problem of the Reconstruction of Legal Rights

The belief in rights as an instrument to remedy social ills has not always enjoyed support from lawyers and legal scholars. Starting with legal realists and following critical legal studies (CLS) scholars, this belief has been increasingly criticized.[18] One of the most famous critique on rights was launched by CLS scholar Duncan Kennedy.[19] He argued that he lost his hope, or rather faith, in rights because rights turned out to be just like any other type of rhetorical or policy argument and, therefore, were not 'trumps' in the Dworkian sense, that is, special claims which could override the interests of a political majority and lead to the closure of the debate.[20] Even if they were

[18] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago 1991).

[19] Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002).

[20] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

used as trumps, rights have the ability to produce counter-claims. The need to balance them would, then again, reduce the dispute to some political or subjective argument, as 'reasoning from the right' contains no objective criteria against which the balancing could be performed.[21] Therefore, what leads to a closure of a controversy is not the claiming of rights as such, but local contingent factors such as the identity of the rights claimer, their rhetorical mastery, and the political viability of supporting arguments. As Kennedy aptly put it, his loss of faith in rights is a 'loss of faith in the judge/legislator distinction, or in the idea of the objectivity of adjudication'.[22]

Feminist critique has also been skeptical of the emancipatory potential of rights. Similar to Kennedy, Smart emphasized rights' ability to produce counter-rights and, respectively, the importance of the existing relations of power for how the balancing between the competing rights will be performed.[23] She argued that counter-rights such as men's rights, fetal rights and children's rights could be and are being used to restrict, for example, women's access to abortion and constitute a disguised support for patriarchal relationships in a society. Therefore, particularly for women, as a traditionally marginalized societal group, the use of rights might not be helpful, as the existing relations of power will even further entrench the existing subordination of women through rights.[24] Similarly, according to Lacey:

> rights may operate, in Dworkin's memorable phrase, as trumps: but trumps are of little use if there are many trumps in the pack. And this multiplicity of rights increasingly brings with it a reliance on a coercive framework of enforcement which, as Carol Smart has argued, inevitably depends on violence of legal power: rights are a creature of the state and hence a function of existing configurations of power. This means, it is argued, that they are of limited use to the politically marginalized or for the construction of claims oppositional to prevailing power relations.[25]

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[21] Kennedy (n 19).

[22] Ibid 197.

[23] Carol Smart, *Feminism and the Power of Law* (Routledge 2002).

[24] Smart (n 23).

[25] Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004) 39. Smart (n 23).

Therefore, the outcome of rights adjudication is more a consequence of local factors such as the existing relations of power in the society and the strength of the arguments used.

One such contingent local factor affecting rights adjudication is the influence of institutionally anchored ways of constitutional interpretation and reasoning, performed by national constitutional courts and contained in constitutional courts' rulings.[26] The burgeoning field of comparative constitutional law illustrated the diversity of interpretation techniques applied by constitutional courts to the interpretation of national constitutions, for example, with respect to the issue of women's reproductive rights and fetal rights.[27] Such a difference can be explained by the national political and legal culture of the country where adjudication takes place.[28] In addition, since these patterns of constitutional interpretation and reasoning are established in constitutional jurisprudence, i.e. in the jurisprudence of highly authoritative supreme courts, they affect the process of rights adjudication also through acting as judicial precedents. Both in common and civil law countries, judicial precedents play an important role because they help to assure the 'continuity scripts of the law'[29] and the certainty of jurisprudence.[30] In sum, the importance of institutionally anchored patterns of constitutional interpretation and reasoning for how rights adjudication is performed testifies that the appeal to rights does not lead to one particular outcome achievable through objective reasoning from the right. Instead, this

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[26] Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

[27] Goldsworthy (n 26). Reva B Siegel, 'The Constitutionalization of Abortion' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012). Donald P Kommers, 'Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective' [1985] *Brigham Young University Law Review* 371. Myra M Ferree, 'Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany' (2003) 109 American Journal of Sociology 304.

[28] Goldsworthy (n 26).

[29] Rosenberg (n 18).

[30] Neil MacCormick and Robert S Summers (ed), *Interpreting Precedents: A Comparative Study* (Dartmouth Applied Legal Philosophy Series 1997)

outcome emerges from applying historically and contextually specific patterns of reasoning and constitutional interpretation, institutionalized in the constitutional case law of the country, to the case at hand.

Less attention has been paid to the role factors, such as institutionally anchored traditions of constitutional interpretation and reasoning, play when the attempt to reconstruct rights is performed by rights claimants. In legal theory, the need and importance of reconstructing legal rights is discussed because the ontological basis upon which traditional rights discourse and rights theory build is increasingly problematized. This ontological basis consists of the right-bearing individual seen as a separate, atomistic and self-sufficient being. Respectively, rights are seen as shields intended to protect this autonomous self and its individual values against intrusion and harm from other individuals and the state. These ontological presumptions of rights, however, have been criticized, as the emphasis on individual autonomy of the rights discourse does not allow to account for the relationality and interdependence among people.[31] Following the idea of relational autonomy, feminist scholars argued that individuals are to a large extent relational beings whose identity and bodies are shaped by the relationships and connections between them and other people.[32] Family has been used as an example of an entity whose members are particularly strongly bound by the relational ties such as responsibility, care and collective interests.[33] Similarly, pregnancy has been discussed as an example *par excellence* of relational autonomy.[34] Pregnant women's personal boundaries are intertwined with the boundaries of the fetus and the latter, in turn, at least in the first stages of pregnancy, entirely depends upon the mother. The emphasis on relationality has been particularly important to undermine the

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[31] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011). Isabel Karpin, 'Legislating the Female Body: Reproductive Technology and the Reconstructed Woman' (1992) 3 Columbia Journal of Gender and Law 325.

[32] Ibid.

[33] Hilde Lindemann Nelson and James Lindemann Nelson, *The Patient in the Family: An Ethics of Medicine and Families* (Routledge 1995). Michelle Taylor-Sands, *Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Reproduction* (Routledge 2012)

[34] Karpin (n 31).

viability of views on a disembodied embryo as a value in itself, or as a person having legal personality and rights, that should be protected against harm and violation.

In order to tackle the shortcomings of the existing rights discourse, some scholars engaged into the process of reconstructing rights. Specifically, some authors developing the idea of relational autonomy, proposed the relational approach to rights. For example, according to Herring, rights could be seen as claims protecting, not only individual but also relational values and interests.[35] While rights are still claimed to protect individual values and interests, there is no reason, according to Herring, why they cannot also be claimed with respect to 'relational values' and interests such as care, responsibility and parental duty. For example, rights such as the right to respect for private and family life, protected by Art. 8 of the ECtHR, can act as such a right, promoting relational values.

Despite the significance of this research on relational autonomy, relational rights and the need to reconstruct rights theory to accommodate relational values, it has focused mainly on the importance of using relational approach to rights as more truthfully reflecting the ontological structure of the world. As a result, the role of contextual factors has been neglected and the relations of power in whether such reconstruction of rights will ultimately succeed. As this article will further illustrate, institutionally anchored ways of reasoning and constitutional interpretation, consolidated in the country's constitutional jurisprudence, can be decisive for whether the reconstruction of rights will be successful. More specifically, in the Italian litigation for access to PGD, they were a key factor why the rights claimed by the litigants, that could protect relational values – the right to reproductive self-determination and the right to respect for private and family life – were not recognized by the Constitutional Court. As a result, existing power configurations might preclude citizens from achieving their goals through rights litigation and having their relational values of care and parental responsibility recognized by the state and thus undermine the importance of rights litigation for achieving biological citizens' goals.

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[35] Jonathan Herring, 'Forging a Relational Approach: Best Interests or Human Rights?' (2013) 13 Medical Law International 32.

III. Fetal Rights in the Italian Constitutional Jurisprudence

The Italian Constitutional Court legitimized abortion in 1975 when it repealed as unconstitutional the abortion articles of the Italian Criminal Code prohibiting abortion.[36] According to the Constitutional Court's ruling, they violated the right to health of the woman.[37]

The Constitutional Court built its ruling on the following arguments. First, it decided that the protection of the conceived (*concepito*) had a constitutional foundation. Specifically, it stated that Art. 2 of the Constitution,[38] an open-ended norm, 'recognizes and guarantees the inalienable rights of human beings, a legal status we must apply to the conceived, albeit with some particularities'. Second, it argued that whereas in itself the criminalization of abortion by the legislator was justified, the protection of the fetus was not absolute and should be balanced with other constitutional commitments of the Italian State. Specifically, because pregnancy and the health condition of the fetus could create adverse effects on pregnant woman's mental or physical health and the woman's right to health also constitutes the fundamental right guaranteed by the Constitution, the need to protect the latter warrants the limitation of the rights of the fetus. Yet, according to the Court, the legislator did not adequately balance its duty to protect the fetus's rights with the duty to protect the pregnant woman's right to health. Therefore, the respective articles of the Italian Criminal Code were unconstitutional. In addition, the Court remarked that 'the right of someone who is already a person – like the mother – not only to life, but also to good health, is not equivalent to the

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36 C.C., 18 febbraio 1975, n. 27 (Abortion Ruling 27/1975).

37 Costituzione della Repubblica Italiana, Art. 32. 'The Republic safeguards health as a fundamental right of the individual and as a collective interest and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person.'

38 Art. 2 of the Italian Constitution: 'The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.'

protection of the embryo who is yet to become a person'.[39] Finally, the Court addressed to the legislator the requirement to establish through law those means that could prevent performing abortion 'without serious acknowledgments about the reality and gravity of the harm or danger that the continuation of pregnancy might inflict upon the mother'.[40] Thus, according to the Court judgment, abortion remained a crime. Yet, when it was necessary for the protection of life and health of an adult person, the judgment 'opened some space for the legitimacy' of abortion.[41]

The reasoning of the Italian Constitutional Court is thus distinctive for its strong pro-life overtones. It acknowledged that the fetus 'was to become a person' and thus enjoyed constitutional rights, although with some particularities that the state had a positive obligation to protect and ensure. However, because no right is absolute, the interference with embryos' rights could be justified to protect values and rights of greater moral and legal weight, such as the right to health of the woman.[42]

Three years later, Italian Parliament followed the Court and passed a law that decriminalized abortion if pregnancy and delivery created risks to the pregnant woman's health.[43] The Law allowed abortion within the first 90 days of pregnancy if 'pregnancy, delivery and maternity would cause a serious threat to the woman's physical and psychological health, because of her economic, social or family conditions, or because of the circumstances in which the conception took place, or because of anomalies or malformations of the conceptus'.[44] Furthermore, a woman was allowed to perform abortion after 90 days if 'pregnancy or delivery poses a serious threat to the woman's life or when pathological processes such as anomalies or malformations of the fetus' causing a serious threat to psychological or physical health of the

39 Abortion Ruling 27/1975 (n 36).

40 Ibid.

41 Monica Cesaritti, 'Liberazione dall'aborto: l'articolato universo delle donne, il Pci e l'approvazione della legge 194' (2011) 1 Mondo contemporaneo 39.

42 It thus performed an interpretive technique called 'balancing of values', characterizing the approach of the Constitutional Court to the adjudication on fundamental rights.

43 Legge 22 maggio 1978, n.194, in G.U. 22 maggio 1978, n. 140 (Law 194/1978).

44 Ibid.

woman are acknowledged'.[45] Finally, in Art. 1 the Law stated that 'the State protects life from the outset'; whereas it did not specifically indicate when exactly human life starts, human life at the embryonic stage of development was symbolically recognized as an object of state protection.

The approach of the Constitutional Court regarding the status of human fetuses was confirmed in its next two rulings that concerned the legitimacy of the abrogative referenda on the subject matter of Law 194/1978. The first ruling concerned three campaigns launched simultaneously by the Italian Radical Party, on the one hand, and Christian Democracy and the pro-life association Movement for Life (*Movimento per la Vita*, MpV), on the other hand. The Radical Party sought to fully decriminalize and hence liberalize abortion in Italy. It campaigned for repealing a number of provisions of Law 194/1978, particularly, Art. 1 of the Law ('The State protects life from its outset'), several articles that regulated the conditions and procedures of performing abortion before and after day 90 of pregnancy, as well the penal sanctions applicable if abortion would be performed in violation of the Law. Instead, Christian Democracy and MpV campaigned for restricting the performance of abortion in Italy launching two referenda campaigns, '*massimale*' and '*minimale*'. The petition for the 'maximal' referendum proposed the electorate to vote only for those articles of Law 194/1978 that conformed to the principle of absolute embryo protection and to vote against those that foresaw any right to perform abortion, including for the sake of protecting pregnant woman's health. The second petition called on voters to vote for excluding the mental health indication for abortion, since it allowed too free an access to legal abortion.

The Constitutional Court considered the petitions for the three referenda on the matter of their consistency with the Constitution. It recognized the 'maximal' referendum launched by the MpV and Christian Democracy to be unconstitutional because the prohibition of abortion would be inconsistent with the Court's own judgment that legitimized abortion if it was needed to protect women's health.[46] However, it allowed the 'minimal' referendum initiated by the MpV and Christian Democracy as well as the referendum

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[45] Law 194/1978 (n 43).

[46] C.C., 10 febbraio 1981, n. 26.

launched by the Radical Party.[47] With respect to the latter, the Court concluded that the provisions that were the question of the referendum constituted merely a 'discretional choice of the legislator' and therefore could be the object of the popular vote.[48] As shall be seen more clearly later, what in fact underlay the decision of the Court was, not so much its view that the liberalization of abortion through a referendum was constitutional, but rather that the criminalization of abortion was not the only legal means of regulating it. In other words, the referendum, at least according to the Court, was not about the liberalization of abortion in general, but about the specific means chosen by the legislator (criminalization) to regulate it. For the time being, however, the Law remained in force: the voters voted 'no' at both referenda.[49]

The next referendum aimed at the liberalization of Law 194/1978 was initiated in 1997 also by the Radical Party and the question of the referendum was analogous to the one of 1981 referendum. However, this time the Constitutional Court ruled against the admissibility of the referendum.[50] Referring to its Abortion Ruling 27/1975, it concluded that Law 194/1978 in its current shape was indispensable to ensure the realization of values that the Court itself had defined as fundamental and in need of positive state protection, including 'the protection of human life from its outset'. Importantly, the Court also explained why it came to the opposite conclusion in its ruling concerning the referendum campaign of 1981. It remarked that, unlike the referendum of 1981, in which the topic of the 'decriminalization of abortion' and the constitutionality of criminal punishment of illegal abortions were put on the forefront, in the current referendum these issues were not raised. Instead, a complete liberalization of abortion was sought. However, according to the Court, 'the Constitution does not allow to touch by means of abrogation, even a partial one, those core dispositions of law of 23 May 1978 n. 194, which concern the protection of the life of the conceived

47 C.C., 10 febbraio 1981, n. 26.

48 Ibid.

49 Jacqueline Andall, 'Abortion, Politics and Gender in Italy' (1994) 47(2) Parliamentary Affairs 238.

50 C.C., 30 gennaio 1997, n. 35.

when the mother's health is not under threat'.[51] In other words, even if the Constitution itself did not require the legislature to regulate the provision of abortion via criminal law, this did not mean that the Constitution allowed a complete liberalization of abortion. Instead, it required the legislature to implement legal provisions that would ensure the minimum degree of protection of 'embryos' right to life. Such minimum degree of protection was the prohibition of abortion for any reason other than the protection of mothers' health.

These two rulings further reinforced and institutionalized the Court's view on the status of unborn human life and the obligation of the state towards it. Similar to Abortion Ruling 27/1975 and again following its pro-life reasoning, the Constitutional Court reconfirmed that fetal rights were in need of state protection. They could be limited only to protect the constitutional value of a greater moral and legal weight such as the women's right to health. This reasoning, reinforced through a continuous reference to its former judgments, thus gave ground to the emergence and consolidation of the *dottrina giuridica* of the Italian Constitutional Court on the issue of the status of unborn human life and state obligations towards it. The doctrine, together with the reluctance of the Constitutional Court to involve into an overt conflict with Parliament over the issue of the regulation of reproductive technologies, would significantly affect the Court's position regarding the status of IVF embryos and the results of the campaign for access to PGD.

IV. The Influence of Catholicism, The Adoption of Law 40/2004 and IVF Embryos as 'Citizen Subjects'

The Italian PGD litigation was a consequence of the adoption by Italian Parliament of a highly restrictive Law 40/2004 regulating the use of ART in Italy, much discussed and criticized elsewhere.[52] The Law was a product of a

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[51] C.C., 30 gennaio 1997, n. 35.

[52] Ingrid Metzler, ''Nationalizing Embryos': The Politics of Human Embryonic Stem Cell Research in Italy' (2007) 2 BioSocieties 413. Herbert Gottweis, Brian Salter and Cathy Waldby, *The Global Politics of Human Embryonic Stem Cell Science: Regenerative Medicine in Transition* (Palgrave Macmillan 2009). Lorenzo Beltrame, 'The Therapeutic Promise of Pluripotency and Its Political Use in the Italian Stem Cell Debate' [2014] Science as Culture 1. Volha Parfenchyk, 'Redrawing the Boundary of

20-year-long controversy spurred on and sustained by the intervention of the Catholic Church in political decision-making in Italy.[53] The Church's moral judgement and vocal appeal to implement it through secular laws found a responsive audience among Italian politicians due to the political circumstances of that time. In the beginning of the 1990s, Italian politics was undergoing profound changes as a result of *Mani pulite* (Clean Hands), a massive judicial investigation of corruption cases among Italian politicians, which led to the disintegration of Christian Democracy, the leading party, and to the emergence of new smaller parties. These latter, especially right-wing parties, such as Berlusconi's *Forza Italia* and the ultra-right *Lega Nord per l'Independenza della Padania*, used the Church's moral teaching to foster their political identity and gain public support. This connection between the political interests of Italian politicians and the bioethical interests of the Church constituted the main political factor pushing for restrictive regulation of ART.

The main bioethical issue in the debate on ART was the 'moral and legal status of the human embryo'. According to Catholic teaching,[54] an embryo is a person from conception and the protection of its life, like that of born persons, is of utmost importance and must be safeguarded through positive law. Hence, the Catholic hierarchy pressed Italian politicians to adopt restrictive regulations of ART to ensure the embryo was protected against technological and scientific manipulation. As Flamigni and Mori argued,[55] the Church gave up its intent to ensure the protection of other catholic values through law such as the prohibition of human procreation 'outside of the conjugal act'.[56] As they argue, the Church agreed that it would not find support for this principle in an increasingly liberal society. However, the protection of embryos remained of paramount importance. In the war

Medical Expertise: Medically Assisted Reproduction and the Debate on Italian Bioconstitutionalism' (2016) 35 New Genetics and Society 329.

53 Patrick Hanafin, *Conceiving Life: Reproductive Politics and the Law in Contemporary Italy* (Ashgate Publishing 2007). Carlo Flamigni and Maurizio Mori, *La Legge Sulla Procreazione Medicalmente Assistita* (Net 2005).

54 Instruction for Human Life in Its Origin and on the Dignity of Procreation '*Donum Vitae*', 1988.

55 Flamigni and Mori (n 53).

56 Ibid.

against the 'culture of death', or ethical relativism, and fighting for the reinstallation of the 'culture of life',[57] embryo protection remained the key guidepost for the Church.

However, this absolutist view of human embryos was not shared by all, as a deep secular-Catholic cleavage had been embedded in Italian society, including the political sphere, for several decades. The lack of consensus regarding the status of the embryo and how ART should be governed led to a failure to quickly produce a law regulating ART. As a result, the only document that regulated the provision of artificial reproduction services was a Circular issued by the Minister of Health in 1988. However, the Circular only applied to public fertility centers, leaving private ones beyond its regulatory reach and leading to the establishment of a rather liberal approach towards ART. Private Italian clinics offered a wide array of ART procedures, ranging from more widespread ones such as the creation of supernumerary embryos and embryo cryopreservation to surrogacy, egg donation, and the fertilization of menopausal and single women. Thus, while Italian politicians were debating about how ART ought to be accommodated in Italian healthcare arrangements, Italian biological citizens were reaping the benefits of new technologies in quite an unconstrained way. PGD, for example, was widely used in Italy, in particular because of the wide spread of diseases such as beta thalassemia in Mediterranean regions.[58]

In 2004, when the Berlusconi-led coalition won the majority of seats in Parliament, the Law was finally adopted. It was immediately labelled the 'Catholic law', because it was heavily influenced by the ethics of life of the Catholic Church and due to the Law's emphasis on the protection of embryos' rights and the disregard of interests and rights of adult citizens. In Art. 1, the Law symbolically recognized the IVF embryo as a rights-holder.[59]

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[57] The papal encyclical on the Value and Inviolability of Human Life '*Evangelium Vitae*', 1995.

[58] Sandrine Chamayou and others, 'Attitude of Potential Users in Sicily towards Preimplantation Genetic Diagnosis for Beta-Thalassaemia and Aneuploidies' (1998) 13 Human reproduction 1936.

[59] Law 40/2004, Art. 1: 'Al fine di favorire la soluzione dei problemi riproduttivi derivanti dalla sterilità o dalla infertilità umana è consentito il ricorso alla procreazione medicalmente assistita, alle condizioni e secondo le modalità previste

To implement the rights of embryos, the Law prohibited many reproductive technologies and practices. Specifically, it forbade embryo experimentation, prescribed that clinical and experimental research must be performed only for the sake of the embryo itself, forbade the creation of embryos for scientific and experimental research and outlawed eugenic embryo selection (Art. 13). Further, in Art. 14, it prohibited the discarding and cryopreservation of embryos, and prescribed that doctors must not 'create embryos in a number higher than the one strictly necessary for a single and simultaneous transfer, and in any case not more than three'. Hence, the doctor was obliged to create not more than three embryos and all the resulting embryos, including those not capable of development and the sick ones, had to be implanted into the women's uterus. The only exception to this rule was if the female patient had health issues that were unforeseen at the moment of fertilization of the eggs (Art. 14 para. 3). Even in this case, however, after the patient's health improves, the doctor was obliged to proceed with implantation.

To further restrict the possibilities of embryo manipulation, the Law directly regulated some adult citizens' rights concerning the use of, and access to, ART. First, it prescribed that only infertile married couples could have access to ART in Italy. Therefore, fertile couples wanting to avail themselves of the opportunities offered by the new technologies were excluded. Similarly, single citizens, homosexual couples and unmarried heterosexual couples did not have the right to use them. Second, in Art. 4, the Law prohibited women from withdrawing their consent after the fertilization of her eggs which meant they could formally be forced to undergo coercive treatment if they changed their mind after the IVF process had started.

Combined, all these provisions technically made PGD impossible. In addition, they created sever risks to women's health. For example, the provision obliging doctors to create a maximum of three embryos, without the right to cryopreserve them, forced them to repeat harmful hormonal stimulations, which created the risk of causing such adverse effects as ovarian hyperstimulation syndrome (OHSS) and ovarian cancer. Also, the difficulty in estimating how many embryos would be created following oocyte

dalla presente legge, che assicura i diritti di tutti i soggetti coinvolti, compreso il concepito'.

insemination could result in a multiple pregnancy, which also put women's health at risk. Furthermore, the outlawing of PGD meant that couples faced a difficult choice between raising a baby with severe genetic pathologies or undergoing a psychologically and physically traumatic abortion procedure.

The enactment of Law 40/2004 provoked a great outflow of Italian citizens seeking treatment abroad. The *Osservatorio Turismo Procreativo* (Observatory of Procreative Tourism), a project launched in 2005 to monitor the consequences of Law 40/2004, reported that the number of couples going abroad to receive treatment in 2005 was almost four times as high as it was in 2003.[60] In 2010, the European Society of Human Reproduction and Embryology performed a survey of foreign patients treated in 46 clinics in six European countries.[61] It found out that 31.8% of the forms were filled in by Italian patients and 70.6% of them referred to legal restrictions as their reason for seeking treatment abroad. Among the most frequent procedures were IVF, gamete and embryo donation and PGD. Not all citizens decided to go abroad to receive the forbidden treatment, however. Some of them, instead, decided to pursue their rights with hope for a better outcome.

V. Local Courts, Biological Citizenship and the Appeal to Relational Values

The Law's prohibition on using the benefits of science and technology to fulfil one's personal reproductive interests prompted citizens to mobilize their efforts and to change the Law 'from below'. They used the mechanism of rights litigation to challenge the constitutionality of the Law and to have their interests recognized by the state. Specifically, the mobilization was undertaken by individual citizens who were susceptible to various serious genetic pathologies such as beta thalassemia or cystic fibrosis and wanted to use PGD to start pregnancies with healthy embryos. Litigants were supported by several patient and scientific associations acting in courts as third parties; these included the Luca Coscioni association, the association

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[60] Osservatorio sul turismo procreativo. Turismo procreativo: fotografia di una realta (225). Press Conference <http://www.tecnobiosprocreazione.it/file_download/33/Turismo+Procreativo+fotografia+di+una+realt.pdf> accessed 4 May 2018.

[61] Francoise Shenfield et al, 'Cross Border Reproductive Care in Six European Countries' (2010) 25 Human Reproduction 1361.

of aspiring parents 'Cerco un Bimbo' and the association for the study of infertility, CECOS Italia. In addition, and importantly, the fertility centers, which had formally denied the plaintiffs PGD and acted as defendants in the trials, mostly testified in favor of the plaintiffs. Hence, a strong coalition of individual citizens and their collectives emerged and acted together to restore rights taken away by Parliament.

In 2004, the first complaint was brought against a fertility center in the local court in Catania.[62] The plaintiffs, husband and wife, were healthy carriers of beta thalassemia and were infertile. During the course of their fertility treatment, Law 40/2004 came into force and the plaintiffs signed the consent form that the Law required. A month later the couple asked the center to proceed with PGD and to have only healthy embryos implanted and the rest frozen. The wife also attempted to withdraw her previous consent to having all the embryos implanted. In her written request to the director of the fertility center asking him or her to proceed with PGD and have only healthy embryos implanted, the wife described her 'hope to conceive a baby that could fulfill and complete our existence and fulfill our desire to be a family in the full and complete meaning of this word'.[63] Further, she described the painful feelings she would have if she gave birth to a baby who would endure 'atrocious suffering' for which she would feel responsible.[64] She also added that if she conceived a sick baby, she would be forced to have an abortion. The director of the center, however, rejected the request, referring to the restrictions established by Law 40/2004. The couple initiated legal proceedings, claiming that the fertility center's refusal to perform PGD violated the inalienable constitutional rights of the wife stipulated in Art. 2 (the guarantee of inviolable human rights) and Art. 32 (the right to health and the right not to be forced to submit to unwanted medical treatment) of the Italian Constitution.

The judge, however, did not sustain the complaint. First, he concluded that the prohibition of PGD did not violate the wife's right to health (Art. 32 para. 1). According to the judge, the recourse to abortion, allowed by Law

[62] Trib. Catania, 3 maggio 2004.

[63] Ibid.

[64] Ibid.

194/1978,[65] was permitted only to prevent risks to the mother's health that a health condition of the fetus or pregnancy could create. However, in the case of PGD, her health could not be harmed because the procedure is performed before the pregnancy is established. Second, he addressed the argument of the plaintiffs that the implantation of embryos against the mother's will would violate Art. 2 and Art. 32 para. 2 of the Italian Constitution. According to the plaintiffs, together these norms meant that if a person is the title-holder of a right (in this case, the right to health), then the person's will cannot be subordinated to another interest and that the will of the individual is the only measure for deciding if, when and how treatment is to be performed. But the court responded that, in the case of PGD, the interests of two subjects were in conflict: the mother and the unborn child. In this case, it is illogical that the mother alone can decide how to balance these interests. Therefore, it was up to the state to decide how to balance these rights, and the prohibition on withdrawing consent, stipulated in Law 40/2004, represented nothing more than the state's view on how the two must be balanced. Finally, he concluded that the plaintiffs' claim was, in fact, simply their 'desire-interest to have a healthy child', which they only masked by referring to other rights. However, he continued, this right could not be sustained because the Italian Constitution did not guarantee the 'right to have a healthy child' or to a 'virtual baby that lives only in a mental representation of its parents'. This, according to the court, was a eugenic practice, which Italian law forbids. Instead, together with Law 40/2004, the Constitution protects the child 'that will in fact live as a result of the fertilization of the eggs, even [if it is] possibly sick'.

Thus, the court's reasoning and the outcome of the litigation provide us with a vivid illustration of how rights-claiming against the state can affect the recognition of biological citizens' demands to ensure the protection of their or their family's health through the use of advances in biomedicine and genetics. As the analysis above illustrates, the plaintiff's position contained claims about the interdependence between her and her future baby and it was the care for its health and well-being that urged her to seek PGD. The plaintiff referred to the suffering she would experience if she would need to give birth to a severely handicapped and suffering baby, as well as the sense of

[65] Law 194/1978 (n 43).

an unfulfilled responsibility because of failing to ensure its good health. Thus, it was not only an individual harm afflicted on her that urged her to seek PGD, but also and particularly the suffering of her future baby that she wanted to prevent via PGD. In such a view, *caring* for the future baby entitled the woman to select embryos without pathologies and discard those carrying defected genes. Her personal feelings of suffering are only a part of deep emotional ties that bound her and her future baby.

However, caring for the health of the future baby as a reason for accessing PGD first had to be translated into a right whose violation might justify the access to PGD. Yet, doing so was not unproblematic because care that the mother described in her appeal implied not only a relatively understandable desire to have a healthy baby, but also the selection of embryos with good genes and the destruction of affected embryos. PGD, in fact, while allowing women to fulfill their caring obligations, inflicted harm upon other entities – existing sick IVF embryos. In particular, the protection of their life against violation and the prevention of harm was the reason behind the prohibition of PGD. Therefore, care for the health of the future baby, a relational desire and responsibility, also implied the affliction of individual harm upon those embryos that would bear defected genes.

In the court's view, motives such as the wish to give birth to a healthy baby out of responsibility for its health or simply to have a 'family' in the full and complete meaning of this word'[66] did not qualify as good enough reason for having access to PGD. Although the couple did not explicitly claim the right to a healthy child, the court 'discerned' this right in the couple's complaint, particularly in the wife's letter to her doctor, and dismissed it. According to the judge, satisfying this request would entitle the couple to 'eugenically select only healthy children' and mean a complete negation of the embryos' right to life. This, according to the court, the state could not allow as it bears a positive obligation to protect unborn life, imposed upon it by the constitutional jurisprudence as well as by Law 194/1978 and Law 40/2004. Therefore, the selection, let alone the destruction of embryos should not be allowed, even if performed for apparently positive and well-justified reasons such as care for the health of the baby eventually to be born.

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66 Trib. Catania (n 62).

The court acknowledged, however, by referring to existing law on abortion, that an embryos' right to life could be limited if the competing right to health of the mother was at risk. However, in the case of PGD, the court took the position that the wife's health could not be harmed in this way, so no rights conflicting with embryo rights could be violated. In other words, attempting to be consistent with the Italian law on abortion, which attributes strong protection to unborn fetuses, the court applied an individualist approach to rights, seeing the mother and the embryo as competing rivals with conflicting interests, because this approach would better promote and guarantee the protection of the embryo's life. If the plaintiff would prove how the mother's right to health is violated, then it would satisfy the plaintiff's complaint. However, because she failed to do so, the court had to dismiss the complaint.

The next case was brought by a couple from Cagliari in 2005.[67] Like the previous case, the husband and the wife were healthy carriers of beta thalassemia and could not conceive a baby naturally. The first IVF cycle was performed without PGD. Following prenatal testing, the couple learned that the fetus was affected with beta thalassemia and the woman had an abortion. After the abortion, she developed an 'anxiety depressive syndrome' that lasted for over a year and the couple decided to make use of PGD to prevent a recurrent negative impact upon her mental state caused by a similar experience. However, the doctor at the clinic refused to perform PGD, referring to Art. 13 para. 1 of Law 40/2004 prohibiting embryo experimentation. The couple asked the Cagliari court to perform a 'constitutionally oriented interpretation' of the Law and oblige the clinic to perform PGD, because not doing so would constitute 'a grave threat to the psychophysical health of the woman deriving from a well-founded fear that the embryo might be affected by a serious genetic disease' and therefore violate her right to health.[68] To substantiate the claim, the couple submitted a report from the wife's psychiatrist to the court which indicated that the woman had developed a mental health condition that could re-occur if she was prevented from using PGD. The couple also asked the court to submit the Law to the Italian Constitutional Court for adjudication on the matter of

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67 Trib. Cagliari, 16 luglio 2005, n. 5026.

68 Ibid.

its constitutionality if it decided that the first two requests could not be satisfied.

The judge considered the requests of the plaintiffs and decided that the clarity of the Law's intent to prohibit PGD did not allow a 'constitutionally oriented interpretation' of Art. 13 of the Law to be made and thus he could not instruct the clinic to perform the procedure. However, the court found that there was a possible contradiction between Art. 13 and the Italian Constitution, specifically, Art. 32 on the right to health. First, the judge referred to the judgment of the Constitutional Court on abortion (Abortion Ruling 27/1975) that addressed the issue of the conflict between the women's right to health and the rights of the fetus, ruling in favor of the former.[69] According to the judge, in the case of PGD, where the rights of IVF embryos similarly conflicted with women's right to health, the protection of the latter should also be prioritized over embryo's interests.

Second, according to the judge, the plaintiffs demonstrated how the legal prohibition of PGD could be harmful to the wife's mental health. Hence, in this case, the reference to health was successful because the plaintiff succeeded in proving how her health might be jeopardized by the prohibition of PGD. Third, the judge specified that legal access to PGD was warranted by the state's constitutional duty to protect the right to health of the plaintiff and not the 'interest of the parents in having a healthy child', as eugenics was forbidden by Italian law. Therefore, access to PGD should be provided on exactly the same grounds as access to abortion, that is, only if the health condition of the embryo or pregnancy would cause adverse effects to women's health. Like the Catania court, safeguarding the mothers' health was again listed as the only reason that could outweigh the conflicting rights of the embryo.

The Cagliari case is thus also illustrative of the interdependence that exists between the embryo and the pregnant woman. The harm caused upon the mental state of the woman is related not only to her individual interest, but also to the care for the future baby and its health. However, unlike the former case, rights invoked by the plaintiff were acknowledged by the judge because the plaintiff managed to translate this interdependence and care into the type

[69] C.C., 18 febbraio 1975, n. 27.

of right that would take priority over embryos' rights and that thus would enable the court to satisfy the complaint. This was done through reframing the mother's suffering into illness and hence her right to PGD as a right to health. The relational values as such were again left beyond the scope of state protection.

The analysis of the two cases is informative because it gives a preliminary illustration of how legal institutions struggle with carving out space for new biomedical technologies in their countries' constitutional order. As both CLS and feminist scholars argued in their analysis of legal rights, one of the main issues that rights claims face is that they can always give rise to counter-claims.[70] Because there are no objective criteria for deciding how the balancing of conflicting rights must be performed, the result of the balancing process depends on contextual factors, including political, moral and other variables. As I have shown above, it is important not only how local factors affect the balancing of individual rights, but also how they affect the ways in which rights, their ontological presumptions, their underlying values and interests are defined in courts in the first place. In the case at hand, one of such local factors was the tradition of treating human embryos as human beings in and of themselves, having moral and legal value due to a mere fact of their existence. This approach towards unborn human life was taken by the Italian Constitutional Court, consolidated in the Court's doctrine and later translated in the legislation on abortion. To be consistent with it and to prevent the possibility of an unconstraint disposal of embryos by future parents, both Cagliari and Catania courts denied that parents' 'interest in having a healthy child' had any constitutional basis. Instead, by recognizing that only the protection of women's right to health warrants affliction of harm on embryos, both courts followed and further reinforced the view taken by the Constitutional Court. Thus, a simultaneous production of constitutional rights, new biomedical technologies, and local legal culture characterized the debate on the constitutionality of PGD.[71] As I have already

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[70] Smart (n 23).

[71] Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004). Jasanoff, *Reframing Rights Bioconstitutionalism* (n 13).

shown and will detail further, there was little place in this debate for relational values and rights that could promote these values.

VI. The First Decisions of the Constitutional Court and the Right to Health

The judge of the Cagliari court asked the Constitutional Court whether Art. 13 of the Law 40/2004 violated Art. 32 of the Constitution on the right to health. However, the Constitutional Court declared the question of the constitutional legitimacy of Art. 13 inadmissible on procedural grounds,[72] and affirmed that the prohibition of PGD also derived from other articles of Law 40/2004 that the local judge had not submitted for consideration. He also held that prohibition of PGD reflected the 'spirit' of the Law. Put in another way, the local judge had failed to correctly formulate the appeal, which entitled the Constitutional Court to dismiss it. Importantly, the Constitutional Court did not take a stance on the legitimacy of PGD; its decision to keep the Law intact was a result of the local court's failure to fulfil the procedural requirements of the appeal procedure.

Success came later, in 2009. The local Florence court[73] and *Tribunale Amministrativo Regionale* (TAR) of Lazio[74] asked the Constitutional Court whether Law 40/2004 was in conformity with the Constitution. This time, however, they provided the Constitutional Court with arguments about other reasons why the Law might be unconstitutional. To begin with, they emphasized that it was not only mothers' mental health that could be harmed. Specifically, Art. 14 prohibiting embryo cryopreservation and obliging the doctor to implant all embryos simultaneously, created adverse effects on women's health like OHSS, ovarian cancer and multiple pregnancy. The most substantial contribution, however, was the conclusion by TAR Lazio about the degree of protection that IVF embryos were accorded by the Law itself. According to the Tribunal, the provision of the Law according to which doctors were obliged to create a maximum of three embryos and

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[72] C.C., 24 ottobre 2006, n. 369.

[73] Trib. Firenze, 17 dicembre 2007. Trib. Firenze, 23 agosto 2008, n. 382. Trib. Firenze, 11-12 luglio 2008, n. 323.

[74] Tribunale Amministrativo Regionale del Lazio, 31 ottobre 2007, n. 398.

implant all embryos simultaneously meant that embryo protection was not absolute. In particular, by allowing a doctor to create three embryos, the Law did not intend to cause a triple pregnancy but sought to increase the chances of (at least) one successful pregnancy. Parliament had thereby accepted, albeit implicitly, that only the healthiest embryo would give rise to pregnancy, while the rest would perish. Hence, the possibility of creating three embryos and not one meant that embryo protection was limited and that their 'lives' could be sacrificed to achieve certain important goals such as the protection of some procreative rights of Italian citizens. In addition, the prohibition to create more than three embryos created risks to women's health by increasing the risks of OHSS, ovarian cancer and multiple pregnancies. Therefore, the doctrine of the Constitutional Court on abortion, according to which a woman's right to health had priority over an embryo's life, should apply also to the case of ART.

In 2009, the Constitutional Court issued a judgment repealing as unconstitutional the prohibition to create no more than three embryos (Art. 14 para. 2) and the exception to the prohibition of embryo cryopreservation (Art. 14 para. 3), because these provisions violated the right to health of Italian female citizens.[75] The Constitutional Court used the reasoning put forward by TAR Lazio about the limited embryo protection accorded to embryos by Parliament itself. As a result, the Court found unconstitutional a part of Art. 14 para. 2, namely 'a single and simultaneous transfer, and in any case not more than three', and Art. 14 para. 3 prescribing that embryo cryopreservation could be performed only if the woman had serious health issues that were 'unforeseen at the moment of fertilization'.

Both judgments were subject of an intense public and scholarly debate and critique. Specifically, according to Italian constitutional law, a failure of the local court to formulate a complaint does not prevent the Constitutional Court from judging on the merits of the dispute, because of the constitutional law principle of derived constitutionality.[76] According to this principle, the Constitutional Court also had a right to repeal those provisions that were not directly questioned by the Cagliari court, if it saw a direct

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[75] C.C., 1 aprile 2009, n. 151.

[76] D'Amico Marilisa, 'Il Giudice Costituzionale E L'alibi Del Processo' [2006] Giurisprudenza Italiana 3859.

violation of constitutional rights. However, the Constitutional Court left Law 40/2004 intact by using a procedural flaw as the justification for its 'decision not to decide'.[77] Instead, it repealed the impugned provisions of the Law as unconstitutional only after it was presented with an argument about the Parliament's own intent to limit the protection of IVF embryos. What might be the reasons of this approach on the part of the Court?

First, this might have been a political move, as the Court might have wanted to avoid an explicit confrontation with Parliament, especially with respect to the problematic Law 40/2004. Second, the Court might have held that the Parliament had a right to distinguish IVF embryos from fetuses in their mothers' wombs and accord greater protection to the former, specifically by legislating that IVF embryos' rights outweigh the rights of the woman, including her right to health. Therefore, owing to the recognition that the intent of the Parliament was to accord limited protection to IVF embryos, the Court found grounds to equate embryos existing outside their mother's body with fetuses and thus to apply its jurisprudence on abortion also to the case of ART. In other words, it allowed the jurisprudence on abortion as well as its underlying philosophy to set foot in the interpretative toolkit of the Italian Constitutional Court also with respect to ART related issues. As I show in the following Section, the Court was very consistent in applying its jurisprudence on abortion also to the case of ART and to the protection of IVF embryos. In fact, exactly the reference to the principle of the protection of unborn life, reiterated and institutionalized in the Italian constitutional jurisprudence on abortion, prevented the reconceptualization of the right to PGD from the right to health of the woman into the right to reproductive self-determination and the right to respect for private and family life.

Tellingly, the judgment already contained the signs of how other cases on Law 40/2004, as well as the claim made by plaintiffs that other experiences and values justifying access to PGD should be acknowledged, would be approached by the Court. For example, the Constitutional Court declined to declare that Art. 14 para. 1, which prescribed the prohibition of cryopreservation as a general rule, was unconstitutional. Instead, it found that the limitation of the possibility to cryopreserve embryos to only 'serious'

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[77] Alfonso Celotto, 'La Corte Costituzionale 'decide Di Non Decidere' Sulla Procreazione Medicalmente Assistita' [2006] Giurisprudenza Italiana 3849.

health issues, 'unforeseen at the moment of fertilization' (Art. 14 para. 3), was unconstitutional. Rather than repealing the prohibition on cryopreservation as such, the Court only extended the range of health issues that justified embryo cryopreservation. Similarly, it only partially repealed Art. 14 para. 2: embryos still had to be created in a number 'strictly necessary' for implantation. Using the metaphor of Italian lawyers, the Court operated with a 'chisel rather than an axe' in repealing the disputed provisions, thus allowing only that degree of embryo manipulation that was essential to prevent adverse risks to women's health.[78]

VII. The Constitutional Court and the Rights to Self-Determination and to Respect for Private and Family Life

The plaintiffs in the following legal cases were fertile couples with various genetic pathologies who wanted to use PGD to start pregnancy with healthy embryos and therefore needed recourse to IVF. They complained that the Law was unreasonable in preventing fertile citizens from accessing PGD, while at the same time allowing prenatal testing and abortion to be performed – procedures significantly more potentially harmful and risky than PGD. As a result, they argued that Law 40/2004 violated several constitutional rights, including the right to self-determination which was protected by the open-ended Art. 2, the right to health (Art. 32), and the right to equality before the law (Art. 3).

These cases were considered by local courts and had different outcomes. The Cagliari court explicitly distinguished between the two rights that could legitimize the couple's access to PGD, namely, the right to health and the right to a healthy child, and recognized only the right to health as justifying access to PGD.[79] In the next three cases, however, the right to have a healthy child and the right to self-determination were acknowledged for the first

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[78] Daniele Chinni, 'La Procreazione Medicalmente Assistita Tra 'detto' E 'non Detto'. Brevi Riflessioni Sul Processo Costituzionale Alla Legge N. 40/2004' (2010) 2 Giurisprudenza Italiana 289. Lara Trucco, 'Procreazione Assistita: La Consulta, Questa Volta Decide, (Almeno in Parte) Di Decidere' (2010) 2 Giurisprudenza Italiana 281.

[79] Trib. Cagliari, 9 novembre 2012, n. 5925.

time. Local courts in Salerno[80] and Rome[81] sustained that the 'right to a healthy child', as part of the right to self-determination and guaranteed by the open-ended Art. 2 of the Constitution, also justified access to PGD. They, therefore, illustrate how judicial decision-making evolved towards the acceptance of a more liberal regulatory regime for PGD, allowing access to it, not only to prevent health risks to the female patient, but also to ensure the couple's right to self-determination on reproductive issues and the fulfillment of other, including relational, values and goals.

The position of the Constitutional Court, however, remained unchanged. The Court was asked by the Rome court whether prohibiting the use of PGD to fertile couple was in violation, among others, of Art. 2 (as it included the right to self-determination on the matters of procreation and the right to a healthy child), Art. 3 (right to equality), and Art. 32 (right to health) of the Italian Constitution. The Constitutional Court issued its judgment in May 2015[82] declaring that Art. 4 of Law 40/2004 prohibiting the use of ART by fertile couples was unconstitutional. However, unlike the Rome court, the Constitutional Court found that this prohibition violated only two articles of the Italian Constitution, namely Art. 3 and Art. 32. It concluded that it was unreasonable to prohibit access to ART and PGD to fertile couples while, at the same time, allowing access to prenatal testing and abortion. This unreasonable prohibition violated Art. 3 of the Italian Constitution. Furthermore, as abortion was much more traumatic than PGD, the prohibition of access to ART and PGD also violated Art. 32 on the right to health. As a result, the Court concluded that women should be allowed to access ART and PGD on the same grounds as they are allowed to have an abortion, namely when the health condition of the embryo or pregnancy creates 'grave risks' to mothers' health, as stipulated by Art. 6 para. 1b of Law 194/1978.

The Court's reasoning is interesting for a number of reasons. First, the Court did not discuss whether 'the right to have a healthy child' and the right to reproductive self-determination were violated. In fact, in its ruling the Court did not mention these rights at all. This 'elegant silence', as Italian scholar

[80] Trib. Salerno, 13 gennaio 2010, n. 12474.

[81] Trib. Roma, 15 gennaio 2014, n. 69. Trib. Roma, 28 febbraio 2014, n. 86.

[82] C. C., 14 maggio 2015, n. 96.

Ianuzzi defined it, suggests that these rights found no support within the Constitutional Court.[83] Rather predictably, and in a similar manner to its previous judgments, the Court quashed another controversial provision of Law 40/2004 by finding that it violated only the right to health and thus allowed access to PGD if it was needed solely to prevent adverse health effects for the female patient.

Second, the Court ruled that access to PGD should be allowed on the same grounds as abortion was allowed, according to Art. 6 para 1b of Law 194/1978, that is to prevent grave risks to women's physical and mental health. According to Law 194/1978, abortion is legitimate within the first 90 days of pregnancy if abortion creates a risk to mothers' health (Art. 3), and after 90 days if abortion creates grave risks to women's health (Art. 6). In the first case, the woman is free to have an abortion and does not need to ask the doctor's permission, whereas in the second case the doctor's permission is required. Hence, without discussing the reasons for its decision, the Court allowed PGD not on the same conditions as abortion is allowed in general but on the strictest conditions. It limited the type of health issues which could be prevented by performing PGD and obliged female citizens to ask for a doctor's permission to perform it. In this way, the possibility of accessing PGD was obviously curtailed by these requirements.

Third, the Constitutional Court refused to build its judgment on the *Costa and Pavan v. Italy* decision that the European Court of Human Rights (ECtHR) had passed in 2013.[84] A brief description of the case is in order here. This complaint against Law 40/2004 was brought by an Italian couple claiming that Art. 8 of the ECHR (right to respect for private and family life) was being violated. The ECtHR upheld the applicant's claim. It held that since Italian law allowed prenatal testing and therapeutic abortions, the prohibition of PGD was unreasonable. Therefore, the government's interference in the applicants' private and family life was disproportionate. During the trial, the Italian government objected to the applicants' claim and

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[83] Antonio Ianuzzi, 'La Corte Costituzionale Dichiara L'illegittimità Del Divieto Di Accesso Alla Diagnosi Preimpianto E Alla Procreazione Medicalmente Assistita per Le Coppie Fertili E Sgretola L'impianto Della Legge N. 40 Del 2004' (2015) 60 Giurisprudenza Italiana 805.

[84] *Costa and Pavan v Italy* [GC] App no 54270/10 (ECtHR, 28 August 2012).

argued that their complaint was in fact a claim to the 'right to have a healthy child', which the ECHR does not guarantee. The ECtHR rejected the government's objection and stated that the right claimed by the applicants was not the right to have a healthy child. According to the ECtHR, plaintiffs did not claim this right because 'PGD cannot exclude other factors capable of compromising the future child's health',[85] such as other genetic disorders or complications during pregnancy. Instead, 'the right relied on by the applicants is confined to the possibility of using ART and subsequently PGD for the purposes of conceiving a child unaffected by cystic fibrosis, a genetic disease of which they are healthy carriers'.[86] In this way the ECtHR distinguished between a 'right' to have a child unaffected by a particular genetic disease, protected by the right to respect for private and family life, and the 'right to have a healthy child', that is an entirely healthy baby. By emphasizing this difference, the ECtHR made an important correction to the local courts' rulings that suggested the potential violation of the right to a healthy child, a part of a broader right to self-determination. In these rulings, the courts did not discuss what exact meaning they attributed to the 'right to a healthy child' and therefore it is not clear whether they indeed meant the right to have a baby unaffected by a particular disease or the right to have an entirely healthy baby. However, and despite this clarification, the Constitutional Court opted for carving out space for PGD in the same way in which it legitimized abortion, that is, only to prevent negative impacts on mothers' health and not out of respect for citizens' private and family life.

The right to respect for private and family life, appealed to by the plaintiffs in *Costa and Pavan v. Italy*, is of a particular importance here. According to proponents of the idea of relational autonomy, one of the ways through which relational values could be promoted is the endorsement by courts of the right to respect for private and family life (Art. 8 ECHR). For example, Herring praised the ruling in the case *K v. LBX*,[87] in which the British Court of Appeal urged courts to take into account the right to respect for private and family life of the ECHR when it should be decided if a person should be taken care of at home or at a relevant medical institution. Building a ruling on Art. 8 of

[85] *Costa and Pavan* (n 84), 9-10.

[86] Ibid, 9-10.

[87] *K v LBX* [2012] EWCA 79.

the ECtHR in cases involving human reproduction, courts could also promote relational values and give more discretion to women and their partners in reproductive decision-making. The Italian Constitutional Court, however, refused to build its decision on *Costa and Pavan v. Italy* and thereby refused to rule that the right to respect for private and family life was also violated.

Thus, on the one hand, through litigation Italian citizens achieved their goal of making access to PGD legitimate. The bottom-up governance made the provision of PGD and other ART in Italy less restrictive. Indeed, there is an important parallel to be drawn between these and similar cases such as litigation for access to medicine in Brazil or the right to financial compensation for health damage in Ukraine.[88] And yet, on the other hand, the use of rights yielded much more modest results in the present context. First, practically speaking, women will always need to ask permission from their doctors if they want PGD and prove they would be at risk of damaging their (mental) health, which automatically gives full decision-making power to the medical profession and runs the risk of them being denied. Second, by failing to recognize that the prohibition of PGD might violate, not only the right to health but also the right to reproductive self-determination or the right to respect for private and family life, the Court did not acknowledge other interests and values that might urge citizens to want PGD. To begin with, there could be financial reasons for having PGD as the couple would be financially incapable of raising a child with a severe genetic disease. More importantly, biological citizens might seek PGD due to ethical and relational values, duties and responsibilities unrelated to women's health proper which might be central to their self-identity or, indeed, to their 'regime of the self'. The letter of the wife from the Catania case, in which she refers to her responsibility towards the future baby as well as her and her husband's wish to create a 'family 'in the full and complete meaning of this word', illustrates that these relational values were also central to the regime of the self of (some) Italian litigants.

Indeed, much sociological research has demonstrated that relational values are key elements of self-identity of many parents to-be. For example, the

88 Hanafin 2012, (n 12).

research on couples choosing PGD has shown that these couples tend to choose PGD, not for the sake of their own health or their interests but out of 'parental obligation' towards their future children and their health.[89] Similarly, as Rapp has shown in her analysis of women having prenatal testing, the responsibility for the future baby and for other family members was often one of the reasons they sought prenatal testing.[90] These conclusions suggest that particularly in the relationships between close family members, such as between parents and children, individuals, albeit driven by parental self-determination, tend to build their decisions on relational autonomy and the feelings of mutual responsibility rather than the feeling of unlimited personal freedom, even if their decisions do not lead to a direct infliction of harm upon others.[91] They were further confirmed by other authors exploring parents' views on sex selection. For example, Scully *et al*. showed the majority of interviewed parents regarded voluntary self-limitation of their choices as constitutive of their identity as 'good parent', and felt that parental autonomy was only possible within the limits set up by relational values.[92] Similarly, in Petersen's study of the experiences of people with genetic disabilities, many participants expressed concerns about the future of their offspring, which induced them to make reproductive choices that would favor what was fair or right for the child's future, rather than their own desires.[93] In other words, in such intimate relationships as between parents and children, the feelings of mutual responsibility, care and interdependence abound. However, such personal and relational family-related interests, values and responsibilities that Italian biological citizens might have had as part of their 'regime of the

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89 Celia Roberts and Sarah Franklin, 'Experiencing New Forms of Genetic Choice: Findings from an Ethnographic Study of Preimplantation Genetic Diagnosis' (2004) 7 Human Fertility 285. Sarah Franklin and Celia Roberts, *Born and Made: An Ethnography of Preimplantation Genetic Diagnosis* (Princeton University Press 2006).

90 Rayna R Rapp, *Testing Women, Testing the Fetus:The Social Impact of Amniocentesis in America* (Routledge 2000).

91 Kathryn Ehrich et al, 'Choosing Embryos: Ethical Complexity and Relational Autonomy in Staff Accounts of PGD' (2007) 29 Sociology of Health & Illness 1091.

92 Jackie Leach Scully, Sarah Banks, and Tom W Shakespeare, 'Chance, Choice and Control: Lay Debate on Prenatal Social Sex Selection' (2006) 63 Social Science & Medicine 21.

93 Alan Petersen, 'The Best Experts: The Narratives of Those Who Have a Genetic Condition' (2006) 63 Social Science & Medicine 32.

self' were not regarded by the Italian Constitutional Court as deserving of state recognition.

The last judgment of the Court regarding PGD, although not directly related to the issue of citizens' relational values, is nevertheless important because it reiterates and further reinforces the Court's position regarding the status of IVF embryos and the role of the state in their protection. The case was referred to the Constitutional Court by the local Naples court, which had to decide on whether the doctors of a fertility center in Naples should be accused of committing the crime of embryo selection and destruction which they performed while conducting PGD.[94] Predictably, the Constitutional Court declared the provision forbidding the selection of embryos (Art. 13 para. 3) to be unconstitutional, because the prohibition on selecting and implanting only healthy embryos would cause harm to women's health and therefore would violate Art. 32 of the Italian Constitution.[95] However, it did not find that the prohibition of destroying embryos (Art. 14 para. 1) was unconstitutional. This was so because, according to the Court, 'the embryo, in fact, irrespective of the amount of subjectivity that is attributed to the genesis of life, is definitely not a mere biological material'. As a result, according to the Court, non-implantable supernumerary embryos had to be permanently frozen in fertility labs and not destroyed. The conclusion of the Court might seem problematic at first sight as the prohibition to destroy embryos will mean that Italian clinics will be again stuffed with thousands of non-implantable 'persons-non-persons',[96] which was the main reason of the prohibition to create more than three embryos established in Law 40/2004 (Art. 14 para. 2). In light of the most recent Constitutional Court's judgment concluding that the prohibition of using IVF embryos in scientific research does not violate the Italian Constitution,[97] the prospects of this are very real. However, this decision builds on the same line of reasoning underlying all Court's former jurisprudence, testifying once again about the importance of

94 Trib. Napoli, 3 aprile 2014, n. 149.

95 C. C., 21 ottobre 2015, n. 229.

96 Camera dei Deputati, 1998. *Resoconto stenografico*. XIII Legislatura, 395 Seduta, 20 luglio 1998, <http://leg13.camera.it/_dati/leg13/lavori/stenografici/sed395/s030r.htm> accessed 9 August 2017.

97 C. C., 22 marzo 2016, n. 84.

institutionally anchored forms of thinking and interpretation for how rights debates are resolved by courts.

All things considered, there is no doubt that Italian biological citizens managed to contest their 'exclusion from full legal citizenship' and, in this bottom-up governance, rights indeed acted as key instruments.[98] And yet, the extent to which citizens secured the 'writing of the law from below' and managed to have their interests, rights and values recognized by the state was significantly more limited, particularly compared with the scope of those rights and values that have been central to the contemporary 'regime of the self', both in Italy and abroad. This contemporary regime of the self has encompassed the feeling of entitlement to and responsibility for ensuring, not only one's own health but also the health of one's future children, which is well illustrated in the plaintiff's letter from the Catania case. However, the Constitutional Court, carefully following its own doctrine and its underlying principle of strong embryo protection, denied any legal recognition to these parental interests. As such, its decision to recognize that only 'the constitutional right to health of the mother', and not the rights to reproductive self-determination and to respect for private and family life, legitimizes access to PGD means that only partial success was achieved.

VIII. Conclusion

In this article, I sought to show the limitations of using rights and rights litigation to gain the freedom to make personal choices related to one's own health and that of one's children and family and to use new advances in biomedicine to achieve these ends. I did not mean to suggest that we should abandon our hope, or faith, in rights. The use of legal rights does play an important role in democratic governance and in making state authorities recognize and fulfill their citizens' health-related needs, rights and responsibilities. Instead, I sought to suggest that a nuanced and more reflexive approach towards rights should be adopted. In particular, I sought to show that local country's historically established and institutionally anchored patterns of constitutional interpretation and reasoning can have a key importance for how rights adjudication is performed by courts and hence

[98] Hanafin 2012, (n 12) 194.

for whether plaintiffs' rights claims will be vindicated. The constraints inherent to rights litigation should therefore be taken into account both by legal scholars exploring the interplay between new technologies and constitutional rights and citizens who chose rights litigation as a tool for changing the legal, political and technological status quo.

THE GLOBAL EFFECTS OF EU ENERGY REGULATION

Davor Petrić*

The European Union's internal energy market is founded on a mix of measures employed at various levels of competence, and aimed to safeguard the EU's key objectives, such as energy security, energy efficiency, and environmental protection. It is generally recognised that institutional features of the internal market provide the EU with considerable capacity to externalise its regulatory measures at different levels of governance. This article assesses the validity of this proposition in the case of EU energy regulation. Analysing instances of the external effects of EU energy law and policy in two dimensions – global and regional – it is shown that even without a consolidated EU internal and external approach, there are considerable effects – both positive and negative from the perspective of EU energy interests – in each of the instances observed. Confirming the contemporary literature on the EU external governance in a wider context, a conclusion is drawn that the internal checks and divisions present the greatest impediment for the more efficient externalisation of EU energy regulation.

Keywords: European Union, energy regulation, energy policy, internal energy market, regulatory externalisation

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I. INTRODUCTION

European Union (EU) energy law and policy represent a complex and multidimensional issue. Various aspects of energy regulation (e.g., the production, distribution, sale and consumption of energy) are scattered along several policy areas. Some of these policy areas (e.g., trade, transport and industry, environmental protection, sustainable development, or foreign affairs) fall under either exclusive, shared or complementary EU competence. In other instances, the EU has no competence to act at all. EU energy regulation is therefore seen as a 'conglomerate of loosely coupled sectoral regimes',[1] which carry different identities (determined by the market, environment or security), occupy different functional spaces, and have even developed different external dimensions.

Regarding energy, the EU is geologically, geo-strategically, and structurally unlike any other international actor or economy.[2] It consumes increasing quantities of energy commodities. Its Member States lack internal resources, making the EU highly import-dependent. The EU struggles to establish coherent energy policies and legislation, due to the Member States' contradicting energy policies, their heterogeneous energy realities, regional and global energy market developments, and political complexities. Energy-poor entities, such as the EU, are generally unable to use energy as a diplomacy tool to influence the behaviour of other international actors.[3] They are left to utilise the power of other sectoral internal policies and regulations in external relations with third parties.

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1 Sandra Lavenex, 'The Power of Functionalist Extension: How EU Rules Travel' (2014) 21 Journal of European Public Policy 885, 887.

2 Rafael Leal-Arcas and Andrew Filis, 'Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective' (2013) 36 Fordham International Law Journal 1224, 1298.

3 Ibid 1276.

It is often noted that the EU is, at its core, still predominantly 'a market'.[4] The EU is, moreover, seen as a 'regulatory entity', which pursues and prioritises 'governance through rules and regulation'.[5] The creation and development of the internal market therefore involves an extensive delegation of powers to independent regulatory bodies and supranational agencies.[6] In market-related policy areas for which the Member States have ceded regulatory competence to the EU, the latter generates a considerable amount of economic and social regulation that can produce important external effects.[7] The Union's 'external governance' is indeed most prominent in the internal market and competition policies, where countries whose economies are strongly interconnected with the EU's are more susceptible to regulatory convergence.[8] The internal market in itself has institutional features that provide the EU with considerable capacity for externalising economic and social market-related policies and regulatory measures.[9] The EU is therefore often depicted as a dominant global regulator, routinely 'exporting, globalizing or uploading'[10] its rules and standards.

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4 Chad Damro, 'Market Power Europe' (2012) 19 Journal of European Public Policy 682, 683, meaning that its identity has been primarily constructed around the internal market project, which provides for the 'material existence of the EU'.

5 Ibid 687.

6 Claire Dupont and Radostina Primova, 'Combating Complexity: The Integration of EU Climate and Energy Policies' in Jale Tosun and Israel Solorio Sandoval (eds), *Energy and Environment in Europe: Assessing a Complex Relationship* (2011) 15 European Integration Online Papers 1, 3 <eiop.or.at/eiop/pdf/2011-008.pdf> accessed 12 December 2017.

7 Damro (n 4) 688.

8 Frank Schimmelfennig, 'Europeanization Beyond Europe' (2012) 7 Living Reviews in European Governance 5, 9 <www.europeangovernance-livingreviews.org/Articles/lreg-2012-1/> accessed 12 December 2017.

9 Damro (n 4) 683.

10 Alasdair R Young, 'Europe as a Global Regulator? The Limits of EU Influence in International Food Safety Standards' (2014) 21 Journal of European Public Policy 904, 909.

There is a growing body of scholarship analysing and describing this phenomenon with different concepts, such as 'the Brussels effect',[11] 'Europeanisation',[12] 'policy diffusion',[13] 'territorial extension',[14] etc. Although these theories have important differences – discussion of which exceeds the scope and intention of the present article – for the purpose of the main argument here, their key commonalities are highlighted.

The theories all recognise the uniqueness of the autonomous EU norm creation: the process starts with forging consensus among the Member States, where often the most stringent standard is adopted, thus representing the regulatory 'race to the top'; this initial step is followed by the norm's application outside the EU's territorial or personal jurisdiction; the extra-jurisdictional application is underpinned by the voluntary acceptance of the EU norm by target subjects, driven by either the EU's commercial or political leverage. Notably, all instances of the 'extraterritorial' application of EU policies and measures are characterised by the absence of physical force. Theory distinguishes two avenues for such 'regulatory globalisation': (i) market-driven harmonisation through 'soft' conditionality and unilateral regulatory convergence, and (ii) political harmonisation through treaties and institutions.[15] Importantly, in externalising its internal policies and regulations, the EU acts as a power that is aware of its market and regulatory strengths.[16] For example, various official documents, such as the 'Europe 2020 Strategy', have called for the establishment of an external political and trade agenda that would be heavily reliant on exporting market-related

[11] Anu Bradford, 'The Brussels Effect' (2012) 107 Northwestern University Law Review 1.

[12] Schimmelfennig (n 8).

[13] Damro (n 4).

[14] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 American Journal of Comparative Law 87.

[15] Bradford (n 11) 43-44. Political harmonisation may furthermore occur with exports of policies and regulations through bilateral (via accession agreements and partnership treaties) or multilateral agreements (by incorporating EU standards into legal regimes of international organisations).

[16] Scott (n 14) 88.

policies, acting as an international standard-setter, developing global rules, and so forth.[17]

The main hypothesis to be explored in this article is the following: the selected instances of external effects of EU energy regulation (dependent variables, here) may be explained by the structural characteristics of this policy area (independent variables, here). The main argument may be summarised as follows: despite the EU energy regulation being an inherently politicised and controversial policy area, sensitive due to national security and sovereignty issues, and despite its incremental and fragmented status, there are considerable external effects of EU energy regulation. These external effects emerge in different dimensions – global and regional – resulting from the EU's various regulatory activities and can be qualified as positive or negative.

'Positive' external effects[18] entail various benefits, rewards and successful regulatory convergence: institutionalising agreements, exporting EU rules and institutions, etc. These benefits are observed from the perspective of EU energy interests. Thus, for instance, if a particular result of EU energy regulation lies in the interest of EU policy – such as the achievement of a beneficial agreement on energy imports, the successful conclusion of an EU-brokered multilateral energy treaty, or the general success of its foreign energy policy – then it is regarded as a positive effect.

'Negative' effects, on the other hand, occur as a consequence of diminishing EU material, normative or political interest – such as the inability to satisfy its energy demands, internal political strife over energy issues, the rejection of an EU-advocated international instrument, or in the general failure of its foreign policy efforts. Negative external effects[19] would thus include: reducing energy imports or terminating trade benefits; implementing embargoes and boycotts; delaying, suspending or denouncing agreements; withdrawing preferences; etc. The positive effects will be uncovered based on factors such as consolidated EU external policy and energy regulatory activity, or the existing constellation of regional geopolitical powers (the

[17] Damro (n 4) 694.

[18] Similarly termed by Damro as 'externalisation associated with positive conditionality', Damro (n 4) 691.

[19] Ibid.

EU's overwhelming size in the global economy). The negative effects will be explained by constraints such as shortcomings in the EU regulatory framework (the absence of regulatory propensity, i.e. of institutional readiness to introduce or uphold stringent standards), internal divisions (decision-making checks) and growing diversity (either of actors through geographical enlargement, or regarding energy realities), high dependence on external actors (Russia in particular), or a constellation of preferences in the international institutions.

The present inquiry of the global effects of EU energy law and policy is structured as follows. After these introductory remarks, section II briefly introduces the structural characteristics that determine unilateral regulatory globalisation. These include the material realities of the EU energy sector and its institutional features. It is argued that the existence and interaction of these characteristics generally predispose the EU to act as a global regulator or 'market-power'. This function allows the EU to effectively externalise its internal policies into the international arena.[20] However, such international effectiveness of the EU regulatory externalisation can be understood only with explicit reference to the international context within which a particular internal regulatory area operates. It is therefore important to further conceptualise various external pressures, together with combinations of internal and external institutions and actors, which all considerably influence the likelihood of externalisation.[21] Therefore, the mainstream scholarship suggests that such analyses should be conducted by precisely theorising sectoral EU market-related policies, such as energy regulation, which is the focus of section III. Section III thus presents a discussion of the global effects of EU energy regulation at the international (within the International Civil Aviation Organisation and World Trade Organisation) and regional level (the Energy Community Treaty and Energy Charter Treaty). This section is wrapped up by briefly sketching avenues for further research, namely the external effects of the EU energy regulation in bilateral instances, most prominently in relations with Russia, the USA and Canada. Section IV draws conclusions.

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[20] Damro (n 4) 689.

[21] See Damro (n 4) and Young (n 11).

It is important to emphasise at this point that the discussion in this article intentionally remains mostly descriptive. Like some of the seminal articles in the field, this article is one of the first attempts to analyse EU energy regulation in its external dimension and to draw doctrinal conclusions on its global (ir)relevance. The article aims: (i) to provide a comprehensive overview of the policy area in question; and (ii) to arrive at a better understanding of the global role of EU energy regulation, thus to contribute to the academic literature discussing the external effects of EU regulation in general. In a theoretical inquiry, I classify and qualify the global effects of EU energy regulation, i.e. I assess at which levels and to what extent these effects are manifested, and what their consequences are.

II. EU Energy Law and Policy: From National Monopolies towards the Energy Union

The EU is the second biggest economy of the world, strongly dependent on energy imports to fulfil its internal demands.[22] It is also the world's largest energy importer, importing about 55% of its energy supply: around 85% of its oil and around 65% of its natural gas.[23] The EU's primary energy supply is characterised by a lack of diversity. Three key exporters – Russia, Norway and Algeria – account for 85% of the EU natural gas imports and almost 50% of its crude oil imports.[24] This trend of the EU's high energy-dependence is forecasted to increase to 70-80% by 2030.[25] Moreover, EU Member States' energy sectors vary widely in terms of resources, infrastructure, investments, prices, regulatory level, foreign agreements, etc.[26] This makes prospects for a unified EU energy policy even more difficult to achieve.

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[22] Eurostat, 'Statistical Books: EU in the World - 2016 Edition' <ec.europa.eu/eurostat/en/web/products-statistical-books/-/KS-EX-16-001> accessed 16 May 2017.

[23] Michael Ratner et al, 'Europe's Energy Security: Options and Challenges to Natural Gas Supply Diversification' (2013) US Congressional Research Service Report 1, 5 <fas.org/sgp/crs/row/R42405.pdf> accessed 16 December 2017.

[24] Leal-Arcas and Filis (n 2) 1234.

[25] Rafael Leal-Arcas and Andrew Filis, 'The Energy Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements' (2014) 12 Oil, Gas & Energy Law 1, 10.

[26] Leal-Arcas and Filis (n 2) 1241.

Historically, the EU's origins lie in matters related to various aspects of energy regulation. Two of the original European communities – the European Coal and Steel Community and the European Atomic Energy Community – dealt with the provision of energy for European economies.[27] However, energy regulation at the European level did not rank highly in importance, given that the Member States defiantly preserved it as their sovereign prerogative. This continued despite the severe repercussions of the 1970s oil crises, the central importance of energy to modern economies, and envisaged savings potentially accrued from an integrated and flexible European energy market.

Nevertheless, a paradigmatic shift in energy-related regulatory governance towards the EU level slowly occurred for a number of reasons. Energy policy gradually and ever more explicitly started to become an area within the Union's competence.[28] First, whole branches of the economy formerly understood as the 'bastions of national sovereignty'[29] underwent drastic changes, reflecting the dynamics of integration and liberalisation at the EU level, characterised by privatisation, deregulation and intensified competition. Similarly, the EU energy market over the last couple of decades has been extensively 'communitarised' or 'supranationalised'. Second, the consolidation of EU energy markets has been boosted by external challenges requiring an integrated EU energy policy. The most prominent have been the high dependence on external energy suppliers and the trends of increasing energy prices, energy security issues (supply disturbances, especially from Russia as the key energy exporter), environmental protection and climate change. Shifts in EU energy policy have been equally influenced by the series of EU enlargements to the East to include more energy import-dependent states.[30]

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[27] Desmond Dinan, *Ever Closer Union. An Introduction to European Integration* (Palgrave 2010) 466. The Treaty establishing the European Coal and Steel Community expired in 2002, while the EURATOM Treaty is still in force.

[28] Dupont and Primova (n 7) 15.

[29] Alexei Ispolinov and Tatiana Dvenadtsatova, 'The Creation of a Common EU Energy Market: A Quiet Revolution with Far-Reaching Consequences' (2013) 2 Baltic Region 78, 78.

[30] Neill Nugent, *The Government and Politics of the European Union* (Palgrave 2010) 343.

Nowadays, EU energy policy stands as a comprehensive and multifaceted issue covering a wide range of related policy matters. The EU pursues its energy policy objectives in a wider context by positioning energy, where appropriate, as a central part of its external relations, and by exporting its regulatory rules and standards.[31] Advocating a stable and transparent regulatory framework for the production and trade of energy, the EU seeks the creation of a liberalised pan-European energy market where 'energy can be exchanged on the basis of supply and demand, rather than on national interests and geopolitical considerations'.[32]

The EU energy *acquis*[33] consists of a plethora of rules and policies covering among others: the functioning of the internal energy market, competition and state aid, environmental protection, the promotion of renewable energy sources, energy efficiency and savings, energy security and crisis management, and the interconnection of energy networks.[34] Recent landmarks for the EU energy governance were the entry into force of the Lisbon Treaty and the enactments of the Third Energy Package and Energy-Climate Package.

The 2009 entry into force of the Lisbon Treaty caused a formal shift for energy policy from being an exclusive Member State competence to a shared (between the EU and the Member States) legislative competence. It included a separate section (Title XXI) on energy in the Treaty on the Functioning of the European Union (TFEU). Clarifying the catalogue of competences and reserving the ordinary legislative procedure for simpler energy decision-making, EU energy governance was to an extent 'strengthened and

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[31] Stephan Renner, 'The Energy Community of Southeast Europe: A Neo-Functionalist Project of Regional Integration' (2009) 13 European Integration Online Papers 1, 3 <eiop.or.at/eiop/pdf/2009-001.pdf> accessed 13 December 2017.

[32] Ibid.

[33] Given that the majority of energy legislation was adopted on an internal market basis (Article 114 TFEU), it is still uncertain whether the reasoning of the *ERTA* judgment (Case 22-70 *Commission v Council (European Agreement on Road Transport)* EU:C:1971:32), ie 'exclusive external competence for the Union exists wherever the single market competence is exercised', will similarly be extended to consolidate EU external competence in all aspects of the energy policy.

[34] Tamara Perišin, 'Pending EU Disputes in the WTO: Challenges to EU Energy Law and Policy' (2014) 10 Croatian Yearbook of European Law and Policy 371, 380.

streamlined'.[35] The Lisbon amendments thus offer a clearer legal basis for pursuing EU ambitions regarding the 'energy trinity' – environment, the internal market and external relations.[36]

As a counterbalance to the increased EU regulatory capacity, Member States under the Lisbon Treaty retained autonomy in matters concerning the mix of energy sources, the conditions for exploiting their energy resources and the structure of their energy supply.[37] However, important aspects of energy, such as competitive conditions of energy trade within the internal market (state aid, antitrust) and the question of tariffs for third-country energy commodities (common commercial policy) have remained within the exclusive competence of the EU.[38] This arrangement has been described as 'a carefully crafted compromise' between national sovereignty over domestic resources and energy taxation issues, and shared EU competence for the remainder of affairs.[39] It has been proposed therefore to construe the post-Lisbon EU energy regulation as a new 'Union method', i.e. a combination of the 'community method' and coordinated intergovernmental action by the Member States.[40] Furthermore, numerous internal and external aspects of the EU energy policy engage a multiplicity of EU institutions,[41] thus rendering international representation in energy policy extremely complex.

In parallel with the EU landmark project of completing the internal market, efforts continued to liberalise European energy markets and establish a functioning EU internal energy market. For this, three key phases of energy

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35 Israel Solorio, 'Bridging the Gap Between Environmental Policy Integration and the EU's Energy Policy: Mapping Out the "Green Europeanisation" of Energy Governance' (2011) 7 Journal of Contemporary European Research 396, 410.

36 Ibid 411.

37 Leal-Arcas and Filis (n 25) 12.

38 Leal-Arcas and Filis (n 2) 1252.

39 Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual' (2011) 31 European Policy Institute Network Working Paper 1, 2.

40 Ibid 8.

41 To name the most important: EU Commissioners for Energy Union and Climate Change and Energy; the European Council's President; the High Representative for Foreign Affairs and Security Policy; the EU External Action Service; the Foreign Affairs Council as a subcommittee of the Council of Minister; etc.

legislation from the 1990s onwards brought measures that aimed to remove numerous legal obstacles, approximate tax and pricing policies, establish common norms and standards, and set environmental and safety regulations. Following the two regulatory packages in 1998 and 2003, the so-called 'Third Energy Package' was adopted in 2009.[42] It contained a bulk of directives and regulations that required legal (via ownership) and functional 'unbundling' of the production, supply and transmission of electricity and natural gas, and increased regulatory powers at the EU level.[43] These measures were met with predictable resistance from France and Germany that had persistently defended their national champions, as well as from large utilities companies, which complained about violation of their property rights.[44] Thus, the Third Energy Package became and still remains a subject of many heated discussions and arguments.[45]

Complementing the Third Energy Package, the so-called '20-20-20' Energy-Climate Package was introduced in late 2008.[46] As the name suggests, it

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[42] Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L 211/55; Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L 211/94; Regulation No 713/2009 establishing an Agency for the Cooperation of Energy Regulator [2009] OJ L 211/1; Regulation No 714/2009 on conditions for access to the network for cross-border exchanges in electricity [2009] OJ L 211/15; Regulation No 715/2009 on conditions for access to the natural gas transmission networks [2009] OJ L 211/36.

[43] Through the establishment of the Agency for Cooperation of Energy Regulators. See Perišin (n 34) 377. The most important pieces of this legislative package were: two directives establishing common rules for the internal market of electricity and natural gas, and two regulations on conditions for access to the network for cross-border exchanges in electricity and to the natural gas transmission networks.

[44] Dinan (n 27) 470.

[45] Ispolinov and Dvenadtsatova (n 29) 85.

[46] Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2009] OJ L 140/ 16; Directive 2009/29/EC to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63; Directive 2009/31/EC on the geological storage of carbon dioxide [2009] OJ L 140/114, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation No 1013/2006 [2009] OJ L 140/114; Decision No 406/2009/EC on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136.

aimed to tackle climate change through innovative measures for energy production and consumption. The EU thus committed to reach the following binding targets by 2020:[47] cutting greenhouse gases emissions by 20% of the levels of 1990; reducing energy consumption by 20% through increased energy efficiency; and increasing renewable energy use by 20%.[48]

Entering into the new institutional cycle in 2015, the EU Strategic Agenda listed the pursuit of an EU Energy Union as one of its key priorities.[49] This was afterwards endorsed by the European Council, and followed by the European Commission's Energy Union strategy.[50] The Commission proposed the creation of an Energy Union to address the fragmentation of the EU energy market, holistically approaching the integration of an ever-wide range of policy sectors, including energy, the environment, security,

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47 At least a 40% reduction of emmissions from the 1990 levels, with at least a 27% increased share of renewables and at least a 27% improvement in energy efficiency, are targets set for the year 2030. This framework was adopted in 2014. The EU objective for 2050 remains to reduce emissions to 80-95% below the 1990 levels. See European Commission, 'Climate Strategies and Targets' <ec.europa.eu/clima/policies/strategies_en> accessed 12 April 2016. See also Måns Nilsson, Claudia Strambo and André Månsson, 'A Qualitative Look at the Coherence between EU Energy Security and Climate Change Policies' (2014) British Institute of Energy Economics 1, 5. The European Parliament has recently proposed a 'zero emissions strategy' ensuring no greenhouse gases emissions after 2050. See European Parliament, 'EP Plenary Session Newsletter 2-5 October 2017 – COP23: MEPs to Press EU to Ratchet up Its Climate Goals' <www.europarl.europa.eu/ireland/en/news-press/ep-plenary-session-newsletter-2-5-october-2017> accessed 16 October 2017.

48 Nugent (n 30) 344. The core pieces of this regulatory package, through which the designated targets were to be achieved, were: the Renewable Energy Directive, with binding national targets for lifting the share of renewable energy sources in the EU; the revised and strengthened EU Emissions Trading Directive, envisaging the inclusion of additional industrial sectors in the emissions trading scheme; the Effort Sharing Decision, containing individual greenhouse gas emissions reduction targets for Member States; and the Directive for the promotion of energy efficiency and development of carbon capture and storage.

49 European Council, 'Conclusions: 26/27 June 2014' EUCO 79/14 <data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf> accessed 28 January 2018.

50 Anders Stouge, 'Time to Get Holistic on Energy' EURACTIV (London, 29 September 2016) <www.euractiv.com/section/energy/opinion/time-to-get-holistic-on-energy/> accessed 10 October 2016.

trade, industry, agriculture, research and innovation, foreign policy, regional and neighbourhood policy, consumer protection, etc.[51]

In 2016, the Commission started publishing proposals for the revision of parts of the Energy-Climate Package, most importantly the EU Emissions Trading System (ETS) Directive for the period after 2020,[52] and the Greenhouse Gas Emissions Regulation for non-ETS sectors.[53] As part of the so-called 'Energy-Security Package', the Commission initiated the revision of the Security of Gas Supply Regulation.[54] The idea of creating a fully-fledged EU Energy Union was once again floated as one of the top priorities for the Union in the post-Brexit era, following the EU-27 meeting in Bratislava.[55]

Finally, in late 2016 the European Commission published the latest instalment of the Energy Union initiative, with an aim to consolidate and strengthen the EU energy legislation.[56] This so-called 'Winter Energy Package' represents the most ambitious and far-reaching set of legislative proposals introduced so far – hence touted as a 'mega-package' – aiming

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[51] The Energy Union project formally encompasses five dimensions: '(a) security, solidarity and trust; (b) a fully integrated internal energy market; (c) energy efficiency for reducing dependence on energy imports and emissions; (d) climate action – decarbonising the economy; and (e) research, innovation and competitiveness'. European Commission, 'Building the Energy Union' <ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/building-energy-union> accessed 29 January 2017.

[52] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments COM/2015/0337 final - 2015/0148 (COD).

[53] Proposal for a Regulation of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 for a resilient Energy Union and to meet commitments under the Paris Agreement and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change COM/2016/0482 final - 2016/0231 (COD).

[54] Ruth Losch and Lothar van Driessche, 'European Commission Presents Energy Winter Package 2016' (2016) 2 Linklaters 1 <www.institutee.cz/podklady-k-prednasce-ceps-3-5/34375193/161202_newsletter_energy_1.pdf> accessed 13 December 2017.

[55] European Council, 'Bratislava Declaration and Roadmap' <www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/> accessed 29 September 2016.

[56] Losch and van Driessche (n 54) 1.

towards a wholly integrated and genuinely liberalised, EU-wide single energy market. The overall package covers various issues, ranging from 'capacity mechanisms and diversification of supply to energy prices and costs, eco-design, bioenergy sustainability, innovation and transport'.[57]

The recently published State of the Energy Union report claims that the EU has continued to make progress towards achieving its energy and climate goals.[58] However, such estimates seem far-fetched, given that many of the above-mentioned proposals still have to successfully pass the legislative procedure and satisfy the tough bargaining positions of the Member States and the European Parliament, let alone to take effect on the ground. Finally, the actual progress of the aforementioned EU energy initiatives is extremely difficult to measure, due to the 'unquantifiable objectives' and lack of recent and updated data.[59] In this sense, the new report of the EU Court of Auditors notes a lack of progress towards reaching the 2030 targets and the 2050 objectives of the EU energy and climate policies.[60]

This section of the article has outlined some of the most important structural characteristics of EU energy policy that determine the prospects for successful regulatory globalisation. On the one hand, the material realities show that the EU is an energy-poor entity in terms of internal resources and is characterised by a dependence on imports and a lack of diversity of supply. On the other hand, the size of the internal market means that the EU has an overwhelming share in global trade. The EU also has well-developed trade relations with third countries. Regarding institutional features, it has been

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[57] European Commission, 'Press Release: Commission Proposes New Rules for Consumer Centred Clean Energy Transition' <ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition> accessed 5 December 2016.

[58] European Commission, 'Second Report on the State of the Energy Union' <ec.europa.eu/commission/publications/2nd-report-state-energy-union_en> accessed 7 February 2017.

[59] Peter Teffer, 'Energy Union Report Provides Little Evidence of Progress' EUobserver (Brussels, 3 February 2017) <euobserver.com/energy/136788> accessed 10 February 2017.

[60] European Court of Auditors, 'Landscape Review – EU Action on Energy and Climate Change' (EU Publications Office, 2017) <www.eca.europa.eu/en/Pages/DocItem.aspx?did=41824> accessed 29 September 2017.

shown that EU energy policy has a specific status in the light of national security and sovereignty issues. EU energy policy is currently fragmented and incrementally developed. The best illustration of this is the EU's uncompleted energy market. However, the EU's regulatory capacity in the energy market, as in the many other policy areas, is high. Indeed, the internal energy market is extensively regulated through various measures, not exclusively emerging from the energy policy toolkit. Regulatory propensity is likewise high. This is reflected in the enforcement of stringent and risk-averse standards in the protection of health and the environment in EU energy regulation. The following section of the article reviews the global effects of the EU energy regulation introduced above. The introduced structural characteristics are observed in interaction with other factors in the international context. A combination of the internal and external characteristics and actors affect the likelihood of the externalisation and international effectiveness of EU energy regulation, as will be shown in the remainder of the article.

III. Global Effects of the EU Energy Regulation: Selected Instances

1. International Arena: Pursuing Incontestable Universal Values or Something More?

In the discussion about the consequences of the EU energy regulation at the international level, two salient issues emerge: the effects on international aviation and on trade.

During the last couple of decades, the EU has become increasingly mindful of climate change and the environmental impacts of new technologies. It has strived to position itself at the vanguard of global efforts to tackle these challenges.[61] To give substance to its declared normative goals, the EU began

[61] The EU international environmental and climate policy was originally rather inward-looking. However, more recently the EU has assumed a leading role in global environmental and climate governance and diplomacy. Its role was crucial in turning the Kyoto Protocol into an operative international agreement in the face of the firm opposition of the USA and other developed countries. See Andrew Farmer (ed), *Manual of European Environmental Policy* (Earthscan/Routledge 2012).

to include in its energy regulation innovative environmental policy approaches. In line with the most relevant principles of the international climate regime as laid down in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and its 1997 Kyoto Protocol,[62] the EU developed and launched its flagship initiative in 2005 – the Emission Trading System (ETS). With the primary aim of environmental protection, it extensively regulated industrial energy consumption. This sophisticated intra-EU system was the first of its kind in the world, hailed as the most ambitious 'grand policy experiment' for meeting, and possibly surpassing, the EU's Kyoto commitments.[63]

The original ETS Directive[64] was enforced with the intention of achieving a cost-effective reduction of greenhouse gas emissions within the EU. In modelling it, the EU adopted both market-based and regulative instruments. The ETS represented a so-called 'cap-and-trade' system for different industrial sectors, in which the policy-maker determined the cap while delegating the allocation of reductions to the market.[65] Therefore, it served

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[62] Kyoto's successor was negotiated at the Conference of Parties (COP21) in Paris in 2015, under the prominent leadership of the EU. State Parties came forward with their proposed contributions to limit the global temperature increase to 'well below 2°C' of the pre-industrial levels. The EU and its Member States, however, struggled with separate ratifications of the Paris accords. The Union had to secure a fast-track deal allowing it to ratify the Paris Agreement, without every Member State having previously ratified it at national level. At present, the EU as a whole accounts for 12% of global emissions. See James Crisp, 'EU Overcomes Sovereignty Fears to Secure Deal on Climate Change' EURACTIV (London, 30 September 2016) <www.euractiv.com/section/energy/news/eu-overcomes-sovereignty-fears-to-secure-deal-on-climate-change/> accessed 13 October 2016. Recently, the UN report revealed that the proposed contributions to limit global warming fell 'alarmingly' short of what was needed to reach this goal. See United Nations Environment Programme, 'The Emissions Gap Report 2017. A UN Environment Synthesis Report' (November 2017) <wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR_2017.pdf> accessed 8 November 2017.

[63] Jon Birger Skjærseth and Jørgen Wettestad, 'The Origin, Evolution and Consequences of the EU Emissions Trading System' (2009) 9 Global Environmental Politics 101.

[64] Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L 275/32.

[65] Nilsson et al (n 47) 5.

as an instrument for allocating carbon emission allowances (in tons of CO_2) to industry, which can buy or sell these allowances as deemed necessary.[66] However, recent findings point out that the low prices of the carbon emission allowances, which dropped especially after the 2008 economic crisis, but were also kept low as a political gesture to appease national industries, caused a lack of incentive for industry to invest in and adopt cleaner energy sources.[67] This implied that the ETS in some instances actually disincentivised 'reduc[ing] emissions from the extensive use of fossil fuels in power generation and industrial processes' through technologies such as carbon capture and storage (CCS).[68]

In the first instance, the application of the ETS was extended to power plants and energy-intensive industrial sectors, which account for about 40% of the EU's CO_2 emissions. Afterwards, it progressively drew in all major polluting

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[66] Skjærseth and Wettestad (n 63) 102.

[67] Peter Teffer, 'EU to Extend Free CO2 Pass to Intercontinental Flights' EUobserver (Brussels, 3 February 2017) <euobserver.com/environment/136787> accessed 12 February 2017. Instead of significantly increasing to thirty euros as initially projected, the carbon price plummeted to below ten euros per tonne. However, the ETS in practice went beyond any other instance of inter-state cooperation on the protection of the environment within the context of the UNFCCC or the WTO. Almost all globally traded emission credits initially went through the EU trading scheme. Through this, the EU has also managed to successfully export low-carbon strategies to several major emitting states. A growing number of them have integrated 'cap-and-trade' schemes into their national climate policies – New Zealand, Australia, Canada and Japan being among them. China has recently also launched a process of setting up its own emissions trading system, partly modelled after the ETS. See also Leal-Arcas and Filis (n 2) 1282, and Peter Teffer, 'EU "Regrets" Trump U-turn on Clean Power' EUobserver (Brussels, 29 March 2017) <euobserver.com/environment/137423> accessed 27 April 2017.

[68] International Energy Agency, *20 Years of Carbon Capture and Storage – Accelerating Future Deployment* (Paris, 2017) <www.iea.org/publications/freepublications/publication/20-years-of-carbon-capture-and-storage.html> accessed 18 April 2018. The CCS was expected to heavily contribute to reducing fossil fuel emissions in the EU. However, although the EU invested 'at least EUR 587 million in grants, subsidies, and public procurement on CCS' between 2007 and 2017, it is striking that in the EU nowadays there are no CCS plants. See Peter Teffer, 'After Spending €587 Million, EU has Zero CO2 Storage Plants' EUobserver (Brussels, 6 October 2017) <euobserver.com/investigations/139257> accessed 10 October 2017.

industries, including the aviation and shipping industries.[69] Hence, a revised and strengthened ETS Directive was introduced as the centrepiece of the EU Energy-Climate legislative package.[70] The new scheme aimed to cover additional industrial sectors' emissions, starting from 2012. The Aviation Emissions Directive[71] was adopted to include civil aviation in the EU emission allowance-trading scheme. The EU hoped that 'the extended scheme, the world's largest greenhouse gas emission trading system, would serve as the nucleus of a much larger global carbon market'.[72]

The Aviation Emissions Directive in effect required all airlines, EU and foreign, to purchase carbon permits equalling their greenhouse gas emissions for all their flights arriving at, or departing from, EU territory.[73] Scott and Rajamani argued that a degree of territorial extension was included in this regulation from the outset,[74] given that the EU: (i) would regulate sections of flights which took place abroad; (ii) would observe the content of third country legislation, by exempting from the ETS regime flights departing from countries that had adopted 'equivalent measures'[75] to reduce the

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69 Leal-Arcas and Filis (n 2) 1281.

70 ETS Directive (n 52); Dinan (n 27) 475.

71 Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L 8/3.

72 Dinan (n 27) 476.

73 Bradford (n 11) 30.

74 See Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 European Journal of International Law 469. Scott and Rajamani argue that the EU is strategically engaging in an exercise of 'contingent unilateralism': using market power to stimulate climate action, and to substitute for climate inaction elsewhere. This concept consists of two key elements: the application of EU climate change law to greenhouse gas emissions that are generated abroad and rendering this geographical extension dependent on the adoption of adequate international or third country climate change regulation.

75 China's official aviation regulator (China Air Transport Association) has demanded all domestic airline carriers to cut their energy and carbon intensity by 22% by 2050. China also immediately demanded exceptions from the ETS for its air companies; however, the EU did not comply with the request and failed to elaborate on the concept of 'equivalent measures'. See Arthur Neslen 'Hedegaard Stops Clock on Aviation Emissions Law' EURACTIV (London, 13 November 2012) <www.euractiv.

environmental impact of these flights; and (iii) bound itself to consider amending the Directive following the eventual adoption of an 'agreement on global measures to reduce aviation emissions'.[76]

The inclusion of international aviation in the ETS was seen by the EU's irritated trade partners as a blatant 'break from international practice'[77] and 'another instance of the EU's regulatory unilateralism'.[78] It was likewise fiercely opposed by the aviation industry in the EU. The controversial decision sparked considerable backlash from foreign governments and airlines. Several countries threatened legal action, retaliation in the form of 'tit-for-tat' taxes, restrictions on traffic rights for EU carriers, and discriminatory treatment of EU aircraft manufacturers.[79] The US Congress passed a bill mandating the US Secretary of Transportation to prohibit, under certain circumstances, US companies from complying with the EU Aviation Emissions Directive.[80] Foreign carriers threatened to forego European Airbus aeroplanes in favour of competing US-based Boeing planes.[81] Both China and India prohibited their national carriers from complying with the EU scheme, while the Chinese government additionally blocked USD 4 billion worth of orders from Airbus.[82]

Several US airlines challenged their inclusion in the ETS before the Court of Justice of the European Union (CJEU), claiming that the EU Directive violated international law. The CJEU confirmed the Aviation Emissions

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com/section/climate-environment/news/hedegaard-stops-clock-on-aviation-emissions-law/> accessed 13 October 2016.

76 Scott (n 14) 97.

77 Dinan (n 27) 476.

78 Rafael Leal-Arcas and Andrew Filis, 'Legal Aspects of the Promotion of Renewable Energy within the EU and in Relation to the EU's Obligation in the WTO' (2014) 1 Renewable Energy Law and Policy Review 3, 23.

79 Lorand Bartels, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations' (2012) 6 Issue Paper ICTSD Programme on Trade and Environment 1, IV.

80 European Union Trading Scheme Prohibition Act of 2011 (49 USC 40101 note), Public Law No. 112-200, 112th Congress, 126 Stat. 1477, approved on 27 November, 2012. These powers were, however, never exercised.

81 Bradford (n 11) 51.

82 Bartels (n 79) 6.

Directive's 'validity [in light of] various international agreements and customary international law', finding no violations of the principles of territoriality and sovereignty of third states.[83] Following the unsuccessful legal challenge, air companies continued exerting pressure on their respective governments to resolve the issue politically in other available fora, such as the International Civil Aviation Organisation (ICAO) and the World Trade Organisation (WTO).[84]

Numerous countries argued against the EU's ETS on the ground that the ICAO, a UN agency for the airline sector, has sole jurisdiction for regulating international aviation emissions, as envisaged by the Kyoto Protocol.[85] A number of ICAO contracting parties lodged reservations expressly denying that unilateral measures were permitted, while Russia aggressively warned about the possibility of its retaliatory measures against 'states which introduce unilateral market-based measures'.[86] In 2011, the ICAO Council endorsed the New Delhi Declaration urging the EU to refrain from including flights by non-EU carriers in its ETS.[87] In 2012, twenty-three ICAO parties adopted the Moscow Declaration denouncing the EU aviation emission scheme, threatening a range of measures in response. This included litigation on the basis of the ICAO's Chicago Convention on International Civil Aviation, the prohibition of domestic airlines from participating in the EU scheme, countermeasures such as imposing additional charges on EU carriers, etc.[88] In the end, the EU yielded to all these pressures and decided

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[83] Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* EU:C:2011:864, as cited in Bradford (n 11) 31.

[84] Tamara Perišin, 'Transatlantic Trade Disputes on Health, Environmental and Animal Welfare Standards: Background to Regulatory Divergence and Possible Solutions' (2014) 10 Croatian Yearbook of European Law and Policy 249, 252.

[85] Dinan (n 27) 476.

[86] Bartels (n 79) 6.

[87] Twenty-six countries signed the New Delhi Declaration in September 2011, which was endorsed by the ICAO Council in October 2011 in the form of the working paper: ICAO, 'Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and Its Impact' C-WP/13790. See also Bartels (n 79) 6.

[88] Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS <www.ruaviation.com/docs/3/2012/2/22/50/> accessed 10 September 2016. See also Bartels (n 79) 7.

to temporarily suspend the application of the aviation emission scheme for a period of one year pending the outcome of negotiations in the ICAO.

In a step towards global cooperation on aviation emissions, the ICAO agreed in 2013 to develop a global system of market-based measures governing greenhouse gas emissions for international aviation.[89] In response to this progress, the EU decided to 'stop-the-clock' and limit the geographical scope of the scheme exclusively to EU territory until the end of 2016. The decision on a multilateral mechanism was delivered at the ICAO's General Assembly in October 2016.[90] The deal, colloquially known as the Montreal Agreement, was characterised by the EU as the 'lowest common denominator', since the ICAO parties managed to water-down the EU's original ambition.[91] The EU compromised on the market-based mechanism becoming mandatory only after 2027, instead of 2021. Seventy countries which account for more than 87% of global aviation emissions, including all EU Member States, China and the USA, pledged to join the mechanism as from 2021.[92] However, the remainder of countries including Russia, India, South Africa and Brazil rejected joining the scheme during the initial voluntary phase (2021-2027).[93]

The Montreal Agreement has been heavily criticised for its vagueness, mostly by EU political representatives and environmental groups. Technical details on the mechanism and governance system were left to be devised by independent expert groups until 2019. This brings into question the existing EU ETS, which is seen by many as a more robust and effective mechanism for

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[89] Leal-Arcas and Filis (n 78) 23.

[90] Jorge Valero, 'Global Deal on Aviation Emissions Puts EU Scheme under Pressure' EURACTIV (7 October 2016) <www.euractiv.com/section/transport/news/global-deal-on-aviation-emissions-puts-eu-scheme-under-pressure/?nl_ref=22134749> accessed 17 October 2016. The official name of the mechanism is CORSIA (Carbon Offsetting and Reduction Scheme for International Aviation) <www.icao.int/environmental-protection/Pages/market-based-measures.aspx> accessed 17 October 2016.

[91] Jorge Valero, 'Europe Sees ICAO Deal to Curb Aviation Emissions within Reach' EURACTIV (30 September 2016) <www.euractiv.com/section/transport/news/europe-sees-icao-deal-to-curb-aviation-emissions-within-reach/> accessed 16 October 2016.

[92] Valero (n 90).

[93] Ibid.

reducing aviation emissions than the new ICAO agreement.[94] Legislative discussion about its future, which must be concluded before mid-2018, has been postponed until after the ICAO conference. Lack of compromise will mean that foreign air companies will automatically be brought back into the ETS. The European Parliament remains very critical of the market-based mechanism of the ICAO agreement since it falls short of the Paris climate agreement's goals, and is unlikely to approve the proposal to repeal the ETS.[95] On the other hand, the Commission plans to propose continued exemption from the scheme for intercontinental flights, given the achieved consensus in the ICAO on reducing aviation emissions.[96]

Aside from the potential inter-institutional clashes, it is interesting to note how in this instance the EU initially tried to legitimise its regulatory unilateralism. In spite of its proclaimed dedication to multilateralism in international relations, the EU invoked 'normatively desirable and universally applicable' value, i.e. the mitigation of climate change.[97] From this perspective, EU regulatory externalisation reflected the 'altruistic purposes of a benign hegemon, acting in the collective interest to provide a global public good'.[98] Difficulties associated with the conclusion of an international treaty on climate change and market-based measures governing aviation greenhouse gas emissions thus provided the EU with 'an imperative to act unilaterally'.[99] Scott and Rajamani have criticised this decision since the EU did not take into account UNFCCC's principle of 'common but differentiated responsibilities and respective capabilities', which requires that 'developed countries should take the lead and bear a relatively greater burden in addressing the causes and effects of climate change'.[100] However, the EU also disguised under climate and environmental concerns a motive to 'level the playing field' and not to place its industries in a comparative

94 Valero (n 91).

95 Ibid.

96 Teffer (n 67). In November 2017, the agreement on the reform of the EU ETS after 2021 was reached between the European Commission, Member States in the Council and the European Parliament convening in so-called 'trilogue' meetings.

97 Bradford (n 11) 37.

98 Ibid.

99 Ibid 38.

100 Scott and Rajamani (n 74) 469.

disadvantage. As Bradford argued, to ensure the competitiveness of the EU airlines (and being heavily lobbied by them), the EU included foreign airlines into its aviation emissions scheme.[101]

In sum, the EU ETS in the ICAO produced negative effects in the form of a political backlash, and (threats of) legal and commercial retaliations. The ETS was underpinned by EU regulatory capacity in the extensive regulation of emissions trading. Another factor was the EU regulatory propensity in enforcing stringent standards of environmental protection in aviation emission regulation, as well as the regulatory interest of protecting the EU aviation industry. To date, some countries (e.g. Switzerland, with which the EU has recently signed an agreement to link their emissions trading systems) have adopted domestic EU-like, albeit less ambitious, measures to cut airline carriers' energy and carbon intensity. The EU regulation on governing aviation emissions, as well as its climate diplomacy, induced the decades-awaited agreement on a global market-based mechanism in the ICAO, at least indirectly. Notwithstanding all its reported shortcomings, this agreement will be an example of the '*de iure* export' of an EU measure to the international level, i.e. to all 191 contracting parties to the Chicago Convention after the mechanism becomes binding.[102] This 'export' is strongly determined by the size of the EU market, i.e. the significance of the EU aviation industry and air traffic share in world trade. Therefore, externalisation of EU energy regulation in this instance may be regarded as successful.

What is left to be seen is whether the existing or extended EU ETS will remain in place. In a context where the EU reinstated the international reach of its aviation emissions regulation, the debate on its validity in the light of WTO trading rules could reopen. In such an event, potential disputes before the WTO Appellate Body would imply negative effects of EU regulatory externalisation, as has emerged in a couple of other instances.[103] Indeed, the

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[101] Bradford (n 11) 40.

[102] Ibid 30.

[103] It was generally considered that the WTO system was not expressly concerned with energy trade. For more on this see, Anna Marhold, 'The World Trade Organization and Energy: Fuel for Debate' (2013) 2 European Society of International Law Reflections 1, 2. Nevertheless, due to certain international developments and global

scheme originally raised several difficult legal questions on its compatibility with the EU's WTO obligations,[104] which may become relevant again.

However, despite the possibility of violating a number of WTO obligations, it is also likely that the EU would still be successful in justifying its aviation emissions scheme on the grounds of environmental protection. More precisely, the 'conservation of exhaustible natural resources' and the 'protection of human, animal or plant life or health' are recognised as general exceptions in the WTO legal regime.[105] What could be problematic is proving that the (re)imposition of the scheme does not amount to prohibited protectionism or an unnecessary obstacle to trade.[106] Aside from concerns about the competitiveness of EU airlines, the ETS was also largely a political gesture towards the EU's green lobby, since aviation accounts for only 2% of global CO_2 emissions and only 3% of overall EU emissions.[107] However, the enormous expansion of the number of passengers has made international aviation a growing source of greenhouse gas emissions. As the European Environmental Agency data show, 'CO_2 emissions from flights have increased between 1990 and 2014 by 80% and are expected to grow another

energy dynamics, energy-related disputes under WTO law have recently emerged. Several of these novel WTO disputes have concerned the EU. The EU tries to leverage its position in the international trade to influence developments of global energy regulation through the imposition of criteria and certification requirements on imported energy products entering its market. For a discussion on this, see Emanuela Orlando, 'The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges' (2013) 21 Transworld Working Paper 1, 10-11. All the emerging disputes are recognised as essential for the 'further development of EU energy law and policy, in particular for the functioning of the internal market, standards of environmental protection and question of national energy security'. See here, Perišin (n 34) 372.

[104] Bartels (n 79) 1. Those were: (i) the prohibition of quantitative restriction on imports and exports; (ii) violation of the 'most favoured nation' rule concerning national treatment, given 'the differing costs based on distance travelled and its proposed granting of selective exemptions'; (iii) violation of GATT transit rules in the light of the 'last leg' aspect of the scheme; and (iv) the violation of GATS rules on measures affecting trade in services, e.g. those dependent on air transport services, such as tourism.

[105] Ibid 8.

[106] Perišin (n 34) 375.

[107] Dinan (n 27) 476.

45% by 2035'.[108] In contrast, if applicants would prove that the EU ETS serves protectionist causes or has been adopted arbitrarily or disproportionally to the aim sought, the EU measure would be declared as contradicting WTO rules. The resolution of such an eventual dispute would render a final conclusion on the effectiveness of externalising the EU regulation of aviation emissions in the global trade setting.

2. Regional Attempts: Falling Short of a Complete 'Success Story' for Being Overly Ambitious

The previously mentioned emergence of energy-related WTO disputes is partially a consequence of the lack of inter-state agreement on establishing a viable energy-specific regime at the global level. Backed by several developed net energy-importing states, the EU has been for a long time a leading advocate for a comprehensive international multilateral agreement on energy under WTO auspices – although, to date, unsuccessfully. Faced with this impasse in the WTO, the EU turned its efforts to conclude geographically narrower legally binding instruments. This bore fruit in the cases of two regional instruments: the Energy Community Treaty[109] (EnC) and the Energy Charter Treaty[110] (ECT), which this section of the article focuses on.

As observed earlier, integration and consolidation of the EU internal energy market is an important driver of EU energy policy.[111] Even though EU energy law is currently not fully harmonised, the Union is engaged in promoting regulatory convergence in its closest neighbouring states by exporting the EU market *acquis*. For this, energy regulation is incorporated within several instruments of EU external policy: ranging from the European Economic Area and European Neighbourhood Policy, multiple Association Agreements, intergovernmental agreements governing the construction and operation of energy transmission infrastructure, to the ECT and the EnC.

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[108] Teffer (n 71).

[109] Treaty establishing Energy Community [2006] OJ L 198/18.

[110] The Energy Charter Treaty, signed in 1994 and entered into legal force in 1998, consolidated version and related documents are available here: <www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> accessed 16 December 2017.

[111] Leal-Arcas and Filis (n 2) 1260.

The first significant regional energy project was the ECT. It came about as a result of a political initiative concerned with the consolidation of international cooperation in the field of energy, launched originally as the declaratory and non-binding European Energy Charter Declaration of 1991. The ECT was made concrete and strengthened in 1994 as a plurilateral international agreement aiming to provide 'a framework for energy cooperation based on the principles of open, competitive markets and sustainable development'.[112] Essential features also encompassed principles of non-discrimination, environmental protection and free access for foreign investment. With its subsequent optional protocols on various issues, the ECT aimed to strengthen the global rule of law on energy issues, and thereby reduce the risks associated with energy-related investments and trade.[113] Priority areas originally included in the ECT regime were investment promotion and protection, trade liberalisation, unrestricted transit, the environment, energy efficiency and dispute settlement.[114]

The ECT represented an example of the EU's engagement in the promotion of its own energy interests by creating a level playing field for long-term energy cooperation based on complementarity.[115] The Commission, as an EU agent, was involved in structuring the agreement. It aimed to achieve regulatory convergence in the legal systems of other signatories, by exporting predictable regulatory and investment frameworks devised on the basis of the then-existing EU legislation.[116] The EU also intended to embed the principles of interdependence and rule-based market governance, and thereby trigger the development of more integrated international energy markets.[117] These principles were successfully exported to more than fifty Euro-Asian states participating in the ECT regime. Its regional reach is reflected in the

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[112] Leal-Arcas and Filis (n 25) 21.

[113] Ibid.

[114] Ibid.

[115] Irina Pominova, 'Risks and Benefits for the Russian Federation from Participating in the Energy Charter: Comprehensive Analysis' (2014) ECT Secretariat Knowledge Centre Occasional Paper 1, 2.

[116] Tomas Maltby, 'European Union Energy Policy Integration: A Case of European Commission Policy Entrepreneurship and Increasing Supranationalism' (2013) 55 Energy Policy Journal 435, 438.

[117] Ibid.

predominance of the European and former Soviet Union countries.[118] The ECT regulations drew heavily on the EU packages of energy legislation, complemented with the WTO norms in respective areas (e.g. transport), as well as with the EU and international practice on bilateral investment treaties.[119] To ensure safe and reliable energy flow towards its market, the EU promoted the adoption of internationally consolidated rules and standards governing energy transit.[120]

However, the externalisation of EU energy regulation through the ECT was only partially successful, given that some of the most important signatories failed to fully ratify it. These leading energy-exporting countries (most notably Russia and Norway) had the same grounds for non-ratification: the EU-influenced arrangement reflected EU concerns as a dominant importer. The Treaty thus established a lenient foreign investments regime in the energy sector, which contradicts the interests of the exporting countries that champion their energy sources as 'national patrimony'.[121] The dominant perception of the ECT as a legal instrument primarily devised to ensure the security of the EU energy supply was confirmed by the 2012 Arbitral Decision of the International Centre for Settlement of Investment Disputes in the case of *Electrabel v Hungary*.[122] According to the decision, the EU had assumed the leading role in the ECT since the beginning, and acted as a determining factor in its establishment. The Tribunal furthermore asserted that there was a 'presumption of non-contradiction between the ECT regulations and EU law'.[123] Therefore, in this particular instance, the EU-centred nature of the ECT regime with the overarching objective of levelling the playing field for interstate cooperation in the energy sector somewhat undermined the

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[118] Pominova (n 119) 3.

[119] Ibid 8.

[120] Anatole Boute, 'The Good Neighbourliness Principle in EU External Energy Relations: The Case of Energy Transit' in Dimitry Kochenov and Elena Basheska (eds), *The Principle of Good Neighborliness in the European Legal Context* (Brill Nijhoff 2015) 355.

[121] Sergey Seliverstov, 'Energy Security of Russia and the EU: Current Legal Problems' (2009) IFRI European Governance and Geopolitics of Energy 1, 8.

[122] ICSID Case No ARB/07/1 *Electrabel SA v Republic of Hungary* <icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C111/DC7353_en.pdf> accessed 16 December 2017, as cited in Boute (n 124) 366-367.

[123] Ibid, para 4.134.

prospects of externalising EU energy regulation to the participating target states.[124]

In parallel with its engagement in the ECT, the EU turned its attention to a geographically even narrower energy arrangement. The EnC represented another EU initiative aimed at extending the internal energy market and *acquis communautaire* in the field of energy, environment and competition, through the integration of the energy markets in Southeast Europe and beyond, on the grounds of a legally binding treaty.[125] The promotion of regulatory convergence through the EnC was pursued in accordance with the goals of EU energy policy, such as energy security, the diversification of energy supply and transit routes, sustainability, etc. Additional interest in exporting EU regulation via the EnC to the neighbouring, historically conflicting, region was to ensure the enhanced economic development and stable and predictable social, political and regulatory environment in these bordering areas, which shelter important corridors for energy supplies and are therefore crucial for the diversification of the EU's gas imports.[126]

The Treaty establishing the EnC entered into force in 2006, and currently includes the EU on the one side, and the countries of the Western Balkans,[127] Moldova, and Ukraine on the other, with Turkey, Armenia, Georgia and

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[124] It is useful to note that in 2015 the International Energy Charter was formally adopted and subsequently signed, as a form of continuation of the European Energy Charter process. A number of signatories from other regions of the world have joined (Africa, South America). It identifies the basic principles for strengthening energy cooperation at the international level. See The International Energy Charter <www.energycharter.org/process/international-energy-charter-2015/overview/> accessed 8 August 2016. It remains uncertain whether this will reproduce the earlier dynamics and crystallise into a binding international treaty. In any case, it will provide another instance for the EU to attempt to exercise its regulatory externalisation.

[125] Boute (n 120) 355.

[126] Renner (n 31) 5.

[127] These are Albania, Bosnia and Herzegovina, Kosovo, the FYR of Macedonia, Montenegro, and Serbia. These states are also the focus of the German-led 'Western Balkans Six' initiative. Important pillars of this recent EU policy approach are regional cooperation, infrastructure connectivity and trans-border energy projects. Energy therefore remains an important factor of EU initiatives towards this region's economic development and integration process.

Norway having the status of observers. The main objectives of the EnC, which partially mirror the TFEU chapter on energy, are: the creation of a single energy market; the development of market competitiveness; investments in energy infrastructure; the improvement of environmental standards; the promotion of energy efficiency through the use of renewables; ensuring the stability of energy supply; and the achievement of a common external energy policy, especially 'towards the Caspian, North African and Middle Eastern region'.[128] Therefore, the participating states agreed to adopt the relevant EU *acquis* and modify their institutional, legal and economic framework to make it suitable for implementing the exported EU energy regulation.[129]

The EnC represents a prototype of how the EU exports its internal policies and regulations. It illustrates the model of 'single-sector integration without membership',[130] i.e. without attaching political requirements concerning civil, social, and political rights. These requirements represent the foundational values of the entire EU integration project. Facing the energy-related challenges of the last couple of decades, this dynamic expresses a less idealistic way of externalising the strict economic essentials of the EU. Expanding its sphere of economic influence and energy interests to its neighbouring states that are all in theory possible candidates for accession, while bypassing demands for democratic and social reforms, is arguably contrary to the very clear mandate in EU primary law as contained in Article 21 of the Treaty on European Union (TEU). This article enshrines an obligation for the EU to promote its 'guiding principles' (democracy, rule of

[128] See Leal-Arcas and Filis (n 2) 1261. See also Boute (n 120) 382.

[129] Concerning the export of standards, one particular example is worth mentioning. As one of the core pieces of the Third Energy Package, the EU Renewable Energy Directive features the possibility of EU cooperation with third countries in renewable energy issues. All EnC contracting parties have thus agreed to an obligatory share of renewable energy in their total energy consumption by 2020. These shares were calculated in accordance with the EU methodology: Albania - 38%, Bosnia and Herzegovina - 40%, FYR of Macedonia - 28%, Moldova - 17%, Montenegro - 33%, Serbia - 27%, Ukraine - 11%, and Kosovo - 25%. See Sergiy Dmitrovich and Nicole Viktorovna, 'Economic Expansion of the European Renewable Energy Market in Case of European Union Law' (2014) 4 Ukrainian Journal on Marketing and Innovation Management 136, 141-142.

[130] Leal-Arcas and Filis (n 2) 1260.

law, human rights, etc.) in all external relations, including EU energy-related agreements with third countries, in order to ensure consistency and cohesion across the EU policy spectrum.[131]

With the EnC, the EU consciously reproduced an identical regional integration model based on the neo-functionalist approach as institutionalised with the early Communities.[132] It was employed with an aim of extending EU governance by 'projecting internal solutions to its external relations'.[133] The EnC's structure thus closely resembles the initial institutional architecture of the two original European communities, with the only exception being the lack of a traditional adjudicative agency that could render binding judicial decisions.[134]

However, the specific results of the implementation of the EnC Treaty are rather mixed. All parties implemented the institutional structures foreseen by the Treaty, substantially modified their energy policies, and formally amended their energy legislation to bring them into line with the EU *acquis*. Despite the praises from the European Commission extolling the EnC as a 'success story', many practical challenges remain.[135] First, ensuring the enforcement of the implemented *acquis* remains problematic. Second, state practices related to poor administrative capacities, structural characteristics and the 'fuel poverty' of the energy sector in Southeast Europe keep preventing the liberalisation and integration of their energy markets with the

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[131] Leal-Arcas and Filis (n 25) 26.

[132] Renner (n 31) 7.

[133] Ibid 14.

[134] Leal-Arcas and Filis (n 25) 29-30. The authors describe how the EnC's dispute settlement mechanism is procedurally modelled after the EU infringement procedure. Its ineffectiveness is, nevertheless, largely due to the absence of a superior adjudicator such as the CJEU, notwithstanding the successfully implemented Ministerial Council decisions on breaches of the obligation to transpose EU legislation into national law. The Ministerial Council acts as a deliberative forum for rendering diplomatic decisions on breaches of the EnC Treaty and deciding on available remedies. An Advisory Committee, composed of three independent lawyers and adjunct to the Ministerial Council, has the task of preparing reasoned opinions on alleged breaches of EnC obligations, comparable to the Advocates Generals at the CJEU.

[135] Leal-Arcas and Filis (n 25) 27.

EU internal energy market.[136] For instance, vertically integrated and state-owned energy providers, 'persistent cross-subsidies and the politically motivated low level of energy tariffs' and the lack of both 'domestic generation and cross-border transmission infrastructure' are the typical remaining problems.[137] Finally, the lack of sufficient investment to foster infrastructure modernisation (energy production, transmission and distribution) indicates that the fundamental problems of the energy sector in this region remain unresolved. This postpones integration of the fully functioning pan-European energy market as envisaged by the EU policy-makers.

Lessons drawn from the partially successful experience of the EnC point to two conclusions. First, the idea to create the EnC had its origin in the European Commission's initiative. Thus, the contracting states did not participate in creating the rules regulating their energy sectors within established institutions, but instead committed themselves to adopting the relevant existing EU legislation.[138] Consequently, lack of a favourable and receptive domestic legal and socio-political environment in the target states negatively affected the success of the externalisation of EU energy regulation. Unfavourable domestic conditions in the target states arguably suffered from the omission from the EnC Treaty of political conditionality, despite the clear mandate for the EU to promote its values and democratic principles in all external relations. Second, the energy sectors of the EU and its Southeast European partners are strongly interdependent, with 'mutual vulnerabilities and complementary interests'.[139] This affects the EU's bargaining power to impose unilaterally its energy policy and regulations on the countries in the region. In addition, studies of neighbourhood policies overwhelmingly show the inconsistent expansion of *acquis* rules when there is no clear full EU membership prospect on the horizon,[140] as is the case with the states participating in the EnC. For these reasons, what initially appeared to be a 'success story' of EU regulatory externalisation is presently stumbling.

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[136] Renner (n 31) 12.

[137] Ibid 13.

[138] Ibid 14.

[139] Schimmelfennig (n 8) 21.

[140] Ibid.

In sum, the external effects of EU energy regulation in both cases of regional energy relations – the ECT and the EnC – were generally positive. This is reflected in the EU-brokered establishment of the institutionalised binding treaties, and the export of portions of the EU energy *acquis* to several contracting parties. In both instances this was caused by EU regulatory capacity and a consolidated external approach. In the case of the EnC specifically, regulatory externalisation was influenced by the power asymmetry and the trade and political interdependence of the EU and target states, mostly the aspiring EU accession candidates. In both instances, market power is also part of the explanation of the positive effects. It is not uncommon for the EU to rely on the strength of its market to achieve other policy goals, in this case to attract third countries to the aforementioned energy treaties. This contributes to the increased leverage of the EU on countries that have established substantial trade relations with the EU or strive to gain greater access to the EU market. Therefore, EU regulatory externalisation in both instances has generally been successful.

The successful export of the EU energy *acquis* to third parties and the creation of institutional segments facilitate the eventual integration of the neighbouring regions in the EU energy market. In the EnC example, regulatory externalisation has been formally successful, yet incomplete in practice given the lack of enforcement of the implemented legislation and the structural shortcomings of the region's energy sectors. In the ECT example, negative effects were produced through the constant rejections of important energy-exporting states to ratify this Treaty, due to the EU-centred importer-friendly arrangements. This, in turn, affected ECT's geographical reach and its global relevance.

As confirmed in these two instances, in a politically contested field such as EU energy governance, regulatory convergence is more likely regarding subjects in a similar situation (energy dependence) or in power asymmetry relations (potential candidates for EU accession). In such an event, it is even possible for the EU to unilaterally impose its energy rules and standards on target countries. In contrast, relations with energy-producing countries or international super-powers (Russia, the USA) demand a more flexible approach and mutual adjustments to encourage a minimum of cooperation.[141]

[141] Lavenex (n 1) 896-897.

That is why the external effects of EU energy regulation in numerous bilateral instances, most prominently in relations with Russia, the USA and Canada, as roughly sketched in the following paragraphs, are important avenues for future research.

3. Further Research

Through the two regional energy treaties presented in the previous section of the article, the EU primarily strove to promote its energy interests. These arrangements were seen by third parties as beneficial exclusively for the EU and its energy policy priorities. The dominance of EU energy interests was the obstacle for Russia's accession to any of the two instruments. In general, EU-Russia energy relations are highly politicised and troublesome, with numerous crises occurring over time, such as energy supply cuts, Ukrainian energy and military crises, etc.[142] Nevertheless, relations with Russia during the last two decades had some minor positive effects in the form of limited regulatory convergence through institutionalised cooperation, policy agreements and trans-governmental networks.

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[142] EU economic sanctions, originally introduced against Russia in 2014 following the annexation of Crimea, have been extended to 2018. They target, *inter alia*, the Russian energy sector through 'financial limitations on Russian energy companies, and curtailing Russian access to sensitive technologies used for oil production and exploration'. See Council of the EU, 'Press release: Russia: EU prolongs economic sanctions by six months' <www.consilium.europa.eu/en/press/press-releases/2017/06/28-eu-sanctions-russia/> accessed 12 July 2017. The negative economic impact of EU sanctions and the Russian countersanctions is estimated at around EUR 30 billion, representing a decrease of 10.7% from the previous period (between 2014 and 2016). See Oliver Fritz, Elisabeth Christen, Franz Sinabell and Julian Hinz, *Russia's and the EU's Sanctions. Economic and Trade Effects, Compliance and the Way Forward* (Austrian Institute of Economic Research – Kiel Institute for the World Economy 2017) <www.wifo.ac.at/en/pubma_entries?detail-view=yes&publikation_id=60669> accessed 3 October 2017. On 'redistributive impact' of the sanctions across the EU, see Francesco Giumelli, 'The Redistributive Impact of Restrictive Measures on EU Members: Winners and Losers from Imposing Sanctions on Russia' (2017) 55 Journal of Common Market Studies 1062. On trade projections, see Francesco Giumelli, 'EU-Russia Trade Bouncing Back Despite Sanctions' EUobserver (Brussels, 17 October 2017) <euobserver.com/opinion/139485> accessed 17 October 2017.

Despite this, successful EU regulatory externalisation towards Russia is less likely, aggravated by the high dependence of the EU on Russian energy imports, and by the institutional features on both sides: on the one hand, the rigidity of Russian formal and informal institutions (centralised leadership and state capitalism), and on the other hand, unconsolidated EU foreign energy policy and inter-institutional struggles.

An interesting example is the effects of the EU's energy regulation on the Russian state-controlled energy company Gazprom, which holds a 34% share of the natural gas market in Europe and controls the world's largest gas reserves.[143] In 2016, a preliminary settlement was reached between Gazprom and the European Commission over a previously initiated antitrust investigation.[144] In the settlement, Gazprom accepted the EU's authority in applying competition and energy rules, e.g. on third-party access to gas infrastructures, diversification and security of supply, strict 'unbundling' of energy production, supply and transmission, etc.[145] The deal helped to unlock

[143] Anna Kinberg Batra and Gunnar Hoekmark, 'Nord Stream 2 is Incompatible with the Energy Union' EUobserver (Brussels, 9 February 2017) <euobserver.com/opinion/136848> accessed 7 March 2017.

[144] Alissa de Carbonnel and Foo Yun Chee, 'Gazprom Putting "Final Touch" to EU Antitrust Deal' Reuters (Brussels, 26 October 2016) <uk.reuters.com/article/uk-russia-gazprom-eu-competition-idUKKCN12Q28O?il=0> accessed 29 October 2016. The antitrust investigation was initiated in 2012 for Gazprom's alleged abuse of a dominant position in the energy markets of Central and Eastern European Member States. In 2017, Gazprom responded by offering the Commission legally binding commitments, failing which it could be fined up to 10% of its worldwide turnover under EU competition rules. The Commission's Statement of Objections proposes three main commitments to modify Gazprom's policy in the Member States' energy markets during next eight years: (i) ensuring competitive gas market prices; (ii) removing restrictions on cross-border gas resales imposed through its dominant market position; and (iii) enabling the free flow of gas without imposing anticompetitive conditions on gas infrastructure operators. For more, see European Commission, 'Gazprom Case (number 39816) Upstream Gas Supplies in Central and Eastern Europe' <ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39816> accessed 12 June 2017; and Eric Maurice, 'EU and Gazprom Closer to Amicable Deal' EUobserver (Brussels, 13 March 2017) <euobserver.com/energy/137219> accessed 14 April 2017.

[145] European Commission (n 144). Gazprom's rejection of the same EU energy and competition rules blocked the previous Russian project named South Stream (a

contentious pipeline projects, which will raise the flow of Russian gas into the EU market in the future. All this was notwithstanding the opposition of Eastern European Member States to Russia's increased energy dominance, the incompatibility with the Energy Union's goal to diversify energy supplies,[146] and the recent challenge before the CJEU of the Commission's

pipeline under the Black Sea to Bulgaria and via the Balkan Peninsula further to the EU). See Andrew Rettman, 'New EU law takes aim at Russia pipeline' EUobserver (Brussels, 8 November 2017) <euobserver.com/energy/139800> accessed 8 November 2017.

[146] Sijbren de Jong, 'Nord Stream 2: The Elephant in the Room' EUobserver (Brussels, 7 February 2017) <euobserver.com/energy/136806> accessed 5 March 2017. The 'Nord Stream 2 saga' has recently been further politicised within the EU itself. A clash between the Commission's DG ENER and the Council's legal service on the legal regime of Nord Stream 2's offshore section raised an issue about whether the 2009 Third Energy Package (namely the Gas Directive) or merely international law applied to the pipeline. See Andrew Rettman, 'EU Lawyers Give Russia Pipeline a Free Pass' EUobserver (Brussels, 2 October 2017) <euobserver.com/energy/139236> accessed 7 October 2017. The Council's legal service held that the Directive does not apply. See Council of the EU, 'Opinion of the Legal Service' (27 September 2017) <www.politico.eu/wp-content/uploads/2017/09/SPOLITICO-17092812480.pdf> accessed 1 October 2017. The European Commissioners for the Energy Union and Climate Action in a letter to the European Parliament asserted the same. See European Commission, 'Request Pursuant to the Framework Agreement – Nord Stream 2' (12 September 2017) <www.politico.eu/wp-content/uploads/2017/09/NS2-SPOLITICO-17091912000.pdf> accessed 1 October 2017. Despite this, the DG ENER has persisted in backing the Directive's applicability. See Sebastian Sass, 'Deliberate Misconceptions about Nord Stream 2?' EUobserver (Brussels, 9 October 2017) <euobserver.com/opinion/139335> accessed 11 October 2017. The core problem is the Council legal service's assessment that 'the assumption that the opening of supplementary routes [with Nord Stream 2] might increase the Union's dependence on its external energy providers is counter-intuitive'. Such a position is opposed by the Nordic, Baltic and especially the Visegrad 4 states (the Czech Republic, Slovakia, Poland and Hungary), for fear of Russia's supply cuts. The idea of amending the Directive to subject the controversial pipeline in full to the Third Energy Package and thus resolve this legal battle was raised at the EU summit in October 2017 and is strongly supported by the Commission. See Andrew Rettman, 'Legal tweak could extend EU control on Russia pipeline' EUobserver (Brussels, 20 October 2017) <euobserver.com/energy/139570> accessed 27 October 2017. Another issue is whether to negotiate with Russia on the Nord Stream 2 project bilaterally through the involved Member States (primarily Germany), or through the Commission

decision for its alleged violation of both the EU-Ukraine Association Agreement and the EnC Treaty.[147]

The controversy continued when the US Congress passed a bill threatening the imposition of extraterritorial sanctions on EU firms involved in investing in the Russian energy projects, including the most contentious Nord Stream 2 project, citing, *inter alia*, Russia's involvement in conflicts in Ukraine and Syria as the main reason.[148] A couple of Member States fiercely opposed this act and sided with Russia. They accused the USA of adopting an extra-jurisdictional act, abusing geopolitical crises as a leverage for reducing EU energy imports from Russia, and securing a greater share in EU energy supplies for the competing US companies. The Commission likewise criticised the bill for challenging EU energy independence and security, entailing 'serious risks of detrimental political spill-overs'.[149] At the same time, the Commission envisaged retaliatory counter-measures in the event of US sanctions being implemented against EU energy companies.[150]

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acting on the Council's unanimous decision. See Andrew Rettman, 'EU Drafts Tough Conditions for Russia Pipeline' EUobserver (Brussels, 14 September 2017) <euobserver.com/energy/139023> accessed 15 September 2017. However, after the October 2017 summit, it was reported that no unanimity was reached among the Member States on these issues (i.e. negotiation mandate and applicable legal rules).

147 Szymon Zaręba, 'Challenging the European Commission Decision on the Opal Gas Pipeline' (2016) 84(934) Polish Institute of International Affairs Bulletin. The legal challenge also focuses on the incompatibility of the Nord Stream 2 pipeline project with Article 9(1) of the 2009 Gas Directive concerning common rules for the internal market in natural gas, which requires 'unbundling' of the production, supply and transmission of natural gas. See Case T-849/16 *PGNiG Supply & Trading v Commission* (pending). If eventually cleared, Gazprom would remain the sole owner of that pipeline, as well as the producer and the supplier of natural gas. For more, see Sijbren de Jong, 'Nordstream 2: Alternative Pipeline Facts' EUobserver (Brussels, 20 February 2017) <euobserver.com/opinion/136969> accessed 2 April 2017.

148 Andrew Rettman, 'US Votes to Sanction EU Firms in Russia Project' EUobserver (Brussels, 25 July 2017) <euobserver.com/foreign/138601> accessed 18 August 2017. The bill is entitled The Countering Iran's Destabilising Activities Act of 2017 (S. 722), and besides Iran covers Russia and North Korea. Despite his opposition to the bill President Trump signed it.

149 Ibid.

150 Andrew Rettman, 'Senate Backs Russia Sanctions, Setting Scene for EU Clash' EUobserver (Brussels, 28 July 2017) <euobserver.com/foreign/138637> accessed 18

Given that Russia is currently the EU's main energy supplier, the Union has to search for other possibilities to safeguard its energy demands. Arguably, the most significant opportunity for this would be the conclusion of the extensive EU-USA Transatlantic Trade and Investment Partnership ('TTIP'), and the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'), both covering trade in energy commodities. The USA and Canada have recently managed to secure their internal energy demands by employing new technologies in exploiting unconventional sources and are expected to soon establish themselves as two of the leading energy exporters.

By turning its attention to energy imports from over the Atlantic, the EU seeks to lower its energy dependence on Russia. However, the negotiation of TTIP and ratification of CETA remain, especially regarding energy, highly controversial in light of EU internal measures aimed at promoting environmental protection and offsetting climate change. The EU, which considers natural gas – in reality, less polluting than coal and oil–[151] as a 'bridge

August 2017. The Commission proposed three possible scenarios: (i) demanding the US government to exempt EU companies from the sanctions' regime; (ii) passing an EU law to block US jurisdiction over EU companies; or (iii) imposing retaliatory (e.g. financial) sanctions on US companies. The latest scenario seems the least likely since it would require unanimous support from Member States. Despite Austria and Germany opposing the US bill, the Eastern European (especially Poland and the Baltic states) and the Nordic Member States oppose the Nord Stream 2 project due to its detrimental effect on the EU's dependence on Russian energy imports. For more, see Rettman (n 146).

[151] Belén Balanyá and Pascoe Sabido, 'The Great Gas Lock-in. Industry Lobbying Behind the EU Push For New Gas Infrastructure' Corporate Europe Observatory (Brussels, October 2017) <corporateeurope.org/climate-and-energy/2017/10/great-gas-lock> accessed 31 October 2017. This report criticises the EU's approach to natural gas as a transitional energy source, claiming that it has 'potentially a bigger carbon footprint than oil and coal' due to the danger of methane leakage, a greenhouse gas more polluting than CO2. It also accuses the EU of being 'highly responsive to pressure from industry and Member States, providing policies that give gas significant legislative, political, and financial support'. For instance, the EU provides fast-track procedures for gas infrastructural projects by designating them as 'projects of common interest' (PCI). The Commission holds that gas PCIs are 'needed to achieve diversification and to complete the integration of the energy markets in the EU and beyond, thus enhancing energy security and competitiveness'. See European Commission, 'Questions and answers on the projects of common

fuel', remains heavily dependent on fossil fuel imports and spends more than 1 billion USD on them daily.[152] However, the International Energy Agency has denounced fossil fuels, especially gas that has lost its 'green status', and has endorsed renewable energy as the essential contribution to decarbonisation.[153] The suspected negative environmental impacts of US[154] and Canadian[155] exploitations are arguably contrary to the EU strategy of decarbonising its industry, i.e. minimising fossil fuel imports and switching to renewables.

As argued previously in this article, EU regulatory propensity led to enforcing strict standards of environmental protection in its energy regulation. The eventual positive effects of EU regulatory externalisation in bilateral energy relations with the USA and Canada could emerge if the EU manages to

interest (PCIs) in energy and the electricity interconnection target' (24 November 2017) <europa.eu/rapid/press-release_MEMO-17-4708_en.htm> accessed 30 November 2017.

[152] Roland Joebstl, 'Who Is Trying to Kill EU Ambition on Renewables and Energy Savings?' EURACTIV (London, 25 November 2016) <www.euractiv.com/section/energy/opinion/who-is-trying-to-kill-eu-ambition-on-renewables-and-energy-savings/> accessed 5 December 2016.

[153] Ibid.

[154] For example, while heavily used in the USA, 'fracking' has been banned in several EU Member States. Fracking is a process of horizontal drilling and hydraulic fracturing, which entails water, chemicals and proppants being pumped at high pressure into the well to open fractures in the rock and release shale gas. As a side effect, it causes large amounts of hazardous, smog-forming and climate-altering pollutants are emitted into the air. Fracking also poses a significant threat for underground water supplies through aquifer contamination, and entails risks to public health, an extended surface footprint, and geological depletion of the land. See Luca Gandossi, *An Overview of Hydraulic Fracturing and Other Formation Stimulation Technologies for Shale Gas Production* (Institute for Energy and Transport, EU Publications Office 2013).

[155] Canada holds the second largest tar sands reserves in the world after Saudi Arabia. Oil made from tar sands is one of the most polluting fossil fuels. Due to the energy and water-intensive production process, drilling methods used release 23% more greenhouse gas emissions than conventional oil production, cause deforestation and soil depletion, and pose a health threat. See Arthur Neslen, 'Tar Sands Alarm as US Crude Exports to Europe Rise' The Guardian (London, 8 December 2015) <www.theguardian.com/environment/2015/dec/08/tar-sands-alarm-as-us-crude-exports-to-europe-rise> accessed 8 December 2016.

incorporate its risk-averse standards in implementing the final versions of the two agreements. However, if or when TTIP and CETA enter into force,[156] differences in regulatory practices in the energy sector (and other related policy areas) may lead to trade disputes between the contracting parties in the WTO. Both agreements will have little to do with traditional trade issues such as tariffs, given that they are already significantly lowered due to the WTO trading rules. Instead, for the most part they will focus on non-tariff barriers, i.e. public interest safeguards such as environmental and health concerns.[157]

For instance, the US and Canadian trade representatives, backed by the world's largest oil companies, have already attacked the EU Fuel Quality Directive for being a 'discriminatory barrier to trade', and have advocated a 'delay in, and possible reconsideration of' the Directive.[158] In addition, US President Trump rejects the concept of human-influenced climate change and recently decided to withdraw from the Paris Agreement. He argued that the Paris commitments would hurt the global competitiveness of the US

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[156] In 2017, the European Commission registered the European citizens' initiative entitled 'Stop TTIP' that demanded the EU to 'repeal the negotiating mandate for TTIP and not to conclude CETA'. See European Commission, 'Press release: European Citizens' Initiative: Commission registers "Stop TTIP" Initiative' <europa.eu/rapid/press-release_IP-17-1872_en.htm> accessed 14 July 2017. For a proposal to link environmental law with trade law through integrating the Paris Agreement goals into new EU trade deals (eg, CETA and the currently negotiated JEFTA with Japan) by envisaging trade sanctions or suspension clauses in event of a party failing to meet its emissions targets or UNFCCC commitments, see Mathilde Dupré and Samuel Leré, 'Trade and climate: How the EU can protect the Paris Agreement' EURACTIV (Brussls, 28 February 2018) <www.euractiv.com/section/climate-environment/opinion/trade-and-climate-how-the-eu-can-protect-the-paris-agreement/> accessed 28 February 2018.

[157] 'Energy Trade in the Trans-Atlantic Trade and Investment Partnership: Endangering Action on Climate Change' (2014) Sierra Club, Business and Human Rights Resource Centre <www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Analysis_of_EU_Energy_Proposal_for_TTIP-Final_-_Sierra_C.pdf> accessed 10 October 2016.

[158] Mark Dearn, 'EU-US Trade Deal Will Unleash Oil Sands and Fatally Undermine Climate Efforts' The Guardian (London, 27 November 2015) <www.theguardian.com/global-development/2015/nov/27/oil-sands-transatlantic-trade-and-investment-partnership-climate-talks-cop21-paris> accessed 30 November 2016.

economy,[159] the second biggest polluter in the world after China. At the same time, he announced greater deregulation for domestic oil and gas companies and the revival of the US coal industry. Such an approach arguably disregards the economic rationale of transition to sustainable and renewable energy: for the EU, this strategy is essential for attracting investments, boosting innovation and new technologies, job creation and competitiveness.[160] All the above-mentioned issues remain open for further research and analysis in the context of the external effects of EU energy regulation on bilateral relations.

IV. Concluding Remarks

This article has introduced several inherently complex notions: EU energy regulation with all its complexities and ambiguities, regulatory externalisation as a multifaceted concept, and a patchwork of international

[159] Peter Teffer, 'US Leaves Paris Climate Deal' EUobserver (Brussels, 1 June 2017) <euobserver.com/environment/138099> accessed 5 June 2017. Previously, the Obama administration had pledged to reduce its greenhouse gas emissions by 26-28% until 2025, compared with 2005 levels. Trump's scepticism resembles the situation surrounding Kyoto Protocol, which was signed by the Clinton administration, but was never ratified in the Congress. The EU responded to the US's announced withdrawal by officially declaring a political commitment to pursue all the Paris Agreement's agreed objectives, and to fight US trade protectionism and isolationism in tackling climate change with a new (and unexpected) ally: China, who is emerging as an important actor in global energy relations. See the report from the recent EU-China summit which has kept climate policy in focus: European Commission, 'EU-China Summit: Moving Forward with our Global Partnership' <europa.eu/rapid/press-release_IP-17-1524_en.htm> accessed 29 July 2017.

[160] Despite President Trump's scepticism of climate change and the economic benefits of green energy, there is considerable support from the US private sector and a number of states (California, New York, Washington) and local governments for continued mutual investments in renewable energy between the USA and EU. A 'coal revival' in Europe is likewise highly unlikely, given that '26 out of 28 Member States (all except Poland and Greece) announced that there will be no new investments in coal plants after 2020'. See Alberto Rocamora García, 'From Brussels to Beijing: Is There Room for Optimism in Climate Policy in Trump's Era?' Politheor (Belgrade, 14 August 2017) <politheor.net/from-brussels-to-beijing-is-there-room-for-optimism-in-climate-policy-in-trumps-era/> accessed on 16 August 2017.

actors and institutions that brings together all the basic elements observed. Besides providing a general insight into the contemporary state of EU energy law and policy, the assessment of the topic has been placed in the framework of scholarship discussing and qualifying the regulatory externalisation of EU rules and policies, without entering into a normative evaluation of the social or political desirability of its outcomes.

As presented in the article, EU energy regulation in various instances has had significant extraterritorial effects. Albeit this has occasionally led to positive dynamics, it likewise has drawn many more controversies in a broader international setting. The observed cases have covered arguably the most prominent examples of both the positive and negative external effects of EU energy regulation in different dimensions (global and regional). Overall, these few instances of regulatory externalisation prove that the EU is indeed a super-influential international actor in energy relations, even 'without a [super] state',[161] and, more importantly, without a consolidated internal and external approach to energy policy. Moreover, EU regulatory externalisation is significant since global energy power has remained less dispersed and more concentrated amongst traditionally dominant resource-rich producing countries, where the EU is introducing more multilateralism in the field.

The 'internal-external nexus' is critical for the EU in this area too, since coordination and cohesion currently represent the most pressing challenges for EU energy policy. Internally, there is an apparent lack of serious political will on the part of Member States to incentivise efforts to complete the internal energy market, consolidate energy regulation and ensure its efficient implementation. Politically driven, rather than market-driven, price formation, protectionist ('market-distorting') subsidies, a lack of appropriate consumer information, and a lack of regional interconnection represent some of the greatest obstacles for a functional EU energy market.[162] The entire EU struggles in achieving sufficient mutual solidarity when it comes to particular Member States' energy issues. Notwithstanding the successes in integrating Member States' energy markets, energy policies during the last

[161] Bradford (n 11) 66.

[162] Gunnar Hoekmark, 'Clean energy package needs market, not just targets' EUobserver (Brussels, 10 November 2017) <euobserver.com/opinion/139832> accessed 13 November 2017.

decade have become 'more national'.[163] Externally, the EU is unable to coordinate its Member States' foreign energy policies and consolidate its own external energy policy to act unanimously at the global level. This 'facilitates divide-and-rule efforts by certain supplier countries',[164] and severely restricts the prospects of successful EU regulatory externalisation.

In addition, it could be that inherently contradictory, yet overlapping interests regarding the implementation of energy policy create insurmountable tensions for an effective external approach. An example would be the perceived incompatibility of the EU's global competitiveness objectives and its environmental aims, which eventually undermines the entire concept of the internal energy market. Another example would be the sacrifice of the EU's foundational values in favour of maintaining energy relations with illiberal and authoritarian regimes. The failure of EU political conditionality and a lack of democratic governance in some of its energy partners negatively affect the prospects of energy cooperation. This mismatch is nothing new. In practice, the EU often struggles with its declared policy goals and values in the face of its economic interests and geopolitical realities. In this, it remains stuck in an Orwellian 'doublethink': simultaneously accepting contradictory values or interests as true and complementary and being unaware of any conflict. Therefore, the trade-off between expanding, competitive energy markets founded on a dominant neoliberal ideology and the need for public intervention in the pursuit of energy policy goals (security, environmental protection, climate change mitigation) should be weighed and eventually reconciled in the future. Another reason for adopting a holistic approach to energy policy is its indirect global socio-political effects: the EU is expected to face an ever-rising influx of migrants fleeing energy poverty, armed conflicts over energy

[163] Nikolas Wölfing, 'A Successful Energy Union Can Sell Benefits of EU to the Masses' EURACTIV (London, 23 November 2016) <www.euractiv.com/section/energy/opinion/fridaya-successful-energy-union-can-sell-the-benefits-of-the-eu-to-the-masses/> accessed 29 November 2016.

[164] EU Global Strategy, 'The European Union in a Changing Global Environment' <europa.eu/globalstrategy/en/european-union-changing-global-environment> accessed 19 December 2016.

resources, environmental depletion, crop failures and global warming, from soon-to-be uninhabitable regions in the Global South.

Similar to other policy areas, the consolidation and externalisation of EU energy policy have not remained unaffected by the contemporary crisis of integration, in times when the idea of the EU itself is under heavy attack. In this context, delegating more regulatory authority to the EU level implies a loss of sovereignty, especially controversial in essential sectors for national legislators such as energy. Energy policy is, in addition, an area in which salient political cleavages between the 'old' core of Western European Member States and the 'new' post-communist Eastern European Member States are perpetuated over issues such as Russian influence or clean energy transition. Thus, as Bradford originally noted in a different context, a growing gap coming from within the EU between 'different visions of the future for the Union',[165] embodied in the rigid internal checks and growing ideological divisions especially in the post-Brexit era, ultimately presents the greatest challenge and impediment for a coherent and efficient EU external regulatory agenda in the energy sector.

[165] Bradford (n 11) 63.

NEW VOICES

OF APPLES, CARS, AND COFFEE – AGAINST THE COMMISSION'S REMEDY TO UNLAWFUL TAX RULINGS

Riccardo Fadiga*

Advance pricing agreements (APAs) are the most effective tool for undertakings to reduce the uncertainty regarding the fiscal liability arising out of transactions regulated by transfer pricing. Multinationals rely on APAs to gain confidence in complicated operations and attain better efficiency. In several recent decisions, the European Commission established that APAs can give rise to unlawful granting of State aid, if they provide for transfer pricing methodologies that do not accurately reflect market conditions. However, the Commission does not describe any method to establish the lawfulness of the adopted pricing methodology objectively. Therefore, this article argues that recovery of such alleged unduly granted aid violates the principle of protection of legitimate expectations, which is a fundamental principle of EU law. As such, recovery should be deemed unlawful.

Keywords: transfer pricing, advance pricing agreements, arm's length principle, legitimate expectations, state aid

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I. INTRODUCTION – THE COMMISSION'S INVESTIGATIONS INTO UNLAWFUL TAX RULINGS AND THE *APPLE*, *FIAT*, AND *STARBUCKS* DECISIONS

Since 2014, the European Commission has launched a number of investigations in advance pricing agreements ('APAs'). APAs are measures granted by national tax authorities that specify the methodologies applicable to determine the allocation of profits within the recipient's corporate group. Their purpose is to grant certainty to the recipient about future tax liability, avoiding the possibility that institutions could, at a later time, object to the recipient's chosen method of allocation of profits. However, the Commission has held that some Member States have employed APAs improperly, with the intent and result of granting State aid within the meaning of Article 107(1) TFEU. This approach is exemplified in the *Apple,*[1] *Fiat,*[2] and *Starbucks*[3] decisions (hereinafter 'the contested decisions').

The facts leading up to these decisions are nearly identical in all three cases. A multinational company represented by one or several subsidiaries seated in a Member State requests an APA. A ruling is granted by the competent national tax authority. The company applies the agreed-upon methodology and liquidates its fiscal obligations accordingly.

In all three of these decisions, the Commission found that the agreements entailed the reduction of the undertakings' taxable base. In fact, according to the Commission, the profit allocation methodologies described in the

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1 *State aid implemented by Ireland to Apple* (SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision 2017/1283 [2016] OJ L 187/1 (hereinafter '*Apple* decision').

2 *State aid which Luxembourg granted to Fiat* (SA.38375 (2014/C ex 2014/NN)) Commission Decision 2016/2326 [2015] OJ L351/1 (hereinafter '*Fiat* decision').

3 *State aid implemented by the Netherlands to Starbucks* (SA.38374 (2014/C ex 2014/NN)) Commission Decision 2017/502 [2015] OJ L 83/38 (hereinafter '*Starbucks* decision').

agreements were unreflective of actual market conditions, therefore amounting to State aid within the meaning of Article 107(1) TFEU. Consequently, the Commission ordered that the States recover amounts of monies equivalent to the difference between the amount paid and the one which would have been paid under normal market conditions.

The inherent purpose of tax rulings is to establish certainty regarding the tax liability of their recipients. However, by claiming to have the competence to review them *ex post*, the Commission frustrates their very objective. Because such procedures are an expression of the issuing authority's exercise of fiscal sovereignty on behalf of their respective State, the Commission's decision violates the principles of fiscal sovereignty, legal certainty and legitimate expectations.

Currently, the Commission's competence in reviewing APAs has not been fully explored, due to the short timeframe in which it has been developed and the number of perspectives from which the legitimacy of such a practice needs to be assessed (e.g. legal certainty, legal clarity, issues of tax harmonization and of control of harmful tax practices, etc.).[4] Compatibility with the principle of legitimate expectations is fundamental to reaching a comprehensive understanding of the issue. Hence, this article establishes a framework within which to assess the compatibility of the remedies proposed by the Commission in the contested decisions with the principles of legitimate expectations and legal certainty. This article argues that the recovery of any sum larger than what was established in the APA is irreconcilable with these fundamental principles of European Union law. More specifically, this article further argues that, in the appeals against the decisions described above,[5] the Court of Justice of the European Union

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4 However, for conclusions similar to those reached in this article, see Liza Lovdahl Gormsen and Clement Mifsud-Bonnici, 'Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax' (2017) 8(7) Journal of European Competition Law & Practice423. For further reading, see Gary Clyde Hufbauer and Zhiyao Lucy Lu, 'Apple's Tax Dispute with Europe and the Need for Reform' (2016) PB16-16 Peterson Institute for International Economics <https://piie.com/system/files/documents/pb16-16.pdf> accessed on 11 December 2017.

5 Each of the decisions has already been appealed before the Court, in all cases by both the company and the State interested. Against the *Apple* decision (n 2): Case T-778/16

(hereinafter 'the Court') should hold the remedy proposed by the Commission to be unlawful, and therefore order that any sum larger than what was agreed in the tax rulings cannot be recovered.

After this introduction, section II of the article goes over the underpinnings of the use of transfer pricing to manipulate profit allocation in order to reduce tax liability, and explains the main workings and consequences of APAs. It also details how the Commission has extended its competence to such measures under the EU State aid rules. Section III describes the issue of assessing correspondence to 'normal market conditions', while section IV examines how EU case law has construed the principle of the protection of legitimate expectations. Section V reviews in detail the aforementioned cases and draws conclusions on their reciprocal compatibility and issues therein, in light of the arguments put forward in the earlier sections.

II. Judicial Review of Fiscal Measures – Background and Justifications

To maximise profits, corporate groups that have subsidiaries in different jurisdictions (hereinafter 'multinational enterprises' or 'MNEs') have an interest in attributing the highest possible amount of profit to subsidiaries in low-tax jurisdictions, therefore reducing the group's overall tax burden. MNEs achieve this by manipulating the price charged for commercial transactions between various companies of the same corporate group (hereinafter 'transfer pricing'). Transfer pricing manipulation contributes to taxable base erosion[6] and constitutes an unfair advantage for those undertakings that can artificially allocate profits between associate

Ireland v Commission (2017/C 038/48) OJ C 38/35, and Case T-892/16 *Apple Sales International and Apple Operations Europe v Commission* (2017/C 053/46) OJ C 53/37; against the *Fiat* decision (n 3): Case T-755/15 *Luxembourg v Commission* (2016/C 059/55) OJ C 59/48, and Case T-759/15 *Fiat Chrysler Finance Europe v Commission* (2016/C 059/56) OJ 59/49; against the *Starbucks* decision (n 4): Case T-760/15 *Netherlands v Commission* (2016/C 059/58) OJ C 59/50, and Case T-636/16 *Starbucks and Starbucks Manufacturing Emea v Commission* (2016/C 462/32) OJ C 462/25. All of these cases are still pending.

6 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris. Available at <http://dx.doi.org/10.1787/tpg-2017-en>, pp 16 and 34 ff.

companies in different jurisdictions.[7] This practice differs from legitimate tax planning, which is expressly safeguarded in some jurisdictions.[8]

EU Member States[9] allow their tax authorities to review intra-group transactions with the aim of establishing whether the pricing schemes adopted genuinely reflect the value of the transaction. The tax authorities can then adjust the price that they take into account for the purpose of calculating the tax liability. This possibility creates uncertainty about the final tax burden resulting from a cross-border operation, which, in turn, leads to sub-optimal strategic decisions[10] and potentially to costly disputes affecting taxpayers and tax authorities.[11]

To reduce this uncertainty, the tax authorities of most Member States offer the possibility of entering a binding agreement which defines *ex ante* the tax

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7 *Ireland Alleged Aid to Apple* (SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision C 2017/5605 [2014] OJ C/369/22, para 150.

8 Eg, the Belgian Supreme Court acknowledged the taxpayers's right to freely choose the 'route of less taxation' in landmark *Brepols* case (Supreme Court of Belgium, Court de Cassation/Hof van Cassatie, 6 June 1961, Brepols, Pas 1961, I, p 1082.). In Luxembourg, the provisions of Article 22bis of the Luxembourg Income Tax Law, implementing the neutrality regime of Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [1990] OJ L225/1, ('Merger Directive'), constitute without question a tax planning tool, and their use does not constitute tax evasion or avoidance.

9 In 2017, Thomson Reuters submitted their yearly questionnaire to legal experts in 38 different countries with questions regarding their respective jurisdiction's approach to topical issues. 14 EU Member States were interviewed: Austria, Belgium, Bulgaria, Croatia, Cyprus, France, Germany, Ireland, Italy, Luxembourg, Portugal, Spain, The Netherlands, and the UK. Thomson Reuters publishes their questionnaire results at <https://uk.practicallaw.thomsonreuters.com/Browse/Home/International/TransferPricingGlobalGuide> accessed on 12 December 2017 (hereinafter 'Thomson Reuters data').

10 John T Jost, Grainne Fitzsimons and Aaron C Kay, 'The Ideological Animal', in Jeff Greenberg, Sander L Koole and Tom Pyszczynski (eds), *Handbook of Experimental Psychology* (Guilford 2004) 263–83.

11 European Commission, 'Communication on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU' COM (2007) 71 final.

burden resulting from a planned operation, called an APA.[12] The content of such measures are agreed upon by the applicant and the tax authority through procedures which include a variable degree of negotiation between the two parties.[13]

The EU Joint Transfer Pricing Forum ('JTPF')[14] found that APAs are beneficial to both taxpayers and tax administrations in that they *(i)* are an efficient tool for dispute avoidance;[15] *(ii)* benefit the tax administration, in that they avoid the need for audits to establish correct transfer pricing, and only leave the correct application of the agreement to be verified;[16] and *(iii)*

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[12] Of course, APAs engender their own tax avoidance issues. They can give rise, *inter alia*, to double non-taxation. Such situation can arise for instance when two distinct agreements are obtained at different conditions in different jurisdictions, if the tax authorities concerned are reciprocally unaware of the proceedings occurring at the cures of the other.

[13] For instance, the German tax authority (see file ref: IV B 4 – S 1341 – 38/06 of the Federal Ministry of Finance of Germany, dated 5 October 2006) tends to determine unilaterally the content of the APA on the basis of the information filed by the applicant, while the French tax authority has a full-fledged negotiation process in place (see <www.impots.gouv.fr/portail/international-professionnel/advance-pricing-arrangement> accessed on 12 December 2017).

[14] The JTPF (formerly Joint Forum on Transfer Pricing) is a standing meeting venue between tax authorities and business representatives instituted by the Commission in order to: examine issues with transfer pricing, APAs and similar tools; consider the scope for improving and rendering more uniform transfer pricing methodologies within the OECD guidelines; and examine necessary improvements to the Arbitration Convention. European Commission, 'Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee - Towards an Internal Market without tax obstacles - A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities' COM (2001) 582 final, p 14, and 61, 43. On page 3 of this Communication, the Commission notes that various problems affect intra-group transactions and therefore stand as obstacles to the realisation of uniform tax conditions within the common market. The Commission suggests the development of APA programs as a possible solution. However, at that moment there seems to be no certainty regarding the methodologies and consequences of such programs. The institution of the JTPF seems to be aimed at fixing precisely this lack of specific knowledge.

[15] Commission Communication (n 11) 3.

[16] Ibid 14.

benefit the taxpayer, in that they enjoy *ex ante* certainty concerning the transfer pricing methodology to be applied to the covered transaction.[17] Through APAs, enterprises can assess the consequences of the covered transaction without the uncertainty engendered by the possibility of a review of the pricing scheme by the national tax authorities. At the time of writing, 23 EU Member States provide for formal procedures for requesting APAs or similar ahead-of-time clearances.[18]

Because States have an interest in corporations shifting their reported taxable base to their jurisdiction, States have an incentive to employ APAs more favourably towards more economically relevant MNEs. In light of this, the European Commission reviewed some of these rulings to ascertain that such a favour does not amount to State aid within the definition of Article 107(1) TFEU. The main objection to the legitimacy of reviewing fiscal measures at the European level is that levying taxes is a capacity at the core of national sovereignty.[19] At the current state of harmonization in the Union, national fiscal policies are subject to negative integration – i.e., States are 'at liberty to determine the conditions and the level of taxation' across their domestic economies, provided that they do so consistently with EU law.[20]

However, with regards to tax measures, the Court has stated that they can 'amount to State aid within the meaning of Article 107(1) TFEU', inasmuch as they 'place the recipients in a more favourable financial position than other

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[17] Commission Communication (n 11) 14.

[18] EU Joint Transfer Pricing Forum JTPF/015/2016/EN, *Statistics on APAs in the EU at the End of 2015*, Brussels, October 20th, 2016, combined with Thomson Reuters, *Regional Q&A on Transfer Pricing*, at <https://uk.practicallaw.thomsonreuters.com/qacompare/report/country/07202ac840c34a2ab6a62cb2d2f4ad91?transitionType=Default&contextData=(sc.Default)#/report/Croatia> accessed on 3 July 2017.

[19] Cf, Sjaak JJM Jansen, *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future* (Kluwer Law International 2011); George Melo, 'Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty (A Critique of the OECD's Report: Harmful Tax Competition: An Emerging Global Issue)' (2000) 12(1) Pace International Law Review 183.

[20] Case C-298/05, *Columbus Container Services* EU:C:2007:754, paras 28 and 43-57. Cf Case C-265/04, *Bouanich* EU:C:2006:51, paras 22-43.

taxpayers'.[21] Consequently, tax measures can be reviewed on the grounds of incompatibility with the Treaty,[22] provided that they fit the criteria established by the case law for classifying a measure as State aid, which are: *(i)* there must be intervention by the State or through state resources; *(ii)* the intervention must be liable to affect trade between Member States; *(iii)* it must selectively confer an advantage on the recipient; and *(iv)* it must distort or threaten to distort competition.[23]

With regard to the criterion *(i)* – state intervention – the Court has progressively denied that the resources concerned must be granted in the form of a positive direct transfer.[24] In particular, the Court has included within this definition the waiving of credit,[25] and specifically of tax revenue.[26] The application of an APA which confers an advantage through favourable conditions (i.e. reducing the recipient's tax liability) satisfies this condition in full.

Both the Commission and the Court have broadly interpreted the criterion *(ii)* – an intervention affecting intra-EU trade –, establishing that it is fulfilled by any sort of economic activity. In particular, and dispelling all doubts on the qualification of preferential tax measures as affecting trade, the Court has stated that 'the grant of aid by a Member State, *in the form of a tax relief*, to some of its taxable persons must be regarded as likely to have an effect on

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[21] Case C-105/14, *Taricco* EU:C:2015:555, para 61, which is the latest in an extensive series of consistent judgments.

[22] *Ex multis*, the Court stated that '[a]lthough both tax legislation and the implementation of tax arrangements are matters for the national authorities, the fact remains that the exercise of that competence may, in certain cases, prove incompatible with Article [107(1) TFEU]' (Case C-83/98, *France v Ladbroke Racing and Commission* EU:C:2000:248, para 4). This formulation can be found in the summary that the Court gave of the judgment given by the Court of First Instance, which the General Court confirmed by dismissing the appeal in full.

[23] Joined Cases C−341/06 P and C−342/06 P, *Chronopost and La Poste v UFEX and Others* EU:C:2008:375, para 122, and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* EU:C:2006:208, para 56.

[24] Case C-30/59 *SMNEnkolenmijnen v High Authority* EU:C:1961:2.

[25] Joined Cases C-6/69 and C-11/69, *Commission v France* EU:C:1969:68.

[26] Case C-387/92, *Banco Exterior de España* EU:C:1994:100.

trade.'[27] A similar reasoning goes towards the fulfilment of the criterion *(iv)* – distortion of competition.[28]

Therefore, the decisive criterion used to assess the legitimacy of a tax measure is that of *(iii) selective advantage*. This concept is made up of the two separate notions: selectivity and advantageousness.

As for the notion of selectivity, a measure must be liable to benefit one or more undertakings, while not being available to others in order to fall under the State aid provisions. *De jure* selectivity can be excluded in any jurisdiction where a State-sanctioned procedure to request tax rulings/APAs is in place – i.e., in the vast majority of Member States[29] – because, indeed, such procedures make APAs theoretically available to all undertakings that request it. On the other hand, to exclude *de facto* selectivity, it must be proved that the same benefit available to some undertakings could have been obtained by others on the basis of criteria that are public, objective, and verifiable.[30] According to this three-step test adopted by the Commission,[31] unless a tax ruling is equipped with proof that its contents result directly from the basic or guiding principles of that tax system, the measure is selective. In other words, as Member States have failed so far to produce the abovementioned criteria, but rather conduct APA negotiations behind closed doors, such measures are liable to be more beneficial to those applicants who wield more bargaining power.

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[27] Case C-494/06 P, *Commission v Italy and Wam* EU:C:2009:272, para 51 (emphasis added) and the case law cited therein.

[28] Case C-372/97, *Italy v Commission* EU:C:2004:234, para 44.

[29] JTPF/015/2016/EN (n 19).

[30] DG Internal Policies, '"Tax rulings" in the EU Member States', IP/A/ECON/2015-08, PE 563.447, p 17. The issue of verifying such conditions has been tackled repeatedly by the Commission; see, eg, EU Commission, 'Notice on the application of State aid rules to measures relating to direct business taxation' [1998] OJ C 384/3; EU Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU (2016/C 262/01) OJ C 262/1, para 101. In the context of investigations on discriminatory fiscal schemes, the Court established a rigorous three-step test for assessing selectivity in Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* EU:C:2001:598, and later in Joined Cases C-78/08 to C-80/08, *Paint Graphos and Others* EU:C:2011:550.

[31] Case C-143/99, *Adria-Wien Pipeline* (n 31).

The second part of the notion of *selective advantage,* that of the advantage itself, refers for the purpose of Article 107(1) TFEU to any economic benefit that an undertaking would not have obtained under normal market conditions.[32] The criterion used to distinguish whether a measure falls within this definition is the Market Economy Investor Principle ('MEIP'). This principle states that the only economic resources that a State can lawfully transfer to a private operator are the resources that would have been 'contributed in circumstances that would be acceptable to a private investor operating under normal market economy.'[33] Mitigations of charges that would otherwise have been part of the budget of the recipient are assimilated to a resource transfer.[34]

Therefore, if the economic situation in which APA recipients find themselves after the agreement is more advantageous than if they had not concluded an APA, then such a measure entails an advantage within the definition of Article 107(1) TFEU.[35] This is held to be the case where multinational corporations price their intra-group transactions in a manner that does not reflect the conditions that apply between companies acting independently on the market ('market-based conditions'). How such conditions are determined is described in the following section.

III. At Arm's Length – The Issue of Assessing 'Market-Based Conditions'

To determine whether a measure entails an undue advantage for its recipient, a benchmark must be established against which to test the economic consequences of a measure *vis-à-vis* 'market-based conditions'. To this end, the so-called 'arm's length' principle has been developed. This section briefly

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[32] Case C-39/94, *SFEI and Others* EU:C:1996:285, para 60; Case C-342/96, *Spain v Commission* EU:C:1999:210, para 41.

[33] *OECD Transfer Pricing Guidelines*, (n 7) at 3.2.

[34] Case C-387/92, *Banco Exterior de España* EU:C:1994:100.

[35] For a further analysis of the notion of selectivity in APAs, see Saturnina Moreno González, 'State Aid, Tax Competition and BEPS: Comments on the European Commission's Decisions on Transfer Pricing Rulings' [2016] University of Leicester School of Law Research Paper No 17/00 <https://ssrn.com/abstract=2947870> accessed 11 December 2016.

outlines its origin and formulation, and discusses the consequences of its application in the contested decisions.

The arm's length principle was established in 1933 in a study conducted by the League of Nations' fiscal committee,[36] and today enjoys worldwide recognition.[37] The principle is included within a plethora of soft law instruments.[38] Most prominently, Article 9 of the OECD Model Tax Convention provides the most accepted formulation:

> [any time] conditions are made or imposed between [...] two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.[39]

Most Member States have developed or are developing their legislations according to this formulation, sometimes expressly referring to the OECD rules.[40] The CJEU has employed the arm's length principle to determine the

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[36] Mitchell B Carroll, 'Taxation of Foreign and National Enterprises', *Volume 4 Methods of Allocating Income* (League of Nations 1933).

[37] OECD *Transfer Pricing Guidelines* (n 7) at 1.14 – 1.15.

[38] OECD, *Model Convention with Respect to Taxes on Income and on Capital (Condensed Version)*, OECD 2014, pp 29-30; OECD *Transfer Pricing Guidelines* (n 7); Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises [1990] OJ L 225/10.

[39] OECD *Model Convention with Respect to Taxes on Income and on Capital* (n 39) 29-30.

[40] Eg, Austria has published the OECD's TPC in the official gazette and they have the status of aids to official interpretation; Ireland's transfer pricing legislation specifically provides for construing regulation in accordance with the TPC; the Spanish Tax Authority has made specific reference to fostering the application of the principles laid out in the OECD Guidelines in their latest General Guidelines; etc. (see Thomson Reuters at <https://uk.practicallaw.thomsonreuters.com/Document/I479cef161fa911e798dc8b09b4f043e0/View/FullText.html> accessed on 3 July 2017). The Guidelines are often referred to even outside the OECD: *inter alia,* they are accepted by means of praxis in Bulgaria and implemented into legislation in Croatia (Thomson Reuters at <https://uk.practicallaw.thomsonreuters.com/w-007-8395> and <https://uk.practicallaw.thomsonreuters.com/w-007-3438> for Bulgaria and Croatia respectively, accessed on 3 July 2017).

existence of selective advantage in fiscal measures[41] which is present if the measure endorsed a method for determining a corporate group's taxable profit that does not result in a reliable approximation of a market-based outcome.[42] To reach a quantitative conclusion on the pricing scheme assessment based on the arm's length principle, several methods can be applied. These methods are described in the OECD Transfer Pricing Guidelines, and establish the accounting techniques that should be used to assess a 'correct' value for the transaction.[43] Different jurisdictions favour different methods.[44] In general, the methods described by the OECD entail either approximating the price of a transaction or comparing it with a comparable, independent operation.

These principles and methods played a cardinal role in the Commission's conclusions that the measures in the contested decisions amounted to State aid. Between 2013 and 2014, the Commission reviewed the tax ruling practices of all Member States, focusing in particular on tax rulings that 'endorse transfer pricing arrangements proposed by the taxpayer for determining the taxable basis of an integrated group company'.[45] It assessed the tax liability resulting from the application of the pricing schemes described in the rulings *vis-à-vis* the results that could be obtained by an independent operator in the market; this comparison led to the finding that several arrangements entailed reductions in tax liability equivalent to State aid.

In stipulating the APAs under review, all the tax authorities involved had considered the arm's length principle. Irish tax law formally recognises the

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41 Joined Cases C-182/03 and C-217/03, *Forum 187* EU:C:2006:416.

42 The Commission thusly summarised the Court's position in its DG Competition Working paper on State aid and tax rulings, 2016, available at <http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf>, accessed on 13 December 2017.

43 While a quantitative or technical definition of such methods lays outside the scope of the article, an in-depth description is included in the OECD *Transfer Pricing Methods* paper of July 2010, available at <www.oecd.org/ctp/transfer-pricing/45765701.pdf>, accessed on 13 December 2017, which, in turn, references paragraphs 2.13-2.145 of the *Transfer Pricing Guidelines* (n 7).

44 Thomson Reuters data (n 10).

45 Working paper on State aid and tax rulings (n 43).

application of the 'arm's length principle' as laid down in Article 9 of the OECD Model Tax Convention.[46] The Luxembourg tax administration confirmed that 'the transfer pricing analysis hereafter has been realized in accordance with the Circular 164/2 of the 28 January 2011 and respects the arm's length principle'.[47] The Dutch administration explicitly accepted that the remuneration determined by Starbucks constituted an arm's length remuneration.[48]

The Commission also made specific reference to the principle, using it as a guideline for its assessment of whether the APAs under review were reflective of actual market conditions. The Commission asserted that 'the OECD's framework [describing the arm's length principle] serves as a focal point and exerts a clear influence on the tax practices of OECD member countries.'[49] In particular, the Commission stated that the investigations were started on the grounds that the results obtained through the rulings' calculations were not compliant with the arm's length principle,[50] and did not correspond to conditions that a prudent independent operator acting under normal circumstances would have accepted.[51]

As means of justification for such claims, the Commission stated in its *Fiat* decision that the method selected for the transfer pricing assessment, known as the Transactional Net Margin Method ('TNMM'), was not reliable. This claim explicitly contradicts what was determined by the national tax authorities. Instead, the Commission argued that the Luxembourg authorities ought to have applied the Comparable Uncontrolled Price ('CUP') method.[52]

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46 See, *Apple* decision (n 2), para 78.

47 See, *Fiat* decision (n 3), para 54.

48 See, *Starbucks* decision (n 4), para 42.

49 *Apple* decision (n 2), para 79. See also, almost verbatim: *Fiat* decision (n 3), para 87; *Starbucks* decision (n 4), para 66.

50 *Apple* decision (n 2), para 149; *Fiat* decision (n 3), para 130; *Starbucks* decision (n 4), para 287.

51 *Apple* decision (n 2), para 146; *Fiat* decision (n 3), paras 131-137; *Starbucks* decision (n 4), para 256.

52 *Fiat* decision (n 3), paras 132-139.

The two different methods, selected respectively by the Commission and by Luxembourg, are both described in and endorsed by the OECD Guidelines.[53] The OECD does not prescribe a rigorous hierarchy between the methods, although the CUP method is presented as preferable in some cases, provided that adequate benchmarks to assess the transfer pricing scheme *vis-à-vis* comparable transactions are available. Nonetheless, all methods are presented as equally valid, and there is no rule mandating States to choose one method over the other. This notwithstanding, the Commission stated that the 'methodological choice' of the Luxembourg tax authorities is the reason why the tax rulings must be regarded as State aid.[54]

The same line of reasoning applies for the arguments used in the *Starbucks* decision. In response to the Netherlands' argument noting the absence of a 'best method rule',[55] the Commission simply argued that the factor determining the validity of a method is that it results 'in a reliable approximation of an arm's length price'.[56] Furthermore, in the *Apple* decision, no quantitative analysis whatsoever is cited.

The Commission bases its reasoning in these decisions on the OECD Guidelines. Therefore, it cannot contradict the validity of the other methodologies described therein – among which are those selected by the Member States. The Commission, then, rather than contesting the methodological choices operated by States, challenges the results that they obtained on the grounds that they are not consistent with the arm's length principle. However, by doing so, the commission is carrying out an *ex post* analysis which compromises the capability of such methods of ensuring a degree of legal certainty. Indeed, if there is no method that can be applied objectively and automatically, taxpayers are prevented from being able to rely on any one of them. Nonetheless, being able to rely on APAs is necessary so that such measures can fulfill their purpose of attaining legal certainty. Therefore, the Commission's claim frustrates the interest of both the

53 OECD *Transfer Pricing Guidelines* (n 7) ch 2.

54 *Fiat* decision (n 3), para 266.

55 *Starbucks* decision (n 4), para 175.

56 Ibid, para 284.

Member States and their taxpayers, as it renders APAs insufficient to guarantee certainty, and therefore fruitless.

The Commission provides no alternative solution to the issue: it has refrained from defining a 'safe' methodology, i.e. a methodology to which the Commission itself would not have grounds to object. Rather, through the motivations advanced in the contested decisions, the Commission claims competence to review the States' decisions on a case-by-case basis.

In conclusion, the Commission criticises the methodological choices operated by the national tax authorities without clear basis, as the OECD defines no strict hierarchy between the methods it described. Subsequently, because it cannot outright reject the application of a method prescribed by the OECD, it criticises the results obtained through that method. However, by proposing to judge the outcome of the process irrespectively of the correctness of the methods employed, the Commission is defying the very purpose of the OECD specification of acceptable methods of calculation. Finally, the Commission does not propose an alternative solution conducive to the establishment of a clear and certain legal framework with respect to the application of the arm's length principle.

IV. Legitimate Expectations within the EU State Aid Framework

The circumstances outlined above impinge decisively on the right to legal certainty and on the Member States' fiscal sovereignty, and, most evidently, on the principle of legitimate expectations. This section will address this latter issue.

The principle of legitimate expectations requires that institutions refrain from penalising or otherwise burdening persons, on the grounds of a conduct that such persons have kept while under a legitimate expectation of lawfulness, provided that the institutions themselves elicited such expectations. In relation to this article, the consolidation of a legitimate expectation with regard to the tax liability entailed by the covered

transaction, is the very object of obtaining an APA, as the Commission itself acknowledged in 2012.[57]

Therefore, the fact that a European institution could claim for itself the competence to review APAs is clearly problematic *vis-à-vis* the necessity of safeguarding legitimate expectations. In the case at hand, protecting the essential object of APAs, in light of their nature of acts originating from a national tax authority on a subject in which national sovereignty should be uncontested.

The Court of Justice holds the principle of legitimate expectations to be 'one of the fundamental principles of the Community.'[58] In its own words, the Court has 'consistently held' that 'any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectation.'[59] With specific regard to the framework established for the recovery of unduly granted State aid, the Council established that the Commission 'shall not require recovery of the aid if this would be contrary to a general principle of Union law.'[60]

Therefore, it appears clear that if the conclusion of an APA is found to be liable of engendering expectations that are legitimate within the meaning of the principle described above, the Commission should refrain from recovery even where it finds that such measure amounts to State aid. Accordingly, the Court has specified the principle's indemnifying contents with regard to European institutions: it held that in case an institution gives specific assurances with regard to their future conduct, such assurances grant the

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57 European Commission, (IP) COM/2012/0516 final, paras 23-24.

58 Case T-43/98, *Emesa Sugar v Council* EU:T:2001:279, para 87. See also Joined Cases C-104/89 and C-37/90, *Mulder and Others v Council and Commission* EU:C:2000:38, para 15; Case 316/86, *Krücken* EU:C:1988:201, para 22; Case 112/77, *Töpfer* EU:C:1978:94 para 19.

59 Case 265/85, *Van Den Bergh En Jurgens v Commission* EU:C:1987:121, para 44, citing Case 78/77, *Lührs v Hauptzollamt Hamburg-Jonas* EU:C:1978:20.

60 Article 16(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (Text with EEA relevance) [2015] OJ L 248/9.

recipient an actionable right with the object of being indemnified from any future divergent conduct.[61]

In light of the analysis of the contested decisions made in the previous section, it should now be apparent that the Commission has set forth a remedy that clashes with the principle of legitimate expectations, and indeed the parties argued on these grounds. In the *Apple* case, third parties argued that the Commission's approach would undermine legal certainty. They submitted that 'transfer pricing is not an exact science';[62] therefore, the only way for taxpayers to reduce uncertainty is to request an assessment by the tax authorities through an advance ruling. In light of this, the recipient should be safeguarded, at least through the exclusion of a potential recovery.[63] With regard to the expectations of lawfulness of the rulings, Ireland itself commented that a 'reasonable and diligent taxpayer' would not have been able to predict the Commission's finding of incompatible State aid within the measure: this circumstance entails that an adjustment of the conditions contained in the measure breaches the principle of legal certainty because the recipient could not have reasonably accounted for it.[64]

The Netherlands argued similarly in *Starbucks*,[65] as well as Luxembourg in the *Fiat* case.[66] Furthermore, with regard to the latter case, the ECOFIN Code of Conduct Group[67] and the OECD Forum on Harmful Tax Practices had found that the Luxembourg tax scheme was compliant with, respectively, the

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61 Case T-203/96, *Embassy Limousines & Services v Parliament* EU:T:1998:302, paras 74 ff.

62 *Apple* decision (n 2), para 175.

63 Ibid, paras 174 ff.

64 Ibid, para 178.

65 *Starbucks* decision (n 4).

66 *Fiat* decision (n 3).

67 See n 7.

Code of Conduct[68] and the Transfer Pricing Guidelines,[69] which – Luxembourg argued – was a circumstance liable to engender the expectation of lawfulness of the rulings.[70]

The Commission rejected the argument that the expectations were legitimate on three grounds, which were that *(i)* Member States lacked standing to invoke the principle; *(ii)* the non-adherence to State aid procedure invalidated the expectations' legitimacy; and *(iii)* the expectations were not legitimate *per se*.

The Commission predominantly emphasised the motivations described at point *(i)*. It argued that Member States lack standing to invoke the principle of legitimate expectations on behalf of the recipient of the ruling. On this issue, the Commission is consistent with the Court's case law. However, it must be borne in mind that the decisions are addressed to the Member States, not to the recipients,[71] and that the obligation to safeguard the taxpayers' legitimate expectations fall upon the Member States.[72] Consequently, the

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[68] EU Council, ECOFIN, Code of Conduct Group documents, are available at <www.consilium.europa.eu/register/en/content/out/?DOC_TITLE=code+of+conduct+guidance&DOC_SUBJECT=FISC&i=COCGGD&ROWSPP=25&DOC_LANCD=EN&ORDERBY=DOC_DATE+DESC&typ=SET&NRROWS=500&RESULTSET=1&TARGET_YEAR=2017> accessed on 11 June 2017. The Code of Conduct Group, set up by ECOFIN in 1998, deals with assessing tax measures for business taxation and overseeing the provision of information on those measures. Furthermore, it is responsible for maintaining a non-binding Code of Conduct intended to guide Member States in curbing harmful tax practices. On the matter at hand, the Group stated that 'there [is] no need for the [Luxembourg tax measure on companies engaged in intragroup financing activities] to be assessed against the criteria of the Code of Conduct', as the system was found to be compatible with the Code.

[69] OECD *Transfer Pricing Guidelines* (n 7).

[70] *Fiat* decision (n 3), para 358. Even setting aside the authoritativeness of such institutions, it is the Guidelines of the latter which are cited as a justification for the Commission's reasoning. As a result, the OECD Guidelines are said not to be liable to engender legitimate expectations, while at the same time the principles *and* methodologies employed in the decision are based on analogous OECD documents. The contradictory nature of such assessment is evident.

[71] Article 5 of the *Fiat* (n 3), *Apple* (n 2), and *Starbucks* (n 4) decisions.

[72] *Starbucks* decision (n 4).

Member States should be able to invoke any and all exceptions to the Commission's findings that they consider to be of help in effectively fulfilling such obligations. Either way, the solution to this issue does not shed light on the substantial applicability of the principle of the protection of legitimate expectations to the case at hand.

With regard to the Commission's point *(ii)*, it must be noted that pursuant to Article 108(3) TFEU, the Court has held that Member States have an obligation of notifying the intent of granting aid before doing so, which they had not done in the cases at hand. When the aid recipient does not verify that the correct procedure for granting State aid has been followed by the State, any expectation regarding such aid is illegitimate.[73] However, extending the reasoning of the Court to circumstances in which the measure under review could not be classified *ex ante* as State aid would be illogical and contradictory. In other words, where a measure is not intended to have any effect that could amount to State aid, like in the case of APAs, it cannot be held that States have a responsibility to notify them to the Commission. The opposite conclusion would be illogical, and accepting it would require subjecting all tax rulings issued by Member States to the Commission's review.

As sole justification concerning the *per se* legitimacy of the expectations' rebuttal (point *(iii)*), the Commission held that in the cases at hand, the expectations held by the taxpayers were not legitimate because they were engendered by a conduct held not by the European institutions but by national authorities. However, the notion of national authorities protecting legitimate expectations in the application of EU law, and in particular preventing the recovery of unduly granted aid is well-established. For instance, the *Elmeka* ruling concerned the legitimate expectation of being exempted from a VAT payment by reason of the (national) tax authorities' conduct. The Court stated that:

> Under the settled case-law of the Court, the principles of protection of legitimate expectations and legal certainty form part of the Community legal order. On that basis, these principles must be respected by the institutions of the Community, but also by Member States in the exercise of the powers conferred on them by Community directives [...] It follows that national

[73] Case C-5/89, *Commission v Germany* EU:C:1990:320, paras 13 ff; and Case C-169/95, *Spain v Commission* EU:C:1997:10, para 51.

> authorities are obliged to respect the principle of protection of the legitimate expectations of economic agents.[74]

Therefore, the Court ruled that provided the tax authority that engendered the expectation was competent on the issue, the expectation was legitimate, and the unpaid VAT could not be recovered. The words of Advocate General Stix-Hackl in her Opinion made the issue even clearer: 'it is to be regarded as permissible for national legislation to protect legitimate expectations and legal certainty in an area such as the recovery of wrongly paid Community aid.'[75] In the words of Advocate General Kokott, with regard to a different case, it is '*imperative* that, when enforcing EU law, the Member States observe the principle of the protection of legitimate expectations'.[76]

In light of the above, this article must conclude that national authorities are liable to engender legitimate expectations with regard to matters on which they are competent to rule. From this conclusion must follow that the rights of the taxpayers engender a duty of refraining from the recovery of unduly granted aid.

In the specific case of APAs, the aptness of the measure with which APAs are granted to engender expectations is even more firmly evident than with other measures that unduly grant aid. The requirements that such assurances be 'precise, unconditional and consistent information' originating from 'authorized and reliable sources',[77] are not only characteristics intrinsic to APAs, but their very objective. The entire aim of the APA procedure is to provide information that is more 'precise, unconditional and consistent' than what a taxpayer can autonomously deduce from tax legislation. Therefore, in the case of APAs, the legitimacy of the expectations engendered is even less susceptible of being contested.

The Commission's unwillingness to give efficacy to the principle of legitimate expectations can be proved further by one final observation. In the

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74 Joined Cases C-181/04 to C-183/04, *Elmeka* EU:C:2006:563, para 31.

75 Opinion of Advocate General Stix-Hackl in Joined Cases C−181/04 to C−183/04, *Elmeka* EU:C:2005:730, para 38.

76 Opinion of Advocate General Kokott in Case C-568/11, *Agroferm* EU:C:2013:35, para 46.

77 Case T-271/04, *Citymo v Commission,* EU:T:2007:128, para 138.

Fiat case, the expectations were not only engendered by the conduct of the tax authority, but also corroborated by the findings of ECOFIN and OECD.

V. Conclusions

In light of what has been discussed, it should now be apparent that a single, objectively correct result of the application of the arm's length principle, cannot be obtained. Therefore, the assessment of the lawfulness of an APA cannot be objective.

The OECD itself recognises that its own transfer pricing guidelines are 'not sufficient to meet the transfer pricing compliance requirements of today's economy'.[78] The efforts to create reliable transfer pricing documentation have been numerous, but these initiatives have, for several reasons, not fully met the needs of either taxpayers or tax administrations.[79] Therefore, it is impossible for either the taxpayers or the tax administrations to reach objectively unquestionable, 'correct' results when determining tax liability according to the arm's length principle.

Indeed, the Commission did not challenge the methodologies applied in the contested APAs – it only contested the concrete results that they had yielded.[80] Therefore, instead of requiring Member States to devise a method that the Commission accepts and that taxpayers can apply autonomously, the Commission requires Member States to obtain, through whichever method they choose, *results* that the Commission accepts.

This is not something that taxpayers can evaluate or predict exactly in advance. There is no way for even the most prudent and discriminating enterprises[81] to establish *ex ante* whether the pricing scheme it elected for a

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78 OECD, *White Paper on Transfer Pricing Documentation*, of 30 July 2013, available at <www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf>, accessed on 13 December 2017, p 4.

79 Ibid.

80 Phedon Nicholaides, 'State Aid Rules and Tax Rulings' (2016) 3 European State Aid Law Quarterly 416, 418.

81 As described in section 3, these are the characteristics that the Court requires the recipient of a measure to display in forming his expectations. For the application of

specific intra-group transaction will be deemed consistent with market conditions. Therefore, it is impossible for MNEs to reliably assess their fiscal liability ahead of time.

The recovery of the alleged aid granted through the contested APAs would contradict very specific case law and general principles of the Union, violating the principles of legal certainty, legal clarity, and legitimate expectations which derives therefrom.

A remedy to this state of affairs would be that the Court and the Commission seek to establish a clear methodology and framework, according to which the Member States and taxpayers would be able to determine the content of APAs in a manner that does not allow a margin of discretion. In this way, the goal of APAs of providing certainty would be restored. In the absence of such framework, and as long as the validity of the methodologies applied by national tax authorities stands uncontested, it remains unacceptable to disregard the results that they had reached, and upon which the taxpayers have formed their legitimate expectations.

Although the intent of limiting Member States' abuse of fiscal autonomy is laudable, the methods employed by the Commission are not acceptable. The Commission should be prevented from invalidating Member States' fiscal measures on the grounds of a test which is based on criteria that the Member States or the taxpayers cannot apply autonomously with certainty. On appeal, the Court of Justice should therefore hold that the implementation of the remedy ordered by the Commission in the contested decisions is unlawful, because it amounts to a violation of a fundamental principles of the Union, the protection of legitimate expectations.

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the formula 'prudent and discriminating' see Case T-177/10 *Alcoa Trasformazioni v Commission* EU:T:2014:897, para 60.

BOOK REVIEW

IYIOLA SOLANKE, DISCRIMINATION AS STIGMA: A THEORY OF ANTI-DISCRIMINATION LAW (HART PUBLISHING 2017)

Raphaële Xenidis*

Several recent campaigns, from Black Lives Matter to the #MeToo movement, have drawn attention to a social phenomenon that deeply shapes discrimination, violence and inequality: stigmatisation. Fed by stereotypes, the process of stigmatisation ascribes a degrading mark – a stigma – to members of certain social groups based on characteristics such as, among others, race and gender. When a stigma is imposed upon individuals or groups based on categorical differences, hierarchical beliefs are formed in relation to these differences. These beliefs trigger negative cognitive and behavioural responses from other members of society. Stigmatisation thereby constitutes social hierarchies, creating and legitimising discrimination, inequality and violence. Anti-racist, feminist and other social justice movements stress the role of stigmatisation in the (re)production of discrimination. For instance, discussions following the 2017 #MeToo campaign on social networks have brought to light the mechanics of stereotyping and stigmatisation at work in gender-based harassment, a legally prohibited form of discrimination.[1] Investigating the causal link between stigmatisation and discrimination is

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[1] See Article 2(c) and (d) of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 and Article 2(c) and (d) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37. Another example is the Black Lives Matter movement's denunciation of racial stigmatisation, *inter alia* in the form of widespread stereotyping of young Black men as criminals, and its consequences in terms of police violence, racial profiling and discrimination. See eg, 'Black Lives Matter, What We Believe' available at <https://blacklivesmatter.com/about/what-we-believe/> accessed on 20 February 2018.

also the agenda set by Solanke in her perspective-shifting and timely book *Discrimination as Stigma: A Theory of Anti-Discrimination Law*.

By shifting the focus to stigmatisation, the book sheds a new light on discrimination theory. While the analysis proposed by the author centres on the essential question of defining the categories protected by non-discrimination law, its implications also allow revisiting other essential debates. Recurrent criticism stresses the inadequacy of non-discrimination law, denouncing its individualistic and adversarial focus and its inability to tackle intersectionality and ensure substantive equality. In this context, Solanke's book opens new avenues for reflection and pathways for future reform.[2] My review first introduces the main argument and structure of the book (section I). I then focus on three ways in which Solanke's contribution opens new spaces for theoretical thinking and legal reform. In section II of the review, I consider how the book displaces the focus from the symptoms to the root causes of discrimination through an innovative methodological approach integrating social science research into the legal analysis. In section III, I highlight the originality of the demonstration, which transcends the dichotomy between individual and structural inequality through a multi-level analysis of the (re)production of discrimination through stigmatisation. Finally, in section IV, my review shows how the proposed theory promotes non-discrimination law as a transformative equality project.

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[2] See eg, Sandra Fredman, *Discrimination Law* (Oxford University Press 2011); Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712; Alan D Freeman, 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 Minnesota Law Review 1049; Suzanne Goldberg, 'Discrimination by Comparison' (2011) 120 Yale Law Journal 728; Catharine A MacKinnon, 'Substantive Equality: a Perspective' (2011) 96 Minnesota Law Review 1; Aileen McColgan, *Discrimination, Equality and the Law* (Hart 2014); Christopher McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001); Dagmar Schiek, 'Organising EU Equality Law Around the Nodes of "Race", Gender and Disability' in Anna Lawson and Dagmar Schiek (eds), *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate Publishing 2011); Alexander Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (Oxford University Press 2011).

I. THE PROPOSITION: RETHINKING DISCRIMINATION AS STIGMA

Building on the widely shared understanding that not all types of discrimination are wrong, the book's point of departure is the question of when discrimination should be made unlawful. That is, what distinctions should be illegal and what categories should be protected by non-discrimination law? The author's ambition is twofold: to propose a 'unifying principle' providing a systemic foundation for discrimination theory, and to offer a 'new', 'clearer' 'rationale' supporting the crafting of non-discrimination law.[3] The concept of stigma, well-known to sociologists and psychologists, serves as a starting line and analytical thread for the inquiry. While the book's scope is quite extensive, the author's central claim is that stigma should illuminate the distributional mechanics of non-discrimination rights. Her argument is that stigma, by demeaning the equal moral worth and social status of certain social groups, generates and maintains widespread and enduring discrimination against their members. Stigmatisation should thus be targeted as the root cause of discrimination. To render the concept of stigma operational, the author designs an analytical framework revolving around what she calls the 'anti-stigma principle'. Through providing a better understanding of why and how discrimination happens, the 'anti-stigma principle' aims to guide the delineation of the socially salient groups that ought to be protected by non-discrimination law in a systemic, flexible and inclusive manner.[4]

The book is divided into two main parts: theory-building and application. The first part is dedicated to the construction of the 'anti-stigma principle', which takes its inspiration from the social model of disability. Stigmatisation, Solanke argues, shapes our perceptions, actions, and modes of organisation in an all-encompassing and multi-level fashion.[5] Rooted in cultural narratives, widely shared symbolic representations, beliefs and social imagery, all of which circulate rapidly through discourses and other media, stigma spreads insidiously as part of what we call 'common sense' at a personal, interpersonal,

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[3] Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017), 56, 62-63, 84, 102, 159 and 213.

[4] Ibid, 84-102.

[5] Ibid.

institutional, but also structural and social level.[6] Rapid transmission, notably through mediatisation, education and everyday trusted social interactions, makes stigma invisible and thus dangerous and highly difficult to eradicate. The 'anti-stigma principle' thus innovatively proposes to replace the current anti-discrimination system by an 'ecological' model that, by analogy to environmental approaches, displaces the focus from 'individual attributes and behavioural deficits' to the social context of production of discrimination through 'social meanings and discourses'.[7]

The author's argumentation unfolds over eight chapters. The first one meticulously defines stigma and its modes of dissemination through socialisation processes drawing on Goffman's influential work and its later elaborations.[8] The second chapter briefly reviews the historical origins of the non-discrimination principle from political philosophy to international law, subsequently turning to a critical discussion of the criteria of immutability and dignity that circumscribe its protectorate. Discarding these criteria because of their vagueness and ambiguousness, the author undertakes to define a different rationale — theoretically sounder and less open to arbitrary manipulations — to delimit the protective scope of non-discrimination law.[9] The third chapter studies how the concept of stigma has so far informed case law in six — in majority common law — jurisdictions. Chapter four, concluding the theoretical section of the book, refines the construction of the 'anti-stigma principle' that is tested in practice in the second part of the book by unwinding a creative analogy between non-discrimination law and public health to illustrate the multi-level impact of stigmatisation, and notably its structural effects.[10] By comparing discrimination to a virus, the author highlights the important role of the social environment in its mechanics of propagation.

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6 Solanke (n 3) 92, 99.

7 Ibid, 27, 102.

8 Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1963).

9 Solanke (n 3) 49-60.

10 These are Australia, England and Wales, Canada, the European Union, South Africa and the European Court of Human Rights, although Croatia, the Czech Republic, Hungary, India, Ireland, New Zealand, Russia, Sweden and the United States are also used as examples.

The second part of the book starts with chapter five in which the author continues the virus analogy and calls for the 'mainstream[ing] [of] social responsibility', as an addition to sanctioning individual responsibility.[11] Drawing lessons from public responses to epidemics, Solanke makes a solid argument in favour of more systematic and preventive anti-discrimination public action. While chapter six explains the ability of the 'anti-stigma principle' to tackle the complexity of intersectional discrimination, the last two chapters apply the principle to two current debates. Chapter seven elaborates a ten-step 'anti-stigma' test to answer the question of which stigmas should be combatted under non-discrimination law.[12] The test, made up of ten questions about the nature, durability and effects of stigmas, is then implemented to the issue of fattism to demonstrate that body size should constitute a protected ground under non-discrimination law. Chapter eight provides a contrasted response with regard to physical appearance applying the same test.

II. The Method: Linking Anti-Discrimination Law with Social Science Research

With this book, Solanke creates a distinct space for discussion in the context of a long and flourishing academic debate on the normative foundations and reform of non-discrimination law. The book's originality lies in its interdisciplinary anchor, at the crossroads of law, sociology and social psychology. While discrimination is often discussed in relation to political philosophy and social theory, this book, faithful to Solanke's socio-legal approach, proposes a practice-oriented discussion.[13] The study of stigma, stigmatisation and related phenomena such as implicit bias, stereotyping and prejudice is neither novel in sociology nor in law,[14] but Solanke inventively

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[11] Solanke (n 3) 213.

[12] Ibid, 162-163.

[13] See eg, Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015); Fredman, 'Substantive Equality Revisited' (n 2); MacKinnon (n 2). See Iyiola Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 Modern Law Review 723 as an example of her use of 'social framework analysis'.

[14] Goffman's foundational sociological study was published in 1963 and as early as 1992, Larry Alexander's article already tackled some of the problems inherent to stigma and

integrates this knowledge in a single principle to re-think discrimination theory and law.

By consolidating her theory with social science research, Solanke fills certain gaps and convincingly responds to current controversies in legal debates about discrimination. Most prominently, by explaining discrimination through the ubiquitous presence of stigma, she embraces knowledge on the persistence of inequality and stratification built over the past two decades, from Tilly's durable inequality to Ridgeway's status beliefs theory.[15] Noticing the endurance of discrimination despite existing anti-discrimination laws, scholars have underscored the role played by hierarchical socio-cultural representations in sustaining discrimination. Solanke adopts this constructivist understanding and proposes to address the cultural narratives and hegemonic discourses that stabilise and convey stigma.

Applied to discrimination through the 'anti-stigma principle', Solanke's method of inquiry shares some features with what, in the US doctrinal debate, has been called the 'anti-subordination approach'.[16] Looking at discrimination through the lens of stigma makes hierarchies based on social divisions visible and invites to look at their historical context of formation and socio-political consequences in terms of subordination. It allows for a more systematic, inclusive and contextual delineation of the categories that should be protected by non-discrimination law, avoiding overreliance on definitions shaped by interest group mobilisations or criteria such as dignity and immutability that can prove problematic.[17] This approach also resolves

bias in discrimination law. See Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 University of Pennsylvania Law Review 1.

[15] See Charles Tilly, *Durable Inequality* (University of California Press 1998) and Cecilia Ridgeway, 'Why Status Matters for Inequality' (2014) 79 American Sociological Review 1.

[16] See, for instance, Abigail Nurse, 'Anti-Subordination in the Equal Protection Clause: A Case Study' (2014) 89 New York University Law Review 293, 300.

[17] For a detailed discussion, see Solanke (n 2) 49-62.

further difficulties of non-discrimination law and doctrine, for instance accommodating the complexity of intersectional discrimination.[18]

Solanke's analytical endeavour is a welcome critique of the current non-discrimination legal apparatus and policies. At the same time, understanding 'stigma [a]s the source of all discrimination' also opens broader questions about the limits of law itself as an agent of social and cultural change.[19] Even though judicial decisions produce an authoritative discourse that can incrementally contribute to shifting cultural narratives, stigmatisation is part of our overarching cultural narratives and 'as [our] common sense, [stigmas] are unchallengeable', as Solanke herself recognises.[20]

Research shows that the velocity of the formation of status hierarchies causes a 'cultural lag' between non-discrimination corrective policies and the spread of stigmatisation.[21] By way of illustration, Harvard's 'Project Implicit' tests implicit bias in cognitive associations and finds that prejudice is pervasive, often unconscious, even when people are actively aware that the stereotypes they hold are unfounded and wrong.[22] In fact, according to Derrida and Cixous, language itself constitutes hierarchies.[23] Stigmatisation thus routinely transforms categories of distinction into grounds of inequality, which discursive hegemony processes then stabilise and perpetuate.[24] It follows that in the short run, non-discrimination law can only limitedly disrupt the deeply rooted cultural frames through which we construct social meaning. Hence, combatting the root causes of discrimination extends beyond the borders of a legal project.

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[18] This compares to the current 'single-axis approach' which requires choosing either/or protected grounds of discrimination for the sake of performing comparative tests of differential treatment. For a criticism of the comparator approach, see eg, Goldberg (n 2).

[19] Solanke (n 3) 208.

[20] Ibid, 111.

[21] Ridgeway (n 15) 13.

[22] See <www.projectimplicit.net/index.html> accessed on 23 April 2018.

[23] See eg, Jacques Derrida, *De la grammatologie* (Éditions de Minuit 1967) and Hélène Cixous, Le rire de la Méduse et autres ironies (1975) L'Arc 61.

[24] See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso 1985).

The author's proposition acknowledges the limits of the law through clarifying that combatting discrimination should become a social priority, like public health and 'well-being'.[25] The approach she proposes, rooted in public and, as the case may be, private education, professional training, prevention measures, policy-making, procedures, etc., could be called non-discrimination by design or non-discrimination mainstreaming.[26] Such a public policy would increase the effectivity of the anti-discrimination project while still leaving space for public authorities to establish the parameters of the balancing with other rights such as freedom and autonomy.[27]

As Solanke clarifies, 'not all stigma should be protected [and] being stigmatised per se is not enough to warrant protection under anti-discrimination law—thus additional factors would have to be considered to determine which stigmas warrant legal protection'.[28] The one-size-fits-all approach proposed by the 'anti-stigma principle' has the merit of offering a set of guidelines that is both contextual and standalone. On the one hand, the test proposed by the author strikes the balance between robustness and flexibility demanded by non-discrimination law. On the other, it is questionable whether such a one-size-fits-all approach appropriately covers the broad range of existing category-specific forms of discrimination in front of a phenomenon as complex and differentiated as stigmatisation.

The test unfolds as follows:

> 1. Is the 'mark' arbitrary or does it have some meaning in and of itself? 2. Is the mark used as a social label? 3. Does this label have a long history? How embedded is it in society? 4. Can the label be 'wished away'? 5. Is the label used to stereotype those possessing it? 6. Does the stereotype reduce the humanity of those who are its targets? Does it evoke a punitive response? 7. Do these targets have low social power and low interpersonal status? 8. Do

[25] Solanke (n 3) 101.

[26] This is by analogy to the 'privacy by design' and 'gender mainstreaming' principles.

[27] One could think, for example, of the exceptions that current apply to religious institutions with regard to the prohibition to discrimination in employment matters. See eg, Article 4(2) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

[28] Solanke (n 3) 161.

> these targets suffer discrimination as a result? 9. Do the targets suffer exclusion? 10. Is their access to key resources blocked?[29]

Despite its comprehensiveness, the set of guidelines is not free from indeterminacy. The first question could lead to a wide range of interpretations. What would be, for example, the understanding of the arbitrariness criterion in the protection from discrimination based on age — both young and old — under the 'anti-stigma principle'?[30] Likewise, the author argues that the scope of the anti-stigma principle explicitly excludes more extensive legal protection — such as granted by French law against discrimination based on lifestyle or habits like smoking, thus raising questions of inclusiveness.[31] The concept of humanity contained in question 6 also suffers from uncertainty in the same form as pointed out by the author in relation to dignity. In addition, question 3 concerning the historical length and embeddedness of stigmas rests necessarily on comparative assessments and only limitedly determines the wrong nature of a label, especially given the non-linear history of stigmas.[32] It is therefore debatable whether the 'anti-stigma' test fully fulfils its purpose of eliminating arbitrariness and discretion in the delineation of protected categories. The test provides interesting clues and enables contextual flexibility but does not in itself determine thresholds

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[29] Solanke (n 2) 162-163.

[30] For example, in the case *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 decided by the Canadian Supreme Court, while the majority found that a social assistance measure reserved for people under 30 was not unlawfully discriminatory, notably because it did not stereotype people based on their age in a demeaning way, Justice L'Heureux Dubé dissented by claiming that '[s]tereotypes are not needed to find a distinction discriminatory'.

[31] See Solanke (n 3) 36 and see the ground 'mœurs' in Article L1132-1, Code du Travail and the example provided by: Défenseur des Droits, Lutte contre les Discriminations et Promotion de l'Égalité (2018) available at <www.defenseurdesdroits.fr/fr/institution/competences/lutte-contre-discriminations> accessed 20 February 2018.

[32] As the book explains, the stereotypes associated to body size have oscillated from positive to negative throughout history, in a differentiated manner for men and women, and it is only with the beginning of World War II that thinness became an imperative. See Solanke (n 3) 168-169. When compared to sexism, the history of fattism is therefore relatively young.

above which the degree of social vulnerability caused by stigma should yield protection.[33]

Finally, the test entailed by the 'anti-stigma principle' also raises the question of operationalisation. In particular, the test's theoretical complexity might reduce its applicability. This concerns legislators and, in some cases, judges. In cases of open non-discrimination legislative clauses, with either a general unspecific non-discrimination principle or a non-exhaustive list of protected grounds, the test would in fact have to be operated by judges within doctrinal reasoning. Although ensuring robustness, the analytical granularity of the 'anti-stigma principle' would have to be put in the balance with the need for manoeuvrability, in addition to legal certainty.

III. The Originality: Stigma as a Path towards Combatting Structural and Societal Discrimination

Owing to the structural implications of reconceptualising discrimination as stigma, Solanke's arguments extend the focus of non-discrimination law from the individual level to society as a whole. This change of perspective is illuminating, despite the difficulties of responding to society's responsibility through a predominantly individualistic and adversarial non-discrimination system. The book recognises the multi-level pervasiveness of discrimination as stigma. Comparing public action aimed to stem epidemic diseases with the concerted efforts that would be needed to stop discrimination, the virus analogy has the merit to expose the dissonance between the societal anchoring of discrimination and the individualistic response brought by non-discrimination law. The author makes clear that eliminating discrimination at the individual or institutional level is not enough. Beyond changing behaviours and institutional practices, society bears an active duty to remedy discrimination through, among others, policies of affirmative action, diversity representation, political empowerment and a substantive public-sector equality duty in fields and contexts as diverse as education, public health, public policy and the media.

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[33] By analogy, see Westen's analysis of the normative emptiness of the principle of equality: Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) Harvard Law Review 537.

Solanke thereby interestingly reverses the paradigm: collective action against discrimination becomes the norm instead of the exception. Thanks to this shift of perspective, the book approaches the thorny question of individualism in non-discrimination law from a new angle. The anti-stigma approach can be read as a critique against a liberal understanding of non-discrimination law as limited to the pursuit of formal equality.[34] Solanke's approach resonates with the literature on substantive equality and echoes other scholars' long-lasting defence of collective and positive action.[35] As such, it demands an outcome-oriented and systemic fight against discriminatory practices and structures, not only through individual and corrective procedures, but also through a set of collective, preventive, public action measures, both of legal and political nature.

The 'anti-stigma principle' efficiently solves a second problem related to the preponderantly individualistic focus of current non-discrimination law, namely the predominant 'perpetrator perspective' that conceives of discrimination as 'actions' rather than 'conditions'.[36] Albeit negating some of the most important progress in the construction of non-discrimination law (e.g. the recognition of indirect discrimination), intent-based analyses of discrimination are lurking pitfalls for judicial reasoning.[37] Focusing instead on society's perpetuation of entire systems of discrimination through symbolic, material and physical violence, Solanke favours analyses centred on victims and effects, and counters the risk of intent-based analyses.[38] The stigma-based approach sends the important message that even if discrimination is unintentional, covert and even naturalised, it is not acceptable. Hence, the 'anti-stigma principle' empowers non-discrimination law to better confront

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[34] For a critique, see Somek (n 2).

[35] See eg, Fredman, 'Substantive Equality Revisited' (n 2); McCrudden (n 2); McColgan (n 2).

[36] Freeman (n 2) 1052-1053.

[37] See eg, Oddny Mjöll Arnadóttir, 'Non-Discrimination Under Article 14 ECHR: The Burden of Proof' (2007) 51 Scandinavian Studies in Law 26-29.

[38] Solanke uses the concept of 'structural stigma' developed in Bruce G Link and Jo C Phelan, 'Conceptualizing Stigma' (2001) 27 *Annual Review of Sociology* 363 (cited in Solanke (n 3)).

entrenched structures of marginalisation, oppression, exploitation and subordination in which individual discriminatory acts are anchored.[39]

After a robust demonstration, the author however intriguingly mitigates her own argument, claiming in her intermediate conclusions, that 'the anti-stigma principle does not necessarily change the tools of anti-discrimination law, but can change their prioritisation'.[40] This claim seems to stand in sharp contrast with the argued necessity to transform non-discrimination into a public well-being and equality project. While the author describes the 'anti-stigma principle' mainly as a tool to inform the crafting of non-discrimination legislation and action, re-thinking discrimination around the concept of stigma entails further-reaching implications. Hence, changing other features of the non-discrimination system would seem necessary to ensure coherence with the author's project to design an 'ecological' model of non-discrimination law.[41] Targeting equality and stigma within non-discrimination law therefore seems to call for a broader reform of the non-discrimination system, both in terms of rules and structure.

First, despite the author's reservations of using stigma to 'influence the determination of a finding of discrimination', the theory laid out could also have implications for judicial reasoning.[42] In particular, in legislation devoid of a closed list of protected grounds, it is incumbent upon judges to define the limits of the scope of protection. Thus, an 'anti-stigma principle' could certainly play a role in assessing whether a characteristic is protected or not.[43] Second, the adversarial nature of non-discrimination law primarily makes it a tool to seek liability and compensation for victims. How to then promote social change through non-discrimination law when 'there is no clear answer as to who is responsible for the creation and maintenance of stigma in society'?[44] Cases like the Court of Justice of the European Union's decisions *Feryn* or *ACCEPT*, which exclude the identification of individual victims as a

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[39] See Iris M Young, *Justice and the Politics and Difference* (Princeton University Press 1990) and Tilly (n 15).

[40] Solanke (n 3) 102.

[41] Ibid.

[42] Ibid, 84.

[43] The Canadian Supreme Court doctrine for instance already uses stereotypes as an indicator of discrimination.

[44] Solanke (n 3) 110.

requirement for condemning direct discrimination in case of hostile and prejudicial public speech, offer lines of reflection.[45] Other possibilities such as class actions, *actio popularis*, collective claims or other group proceedings exist, but the tension between systemic responsibility and individual liability remains.

In addition, the analogy between public action against discrimination and public health models to eradicate epidemic diseases, albeit illuminating, highlights that the success of non-discrimination public action is tied to political consensus.[46] Combatting epidemics is of direct interest for the majority and is supported by a large societal consensus. There is no comparable consensus on fighting against discrimination, not least because privilege and oppression are partially naturalised or disguised as products of a meritocratic society.[47] Hence coming up with a public action programme in the absence of broad awareness and substantive social commitment is difficult, as evidenced by the controversies surrounding affirmative action. Considering the complexity of the challenge and the required degree of voluntary cooperation of the majority towards minorities' interests, efforts to free society from the discrimination 'virus' do not herald the most optimistic prognoses.[48] By way of illustration, a necessary non-discrimination measure would be to ban gender stigmatisation in the media, advertisement and education. However, policy-makers at the EU level exempted precisely these three vital sectors from the obligation to ensure gender equality.[49]

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[45] See Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* EU:C:2008:397 and Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* EU:C:2013:275.

[46] Solanke herself acknowledges the 'challenges in transferring [the] lessons [learnt from the public health modes of action] to tackling discrimination', notably because 'in society most people do not live with an active everyday fear of discrimination' and 'many in society do not agree'. See Solanke (n 3) 109-110.

[47] See for instance the discrepancy between our perception of socio-economic status as a product of meritocracy, and Bourdieu's theorisation of class habitus as deeply entrenched in individual perceptions and behaviours. See Pierre Bourdieu, *La Distinction : Critique Sociale du Jugement* (Les Éditions de Minuit 1979).

[48] Solanke (n 3) 97-101.

[49] Article 3(3) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

IV. The implications: Transformative Equality and the Question of Maldistribution

The very first line of the book – '[t]his book is about the use of anti-discrimination law to pursue equality' – makes clear that equality is considered the normative bedrock of non-discrimination law.[50] However, the author explicitly claims that her theory does not explore the question of the normative purpose behind non-discrimination law.[51] In view of the diversity of normative commitments carried by other discrimination law projects, ranging from autonomy to dignity and substantive equality, it would have been insightful to read more about the author's vision of equality.[52] Despite this grey area, the book appears to promote a deeply 'transformative' understanding of equality.[53] The author's view of tackling systemic discrimination can be understood in terms of achieving social change through accommodating diversity and eliminating oppressive categorical hierarchies.[54] Combatting discrimination as stigmatisation implies 'modify[ing] [...] social and cultural patterns of conduct [...] with a view to achieving the elimination of prejudices and customary and all other practices

[50] Solanke (n 3) 21.

[51] Ibid, 22: 'while [others] see[k] to clarify the purpose of discrimination law, my goal is to clarify the mechanics of that law'; 'it is not an inquiry into why some forms of discrimination are seen to be so bad that they require legal regulation'.

[52] See eg, Khaitan (n 13); Fredman, 'Substantive Equality Revisited' (n 2); MacKinnon (n 2).

[53] The idea of transformative equality originates from the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). See CEDAW General Recommendation 25 (2004) calling for 'a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns'. This understands stigma, stereotypes and prejudices as 'underlying causes of discrimination [and] inequality'. The idea of transformative equality has been theorised by Fredman in her four-dimensional substantive equality model as the accommodation of diversity through social and cultural transformation. Transformative equality therefore requires structural and cultural change to tackle systemic inequalities. See eg, Fredman, *Discrimination Law* (n 2) 25, 30-31, 98-99.

[54] Fredman, *Discrimination Law* (n 2), 98-99.

which are based on the idea of the inferiority or the superiority' of certain categories, a foundational goal of transformative equality.[55]

Unwinding the idea of 'transformative equality' then opens broader questions related to the link between non-discrimination law and the set task of 'pursu[ing] equality'.[56] Notably, (re)distributive questions and issues of material inequality arise, which are mainly absent from the analysis. Two interrogations unfold. First, does understanding discrimination as stigma allow tackling its socio-economic manifestations? Second, does a politics of recognition subsume the goal of addressing the root causes of discrimination?

Even though Solanke recognises the role of poverty in relation to obesity, it is not discussed as an autonomous protected ground. The book understands stigma as the exclusive mediator of discrimination. On the one hand, this account echoes sociological knowledge about the stigmatisation of material disadvantage.[57] In that sense, a non-discrimination law revolving around the concept of stigma could capture material inequalities through their correlated prejudices. On the other hand, the presence of a ban on class-based, economic or socio-economic discrimination in numerous European countries shows that a more direct, systematic, and maybe effective way to tackle material inequality is to explicitly acknowledge systemic discrimination based on material resources.[58]

This brings us to the second question, which relates to modes of anti-discrimination action. One of the book's aims is to tackle the root causes of discrimination rather than its symptoms, therefore it is important that a

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[55] Article 5(a) CEDAW on 'sex role stereotyping and prejudice'.

[56] Solanke (n 3) 21.

[57] Bourdieu has shown the links between class habitus and stigmatisation. See Bourdieu (n 47).

[58] For instance, 'wealth/income' and 'social origin' are protected grounds in Belgium; 'social origin' and 'financial status' in Hungary; 'class', 'estate or property', and 'social standing' in Austria; 'social descent', 'wealth', and 'social class' in Cyprus; 'economic situation' and 'social condition' in Portugal; 'social standing' and 'economic situation' in Slovenia; the 'particular vulnerability resulting from a known or apparent economic situation' in France. These categories encompass both the material and the symbolic dimensions of class-based discrimination. In addition, a number of other countries prohibit discrimination based on 'social origin', 'social status', 'property', 'education', 'belonging to a disadvantaged group' and 'social condition'.

'reciprocal causal interdependence [exists] between cultural status beliefs about social groups and material inequalities between these groups'.[59] It appears that 'status beliefs develop quickly among people under conditions in which categorical difference is at least partially consolidated with material inequality'.[60] This consideration *de facto* makes the redress of socio-economic inequality a necessary condition to eradicate stigma-based discrimination in the long run.[61] While echoing the idea that stigmas are '*independent* dimensions of inequality that generate material [and other] disadvantage', Solanke seems to minimise the reciprocity of this relationship.[62] To give a concrete example, gender equality requires anti-discrimination measures to address both the cultural narratives and the social and economic structures organised around the bivalent category of gender.[63]

Conceiving all discrimination as stigma *de facto* leads to privileging politics of recognition, resting on the idea that stigma-based discrimination subsumes material inequality. Importantly, founding non-discrimination law on stigma should not aggravate what Fraser calls the 'widespread decoupling of the cultural politics of difference from the social politics of equality', at the risk of compromising the transformative reach of the equality project.[64] Instead,

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[59] Ridgeway (n 15) 4.

[60] Ibid, 3.

[61] See Tilly (n 15) and Ridgeway (n 15). Tilly understood exploitation, along with opportunity hoarding, as the two conditions for durable inequality. Based on his theory, Ridgeway explains how, primarily, 'inequality based purely on organizational control of resources and power is inherently unstable' and becomes consolidated and stabilised through the formation of essentialising and hierarchising status beliefs based on categorical differences between people (race, gender, etc.), which in turn become a partially independent variable of inequality.

[62] Ridgeway (n 15) 1.

[63] See Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation* (Wissenschaftszentrum Berlin für Sozialforschung, Berlin 1998).

[64] The anti-stigma approach seems closer to the US anti-stereotyping model than to the European model centred on social and economic rights (eg, securing an individual autonomy of choice vs. ensuring social and economic rights such as maternity leave). See eg, Julie Suk, 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' (2012) 60 American Journal of Comparative Law 1 75 and Ruth Rubio-Marin, 'A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States' (2012) 60 American Journal of Comparative Law 199.

if the aim is to tackle the root causes of discrimination, equality should be regarded as a bivalent justice project that demands coordination between redistributive, as well as recognition-based remedies and public action.[65] Ultimately, this observation also poses the broader question of how big a role non-discrimination law can play in the fight against inequality.

V. Conclusion

As my review shows, Solanke's book is both inspiring and thought-provoking. It can be highly recommended for two main reasons. First, it sheds a new light on current debates of discrimination theory and law. By bringing with force and creativity an argument well-known in sociology and social psychology into this field of law, it reinforces our understanding of, and stimulates reflection on, three crucial questions: What discrimination to combat? Whom should law protect? And how should law do it? The book thus offers a distinct perspective on this controversial discussion thanks to its interdisciplinary approach. Through an adroit analytical shift in the conceptualisation of the issue of discrimination, it proposes a concrete way to re-think non-discrimination law and policy, building on insights about the volatile and ubiquitous harm of stigmatisation. Solanke's demonstration — and this is the second major strength of this book — lies in the practical implications that it entails for law reform. Thinking about discrimination in terms of stigma could bring great added value to non-discrimination law and action, in terms of protected categories in legislation, public action and policy-making, but perhaps also in terms of judicial reasoning.

While the value of the 'anti-stigma principle' is thus not to be doubted, the risk might, however, lie in the search for a 'Holy Grail' in the form of a unique principle cementing the normative foundations of non-discrimination law.[66] Considering the 'anti-stigma principle' as the sole underpinning of non-discrimination law might promote both too narrow and too broad a rationale. Too narrow to directly tackle the material repertoires of discrimination that constitute the counterparts of stigma in the (re)productive dynamics of inequality. Too broad for the sake of law-making because combatting stigmatisation as the root cause of discrimination demands an extensive

[65] See Fraser (n 61).

[66] See Khaitan (n 13) 6.

social, political and cultural reforming enterprise. Hence the reflection raises far-reaching questions beyond the scope of the book. The contribution should be praised for the daring, the originality and the clarity of its propositions. The new theory laid out brings up fascinating issues, sketching new pathways for future exploration in a context of increasing targeted attack against minority and diversity protection.