NEW VOICES

THE DEATH OF LAWS: MANDATORY REQUIREMENTS AND ENVIRONMENTAL PROTECTION

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Legal change is usually seen as a process exogenous to law. In this article, we argue that laws, even if left untouched by the political process, decay of their own accord. The first part develops the argument in conceptual form. The second illustrates it through an example from European Union law. Specifically, it shows that the Court of Justice of the European Union's 'mandatory requirements' doctrine was gradually hollowed out.

Keywords: legal theory, environmental protection, European Union law, mandatory requirements

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I. INTRODUCTION

All that is born must die. Our bodies are like this, and so too our laws. Impressment,[1] the divine right of kings,[2] the law of necessity,[3] trial by battle[4], ordeals,[5] the Nuremberg Laws,[6] the Statute of Frauds,[7] the Magna Carta,[8] *wergild,*[9] the *Mecelle*,[10] and the Twelve Tables:[11] all dead. Doctors study death compulsively. Lawyers, not so much. Why do laws die? One explanation is that laws tailored to one way of life become obsolete when people start living differently. Trial by battle made sense in high feudalism, but it sounds crazy in high capitalism.[12] Divine proof seemed sound when everyone was pious, but it became absurd after the Enlightenment.[13] Legicide can also come about as a by-effect of politics, the winds of history, and such like. To destroy the *ancien régime*, Napoleon had to wipe out precedent in France. Mr Johnson

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1 The right of the Royal Navy to conscript seamen. See Vagabonds Act 1597.

2 John Figgis, *The Divine Right of Kings* (2nd edn, Cambridge University Press 1922).

3 The right to disobey the law where necessary. See *United States v Schoon*, 939 F.2d 826 (1992).

4 *Ashford v Thornton* (1818) 1 B & ALD 405, 106 ER 149.

5 Margaret Kerr, Richard Forsyth and Michael Plyley, 'Cold Water and Hot Iron: Trial by Ordeal in England' (1992) 22 Journal of Interdisciplinary History 573.

6 Richard Heideman, 'Legalising Hate: The Significance of the Nuremberg Laws and the Post-War Nuremberg Trials' (2017) 39 Loyola of Los Angeles International and Comparative Law Review 5.

7 Joseph Perillo, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form' (1975) 43 Fordham Law Review 39.

8 AE Dick Howard, *Magna Carta: Text and Commentary* (2nd edn, University of Virginia Press 1998).

9 The remedy of blood money. See Geoffrey MacCormack, 'Inheritance and Wergild in Early Germanic Law' (1973) 8 Irish Jurist 143.

10 An Ottoman civil code based on the Sharia. See Samy Ayoub, 'The *Mecelle*, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries' (2015) 2(1) Journal of the Ottoman and Turkish Studies Association 121.

11 EB Conant, 'The Laws of the Twelve Tables: An Introductory Note and Translation' (1928) 13 St. Louis Law Review 231.

12 Peter Leeson, 'Trial by Battle' (2011) 3 Journal of Legal Analysis 341.

13 Mirjian Damaska, 'Rational and Irrational Proof Revisited' (1997) 5 Cardozo Journal of International and Comparative Law 25.

must do the same to *van Gend en Loos*[14] in Britain, or his regime will surely crumble.

Now, European Union (EU) law can explain Johnson no more than medieval law could explain Bonaparte. If laws emerge and perish subject only to exogenous conditions, then the death of laws is not a concern for lawyers. However, we believe that legal decay can be endogenous, too. A specific question occupies us. Does litigation trigger the decay of laws?[15] Our answer, in brief, is that the more people use a law in litigation, the greater the likelihood that the law in question will become hard to interpret. The proliferation of possible interpretations is liable to cause the law to become either harmful or useless, eventuating its demise. All law thus carries the seed of its future destruction.

We are not the first to say that law is transitory. Professor Rose, for example, has observed regular shifts from 'crystals' to 'mud' in property law.[16] Atiyah's great history of contract ventilates similar ideas.[17] These theories tie the decay of rules to aspects of reality that are exogenous to laws – shifts in social attitudes and practices cause good laws to turn bad, which prompts their supersession. We, conversely, argue there is an endogenous mechanism that causes rules to collapse under their own weight. As far as we can tell, this is a new argument and one whose truth is perhaps not obvious. We propose to develop it in stages. Section II will start by arguing that consumption of law by one person decreases the quality of law available to others. This proposition will then become our cynosure, and we will build a conceptual model of endogenous legal decay around it. In Section III, we will illustrate the model by reference to the case law on 'mandatory requirements' and Article 36 of the Treaty on the Functioning of the EU (TFEU). Section IV concludes.

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14 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* EU:C:1963:1.

15 We assume that litigation is endogenous to law. Of course, litigation also has extra-legal dimensions. We do not consider them here.

16 Carol Rose, 'Crystals and Mud in Property Law' (1988) 40 Stanford Law Review 577.

17 Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985).

II. A Conceptual Model of Endogenous Legal Decay

It is common, especially among lawyer-economists, to say that the law is a public good.[18] Public goods are non-excludable and non-rival. Nobody can be barred from clean air. My breathing does not obstruct yours. The *enforcement* of law is certainly like that. When the police keep the streets safe, nobody is excluded from frolicking around town, nor does the safety of one person make all others less safe. The *production* of law under precedent is also a little like a public good. For a body of precedent to accrue, people must sue one another and proffer information to the courts.[19] The courts use that information to make laws. If the courts make a really good negligence rule, everyone is free to use it to bring further suits. Moreover, use of the rule by one person does not, at least in the short run, make the rule less valuable to others. There is thus non-excludability and non-rivalry.

Our theory is a little different. We say that the law is like the fish in the sea. How so? Without regulation, everyone is free to fish. However, fishing causes the number of fish in the sea to diminish. Technically, the fish in the sea are a common-pool resource.[20] We will argue that the *interpretation* of law is a common-pool resource, too. When the courts make a good negligence rule, everyone can use it to sue others. However, use of the rule by one person causes its value to diminish for future users. Thus, as far as application is concerned, law is non-excludable but rival in consumption.

1. A Model of Legal Decay

To show you how this rivalry in consumption comes about, we will use a hypothetical. Let us say that the Chatrapatran parliament has passed the following law:

- Law: The importation of elephants into Chatrapatra is hereby prohibited, on pain of imprisonment not exceeding three years.

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18 See e.g. Tyler Cowen, 'Law as a Public Good: The Economics of Anarchy' (1992) 8 Economics & Philosophy 249.

19 See Steven Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System' (1982) 11 Journal of Legal Studies 333.

20 The classic exposition is Garrett Hardin, 'The Tragedy of the Commons' (1968) 162(3859) Science 1243.

At this point, the law works well. Chatrapatrans know that they may not import elephants, and that is that. In the year following the law's enactment, various elephant importers are brought to court. The defendants' go-to defence is that the animal in their possession is not an elephant but a rhino. The courts, when dismissing these defences, have no choice but to interpret the law to define the term 'elephant'. Let us say that they come up with the following interpretations:

- Interpretation 1: An elephant has floppy ears.
- Interpretation 2: An elephant has massive feet.
- Interpretation 3: An elephant has long, sharp tusks.

The importers all go to jail because the ears of the rhinoceros are not floppy, its feet are comparatively small, and it has a horn rather than tusks. Now, suppose that the next year, a woman is charged under the act with importing an Airedale terrier. The courts say that even though Airedales have floppy ears, they have neither tusks nor massive feet. The woman is free to go. Next, some man, spurred on by Satan, tries to import an elephant with its tusks hacked off. The courts say that the animal, though tuskless, has flapping ears and massive feet, so it is an elephant. We now have two meta-interpretations of the interpretations given in the previous years:

- Meta-interpretation 1: Interpretation 1 alone cannot found liability under the law.
- Meta-interpretation 2: Interpretations 1 and 2 can found liability under the law notwithstanding interpretation 3.

Now, let us imagine that somebody is charged under the law for importing elephant tusks. If the court follows meta-interpretation 1 strictly, then the importer is blameless: having only one mark of an elephant is not enough to establish elephanthood, by analogy with the case of the Airedale. If, however, the court follows meta-interpretation 2, then the importer is liable: if an elephant is an elephant even if it has no tusks, then parts of an elephant must be an elephant, too.

One way out is to devise some interpretation of the meta-interpretations, or a meta-meta-interpretation. However, as new cases come up, that meta-

meta-interpretation is likely to call for meta-meta-meta-interpretations, and so on and so forth. Elephanthood would eventually come to have no definition. At that point, a good government would repeal the law. A bad one would use it to oppress its subjects. A pragmatic one would ignore it. In any case, the law is a dead letter.

Let us now generalise. The Chatrapatran law deteriorates. Its interpretations clash. The only way out is more interpretation. Every additional interpretation helps a judge dispose of the immediate dispute before her, but it adds to the vexations of the next. The root cause of this interpretative proliferation is litigation. When the law was still fresh, it was easy to determine whether the court was dealing with an elephant. Now that there have been a thousand interpretations, the question of elephanthood is no longer soluble.

2. Three Objections

We have so far said two things. First, litigation causes interpretation. Second, interpretation causes the death of laws. Is that process inevitable? In the long run, it assuredly is. A capable judiciary might produce mutually consistent interpretations over very long periods of time. However, in every instance of litigation, there is a *positive* probability that the judiciary will adopt an interpretation which causes inconsistencies further down the line.[21] It follows, then, that every law will eventually go the way of the Chatrapatran law.

You might contest our model on three grounds (that we can see). First, you could say that the proliferation of interpretations that we describe occurs only if the judgments of one court bind the next, that is, under a system of precedent. However, all capitalistic systems of law use precedent in some form.[22] Judges like to follow one another, just like other people. If you wish to take your objection further, you could say that the type of decay that we describe can be avoided if judges were forbidden from delivering reasoned

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21 See Goutam Jois, '*Stare Decisis* Is Cognitive Error' (2009) 75 Brooklyn Law Review 63.

22 See D Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (Routledge 2016).

judgments. This is true, but no modern legal system does this, and for obvious reasons.

You might also object to our model if you like Dworkin. Dworkin thought that, in law, there is always a right answer.[23] Our theory blatantly assumes that judges just make answers up as they go along. We nonetheless think that the two are not irreconcilable. Dworkin did not say that the right answers are available to us right now, merely that they exist in principle and that judges should try to find them. The search for right answers may well involve interpretative proliferation. Our theory, were we to embed it into Dworkin's, would explain what happens to Hercules while he is still looking for the right answer.

Last, you could say that our hypothetical is bogus. We populated the Chatrapatran judiciary with rank amateurs. Anyone with legal training would say that the floppy ears holding does not set necessary *and sufficient* conditions for elephanthood. It is also easy to distinguish the case law on living animals from that on tusks. Harmony is thus restored. Is this law's moksha? We think that it is not. Devices like defeasibility and distinguishing precedent are fabrications of the legal mind, just like the naïve meta-interpretations from the hypothetical. Cases can be distinguished until they cannot; criteria are inexhaustive until they become exhaustive. You can certainly devise meta-meta-interpretations that salvage the meta-interpretations,[24] but these too will decay in the same way. Now, unlike the Chatrapatran judiciary, real-world judges design meta-interpretations strategically to keep the laws alive. It would be alarming if they did not, and if the judges are good, a law can live a hundred years or more. Eventually, however, the meta-interpretative edifice must collapse under its own weight.[25]

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[23] See, among others, Ronald Dworkin, 'Judicial Discretion' (1963) 60 The Journal of Philosophy 624 and Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

[24] British jurisprudence enthusiasts might recognise this mechanism in the *Practice Statement* [1966] 3 All ER 77; *R v R* [1991] UKHL 12; and *Re Spectrum Plus Ltd* [2005] UKHL 41.

[25] Can good judges postpone this collapse indefinitely? In every instance of adjudication, there is a positive probability that a new meta-interpretation will be necessary to dispose of the facts. If the existing set of meta-interpretations is

3. Solutions

With these straw men burnt, we return to the model. If we are correct, then law is a common-pool resource, that is, one which exhibits non-excludability and rivalry in consumption. Common-pool resources are liable to cause inefficiency. If everyone fishes to their heart's content, the sea would soon be fishless. To avoid depletion, we can regulate. One idea would be to limit access to the courts. Many litigants will file a claim only once. They have no reason to care if their suit causes the quality of the law to deteriorate. If we could expel the casuals from the courts, the aggregate volume of lawsuits would be closer to the optimum. Conversely, repeat litigants shoulder the cost of legal decay.[26] When they decide whether to sue or not, they must balance the expected benefits of a favourable outcome against the risk that the quality of the law that they use will deteriorate. Therefore, we should let them sue whenever they think fit. This is all obviously impracticable, since the class of repeat litigants encompasses large corporations, interest groups, and other vested interests. To close the courts for everyone else would violate all sorts of rule-of-law constraints, not to mention that it would be monstrously unfair.

You can also maintain fish stocks by breeding fish. Obviously, this is costlier than simply taking what is in the sea. However, the expenditure might be justified if it solves the commons problem. Laws are similar. When too much litigation thins out a legal rule, we can simply replace it with some other rule. The fresh rule will be more certain than the old, at least for a while. Provided that the benefits of having a rule at all are positive, a policy of regular legislative (or judicial) reform seems wise. This is so even when the new law aims to achieve the exact same distributive outcome as the old. If litigation causes the decline of a negligence rule that allocates costs to the least-cost-

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good, then that probability might be quite low. However, it cannot be zero. Over time, then, the number of meta-interpretations will increase. Eventually, there will come a point at which computing a meta-meta-interpretation that is consistent with all previous meta-interpretations will be beyond the computational reach of even the brightest stars on the judicial firmament. That point will come much sooner if the judges are obtuse or corrupt, but in any case, could only be avoided if they were like Dworkin's Hercules.

[26] See Paul Rubin, 'Common Law and Statute Law' (1982) 11 Journal of Legal Studies 205.

avoider, the best policy is to simply phrase the old rule differently and put it back on the statute book. Many legal reforms can be understood from this angle. One of them is environmental protection in EU law, on which we now propose to focus.

III. THE MANDATORY REQUIREMENTS DOCTRINE

1. The 'Mandatory Requirements' – Article 36 Boundary

One of the most long-standing issues in EU law is the balance between market integration and other interests such as environmental protection.[27] The judgments adopted by the Court of Justice of the EU (CJEU) on these issues have not always been consistent. Its case law on mandatory requirements with regard to environmental protection offers a striking example.

It is best to refer first to the *Cassis de Dijon* judgment.[28] Article 36 of the 1957 Treaty establishing the European Economic Community (EEC Treaty) included a limited number of exceptions (*numerus clausus*) to the general prohibition on measures restricting trade. In *Cassis de Dijon*, the Court posited that measures restricting trade are otherwise permissible only if these measures are based on certain 'mandatory requirements'.[29] This theory of mandatory requirements provided additional grounds of justification, distinct from the exceptions in Article 36 of the EEC Treaty. In the traditional view, the latter applies to both directly and indirectly

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[27] Patrick Thieffry, *Droit de l'Environnement de l'Union Européenne* (2nd edn, Bruylant 2011) 156. See also Lucía Casado Casado, 'Environmental Protection as an Exception to the Freedom of Establishment and the Freedom to Services in the European Union' (2015) 24(2) Review of European, Comparative & International Environmental Law 209.

[28] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42.

[29] Ibid para 8. The CJEU introduced the concept of 'mandatory requirements' in the *Cassis de Dijon* judgment. This is a non-exhaustive list of exceptional cases in which the Member States can justify the adoption of national measures that could restrict trade in the interest of safeguarding the public interest (e.g. protection of public health, consumer protection), thus complementing the exceptions laid out in Article 36 EEC Treaty.

discriminatory measures, while the former only governs non-discriminatory measures.[30]

Let us take this as the equivalent of the Chatrapatran Law. The CJEU created a distinction between Article 36 and the mandatory requirements doctrine. The distinction is not particularly taxing on the mind, nor is it inconsistent with the text of the EEC Treaty and its successors (collectively, 'the Treaties').[31] However, as cases came to be litigated, the Court's jurisprudence became inconsistent. The inconsistency eventually became too much to bear, and the Court abandoned the distinction between Article 36 and mandatory requirements. While environmental protection had gained political traction over that period, it was the inconstancy occasioned by litigation that ultimately caused the distinction to perish.

Why do we say that the distinction is logical? The term 'environmental protection' was not explicitly included in the EEC Treaty. You would not find it in Article 36 TFEU, either.[32] The grounds of justification explicitly provided in the TFEU are 'public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'.[33] For this reason, environmentally friendly measures restricting trade are only permissible if they are non-discriminatory, at least as far as the traditional interpretation of the Treaties is concerned. This interpretation, however, did not remain stable in the case law.[34] While at the beginning, the question of whether a

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30 See Peter Oliver, *Oliver on Free Movement of Goods in the European Union* (5th edn, Hart Publishing 2010) 216ff.

31 The EEC Treaty was replaced by the Treaty Establishing the European Community (EC Treaty), which, in turn, was replaced by the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU).

32 Article 36 EEC Treaty became Article 30 EC Treaty and, later, Article 36 TFEU.

33 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 36.

34 Charles Poncelet, 'Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship?' (2013) 15(2) International Community Law Review 171.

measure was discriminatory was read as a preliminary step in determining the applicability of mandatory requirements, it later became irrelevant.

2. The Traditional Approach

We have argued that the CJEU traditionally treated environmental protection as a mandatory requirement. For example, in 1985, the CJEU decided that a directive on the disposal of waste oils was compatible with the EEC Treaty because the freedoms are 'subject to certain limits justified by the objectives of general interest pursued by the Community'.[35] The Court argued that measures restricting trade 'must nevertheless neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest'.[36] The CJEU thus created an *implicit* distinction between the exceptions to discriminatory measures in Article 36 and other limits to free trade that are based on the 'general interest'.

The CJEU carried this interpretation further in the *Danish Bottles* case, where it had to decide whether legislation requiring reusable containers for beers and soft drinks restricted free trade.[37] There, the Court held that environmental protection is an acceptable 'mandatory requirement' under *Cassis de Dijon*.[38] This judgment is relevant to our argument here for two reasons. First, the CJEU showed that the list of mandatory requirements is open-ended.[39] Second, it stressed that environmental protection, along with all of the other mandatory requirements, should not be equated with the

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35 Case 240/83 *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* (*ADBHU)* EU:C:1985:59.

36 Ibid para 15. This judgment elicited some controversy due to the lack of any legal basis to define environmental protection as an essential objective of the European Community. See Francis Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18(2) Journal of Environmental Law 185, 188.

37 Case C-302/86 *Commission of the European Communities v Kingdom of Denmark* EU:C:1988:421.

38 Ibid para 9.

39 The open-ended nature of the provision could also be inferred from the *Cassis* judgment since the reference to mandatory requirements included the term 'in particular'.

'protection of health and life of humans, animals or plants' exception in Article 30 of the Treaty establishing the European Community (EC Treaty) (formerly, Article 36 of the EEC Treaty).[40]

Finally, *Walloon Waste* confirmed that the aim of 'environmental protection' was only sufficient to salvage non-discriminatory measures.[41] There, the CJEU had to decide whether a Belgian regional decree banning importation of waste (thus excluding the disposal of locally produced waste) was a restriction on the movement of such waste. Although the Belgian authorities invoked environmental protection, the Commission argued that this mandatory requirement could not apply due to the discriminatory nature of the measure.[42] The CJEU, however, stressed that the justification based on environmental protection was legitimate because the particular nature of the subject (i.e. waste) made the decree non-discriminatory. By adopting a definitory strategy, the CJEU maintained the firm distinction between Article 30 EC Treaty and mandatory requirements. The latter only apply to non-discriminatory measures.

3. Rupture

Six years later, the CJEU, in *Dusseldorp*,[43] deviated from *Walloon Waste*. The CJEU decided that a Dutch national measure restricting the export of waste could be justified by environmental protection interests even if the measure was openly discriminatory – something that formerly would foreclose the possibility of applying mandatory requirements.[44] A similar approach was also adopted in the *Aher-Waggon* case.[45] There, the CJEU considered that a German measure making registration of aircraft conditional on observing certain noise limits was justified by considerations of public health and environmental protection, again regardless of its discriminatory nature.[46]

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40 More recent judgments confound this matter a lot more.

41 Case C-2/90 *Commission of the European Communities v Kingdom of Belgium* EU:C:1992:310, para 34 (*Walloon Waste*).

42 Ibid paras 31-33.

43 Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* EU:C:1998:316.

44 Ibid paras 24-50, especially paras 42, 50.

45 Case C-389/96 *Aher-Waggon GmbH v Bundesrepublik Deutschland* EU:C:1998:357.

46 Ibid para 18. See also Case C-320/03 *Commission v Austria* EU:C:2005:684.

These cases moved away from the traditional view that the non-discriminatory nature of a measure was a pre-requisite for applying mandatory requirements.

This new approach was confirmed in *PreussenElektra*.[47] There, the CJEU concluded that a measure mandating that network operators should only purchase renewable electricity from their local area was not incompatible with Article 30 of the EC Treaty due to 'the aim of the provision in question' and 'the particular features of the electricity market'.[48] In other words, the CJEU argued that, although the 'buy local' obligations were potentially discriminatory under previous case law,[49] the specific characteristics of the subject matter, coupled with the environmental protection objective (as well as the interest protecting the health and life of humans, animals, and plants),[50] made this obligation non-discriminatory. In a departure from its previous case law,[51] the Court discussed both grounds of justification (i.e. Article 30 of the EC Treaty and mandatory requirements). One plausible explanation is that, at that stage, the CJEU was no longer concerned with establishing any particular relationship between environmental protection and non-discrimination.

Indeed, in subsequent cases, the CJEU has conceded that there is no need to investigate whether the grounds of justification presented by the Member State refer to discriminatory or non-discriminatory measures since the protection of public health (relevant for the discriminatory measures) and environmental protection (relevant for non-discriminatory measures) are closely interlinked.[52] However, the approach of the Court has not always been consistent. On one occasion, the CJEU reverted to its traditional view. In

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47 Case C-379/98 *PreussenElektra AG v Schhleswag AG* EU:C:2001:160.

48 Ibid para 72.

49 Ibid paras 70-71 with reference to Case 72/83 *Campus Oil and Others* EU:C:1984:256, para 16 and Case C-21/88 *Du Font de Nemours Italiana* EU:C:1990:121, para 11.

50 Ibid paras 73, 75.

51 See in particular *Walloon Waste* (n 41).

52 Case C-524/07 *Commission v Austria* EU:C:2008:717, para 56; Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos*, EU:C:2009:336, para 33.

Radlberger,[53] the Court was called upon to decide whether the public interest of environmental protection could justify a measure restricting trade. In its judgment, the CJEU noted as a preliminary issue that such measure 'appl[ied] without distinction', thus implying that the non-discriminatory character of a measure carries some significance in the environmental protection context.[54]

4. The Death of Mandatory Requirements

The CJEU's inconsistency on whether mandatory requirements can apply only with respect to non-discriminatory measures reached its peak in *Ålands Vindkraft*.[55] There, the CJEU was faced with the question of whether it was permissible for the Swedish government to provide green electricity certificates only to production installations located in Sweden, thus disfavouring green electricity importers. In addressing this issue, the CJEU did not refer either to Article 36 TFEU or to mandatory requirements. Instead, the CJEU stressed how the promotion of renewable energy sources for the production of electricity, despite being a hindrance to free trade, may serve to protect both the environment and the health and life of humans, animals and plants.[56] The CJEU referred to environmental protection without concern for whether the measure was indistinctly applicable. Hence, the measure adopted by Swedish authorities was justified regardless of whether it was a barrier to the free movement of goods.[57]

This shows very clearly a clash between the traditional and current approaches. In the first judgments, mandatory requirements could only be applicable if national rules did not discriminate between imported and domestic goods.[58] This no longer seems to be the case. In fact, the strict application of the traditional approach would have been fatal to the Swedish

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53 Case C–309/02 *Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg* EU:C:2004:799.

54 Ibid para 61.

55 Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* EU:C:2014:2037.

56 Ibid paras 77-80.

57 Ibid para 82.

58 See e.g. Case C-788/79 *Gilli & Andres* EU:C:1980:171, para 6.

scheme, which caused clear injury to non-domestic electricity suppliers.[59] The CJEU adopted a similar approach in the *Essent Belgium* case.[60] Although the CJEU still has not expressly overturned the traditional doctrine that mandatory requirements are only applicable to non-discriminatory measures, in this case it simply avoided acknowledging that the measure at issue was discriminatory (even though it openly was).[61]

It is clear that, by the time *Essent Belgium* was decided, there was no longer any distinction between Article 36 and 'mandatory requirements'. Nowadays, the CJEU simply uses environmental protection in the same way that it uses the grounds for derogation under Article 36. The distinction is a dead letter. The Court has never cited any explicit reason for demolishing the distinction, even though the opinions delivered by the Advocates General in more than one judgment urged the Court to take a stance.[62] It would appear that maintaining consistency of interpretation simply became impossible and that the distinction no longer served any useful analytical purpose.

We propose to close off with two theoretical considerations. Firstly, if the law were a public good in the strict sense, then *Cassis de Dijon* would still stand. Its erosion was the result of litigation. Every new attempt to defend some measure by reference to mandatory requirements made the boundary between mandatory requirements and Article 36 harder to define. The first litigants under the *Cassis* regime did not have to worry about this. The parties in *Ålands Vindkraft* certainly did. The eventual depletion of the distinction as a logical device caused its ultimate abandonment. It must be true, then, that the law as a juridical concept is more like a common resource than a public good.

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59 Armin Steinbach and Robert Brückmann, 'Renewable Energy and the Free Movement of Goods' (2015) 27 Journal of Environmental Law 1, 10.

60 Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* EU:C:2014:2192.

61 Henrik Bjørnebye, 'Joined Cases C-204/12 to C-208/12 *Essent Belgium*' [2015] (3) Oil, Gas & Energy Law Journal 6.

62 See *Ålands Vindkraft* (n 55), Opinion of Advocate General Bot; *Essent Belgium* (n 60), Opinion of Advocate General Bot para 92; *PreussenElektra* (n 47), Opinion of Advocate General Jacobs para 230.

Secondly, the dissolution of the distinction is not especially momentous if one is concerned with adjudicative outcomes rather than matters of doctrine. The CJEU could have maintained the distinction. As the Advocates General have regularly suggested, it would have been possible to extend the use of environmental protection as a justification for discriminatory measures, provided that a more rigorous proportionality test be carried out.[63] The mandatory requirement of environmental protection, as interpreted, would then mirror Article 36, achieving the exact same result as the dissolution of the distinction. Had this been done, however, interpretations would have kept on proliferating, and the law would have grown even more uncertain. The ultimate abandonment of the distinction had the effect of resetting that interpretative process, and nothing else.

IV. Conclusion

This contribution discussed why laws die. The argument put forward is that an endogenous mechanism accounts for this. Laws, even if left untouched by exogenous conditions such as shifts in social attitudes, decay of their own accord. As outlined above, the interpretation of laws resembles a common-pool resource – non-excludable but rival in consumption. Individual recourse to courts can decrease the marginal value of the law for future users.

Despite its novelty, this argument is not as controversial as it may appear. In fact, we do not disagree with those claims according to which social change or other exogenous factors may spur regulatory intervention.[64] What we are instead concerned with is only the 'terminal stage' of legal decay. In this vein, our theory could help identify when laws are going to decay and when legislators should repeal them. As this article showed, this issue is not moot. Many regulatory systems experience situations in which the work of the courts has yielded inconsistent adjudicatory outcomes, eventually

63 Ibid.

64 Lyria Moses, 'Regulating in the Face of Sociotechnical Change', in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation, and Technology* (Oxford University Press 2017), Marta Katarzyna Kołacz and Alberto Quintavalla, 'The Conduit between Technological Change and Regulation' (2018) 11 Erasmus Law Review 143.

contributing to the demise of certain laws – the *Cassis de Dijon* case law and environmental protection being only one of these instances.