

## EDITORIAL

- Raphaële Xenidis, Elias Deutscher and Birte Böök*  
Managing a Student-Run Peer-Reviewed Legal Journal:  
Ten Years of Bridging Research and Experience 1

## NEW VOICES

- Marina Aksenova*  
Of Victims and Villains in the Fight against International  
Terrorism 17
- Guilherme Del Negro*  
The Validity of Treaties Concluded under Coercion of the  
State: Sketching a TWAIL Critique 39

## GENERAL ARTICLES

- Francesca Capone & Andrea de Guttry*  
An Analysis of the Diplomatic Crisis between Turkey and  
the Netherlands in Light of the Existing International Legal  
Framework Governing Diplomatic and Consular Relations 61
- Mariana Gkliati*  
The Application of the EU-Turkey Agreement: A Critical  
Analysis of the Decisions of the Greek Appeals Committees 81
- Diane Fromage & Valentin Kreiling*  
National Parliaments' Third Yellow Card and the Struggle over  
the Revision of the Posted Workers Directive 125
- Benjamin Bricker*  
Party Polarization and its Consequences for Judicial Power and  
Judicial Independence 161
- Lukas van den Berge*  
Montesquieu and Judicial Review of Proportionality in  
Administrative Law: Rethinking the Separation of Powers in the  
Neoliberal Era 203
- Barend van Leeuwen*  
Rethinking the Structure of Free Movement Law: The  
Centralisation of Proportionality in the Internal Market 235
- Silvia Nuzzo*  
Tackling Diversity Inside WTO: The GATT Moral Clause after  
*Colombia – Textiles* 267

## BOOK REVIEWS

- Elena Brodeală*  
Barbara Havelková, *Gender Equality in Law: Uncovering the  
Legacies of Czech State Socialism* (Hart Publishing 2017) 295
- Rūta Liepiņa*  
Geoffrey Samuel, *A Short Introduction to Judging and to Legal  
Reasoning* (Edward Elgar Publishing 2016) 305

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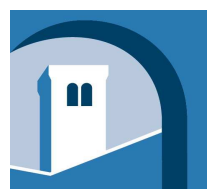
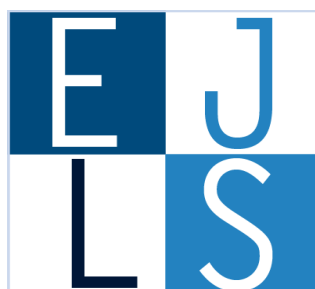
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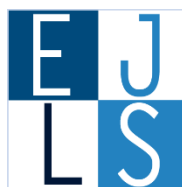
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TABLE OF CONTENTS

EDITORIAL

- Raphaële Xenidis, Elias Deutscher and Birte Bөөk*  
Managing a Student-Run Peer-Reviewed Legal Journal:  
Ten Years of Bridging Research and Experience 1

NEW VOICES

- Marina Aksenova*  
Of Victims and Villains in the Fight against International  
Terrorism 17
- Guilherme Del Negro*  
The Validity of Treaties Concluded under Coercion of the  
State: Sketching a TWAIL Critique 39

GENERAL ARTICLES

- Francesca Capone & Andrea de Guttry*  
An Analysis of the Diplomatic Crisis between Turkey and  
the Netherlands in Light of the Existing International Legal  
Framework Governing Diplomatic and Consular Relations 61
- Mariana Gkliati*  
The Application of the EU-Turkey Agreement: A Critical  
Analysis of the Decisions of the Greek Appeals Committees 81
- Diane Fromage & Valentin Kreilinger*  
National Parliaments' Third Yellow Card and the Struggle over  
the Revision of the Posted Workers Directive 125
- Benjamin Bricker*  
Party Polarization and its Consequences for Judicial Power and  
Judicial Independence 161
- Lukas van den Berge*  
Montesquieu and Judicial Review of Proportionality in  
Administrative Law: Rethinking the Separation of Powers in the  
Neoliberal Era 203
- Barend van Leeuwen*  
Rethinking the Structure of Free Movement Law: The  
Centralisation of Proportionality in the Internal Market 235
- Silvia Nuzzo*  
Tackling Diversity Inside WTO: The GATT Moral Clause after  
*Colombia – Textiles* 267

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Geoffrey Samuel, *A Short Introduction to Judging and to Legal  
Reasoning* (Edward Elgar Publishing 2016) 305



## EDITORIAL

### MANAGING A STUDENT-RUN PEER-REVIEWED LEGAL JOURNAL: TEN YEARS OF BRIDGING RESEARCH AND EXPERIENCE

#### *I. Introduction*

Founded ten years ago, the European Journal of Legal Studies (EJLS) has since continuously evolved and progressed, thanks to the strong commitment and hard work of the researchers of the European University Institute (EUI). With a pool of about 50 in-house editors and external reviewers and thanks to the continuous support of the EUI professors and Law Department, the EJLS has, over the years, perpetuated a tradition of high quality research and offered a platform for young, talented researchers. The EJLS has contributed to training young scholars at the EUI to carry out peer reviews and engage in other journal-related activities, thus preparing them for their future academic careers, and forging a valuable set of knowledge that has been passed down through generations of researchers.

After two years of close cooperation, the current EJLS management team is changing. Today, we are proud to pass on the torch to a new team of enthusiastic young researchers, who will take the EJLS on yet another journey. With the next generation of managers, the EJLS will continue to provide a dynamic platform, bridging two sides of legal academia: bringing innovative research to the fore on the one hand, and building valuable journal-editing experience amongst researchers on the other.

The main commitments of the EJLS are two-fold. First, the EJLS aims to offer a platform for young researchers at the beginning of their careers to spread their ideas. From this perspective, our open-access policy offers the advantage of a wide spectrum of readership. The general commitment behind our publication policy is to ensure a merit-based diffusion of ideas through an attractive, fast, and highly exigent review process, accessible to all in the spirit of fairness. Second, the EJLS is committed to innovation. It has consistently aimed at opening new horizons for interdisciplinary, contextual and critical legal research, in recent times notably through a focus on empirical legal

studies. Because law does not exist in isolation from the fields it regulates, building bridges with other disciplines is one of the EJLS' principal tasks.

Of course, during the last years, achieving these goals has not been without its challenges. Notably, ensuring the overall quality of our publications and the respect of publication and research ethics, resisting the negative side effects of the pressure to 'publish or perish', and promoting diversity in our authorship, have been three key tasks which we grappled with over the years, and which we want to address in this editorial.

## *II. The EJLS' Inside Voice: The Double-Blind Peer Review Process*

Over the course of the last two years, managing the double-blind peer-review process of the EJLS and enhancing its quality has taken a prominent place in our daily work. Gaining first-hand and in-depth insight into the functioning and role of the review process of a legal scholarly journal has been one of the most important and formative experiences we have gained as the managing team of the EJLS. First, we have witnessed – through both positive and negative experiences – the fundamental role that a thorough double-blind peer-review process plays in ensuring the quality of publications. Indeed, despite its inevitable shortcomings, the role of the review process goes beyond guaranteeing a fair, neutral and anonymous procedure to decide which authors have the opportunity to publish in a well-known journal and, ultimately, improve their career chances. Importantly, a well-functioning peer-review process also constitutes the central mechanism for quality control of scholarly publications, and, thus, lies at the heart of the success of our journal.

We have also experienced the peer-review process as a crucial learning device for our reviewers. Indeed, already at its inception ten years ago, the EJLS' creation was primarily motivated by the objective of providing PhD researchers at the EUI Law Department with the opportunity to gain experience in academic publishing and, more specifically, in the management of a double-blind peer-reviewed journal. By familiarising themselves with each stage of the value chain of academic publishing, from the screening and reviewing of articles, to the editing and final polishing of each new issue, the EJLS enables researchers to build a toolkit of crucial analytical and organisational skills which will prove helpful in their future academic career.

In addition, a thorough review process constitutes a valuable 'public good' in times where critical engagement with the academic research of one's peers becomes an increasingly scarce resource. Peer review, despite requiring a considerable amount of time and intellectual engagement by reviewers, is voluntary and provided for free. This might explain why it becomes increasingly difficult for academic journals to find scholars willing to carry out thorough and timely peer-reviews. Because the EJLS review process is part of a win-win exchange between our reviewers and authors, our journal benefits from an important advantage in comparison with other journals, namely the ability to provide thorough, yet fast, feedback. In particular, early-career academics often appreciate, or at times even depend on, a swift review process, which can secure an additional peer-reviewed article on their publication list when applying for an academic job.

### *III. The EJLS' Outside Voice: Promoting Young Legal Scholarship and Cutting-Edge Research*

Beyond the overall goal of ensuring a high standard of publication and giving researchers the opportunity to gain experiences in the world of peer-reviewed academic publishing, our agenda over the last two years has been mostly structured by the goal of promoting young legal scholarship and new ways of doing legal research. This has been achieved by offering a learning device and an inclusive platform to researchers at the beginning of their career, and by encouraging novel approaches to legal studies.

Achieving the first objective does not only mean guiding authors through our publication process and securing visibility for their published research. It also means making sure that our review process really provides detailed, constructive and critical feedback to all authors, so that even unsuccessful contributors can reap the benefits of peer-review and improve the quality of their research. Our peer-review process is thus also a forum for the serious discussion of fellow researchers' work and ideas.

More specifically targeting early-career legal researchers (with less than five years post-PhD academic experience), our New Voices section offers a stage reserved exclusively to young scholarship. Introduced by our predecessors, this section has been boosted by the New Voices Prize, a competition we launched in October 2016 with the support of the EUI Law Department. The format of our New Voices section represents a new way of communicating



legal analysis. With their lively and dynamic essay-like style, New Voices articles also constitute an attempt to make legal research more accessible and improve its readability. The New Voices section thus bears witness to our efforts to encourage a debate on the necessity to make legal research more accessible and to enhance its role within public debate.

Both our aims to promote young legal scholarship and cutting-edge research find expression in the conference organised for the 10<sup>th</sup> anniversary of the EJLS this November. Revolving around diverse topics of EU law, our call for papers has attracted widespread interest from young scholars focusing on contemporary developments in the EU. The conference programme reflects innovative thinking and features various attempts by early-career scholars to apply new, often inter-disciplinary, methods of analysing EU law.

Finally, promoting cutting-edge legal research also implies encouraging a diversification of legal methodologies, cultures and approaches. Over the last ten years, the EJLS has continuously endeavoured to put forward a pluralist understanding of legal scholarship by publishing critical and inter-disciplinary articles that go beyond traditional doctrinal legal analysis. We firmly believe that the diversification of legal approaches is necessary to overcome the long-standing methodological monoculture in legal research, and to support an understanding of law as a subject which should not be perceived in isolation, but rather in the context in which it is embedded. To advance new ways of thinking about law, we have successfully launched a call for papers focusing on empirical legal studies. As a result, we have received numerous submissions, some of which have featured prominently in our recent issues. Thanks to our collaboration with reviewers from the EUI Department of Political and Social Sciences, we are able to provide sound feedback to empirical legal scholars willing to contribute to the EJLS. Furthermore, we are institutionalising the promotion of legal empirical research through a new cooperation with the Network of Legal Empirical Scholars (NoLesLaw), while still pushing for further innovation, originality and inclusiveness at the EJLS.

#### *IV. Past, Current and Future Challenges*

These past years have also presented an occasion to think about how to overcome the recurrent difficulties and enduring challenges with which the EJLS is regularly confronted.



One of these difficulties is how to attract 'good' submissions. Over the last years, the EJLS has received an increasing amount of submissions that do not meet minimum academic standards and that lack the most basic features of academic research (i.e. a research question, a clear argument and structure, and a contribution to the existing literature). This phenomenon goes hand in hand with a general increase of submissions by 53% if we compare the numbers of September 2013 – August 2015 with those of September 2015 – August 2017. While 13% of the 182 submissions received over the first period were published, publication over the past two years only amounts to 10% of the 278 submissions received. This shows, first, that the EJLS has become more attractive for authors. Second, as a result, the EJLS has become more selective in choosing papers to be published. Nonetheless, relatively-speaking, the continuously high percentage in submissions that do not meet our quality standards is unsettling. In fact, it reflects a growing pressure to publish, illustrated by the well-known adage 'publish or perish', which young legal scholars in particular are subjected to. This means that too many articles are submitted before being ready for publication. Many authors might feel compelled to focus on quantity over quality. This situation raises questions about the underlying structural reasons which cause this pressure, and their impact on the overall quality of legal research globally.

A second challenge the EJLS has faced is the issue of ethics in legal research. Our experience over the last two years has shown that systematically ensuring respect for publication and research ethics in managing a peer-review and editorial process is a highly challenging exercise. This is true on both sides of the review-process – on the reviewers' side and on the authors' side. In fact, the outcome of the peer-review process has important consequences for authors, sometimes affecting their career chances. Hence, assessing the quality of scholarly research entails heavy responsibilities for reviewers, as well as the duty to treat submissions in a fair, transparent and constructive manner. Therefore, transparency and the equal treatment of submitted articles are paramount, in the same way that respectful and constructive critique despite disagreement are. On the authors' side, respecting ethical rules is crucial to ensure the credibility and legitimacy of their findings. Authors have to deal with a number of ethical questions, not only regarding plagiarism and authorship, but also concerning methods of conducting legal research, the disclosure of private research funding and potential conflicts of interest. To address these issues and ensure research and publication

integrity, we have drawn up an EJLS Publication Ethics and Malpractice Statement that aims at providing guidance to our reviewers and authors alike.

Thirdly, diversity represents a continuous challenge for the EJLS, which aims to provide a representative and inclusive platform for all academic authors whose research fits the scope of the journal. Yet, similarly to many of its peers, the EJLS has persistently faced an issue of under-representation of authors from outside the US and Europe. This lack of diversity not only reflects socio-economic inequalities and the ensuing biased distribution of 'cultural capital',<sup>1</sup> as well as the dominance of English as an academic *lingua franca*, but also silences an important part of the academic and legal world. Over time, it creates and reproduces a cultural bias which is deeply entrenched in legal research. This also links with another kind of diversity concern that the EJLS, like many other academic journals, is facing, and which also reflects another deep issue of structural discrimination in academia and beyond. We observe a lasting gender imbalance in our authorship. Over the four issues that we published during the last two years, including the present one, we count 22 male and 12 female contributors in our peer-reviewed sections. All in all, of a total of 30 peer-reviewed articles published over the past four issues,<sup>2</sup> this amounts to 64.7% of male authors and 35.3% of female authors. This does not reflect the commitment to diversity which we would like to fully concretise at the EJLS. Importantly, the problem of gender imbalance is not linked to the selection operated through our double-blind peer-review process. We indeed observe a similar gender imbalance at the level of incoming submissions. In fact, over the period of September 2015-2017, 70.4% of contributors who submitted a paper to the EJLS were male, compared to 29.6% of female contributors. These mirroring pre- and post-review process statistics reflect a problem of structural gender inequality and representation within legal academia, perpetuated through legal education and career tracks. The EJLS thus calls for more diversity and for global measures to combat the systemic vectors of both cultural and gender inequality in academia, which take many forms,

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<sup>1</sup> Pierre Bourdieu and Jean-Claude Passeron, *Les Héritiers. Les étudiants et la culture* (Les Éditions de Minuit 1964) and Pierre Bourdieu and Jean-Claude Passeron, *La Reproduction. Éléments d'une théorie du système d'enseignement* (Les Éditions de Minuit 1970).

<sup>2</sup> The gap between the number of authors and the number of articles published is due to co-authorship.

ranging from unequal salaries to harmful stereotyping, in order to achieve a representative sustainable balance.

Finally, a further difficulty is met when considering access to, and popularisation of, the legal analyses published in the EJLS. On the one hand, the EJLS has increased its presence both in social media and in journal rankings, indexes and repositories, securing more visibility and an easier access for readers, in addition to its open access policy. On the other hand, simplifying complex legal debates also enhances accessibility, which is crucial if legal analyses are to influence public debates. Despite our New Voices section, which favours a more approachable vehicle for legal debates than traditional academic articles, peer-reviewed legal research tends to remain the prisoner of an ivory tower. The emphasis on a widely accepted traditional academic style certainly allows shared understanding in the field. However, it also deprives a wider audience outside the strict field of law from interesting findings and important reflections, even when touching on topics broadly discussed within the public sphere. To remedy this gap and make legal research more accessible, future steps could be taken to further build interdisciplinary bridges and to devise innovative ways for legal scholarship to contribute to societal discussions.

#### *V. The EJLS: A Bridge Between Research and Current Socio-Political Developments*

The articles in this issue once again reflect the EJLS' commitment to young, contextual and critical legal scholarship that engages with a discussion of timely and topical socio-political issues.

This issue kicks off with a New Voices essay by *Marina Aksenova* that tackles one of the most pressing challenges our societies currently face: international terrorism. The essay explores the underlying reasons for the international community's failure to agree on a viable definition of 'international terrorism', despite an emerging consensus about the necessity to criminalise terrorist activities. The essay claims that the threat of terrorism has triggered the fundamental reversal of traditional legal categories of domestic criminal justice systems, which ultimately undermines the legitimacy of attempts to criminalise terrorism at the international level.

The second New Voices essay by *Guilherme Del Negro*, based on a critical reading of the drafting history of the Vienna Convention on the Law of Treaties (VCLT), challenges the established principle that non-military coercion does not vitiate the validity of international treaties. The essay shows that at the beginning of its drafting process, the exclusion of non-military coercion from Article 52 VCLT as a ground for the invalidity of international treaties was far from settled, but rather constituted the outcome of the codification of the *status quo* of post-colonial power-relations. The essay thus openly questions the legitimacy of international agreements subjecting developing countries, or more recently Greece, to economic pressure and conditionality.

*Francesca Capone* and *Andrea de Guttry* open the General Articles section, assessing the recent diplomatic feud between the Netherlands and Turkey in the run-up to this year's Turkish constitutional referendum against the backdrop of international law. The authors discuss, and eventually refute, Turkey's claims that the Netherlands had breached international laws of diplomatic and consular relations by denying landing rights to the Turkish Minister of Foreign Affairs on Dutch soil, as well as by refusing access to the Turkish Consulate to the Turkish Family and Social Policies Minister. This article thus requalifies some of the emotionally loaded political polemics which constitute the background music to the steadily progressing deterioration of relations between Turkey and EU Member States.

By assessing the implementation of the notorious EU-Turkey Agreement on migration concluded a year and a half ago in the midst of the migration crisis, *Mariana Gkliati's* article sheds light on one of the most contentious, yet most politically sensitive, fields of ongoing cooperation between the EU and Turkey. Indeed, the Agreement illustrates the continuous inter-dependence between the EU and Turkey, despite rising tensions. Her article, providing the first analysis of the decisions and legal reasoning of the Greek Asylum Appeals Committees responsible for the application of the agreement, shows that in a large majority of decisions the Committees denied Turkey's status as 'safe third country'. The article thus casts doubt upon the presumption underlying the Agreement that Turkey is a safe third-country, raising further doubts as to whether it lives up to EU and international asylum law values.

*Diane Fromage* and *Valentin Kreilinger*, in turn, analyse the third use of the 'Early Warning Mechanism' by which mostly Central and Eastern European

national parliaments expressed their fierce opposition to the EU Commission's legislative proposal for the reform of the Posted Workers Directive based on subsidiarity grounds. This opposition against a reform that lies at the heart of the newly elected French President's, as well as the EU Commission's, agenda to push for a 'Social Europe', clearly reveals another inconvenient truth. It shows that views about 'social dumping' and 'Social Europe' fundamentally differ across Europe. Besides Brexit, the European project thus also faces a growing inner political divide between 'old' and 'new' EU Member States.

These deepening fault lines within the European project also materialise in the current dispute over the respect of the rule of law and judicial independence in some Central and Eastern European Countries. In this regard, *Benjamin Bricker's* article engages in an empirical analysis of the underlying factors that explain the establishment and maintenance of a powerful independent judiciary. His article shows that judicial independence not only depends on the competitiveness, but also on the polarisation of a given party system. This article constitutes yet another example of the EJLS' effort to promote promising and cutting-edge legal research in the field of empirical legal studies.

The judiciary also constitutes the focal point of *Lukas van den Berge's* article, which discusses the role of proportionality for judicial review in administrative law from a perspective of legal theory. Revisiting Montesquieu's legal philosophy, the author takes issue with the widely-shared view that Montesquieu's theory of the division of powers and his conception of the judicial branch as 'mouthpiece of the law' calls for a deferential or marginal judicial review in administrative law. Rather, he argues that this view is based on a deeply entrenched misreading of Montesquivian legal thought, and unduly prevents administrative judicial review from addressing the new challenges it is faced with in the 'neo-liberal era'.

The standard of judicial review is also the central theme of *Barend van Leeuwen's* article. It revisits the main developments of the Court of Justice of the European Union's free movement case law over the last two decades – namely, the adoption of a market access approach, the extension of horizontal direct effect and the assimilation of justifications across fundamental freedoms. The article observes how the Court of Justice has

increasingly departed from the initial structure of its free movement case law, blurring the lines between the previously separate stages of its four-prong inquiry of restrictions of free movement rights. The article critically observes that these developments confer a central role onto the proportionality test in reconciling free movement with the Member States' public policy goals and regulatory autonomy.

The difficulty in reconciling free trade with domestic public policy goals is already a challenge at the level of the 28 member-strong EU. *Silvia Nuzzo's* article, which examines the WTO case law on the public moral justification of trade restrictions under Article XX(a) GATT, illustrates how such a balancing exercise becomes even more challenging within the WTO, with the diverse cultural, political and societal backgrounds of its 164 Members. While the WTO adjudicative bodies have adopted a deferential stance towards the legitimate goals Member States can invoke to justify trade restrictions under the public morals clause, the author critically points out that the inconsistencies in their interpretation of the subsequent necessity test undermine Members' regulatory autonomy, making an effective use of the public morals clause virtually impossible.

Last but not least, in our book review section, *Elena Brodeală* discusses Barbara Havelková's monograph 'Gender Equality in Law: Uncovering the Legacies of Czech State Socialism' (Hart 2017), which constitutes the first analysis of the role of Feminist Jurisprudence in a Central and Eastern European country. The second book review, by *Rūta Liepiņa*, revisits Geoffrey Samuel's 'A Short Introduction to Judging and to Legal Reasoning (Edward Elgar Publishing 2016)' in light of the looming challenges for legal decision-making in times of technological innovation and increasingly complex developments in the field.

## *VI. A Few Words of Gratitude*

All that remains to be said are a few words of heartfelt thanks. Firstly, we are enormously grateful for the opportunity to have been part of the EJLS. During the last two years, we have learned from each other, as well as the wider EJLS team. We have had the chance to develop personally and professionally, learning not only what it means to manage an academic journal, but also about team work and closely cooperating with one's peers,



whether they be authors, reviewers, or other academic or non-academic professionals.

Secondly, it has been incredibly gratifying to be able to witness the interplay between socio-politico-legal developments and the EJLS as a platform for debate and synergy. This experience has made clear to us how important it is to publish critical pieces which help deconstruct the spread of arguments that are not backed up by fact. Being able to contribute conscientiously to the spreading of knowledge within this area of academia is a privilege and a task that we have not taken lightly. In this vein, we would like to thank our authors for their great work, which allows us to put together issues packed with interesting, innovative and quality research.

Thirdly, and importantly, we would like to thank all members (and external contributors) of the EJLS that we have had the pleasure to work with over the last two years. Without each and every member, this joint project would not be possible. A particularly warm thank you to our former Heads of Section, Federica Coppola (Comparative Law), Fabrizio Esposito (Legal Theory), Stavros Pantazopoulos (International Law), and Martijn van den Brink (European Union Law). It has been an absolute pleasure working with you, and we are very grateful for your continued support and constructive feedback throughout. A special thank you also to our former Executive Editor, Kasper Drajewski, whose insights and skills in formatting our issues and managing our website have been invaluable, and Maria Haag, who ensures the visibility of the EJLS on social media through her excellent work. Thanks are also due to the EUI Ethics Committee, who has been incredibly helpful for us in navigating the ethical bounds of our tasks. Your knowledge and advice were priceless. We would also like to thank Jan Zglinksi, the EJLS' former Editor-in-Chief who, apart from inspiring all three of us to take on a more managerial role at the EJLS, has always been willing to stand by us with his salient advice, encouragement and great ideas – we learned a lot from him. Last but not least, thank you also to Professor Dennis Patterson, who is leaving the Departmental Advisory Board after many years of offering his salient advice on a variety of issues, and to Professors Martin Scheinin, Claire Kilpatrick, and Deirdre Curtin, whose ready guidance, as well as ethical and financial support, have been highly appreciated and valued. We also extend the same words of gratitude to Professor Urška Šadl, who is replacing



Professor Dennis Patterson as the newest member of our Departmental Advisory Board, and welcome her warmly.

Finally, a warm welcome to the entire new team, which will follow in our footsteps: Welcome to our new Heads of Section, Marcin Barański (Legal Theory), Théo Fournier (Comparative Law), Sergii Masol (International Law), and Stavros Makris (European Union Law). We have already witnessed the great work that you do, and are grateful for having been able to work with you in our final months as Managing Editors and Editor-in-Chief. A special welcome also to Maria Haag and Rūta Liepiņa, our new Executive Editors. Putting together our last issue with your help and skills has been such a pleasure – thank you both for your great work! And a warm welcome to the three colleagues who will take over from us directly: Rebecca Mignot-Mahdavi (Editor-in-Chief), Janneke van Casteren, and Anna Krisztián (Managing Editors). We could not be happier passing the management of the EJLS, which has gained a special place in all of our hearts, on to you. We are confident that you will do a wonderful job carrying the EJLS forward.

*Raphaële Xenidis, Elias Deutscher and Birte Böök*

*(Managing Editors and Editor-in-Chief)*

## EUROPEAN JOURNAL OF LEGAL STUDIES 10TH ANNIVERSARY CONFERENCE ANNOUNCEMENT



The European Journal of Legal Studies (EJLS) and the Academy of European Law are delighted to be organising a conference on the occasion of the 10th anniversary of the founding of EJLS. The event will be held on Thursday, November 16, 2017 at the European University Institute (EUI) in Florence, Italy. We warmly invite all EJLS readers to attend this special event.

Sixty years after the Treaty of Rome and twenty-five years after the Treaty of Maastricht being signed, the European Union is at a crossroads. A critical assessment of the EU integration process, as well as new perspectives and innovative views on its future are needed now more than ever. The anniversaries of the Rome and Maastricht Treaties coincide with the 10th anniversary of the EJLS which, throughout the last decade, has provided a platform for young scholars engaging in innovative and critical legal research. On this occasion, the EJLS has invited young scholars to submit papers that reflect on the sixty years of legal integration, discuss new ways to think about the European project or present innovative responses to current challenges of the EU. The event will include four panels. Please find below our selected speakers.

### **Panel 1: Modes of Integration and their Role in Promoting and Undermining the European Integration Process**

Lena Boucon and Daniela Jaros, *The EU Banking Union: A New Mode of Integration?*

Eva Kassoti and Lisa Louwerse, *European (Dis)integration through the Prism of the EU's Values: The Shortcomings of the EU's Enlargement Policy and their Impact on the Rule of Law in (Future) Member States*

Marijn van der Sluis, *The Choice for Maastricht*

### **Panel 2: National (Constitutional) Courts and the EU Legal Order – More Trouble Ahead?**

Jasper Krommendijk, *It Takes Two to Tango – The Preliminary Reference Dance between the Court of Justice of the European Union and National Courts*

Cristina Sáenz Pérez, *The ECJ and National Constitutional Courts in Criminal Law – A Troubled Relationship*

Jan Zgliniski, *Who Is the Final Arbiter of EU Law? The Growing Role of National Courts in the European Judicial Architecture*

### **Panel 3: The EU and the International Legal Order – An Integration Paradox?**

Ricardo García Antón, *Towards an EU Common Foreign Policy in Direct Tax Matters – Is ERTA Still Alive?*

Angshuman Hazarika, *Bits of Confusion: Understanding the Position of Intra-EU BITs in the International and EU Legal Order*

Lando Kirchmair, *Who Has the Final Say? The Relationship between International, EU and National Law*

### **Panel 4: How to Think EU Law?**

Justin Lindeboom, *The Razian Court – Opinion 2/13 and the Construction of the EU Legal System*

Lucie Pacho Aljanati, *Multilingual EU Law – A New Way of Thinking*

Francielle Vieira Oliveira and Alessandro Rosanò, *Interconstitutionality and Protection of Fundamental Rights in the European Union's Legal System*

We would like to thank the EUI Law Department, the Academy of European Law, Hart Publishing, the President's office of the EUI and the initiative of Italy's Presidency of the Council of Ministers to celebrate the sixtieth anniversary of the Treaties of Rome for their generous support of this conference.

If you would like to attend this event, please register here:

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## NEW VOICES

### OF VICTIMS AND VILLAINS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM

Marina Aksenova<sup>\*†</sup>

*Producing a satisfactory international definition of terrorism requires the resolution of a number of problems. I argue that one of the biggest challenges stems from the incompatibility of the offence of terrorism and the traditional roles assigned by the criminal justice system to victims, offenders and mediators. The usual paradigm embodies values formed over time and collectively shared by society. As a result, offenders are the 'villains' in the eyes of the community for violating the agreed norms, victims suffer evident harm on an individual basis and courts together with the law enforcement agencies serve as legitimate mediators in the conflict by administering justice on behalf of the public. These roles are, however, often reversed or mixed up in the fight against terrorism. Because of the preventative focus of the laws tackling the problem, terrorist suspects become the new 'victims' if they are tortured, banned from entering a country or mistreated in other ways, executive agencies sanctioning these practices become the new 'villains', and those harmed by the attacks involuntarily become the new 'mediators' because their suffering is intended to transmit a certain message to the rest of the world. The uncertainty about the roles within domestic law, in turn, reduces the possibility of creating a viable international formula defining terrorism.*

**Keywords:** Terrorism, definition, victims, consensus, preventative shift

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## TABLE OF CONTENTS

I. INTRODUCTION .....	18
II. EVIDENCE OF THE EMERGING CONSENSUS .....	20
III. NEW VICTIMS, NEW VILLAINS AND NEW MEDIATORS IN THE FIGHT AGAINST TERRORISM .....	23
1. <i>Traditional Criminal Justice Roles</i> .....	24
2. <i>The New Victims</i> .....	25
3. <i>The New Villains</i> .....	28
4. <i>The New Mediators</i> .....	31
IV. COLLECTIVE ACTION IN DEFINING INTERNATIONAL TERRORISM .....	33
V. CONCLUSION .....	37

### I. INTRODUCTION

This article explores the widening gap between international and domestic efforts aimed at tackling terrorism through legal means. While there is an increasing agreement at an international level about the need to address the crime of terrorism, there is a lack of uniformity of legal approaches to this offence at the level of domestic actors. Such discord at the domestic level stems, to a large extent, from the change of traditional criminal law roles. This, in turn, hampers collective efforts aimed at addressing the problem through juridical means. One manifestation of such dissonance is the absence of a commonly agreed international definition of terrorism that would hold up in courts and serve as an authoritative benchmark for the UN and national actors alike.

The famous UN Security Council Resolution 1373 passed in the aftermath of 9/11 called on the states to prevent and suppress international terrorism while failing to explain what exactly is meant by 'international terrorism'.<sup>1</sup> Fast-forward to 2014, UN Security Council Resolution 2178 on foreign fighters aimed at preventing the 'recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning of, or participation in terrorist acts' still failed to account for what constitutes international

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<sup>1</sup> UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.



terrorism.<sup>2</sup> What these two resolutions have in common is their call on *states* to criminalize terrorism domestically and pass measures aiming to tackle the problem. The majority of states – democratic and authoritarian alike – welcomed the call. However, newly passed domestic laws on terrorism are frequently used to suppress political opposition and dispose of internal threats to the ruling party, as happened in Turkey with multiple prosecutions against the Kurds.<sup>3</sup> This phenomenon also occurs in Western Europe, with countries like France using acts of terrorism to justify a state of emergency and derogate from human rights instruments.<sup>4</sup> Without international guidance and the acknowledgement of its clear boundaries, the crime of terrorism is prone to becoming a governance tool in domestic politics.<sup>5</sup>

Thus, the definitional step is important because it paves the way to a more coherent, more regulated and appropriate response by the international community. Notably, translation from the political sphere to the legal arena requires accumulation of collective will. Drawing parallels with human rights, Madsen and Verschraegen argue that these rights gained their traction not only by being grounded in cultural value commitments but also by receiving legal recognition.<sup>6</sup> Recognition at an international level also brings about wider possibilities of enforcement at the level of local actors.

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<sup>2</sup> UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

<sup>3</sup> World Report 2014: Turkey, Human Rights Watch, <<https://www.hrw.org/world-report/2014/country-chapters/turkey>> accessed 11 September 2017.

<sup>4</sup> For instance, in July 2017, France's parliament voted for the sixth time to extend the state of emergency law, first enacted in the aftermath of the November 2015 terrorist attacks in Paris. This law gives power to the government to designate public spaces as secure zones, temporarily close down places of worship suspected of promoting extremism, and conduct individual surveillance. See Yasmeen Serhan, 'Will France's State of Emergency Become Permanent?', *The Atlantic*, 11 July 2017, available at <<https://www.theatlantic.com/international/archive/2017/07/will-frances-state-of-emergency-become-permanent/532848/>> accessed 7 September 2017.

<sup>5</sup> Marina Aksenova, 'Conceptualising Terrorism: International Offence or Domestic Governance Tool?' (2015) 20(2) *Journal of Conflict and Security Law* 277.

<sup>6</sup> Mikael Rask Madsen and Gert Verschraegen, 'Towards a New Sociology of Human Rights? A Review Essay on Hans Joas' *Sacredness of the Person*' (2016) *iCourts Working Paper Series* No 43, 16.

However, the absence of a commonly agreed international definition of terrorism is only the tip of the iceberg. The underlying problem seems to be that the label of terrorism domestically has been tarnished by a number of ideological biases. The biggest challenge to arriving at an international consensus about terrorism is not necessarily the lack of legal tools to distil a definition acceptable to the international community. Rather the shifts within domestic criminal justice system towards prevention are also to blame. As this article will demonstrate, counter-terrorism laws and activities lead to the reversal of roles traditionally assigned to different parties affected by the crime. This is the result of the appropriation of the label 'terrorism' by actors other than courts, such as the media or the government.<sup>7</sup>

The paper dissects this process and explores the circumstances under which terrorism could be conceived as an international crime. Section two of this article presents evidence that the time is right for efforts to reach consensus on an international definition of terrorism. Section three discusses some of the obstacles to reaching international agreement. A stalemate is not only the result of the disagreement between states and other actors over key terms, but is also caused by a more fundamental process. The paper argues that a preventative shift in the fight against terrorism has taken place, resulting in the reversal of traditional roles of victims, villains and mediators. Section four discusses how this shift in roles is at the basis of some of the most controversial debates in defining international terrorism: the issue of intent, questions surrounding the international embedment of the offence of terrorism, as well as debates about which branch of international law (or domestic law) is the most appropriate for tackling terrorism. In order to arrive at a workable definition of terrorism at the international level, it is argued, that these biases must be addressed.

## II. EVIDENCE OF THE EMERGING CONSENSUS

Although there is a lack of consensus on the international definition of terrorism, international practice is moving in this direction. Consensus is essential for a crime to qualify as international in character, providing it with

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<sup>7</sup> Betty Dobratz, Liza Waldner and Timothy Buzzell, *Power, Politics, and Society: An Introduction to Political Sociology* (Routledge 2012) 313.

an element of legitimacy. The core international crimes currently prosecuted by the International Criminal Court (ICC)<sup>8</sup> have historical roots and stem from the expanded notion of war crimes. Only four victorious powers – the UK, the US, the Soviet Union and France – participated in the framing of the charges at the Nuremberg trials. Consequently, the bulk of international offences were shaped by a handful of nations acting on behalf of the broader community of states in the aftermath of the Second World War. This was the time of realization that perpetrators of mass atrocities must stand trial and the international community needs to take a stake in this process.

Therefore, consensus does not require all or even most states to be on board as to the definitional aspects of the prohibited acts, but rather demands a sense of urgency and concern for humanity as a whole. Susan Waltz discussed a similar pattern of consensus building surrounding the human rights movement. She convincingly dismantled the myths related to consensus building, including the assumption that its development is entirely attributable to the atrocities committed by Nazi Germany. Consensus was preceded by the accumulation of political will over a period of time. Waltz outlines a number of indications from the early to mid-twentieth century pointing to the ripening of the idea of the universal human rights. At the same time, she acknowledges that the Nuremberg trials 'galvanized' the support for the universalist human rights project.<sup>9</sup> Legal recognition of the gravest violations of human rights in times of war and peace further propelled this project.<sup>10</sup>

Terrorism is the 'odd one out' when compared to other international crimes. Terrorism was not part of the offences established in the 1945 Charter of the International Military Tribunal of Nuremberg. Hence, terrorism lacks the historical grounding of the other core international offences. However, there is evidence that the moment for translating the offence of terrorism from political into legal language is fast approaching. The attacks perpetrated by contemporary terrorist groups such as the Islamic State of Iraq and the

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<sup>8</sup> Article 5 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

<sup>9</sup> Susan Waltz, 'Reclaiming and rebuilding the history of the Universal Declaration of Human Rights' (2002) 23(3) *Third World Quarterly* 439.

<sup>10</sup> Madsen and Verschraegen (n 6).

Levant ('ISIL'), Al Shabaab and Al Qaeda against civilian populations around the globe have the immediate aim of intimidation and coercion. The short-term impact of terrorist acts is always context and situation specific. Yet, the cumulative long-term effect of these crimes might be an incentive for the international community to overcome the ideological disagreements about various aspects of the definition of terrorism. At the Nuremberg trials, it was human suffering and the horrendous nature of the crimes that created the momentum for consensus over the definition of international crimes. A similar scenario might occur with respect to terrorism in the near future. Abi-Saab referred to the 'shock of recognition' produced by the 9/11 attacks that performed as a catalyst for psychological recognition of the need for collective action.<sup>11</sup> Continuous attacks during the subsequent decade and a half only add to the critical mass required for the mobilisation of efforts.

UN Security Council Resolution 2249 (2015) is another indicator of the impending consensus. This Resolution is somewhat different from its predecessors. It was passed as an express condemnation of the attacks on 26 June in Sousse, on 10 October in Ankara, on 31 October over the Sinai Peninsula, on 12 November in Beirut and on 13 November in Paris, among others. The text still does not provide a definition of international terrorism. What is different, however, is that the Resolution targets ISIL specifically and, although not passed under Chapter VII of the UN Charter, encourages states to use force against those responsible for the attacks.<sup>12</sup> Indeed, the Security Council '[c]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law [...] to prevent and suppress terrorist acts committed specifically by ISIL'.<sup>13</sup> While there is no explicit authorization of the use of force, the Resolution leaves space for states to take coercive measures by calling upon them to take 'necessary measures'. The Resolution is precise about the nature of attacks, referring to them as 'terrorist acts'. The unequivocal rejection of the attacks

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<sup>11</sup> Georges Abi-Saab, 'The Proper Role of International Law in Combatting Terrorism' (2002) 1 *Chinese Journal of International Law* 311.

<sup>12</sup> Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (*EJIL Talk*, 21 November 2015), <<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>> accessed 7 September 2017.

<sup>13</sup> UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, para 5.

shows a clear indication of a greater ideological unity about these crimes: they are of such gravity that they concern humanity as a whole.

Another piece of evidence that consensus is building at an international level lies in the renewed interest of some states in the creation of the Special Court against Terrorism. In February 2015, Romania, together with Spain and the Netherlands, proposed the establishment of an International Court Against Terrorism (ICT).<sup>14</sup> The countries launched a joint consultation process that may lead to its eventual creation. The jurisdiction of the ICT would be complementary to both national courts and the ICC. Accordingly, it would intervene only when domestic bodies are unable or unwilling to try a terrorism case or when the crimes committed are outside the ICC's jurisdiction.<sup>15</sup> The discussion of a court had been shelved since the 1937 Convention for the Creation of an International Criminal Court designated to try the offence of terrorism, which failed to collect enough signatures for its entry into force prior to the Second World War.<sup>16</sup>

There are some indications that an emerging consensus is developing towards an internationally accepted definition of terrorism. This does not stem from agreement of all states, but rather from a universal condemnation of terrorist acts, which are of concern to humanity. The next section discusses some of the obstacles that prevent such consensus from emerging.

### III. NEW VICTIMS, NEW VILLAINS AND NEW MEDIATORS IN THE FIGHT AGAINST TERRORISM

As discussed above, the point at which different actors in the field of international law and politics agree on a common definition of terrorism might be approaching. Yet, one of the greatest obstacles on the way of this process is the reversal of roles traditionally assigned by criminal law to

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<sup>14</sup> Luca Pantaleo and Olivier Ribbelink, 'The Establishment of a Special Court against Terrorism' (*EJIL Talk*, 7 January 2016), <<https://www.ejiltalk.org/the-establishment-of-a-special-court-against-terrorism/>> accessed 7 September 2017.

<sup>15</sup> MFA officially initiates consultations on Romania's initiative to create an International Court to combat terrorism, Romanian Ministry of Foreign Affairs Press Release, <<http://www.mae.ro/en/node/31628>> accessed 7 February 2017.

<sup>16</sup> League of Nations Document, C.547(I).M.384(I).1937.V, reprinted 7 Hudson, *International Legislation*, No 500, 878; opened for signature 16 November 1937.

different actors. While there is sufficient accumulation of will from 'above', there is an undercurrent from 'below' that is arguably the root cause of the problem of the lack of commonly agreed definition of terrorism. This section addresses this shift in traditional criminal justice roles.

### 1. *Traditional Criminal Justice Roles*

The resistance of the domestic criminal justice system when it comes to the offence of terrorism is best explained through the Durkheimian framework. According to Durkheim, criminal sanction is a passionate reaction of the society to the violation of the intense collective sentiments.<sup>17</sup> A national criminal justice system operates under the assumption that the convicted person has committed a certain wrongdoing for which he or she must bear responsibility and face reprobation. According to this conception, we see the offender as a 'villain' for his or her criminal acts hurt individual victims and society as a whole. The institutions bringing the accused to justice serve as a medium for the expression of the state's response to the infringement. These roles – the offender as a villain, society together with the harmed individuals as victims, and the courts and law enforcement as mediators – rarely come into question. The discussion centres rather on the degree of the 'vilification' of the offender and the amount of suffering they inflicted on victims. The mediators take into account the mitigating factors that might lessen the punishment, such as family circumstances, first-time offending, or remorse.

This rigid paradigm can be explained by the traditionalist nature of domestic criminal law, which is a highly conservative institution aiming to preserve the established order and enforce social norms through criminal sanctions.<sup>18</sup> In Mill's philosophy, self-protection is the sole end for which mankind is allowed to interfere with the individual liberty of any of their number. Consequently, the only purpose for which power can be exercised is to prevent harm to others.<sup>19</sup> The definition of harm depends on the values embedded in society. Usually the ruling classes define these values over time; the threat of penal sanctions for violating them protects the equilibrium

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<sup>17</sup> Emile Durkheim, *The Division of Labour in the Society* (Macmillan 1984) 37.

<sup>18</sup> Andrew Ashworth, *Principles of Criminal Law* (Clarendon Press 1995) 15.

<sup>19</sup> John Stuart Mill, 'On Liberty' in Larry May and Jeff Brown (eds), *Philosophy of Law: Classic and Contemporary Readings* (Wiley Blackwell 2011) 369.



attained in a particular society.<sup>20</sup> Durkheim explains the traditionalist nature of penal law by the fact that it denotes the feelings collectively shared by society.<sup>21</sup> The authority of the penal rule is thus a societal custom formed over time.<sup>22</sup> Domestic criminal law therefore has an indispensable regulatory function: by guarding dominant values shared by its citizens it may be argued to preserve the cohesion of the society. Punishment in domestic law is administered in a systematic fashion because all members of the society are presumed to share the values and agree to submit the offender to censure.<sup>23</sup>

The crime of terrorism challenges this traditional approach altogether. There is a high degree of fragmentation when it comes to the agreement upon what constitutes terrorism. The offence of terrorism thus distorts familiar perception of criminal offences. It provides less clear-cut definitions of villains, victims and mediators. The preventative focus of the fight against terrorism<sup>24</sup> leads to a shifting of these roles.

## 2. *The New Victims*

The 'victim' is fast becoming one of the key players in modern criminal justice discourse.<sup>25</sup> To be sure, the figure of the victim as a bearer of interests that are harmed by the offender has always been implicit in criminal law. What has changed in the past decades is the role that the victim plays in the actual process of administering justice – from being a distant figure and a symbol of injured values in society to an active participant in the trial process, and the holder of distinct rights.<sup>26</sup> Regardless of whether victims have an actual or a symbolic presence in a criminal process, their status as such is not contested. This vision rests on the idea that all members of the society share certain

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<sup>20</sup> Ashworth (n 18) 16.

<sup>21</sup> Durkheim (n 17) 37.

<sup>22</sup> Ibid 35.

<sup>23</sup> Ibid 45.

<sup>24</sup> Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'' (2009) 49(5) *The British Journal of Criminology* 628-645.

<sup>25</sup> Carolyn Hoyle and Lucia Zedner, 'Victims, Victimization, and Criminal Justice', in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5<sup>th</sup> edn, Oxford University Press 2012) 473.

<sup>26</sup> Ibid.



values attacked by the crime, and thus the role of the victim as an individual bearer of injured interests remains intact. This reasoning holds true for regular crimes such as homicide or robbery – it is hardly disputed by anyone that these acts go against the established order and must be punished.

However, it becomes more difficult to argue for the existence of shared identity with respect to ideologically motivated offences, such as terrorism. Modern societies are more fluid and the individual identity of their members is multidimensional, not necessarily linked to a particular state or specific group. People move across borders and exchange information in the variety of contexts. With such an increased mobility of the population, the reality is no longer defined within the borders of a particular state. The circulation of information occurs on many levels, including social media, international press outlets as well as the experiences of those living in a foreign country. Such pluralism of ideas can serve as a fertile ground for radicalization of disenchanted persons wishing to satisfy their need for a sense of belonging. This is not to argue in favour of a monolithic ideology to be put in place as a 'safety net' against radicalization, but rather to stress the proneness of distressed youth to manipulation in the light of the proliferation of various sources of information.

These radicalized individuals involved in hostile acts and recruited by ISIL, and other terrorist organizations, are unlikely to perceive of themselves as offenders. They rather view their actions as reflecting a certain ideology, such as, for example, disapproval of the marginalization of the Muslim community in Western societies. The current European migrant crisis only reinforces the fragmented narrative of the values dominant in a society.

Consequently, when it comes to vilification of terrorist offenders, there is far less unity compared with other crimes. Some would even place them in the category of victims. This is arguably the case if one examines the position of terrorist suspects, who are routinely subjected to various human rights abuses. Those who are tortured, entrapped by the government agents into conspiracies they were not intending to join,<sup>27</sup> and stripped of the possibility

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<sup>27</sup> Jesse Norris, 'Why the FBI and the Courts are Wrong about Entrapment and Terrorism' (2014-2015) 84 Mississippi Law Journal 1257.

to effectively question their detention in court<sup>28</sup> may equally be viewed as 'victims'. Moreover, whole groups of populations become targets of indiscriminate sanctions based on the potential threat they represent. A recent example of this is the executive order restricting the entry into the United States of nationals of several majority Muslim countries, based solely on the fact that '[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001'.<sup>29</sup>

Frequent use of anti-terrorism laws to fight dissent further contributes to the ambiguity surrounding the figure of an offender. The decision of the Cairo court to sentence three Al Jazeera journalists to three years of imprisonment for aiding a terrorist organization is a good example of the reversal of roles of victims and villains.<sup>30</sup> The punishment of journalists as accomplices in terrorism solely for reporting on Egypt in a light, which may not have been seen as favourable by the ruling regime, caused worldwide outrage.<sup>31</sup>

This is clearly not to deny the suffering of the actual victims harmed by terrorist acts. Securing their rights and defining state obligations in protecting those rights is one of the priorities of the current Special

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<sup>28</sup> Richard Fallon and Daniel Meltzer, 'Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror' (2007) 120(8) *Harvard Law Review* 2031. On indefinite detention see, *A. and Others v the United Kingdom* [GC], 2009 ECHR 20, § 190; on the right of those suspected of terrorism to have the lawfulness of that detention reviewed speedily see *M.S. v Belgium* App no 50012/08 (ECtHR, 31 January 2012), § 166.

<sup>29</sup> (Revised) Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States, 6 March 2017 (original order dated 27 January 2017), available at <<https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>> accessed 11 September 2017.

<sup>30</sup> 'FAQ: Al Jazeera's journalists on trial in Egypt' *Al Jazeera*, 29 August 2015, available at <<http://www.aljazeera.com/news/2015/03/faqs-al-jazeeras-journalists-trial-egypt-150317113935704.html>> accessed 6 September 2017.

<sup>31</sup> The journalists were later released from prison following presidential pardon. See 'Al Jazeera journalists freed from Egypt prison' *Al Jazeera*, 23 September 2015 <<http://www.aljazeera.com/news/2015/09/al-jazeera-journalists-pardoned-egypt-150923112113189.html>> accessed 11 September 2017.

Rapporteur for Terrorism.<sup>32</sup> His report published in 2012 called for an international legally binding instrument to provide for compensation, reparation and support to all victims of terrorism, attempting to effectuate the shift towards victims' rights in addressing terrorism. It is noteworthy that the UN Special Rapporteur on Terrorism also expanded the category of victims of terrorism by including 'indirect victims', or individuals subjected to lethal force by a public authority after being mistakenly identified as a suspected terrorist.<sup>33</sup>

### 3. *The New Villains*

National legal systems frequently approach the offence of terrorism from a particular standpoint: there is a paradigm shift of criminal justice from a responsive approach to a preventive approach in addressing terrorism.<sup>34</sup> The justification of this turn lies in the objective to contain or prevent a potential attack, and results in acting on the threat of a potential violation rather than on the actual violation. As a result of this preventative tilt, national anti-terrorism efforts are often aimed not at punishing individuals for what they have done, but rather at identifying groups of persons that might pose a danger in the future. The extraordinary nature of the threat is used to justify extraordinary ways in which domestic legal systems fight against terrorism. Concrete examples of the shifting focus of criminal justice systems in the fight against terrorism are restrictions on the freedom of movement, extended administrative detentions of terrorist suspects, employing the notion of conspiracy that criminalizes the agreement to commit terrorism rather than the act itself and the introduction of the broad legal categories such as 'material support of terrorism' or 'possession of materials likely to be used for terrorism'.<sup>35</sup>

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<sup>32</sup> UNCHR, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', Ben Emmerson, 'Framework principles for securing the human rights of victims of terrorism' (4 June 2012) UN Doc A/HRC/20/14, para 10.

<sup>33</sup> Ibid, para 16.

<sup>34</sup> Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights', in Ben Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007).

<sup>35</sup> Eg UK Terrorist Act (2006); 18 U.S.C. § 2339A; Australian criminal code act 1995, division 101.

This architecture exposes the offence of terrorism to potential abuse by those in power and makes it a governance tool in the hands of authoritarian and democratic regimes alike. Rather than acting as a barrier to such abuse, the judicial branch often complies with the rationale of the executive,<sup>36</sup> while the latter use their extended powers to sanction or overlook abuse for the sake of an alleged common good: security.

There are numerous examples of such abuse. The scheme introduced in the US following *Rasul v. Bush* decision by the Supreme Court, for example, on paper allows inquiry into the lawfulness of detentions at Guantánamo Bay, yet in reality it entirely precludes detainees in the United States or at Guantánamo Bay from challenging their detention or conditions of confinement before a civilian court.<sup>37</sup> The FBI's technique of entrapment, that is inducing otherwise law-abiding individuals to join conspiracies to commit terrorism offences is not only counterproductive in preventing threats,<sup>38</sup> but also challenges universally recognized fair trial standards.<sup>39</sup> The use of 'enhanced interrogation tactics' in the war on terror is another widely used counterterrorism practice.<sup>40</sup> In that vein, the Guantanamo commission declared instruments such as the Convention Against Torture non self-executing, and hence not directly binding on the US.<sup>41</sup> Laguardia argues that increasing acceptance of torture-tolerant narratives in criminal procedure

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<sup>36</sup> Cf The US Court of Appeals for the 9<sup>th</sup> Circuit rejecting the government's argument that suspension of the order preventing entry to the US of nationals of several majority Muslim countries should be lifted immediately for national security reasons. See *State of Washington v. Trump*, United States Court of Appeals for the 9<sup>th</sup> Circuit, Order No 17-35105, 9 February 2017.

<sup>37</sup> *Rasul v. Bush*, 542 U.S. 466 (2004); Fallon and Meltzer (n 28).

<sup>38</sup> Norris (n 27).

<sup>39</sup> See Human Rights Watch, *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* (2014), available at <<https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions>> accessed 11 September 2017.

<sup>40</sup> Francesca Laguardia, 'Imagining the Unimaginable: Torture and the Criminal Law' (2015) 46 *Columbia Human Rights Law Review* 48.

<sup>41</sup> *United States v Khalid Sheikh Mohammed et al*, Order AE 20011 To Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, 16 December 2013, para 6.

doctrine and education is a result of the shift to prevention.<sup>42</sup> Concerns over this shift dominate academic discussions, and, to a lesser extent, public discourse.

The European Court of Human Rights (ECtHR) sometimes strikes down national counter-terrorism measures due to their incompatibility with human rights standards. For example, in *Gillan and Quinton*, the ECtHR ruled that stop and search powers granted to police under the sections 44–47 of the Terrorism Act 2000 were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.<sup>43</sup> In *Finogenov and others v Russia*, the Court found that Russia violated the right to life by indiscriminately using poisonous gas during the anti-terrorist raid while resolving the hostage crisis at a theatre in Moscow in October 2002.<sup>44</sup> In *Al Nashiri v Poland*, the ECtHR declared unacceptable the existence of secret prisons around Europe where terrorist suspects are held without proper access to justice.<sup>45</sup> The latter case emphasised the lack of transparency of counter-terrorism operations, which only adds to the perception of those executing them as villains.<sup>46</sup> This lack of transparency is not only detrimental to the rights of the accused or suspected persons, but also obstructs the emergence of a common understanding of terrorism. International law includes custom and the general principles of law recognized by civilized nations as its sources.<sup>47</sup> Hence, international law cannot develop under such conditions of secrecy and non-transparency.

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<sup>42</sup> *US vs Mohammed et al* (n 41).

<sup>43</sup> *Gillan and Quinton v United Kingdom* App no 4158/05 (ECtHR, 12 January 2010).

<sup>44</sup> *Finogenov and Others v Russia* App nos 18299/03 and 27311/03 (ECtHR, 20 December 2011).

<sup>45</sup> *Al Nashiri v. Poland* App no 28761/11 (ECtHR, 24 July 2014); *Husayn (Abu Zubaydah) v. Poland* App no 7511/13 (ECtHR, 24 July 2014).

<sup>46</sup> There are efforts to improve this state of affairs. The UK draft Investigatory Powers Bill seeks to increase transparency around the powers that the authorities have to intercept our communications. See <[http://www.theregister.co.uk/2016/01/11/strasburger\\_on\\_draft\\_investigatory\\_powers\\_bill/](http://www.theregister.co.uk/2016/01/11/strasburger_on_draft_investigatory_powers_bill/)> accessed 6 September 2017.

<sup>47</sup> The sources of international law are listed in Article 38(1) of the Statute of the International Court of Justice.

#### 4. *The New Mediators*

It is not only the roles of the victims and villains that have undergone a shift in the context of terrorism, but also the mediators between these actors. The traditional criminal justice paradigm presupposes that the courts and the executive branch act as mediators by administering punishment on behalf of society.<sup>48</sup> They apply laws and customs formed over time and via consensus. When it comes to terrorism, however, the sanction is often applied by society as a whole rather than by the courts or law enforcement agencies. This is done through highly responsive anti-terrorism laws frequently passed in the aftermath of the attack. Examples of such laws are the US Patriot Act (2001) passed following the 9/11 attacks, the UK Terrorism Act (2006) introduced as a response to London bombings, and the enhanced surveillance law passed in France following Charlie Hebdo attacks.<sup>49</sup> The Indonesian government considered preventive detention laws to curb terrorism following a number of deadly explosions in Jakarta in January 2016, for which ISIL claimed responsibility.<sup>50</sup> Pakistan's Anti-Terrorism Act of 1997 was amended in 2015 following the attacks on the Marriott hotel in Islamabad (2008) and the Peshawar school massacre (2014) to include the new system of military courts designed to try terrorism offences. The new reactive laws typically include

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<sup>48</sup> Garland points the axiom that punishment is to be understood not only as an instrumental response to a crime but also as a constitutive element of larger social processes David Garland, 'Punishment and Social Solidarity' in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage 2013) 34.

<sup>49</sup> Law on intelligence n 2015-912, dated 24 July 2015, adopted by the National Assembly and Senate, available at <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030931899>> accessed 11 September 2017. See also Lizzie Dearden, 'French parliament approves 'intrusive' surveillance laws after Charlie Hebdo attack', *The Independent*, 6 May 2015 <<http://www.independent.co.uk/news/world/europe/french-parliament-approves-intrusive-surveillance-laws-after-charlie-hebdo-attack-10228206.html>> accessed 11 September 2017.

<sup>50</sup> 'Indonesia: Counterterrorism Law Changes Threaten Rights: Reject Proposals to Restrict Speech, Revoke Citizenship' (Human Rights Watch, 12 June 2017), available at <<https://www.hrw.org/news/2017/07/12/indonesia-counterterrorism-law-changes-threaten-rights>> accessed 6 September 2017.



coercive measures and overly broad definitions, granting executives the tools to address a variety of suspicious conduct.<sup>51</sup>

The above laws address the courts and the executives by granting them extra powers to fight or prevent terrorism. However, their aim is not merely to tackle the act per se, but rather to preserve the way of life that terrorist offences aim to undermine.

The victims of terrorist acts become mediators as they carry an additional burden of transmitting a certain message to the rest of the world. Targets of terrorist attacks are often selected for their symbolic value for the rest of the population. The essence of the crime is thus reducing humans to means by exposing the rifts in the texture of modern society. The objects of the attack and its victims spark debates on multiculturalism, diversity and inequality.<sup>52</sup> Alienation of certain groups of individuals and thus their propensity to self-radicalise enters the discourse.

A good example is the UK Counter-Terrorism and Security Act (2015) that was passed as an emergency measure to prevent the threat of terrorist attacks by persons returning from the conflict zones in and around Syria with the skills necessary to carry out the acts. This law places, *inter alia*, a duty on specific institutions, such as universities, to have due regard and to monitor people with propensity of being drawn into terrorism. Entrusting universities with singling out dangerous individuals represents a response of the community as a whole rather than through designated institutions. Constitutional amendments allowing for stripping nationality from French-born dual citizens convicted of terrorism, contemplated but later dropped by the government, would have constituted another example of the community response to terrorism.<sup>53</sup>

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<sup>51</sup> For example, the UK Terrorism Act (2006) allowed for the prolonged detention of terrorism suspects and introduced new offences such as encouraging terrorism, disseminating publications, training, making or possessing devices, and others.

<sup>52</sup> Jean-Pierre Dupuy, *The Mark of the Sacred* (Stanford University Press 2013) 169.

<sup>53</sup> According to *The Economist*, the proposal was backed by 85% of French population. See 'Après Charlie', *The Economist* (Paris, 9 January 2016), available <<https://www.economist.com/news/Europe/21685487-after-year-far-reaching-security-measures-left-thinks-latest-one-step-too>> accessed 11 September 2017.



This section has discussed how traditional criminal justice roles undergo a shift in the context of the fight against terrorism – villains become victims, victims become mediators, and mediators can act as villains. The next section addresses the way this underlying shift affects the development towards an internationally accepted definition of terrorism.

#### IV. COLLECTIVE ACTION IN DEFINING INTERNATIONAL TERRORISM

The UN is currently calling on states to criminalize terrorism, while allowing each state the discretion to decide on the exact scope and definition of the category.<sup>54</sup> As demonstrated in the previous section, this approach leaves room for abuse at the domestic level. The absence of evident definitional constraints at an international level partly lead to arbitrary decisions with respect to terrorism offences at the national level. This, in turn, delegitimizes attempts to tackle the problem both internationally and domestically. It is therefore essential to facilitate inter-state discussions on the definition of terrorism.

Various UN bodies may be of assistance in facilitating cross-state communication, which is required to build the necessary consensus. The work of the Special Rapporteur on Terrorism,<sup>55</sup> the reports issued by the UN Human Rights bodies, fact-finding missions and discussions in the General Assembly and the Security Council are a good start. The former Special Rapporteur on Terrorism initiated the discussion by suggesting the definition of terrorism inspired by the text of UN Security Council Resolution 1566 (2004) passed in the aftermath of the hostage taking in Beslan, Russia in 2004. This particular Resolution resembled all the others in that it expressly called on states to suppress terrorism, but it also provided

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<sup>54</sup> Kim Scheppele argues that UNSC Resolution 1373 prompting states to criminalize terrorism without providing an international definition of the offence led to the situation whereby various local agendas entered into domestic definitions of this crime. See Kim Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2011).

<sup>55</sup> Eg UNCHR, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (6 August 2008) UN Doc A/63/223; (14 February 2010) UN Doc A/HRC/16/51.

some of the elements of the crime. In particular, this resolution clarified the scope of the required intent.<sup>56</sup> The definition by the Special Rapporteur encompassing these considerations reads as follows:

Terrorism means an action or attempted action where:

- '1. The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and
3. The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law'.<sup>57</sup>

This definition is rather comprehensive, but at the same time it shows strong deference to the national law of the member states. One of the elements of terrorism is the commission of a serious offence as defined by domestic law. This is a much-needed compromise. It does not require states to relinquish their authority to legislate in the sphere of counter-terrorism, but still puts in place constraints of international law. There remain several bridges to be built between the model definition of terrorism and actual state practice. Yet it is not enough for states and international institutions to arrive at a common understanding of terrorism and a legal definition. This is because the phenomenon of terrorism involves a shift in traditional criminal justice roles, which must be taken into account. In particular, there are three areas where

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<sup>56</sup> UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, para 3.

<sup>57</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 'Ten areas of best practices in countering terrorism', 22 December 2010, UN document A/HRC/16/51, para 28, practice 7.

this gives rise to particular problems that must be addressed in linking the international and domestic definitions.

First, the problem of intent for the offence of terrorism is not yet entirely resolved. From a criminal law perspective, it seems illogical to label as 'terrorism' only acts with direct intent to coerce or intimidate, while excluding actions that unintentionally lead to the same result. The proponents of excluding the element of 'coercion or intimidation' from the definition of terrorism would refer to any violence meant to advance certain ideology as 'terrorism', regardless of whether intimidation or coercion was an ideological motive underlying the aggressive acts. Indeed, there is validity to the argument that any armed violence against a particular group is bound to intimidate civilian populations. At the same time, expanding the definition to cast the net wide to include additional motivations invites the 'slippery slope' objection. This is particularly acute because terrorism is essentially a political offence used as an instrument to 'frame' certain acts that could otherwise be described as arson, mass murder, hostage taking, and so on. Removing the requirement of the special intent would make the boundary between terrorism and other related offences even more arbitrary. This, in turn, would lead to further misappropriation of the term by various actors, including for governance purposes, and the subsequent 'vilification' of these actors for such a misuse.

The second problem in linking international and domestic definitions of terrorism lies in the unclear contextual embedment of the offence. There is a lot of confusion on an international, regional and state level as to whether the acts of terrorism may be committed in an armed conflict. This lack of clarity speaks to the conception of terrorists as the new 'victims' for their role is contested depending on the audience. The famous statement 'one person's terrorist is another person's freedom fighter' accurately reflects this general sentiment. At the regional level, the EU has been one of the main supporters of current Article 3 of the Draft Comprehensive Convention on International Terrorism (former Article 18), according to which the definition of terrorism excludes 'international law applicable in an armed conflict, in particular those rules applicable to acts lawful under international

humanitarian law'.<sup>58</sup> At the same time, the EU has shown uncertainty in the matter as evidenced by the *Tamil Tigers* case decided by the General Court. The EU added the Tamil Tigers – a party to a non-international armed conflict against Sri Lanka – to the list of banned terrorist organizations. The General Court upheld the listing of the Tamil Tigers on *substantive* grounds (annulling it on procedural grounds).<sup>59</sup>

The African Union also does not consider acts committed during armed conflict as terrorism. The Draft Protocol which amends the Statute of the African Court of Justice and Human Rights explicitly provides that 'the acts covered by international humanitarian law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts'.<sup>60</sup> The same article also excludes from the definition 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces'. The latter provision is a reflection of the colonial past and may give rise to the ideological controversy if ever applied to the specific case.

Third, it is unclear which branch of international law must bear primary responsibility for defining international terrorism. International law is prone to fragmentation or, as some may call it, pluralism. Thus, it is essential to identify which branch of international law is most suitable for developing an international definition of terrorism. If general international law applies, then relevant treaties must be identified for the purposes of establishing the existence of the offence. For example, the violation of which treaties and norms triggers state complicity in terrorism?<sup>61</sup> If one places defining

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<sup>58</sup> Asier Garrido Muñoz, 'Not Only a Matter of Lex Specialis: IHL, the European Union and Its Two Definitions of Terrorism' (*EJIL Talk*, 1 December 2014), available at <<https://www.ejiltalk.org/not-only-a-matter-of-lex-specialis-ihl-the-european-union-and-its-two-definitions-of-terrorism/>> accessed 6 February 2017.

<sup>59</sup> Ibid; Joined Cases T-208/11 and T-508/11 *Liberation Tigers of Tamil Eelam (LTTE) v Council* EU:T:2014:885.

<sup>60</sup> Draft Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev 1, 15-16 May 2014, art 28 (G).

<sup>61</sup> See Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011); James Crawford, *State Responsibility: The General Part*

terrorism on the lap of international criminal law by (hypothetically) extending the jurisdiction of the ICC to the crime of terrorism, or, alternatively, by setting up an international court for its prosecution, it is important to be cognizant of the limitations of the discipline.<sup>62</sup> International prosecutions require the mobilization of the resources and cooperation of a variety of actors; its perceived legitimacy is fragile as can be seen with the current debates on the sustainability of the ICC. If the pertinent field is international humanitarian law, then who decides on the existence of an armed conflict? Would these be domestic courts or the organs of the United Nations? If one contends that the domestic law paradigm must be the basis for an international definition of terrorism, then the biases implicit in the internal treatment of the offence must be removed to the greatest extent possible.

## V. CONCLUSION

The aim of this article was not to arrive at a definition of terrorism, but to examine and challenge the underlying conditions that prevent an internationally agreed definition from emerging. The lack of consensus is not only caused by a lack of political will by actors at the international level, but also by a shift that occurs within the criminal justice paradigm. Criminal justice systems often tackle the offence of terrorism as a potential threat, rather than the actual offence itself. This change leads to the shift of roles traditionally assigned to victims, offenders and mediators in a national criminal justice paradigm. Individuals are often punished on the basis of their dangerousness or political stance threatening the regime, making them the new 'victims' in the fight against terrorism. Courts and law enforcement agencies, which normally act as mediators between the victim and the offender, assume villains' role in prosecuting terrorism offences by surpassing human rights guarantees for the suspects and using terrorism as a governance

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(Cambridge University Press 2013), 159–60 cited in Miles Jackson, *Complicity in International Law* (Oxford University Press 2015), 189.

<sup>62</sup> Article 10 of the Rome Statute of the ICC stipulates, 'nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.

tool. The 'traditional' victims – those who are affected by terrorist acts – also become the new 'mediators' in the discourse on terrorism, while their suffering transmits a message of intimidation or coercion. Individual states must cooperate and rely on international bodies, such as the UN to push the agenda forward and set the parameters for future agreement on the international definition of terrorism. Yet, in doing so, they must also address the implicit biases that this paper has discussed. Many of the most controversial issues in the debate on the international definition of terrorism – the issue of intent, the international embedment of the offence, and the most appropriate branch of international law – are each linked to these implicit biases.

# THE VALIDITY OF TREATIES CONCLUDED UNDER COERCION OF THE STATE: SKETCHING A TWAIL CRITIQUE

Guilherme Del Negro\*

*The invalidity of treaties based on non-military coercion remains one of the biggest unresolved problems within the law of treaties. It paradoxically combines great certainty and clarity on the side of soft law with uncertainty and indeterminacy on the side of hard law. Unfortunately, the codification undertaken at the Vienna Convention on the Law of Treaties (VCLT) not only did not solve the hard law uncertainties, but also enlarged the cleavage between the perspectives of weak and strong States regarding international relations. By combining legal positivism with Third World Approaches to International Law (TWAIL), this paper suggests that (i) the way Article 52 of the VCLT was drafted had the effect of undermining the concept of consent and paving the way for the entrenchment of power politics, and (ii) that there is some elbow room for trying to consolidate a wider interpretation of the Article. Such an interpretation would allow us to condemn economic and political pressures that amount to true coercion as illegal strategies in treaty negotiations, safeguarding weaker States.*

**Keywords:** Coercion of the State, law of treaties, TWAIL, codification, progressive development, colonialism, true consent, power politics

## TABLE OF CONTENTS

I. INTRODUCTION .....	40
II. THE DRAFTING HISTORY OF ARTICLE 52 .....	42
III. THE POLITICS OF CODIFICATION/PROGRESSIVE DEVELOPMENT AT THE ILC .....	50
IV. CREEPING COLONIALISM.....	54
V. CONCLUDING REMARKS .....	57

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## I. INTRODUCTION

The validity of treaties concluded under the influence of non-military coercion is still a sensitive theme in international law. The International Law Commission (ILC) did not come to a lasting solution to this question, despite it having been analyzed by different Rapporteurs, over a span of nearly 20 years. In the end, explicit reference to non-military coercion was simply excluded from the express wording of Article 52 of the 1969 Vienna Convention on the Law of Treaties (VCLT). The drafting history of Article 52 is marked by a clear opposition. On the one hand, many countries, mostly from the (Global) South,<sup>1</sup> intended to expand its scope in order to expressly include economic and political coercion as grounds of the invalidity of treaties. On the other hand, many Northern countries feared that an expanded reading of coercion would open the door to arbitrary allegations. Each side tried its best to arm itself with legal arguments – the latter group maintained that the use of economic and political influence amounted to nothing more than mere pressure, while the former depicted it as a way to depart from customary law constraints and to surreptitiously force peripheral States into contradicting their true will.

The difficulties faced by international lawyers when dealing with this issue become clear when we analyze certain instances of political and economic influence at the international level. Numerous *soft law* instruments condemn economic and political coercion as undue interference in internal affairs.<sup>2</sup> On

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<sup>1</sup> In this brief paper, I will not offer a deep insight into the reach of notions such as the 'Third World' and the 'South', terminologies that are well-addressed by many TWAILers. However, I do suggest that TWAIL use these concepts as open-ended tools, not necessarily determined by geographical considerations. These notions encompass common sensitivities felt by States and groups who suffer from relationships based on domination and powerlessness. For a self-critical analysis of TWAIL on this matter, see Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) 14 *Oregon Review International Law* 131.

<sup>2</sup> UNGA Res 2131 (21 December 1965) UN Doc A/RES/20/2131; UNGA Res 2625 (24 October 1970) UN Doc A/RES/25/2625; UNGA Res 3201 (1 May 1974) UN Doc A/RES/S-6/3201; UNGA Res 3281 (12 December 1974) UN Doc A/RES/29/3281; UNGA Res 42/173 (11 December 1987) UN Doc A/RES/42/173; UNGA Res 64/189 (21 December 2009) UN Doc A/RES/64/189.

the other hand, when it comes to *hard law*, customary and conventional law are still unclear on the limits of economic and political coercion.<sup>3</sup> Antonios Tzanakopoulos suggests that there is no customary rule on the right to be free from economic coercion, however desirable it would be. This absence can be explained by two reasons. First, it is a hard task to compile evidence of practice and *opinio juris* in support of a right to be free from economic coercion. Second, it is difficult to draw a clear line between pressure and coercion.<sup>4</sup> Yet, be this as it may, the social consequences which result from political and economic coercion during treaty negotiations are highly visible. Some examples, among many others, illustrate this: The United States used their economic leverage to affect Central American countries' foreign policy during the 1970s and Russia, during the Georgian-Russian crisis, issued embargos as soon as Georgia announced that it would take further steps to join NATO.

Many Third World countries are particularly affected by certain forms of non-military coercion. For example, food security is a sensitive theme in the international arena for India, as the country is highly dependent on a complex and fragile network of internal and international suppliers to provide food to its population. The Greek sovereign debt crisis illustrates a case of economic coercion. The Greek government, threatened by a constrained access to liquidity, was pushed into accepting a reinforced regime of conditionalities, which would not be voted favorably under regular democratic processes. Moreover, institutionalized action like the 'Oil-for-Food Programme'<sup>5</sup> evinces that even economic sanctions and countermeasures applied to enforce international law have their risks and must be cautiously planned in order not to reinforce distributive inequalities. Because economic measures carry risks, grave economic coercion – understood as a practice that is unrelated to the implementation of a legal obligation – should definitely not be tolerated.

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<sup>3</sup> Barry E Carter, 'Economic Coercion', *MPEPIL* (September 2009) <<http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1518>> accessed 31 March 2017.

<sup>4</sup> Antonios Tzanakopoulos, 'The Right to Be Free From Economic Coercion' (2015) 4 *Cambridge Journal of International and Comparative Law* 616.

<sup>5</sup> UNSC Res 986 (14 April 1995) UN Doc S/RES/986.

This article sketches a TWAIL critique of how the VCLT regards coercion of the State as a ground of the invalidity of treaties. It is divided in four parts. First, I will describe and analyze the drafting history of Article 52 of the VCLT – that deals with the ground of invalidity – both within the ILC and at the 1968/69 Vienna Conference on the Law of Treaties, in order to evince the underlying North/South tensions therein. Next, I will describe and emphasize how the choice made by the ILC to favor codification in spite of progressive development stands out as a political choice that bears political consequences, drawing upon reflections from critical legal scholars. Then, I will present some TWAIL readings on the pervasive colonialism in international law as a framework for understanding the consequences of a narrow reading of Article 52. Finally, I will offer some concluding remarks, pointing out that there exists some leeway for consolidating non-military coercion as effective grounds of the invalidity of treaties, linked specifically to parallel procedures and treaty interpretation and that TWAILers should explore this leeway.

## II. THE DRAFTING HISTORY OF ARTICLE 52

The ILC decided at its first session, in 1949, to award priority to the codification and progressive development of the law of treaties. Mr. James Brierly was named the first Special Rapporteur. At the Second Session of the ILC (1950), he submitted a Draft Convention on the Law of Treaties and presented a selection of alternative proposals on this subject-matter.<sup>6</sup> Only two proposals presented by James Brierly included rules on the effects of threats or violence over consent to enter into a treaty: Bluntschli's and Fiore's Draft Codes, both written in the second half of the 19<sup>th</sup> century. The Rapporteur's Draft did not elaborate on this issue. Bluntschli's proposal stated that free will did not exist if the representatives of the state were 'subjected to violence or to grave and immediate threats' (Articles 408-409).<sup>7</sup> Fiore's proposal considered that duress<sup>8</sup> was a ground of invalidity when the

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<sup>6</sup> ILC, 'Report on the Law of Treaties by J.L. Brierly, Special Rapporteur' (14 April 1950) UN Doc A/CN.4/23.

<sup>7</sup> Ibid 246.

<sup>8</sup> Despite the existing differences in other contexts, *duress* and *coercion* were used interchangeably during the discussions on grounds of the invalidity of treaties.

State was subjected to 'physical violence' or when its representatives were led to act based on 'external constraint'. Such external constraint needed to be capable of depriving them 'of all deliberation and freedom of judgment' (Article 758).<sup>9</sup>

The validity of treaties concluded under coercion was only addressed directly by Brierly's successor, Sir Hersch Lauterpacht. In Lauterpacht's first Report on the Law of Treaties,<sup>10</sup> presented at the Fifth Session of the ILC (1953), a provision concerning the coercion of the State was written as follows:

Article 12. Absence of compulsion

Treaties imposed by or as the result of the use of force or threats of force against a State in violation of the principles of the Charter of the United Nations are invalid if so declared by the International Court of Justice at the request of any State.<sup>11</sup>

Nearly thirty years before, in *Private Law Analogies*, Lauterpacht had defended that the use of force and threats of force did not vitiate consent to enter into a treaty because of the underdevelopment of international law, rather than the intrinsic adequacy of these means. The use of force and threats of force were a *malum necessarium* caused by the imperfect structure of the legal sanction in international law and the unorganized character of international society. Their use was widespread and they were accepted as general instruments of international relations, encompassing even treaty negotiations. However, for Lauterpacht, if ever there was a change in political

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Both expressions described a circumstance in which a 'threat or actual harm' was posed against the State or its representatives, so that whoever acted under duress or coercion did not voluntarily agree to the treaty, but was effectively and unwillingly forced to enter into it. Some Rapporteurs and experts opted for *duress*, while others preferred *coercion*, but it is not possible to identify fundamental differences in the *travaux préparatoires*. Resort to the authentic texts of the VCLT in different languages reinforces this perception. When we compare the final versions of Article 52 in English, Spanish and French, each one resorts to terms that are not exact and straightforward translations, despite expressing similar ideas: 'coercion', 'coacción' and 'contrainte'.

<sup>9</sup> ILC, 'Report' (n 6) 247.

<sup>10</sup> ILC, 'Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur' (24 March 1953) UN Doc A/CN.4/63.

<sup>11</sup> Ibid 93.

will, international law could effectively impose constraints on violent actions. Such development would be positive for the law of treaties, as it would allow for the consolidation of true consent as the basis of treaty law, instead of fictitious consent – plugging some holes linked to the previously imperfect private law analogy.<sup>12</sup>

As Special Rapporteur, Lauterpacht identified that this development had already taken place. He affirmed that the legal situation had significantly changed since 1928 (and after the presentation of his doctoral thesis). Firstly, the General Treaty for the Renunciation of War outlawed aggressive war and the use of force as an instrument of foreign policy. Then, the Charter of the United Nations limited the use of force between its members. Once the prohibition of the unauthorized use of force took shape as a rule of customary international law, many countries issued declarations against the recognition of treaties resulting from the unlawful use of force.<sup>13</sup>

For Lauterpacht, the newly imposed limits on the use of force and threats of force meant that the field was wide open for coercion to take hold as a ground of the invalidity of treaties. Whilst designing Article 12, he put the proposal from *The Function of Law in the International Community*<sup>14</sup> into practice – indicating that questions related to coercion should be subjected to the compulsory jurisdiction of the International Court of Justice (ICJ). The ICJ would act as a safeguard against baseless and arbitrary allegations of coercion, which would possibly encompass both direct physical force and forceful menaces:

The article refers to physical force or threats of physical force as distinguished from coercion not amounting to physical force. However, in the case of a State the borderline between these two kinds of coercion is not rigid. In fact, it would appear that direct physical force can be applied only to persons, but not to the collective entity of the State. On the other hand, in

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<sup>12</sup> Hersch Lauterpacht, 'Private Law Analogies in International Law' (PhD thesis, The London School of Economics and Political Science 1926) 70-77 <<http://etheses.lse.ac.uk/664/>>, accessed 31 March 2017. In his thesis, Lauterpacht only refers to 'duress' as a ground of the invalidity of treaties alongside 'error' and 'fraud', making no reference to 'coercion', the expression he favored as Rapporteur.

<sup>13</sup> ILC, 'Report' (n 10) 147-152.

<sup>14</sup> Sir Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, Oxford University Press 2011) 431-434.

cases such as attempts or threats to starve a State into submission by cutting off its imports or its access to the sea, although no physical force is used directly against persons it may be difficult to deny that the treaty must be deemed to have been concluded as the result of the use of force or threats of force.<sup>15</sup>

Sir Gerald Fitzmaurice, the third Special Rapporteur, in his third Report on the Law of Treaties,<sup>16</sup> presented at the tenth session of the ILC (1958), denied that duress could affect a State. According to him, duress would only be forbidden by international law when it amounts to a direct physical or mental threat against representatives of the State. Interestingly enough, Fitzmaurice also based himself on a private law analogy to defend this exclusion. In private law, he argued, the question of the validity of contracts is solved with reference to 'individual conscience', as individuals are the only ones who can represent or misrepresent things. According to Fitzmaurice, corporate responsibility has nothing to do with 'corporate consent', but deals merely with questions of entitlement – the definition of who is capable to act in the name of the corporation. As such, corporate entities could hardly be the object of coercion; the only way coercion could take place is through their representatives being forced to act against their will.<sup>17</sup> Hence, for him, traditional international law had correctly repudiated duress as grounds of invalidity applied directly to States. Article 14 of his draft treaty clearly reveals his position by focusing on the representatives of the State rather than on the State:

Article 14. *Duress*

1. Subject to the provisions of paragraphs 2 to 5 below, the conclusion of a treaty brought about by duress or coercion, whether physical or mental, actual or threatened, employed directly and specifically against the persons, of the individual agents, plenipotentiaries, authorities or members of organs engaged in negotiating or signing, or ratifying or acceding to, or any other act of participation in a treaty, vitiates the consent apparently given, and invalidates the act concerned, and consequently the treaty.

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<sup>15</sup> ILC, 'Report' (n 10) 149.

<sup>16</sup> ILC, 'Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur' (18 March 1958) UN Doc A/CN.4/115.

<sup>17</sup> Ibid 38-39.

[...]

4. Duress for the purposes of the present article means duress addressed to the persons concerned, as individuals, or as members of the negotiating, ratifying or acceding body or organ, and directed to securing the performance of the act of participation. Duress is not constituted by the threat of the consequences that will or may ensue for the State of which those persons are nationals, in the event of their non-compliance (or for themselves as nationals of that State), nor by their fear of such consequences, nor by the existence of any indirect threat to themselves or their relatives or dependents that may arise from the possibility of such consequences.<sup>18</sup>

Sir Humphrey Waldock, the fourth and final Special Rapporteur, devoted meticulous attention to this theme in his Second Report on the Law of Treaties,<sup>19</sup> presented at the fifteenth session of the ILC (1963). Because of diverging opinions from previous Special Rapporteurs, Waldock decided to approach coercion in two different articles of Part II of his draft treaty, which respectively dealt with coercion of representatives (Article 11) and coercion of the State (Article 12).

In Article 11, Waldock opted for a broad definition of coercion. Coercion against the representatives may be 'actual or threatened, physical or mental, with respect to their persons or to matters of personal concern'.<sup>20</sup> Waldock explained that the reference to 'mental coercion' intended to account for all acts that fall outside the scope of the use of physical violence. Besides, he pointed out that the reference to 'matters of personal concern' intended to account for acts that targeted persons who are close to the representative, not only him or herself. He affirmed that international practice provided many examples of treaties that could be annulled due to the coercion suffered by the representative of the State: Japanese pressure on the Emperor of Korea in 1905, North American pressure on the Haitian National Assembly in 1915, and German pressure on the President and the Foreign Minister of Czechoslovakia in 1939.<sup>21</sup> In the final text of the VCLT, Waldock's division into two different articles was kept, but Article 51, which now deals with the

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<sup>18</sup> ILC, 'Third Report' (n 16) 26.

<sup>19</sup> ILC, 'Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur' (20 March 1963) UN Doc A/CN.4/156.

<sup>20</sup> Ibid 50.

<sup>21</sup> Ibid 50-51.



coercion of a representative of a State, unfortunately lost all minutiae proposed by the Special Rapporteur, not mentioning coercion to persons who are close to the representative nor making the reference to 'mental coercion' explicit.

Regarding Article 12, unlike Fitzmaurice, Waldock recognized the possibility for a State to be directly coerced. Waldock reaffirmed Lauterpacht's idea that the invalidity of treaties concluded as a result of a State's coercion was *lex lata*. However, he also took into consideration Fitzmaurice's concern for the effectiveness of *pacta sunt servanda* if the grounds of invalidity were too broad. Waldock's middle-ground solution was to take a conservative stance. He limited the scope of the clause only to encompass the illegal use of physical force that could amount to military coercion. Besides, he added a 'procedural brake': after coercion had ceased, the State was only entitled to declare it void if it had never consented to its application:

[...] if 'coercion' were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of 'coercion' are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties. Accordingly, while accepting the view that some forms of 'unequal' treaty brought about by coercion of the State must be regarded as lacking essential validity, the Special Rapporteur feels that it would be unsafe in the present state of international law to extend the notion of 'coercion' beyond the illegal use or threat of force.<sup>22</sup>

Waldock's Draft Articles, adopted provisionally by the ILC in 1965, were sent to governments for commentaries, in accordance with the Statute of the Commission. The ILC discussed them during the seventeenth session, which was conducted in two parts (1965/66) due to the heavy workload. Discussions on the validity of treaties were held in 1966 and were summarized in

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<sup>22</sup> ILC, 'Second Report' (n 19) 52.

Waldock's Fifth Report on the Law of Treaties.<sup>23</sup> Article 36 of the 1965 Draft Articles had the following wording on the coercion of the State:

Article 36. Coercion of a State by the threat or use of force

Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.<sup>24</sup>

On the one hand, many countries in the so-called global periphery considered the scope adopted by the Special Rapporteur to be too narrow, and called for the inclusion of other forms of coercion. The Communist bloc – alongside some African nations – reiterated its post-war political stance<sup>25</sup> against leonine treaties that link former dependent territories to their colonial authorities and disregard assertions of self-determination.

On the other hand, delegates from the Netherlands, the United States and the United Kingdom opposed proposals for the inclusion of non-military force as a form of coercion. They affirmed that: (i) such an inclusion would create uncertainties that would not only deprive the Article of all effectiveness, but also give rise to 'pretexts for the evasion of treaty obligations'; and (ii) the *lex lata* did not forbid the use of economic and political pressure. According to the Dutch representative, 'however reprehensible' some forms of economic or psychological coercion might be, the risks of drafting too broad a rule outweighed the benefits of including them under the single general rule prohibiting coercion.<sup>26</sup> Some developed countries, like Spain, took a middle course, understanding some forms of non-military influence, such as 'the threat of starvation from economic

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<sup>23</sup> ILC, 'Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' (15 November 1965 - 18 January 1966) UN Doc A/CN.4/183 and Add. 1-4.

<sup>24</sup> ILC, 'Draft articles adopted by the Commission' (7 January 1965) UN Doc A/CN.4/L.107.

<sup>25</sup> For further information on this stance, see: Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (first published 1995, Cambridge University Press 2008) 44-47.

<sup>26</sup> ILC, 'Fifth Report' (n 23) 16.

pressure', to be already prohibited by the text of Article 36, under the heading of 'use of force'.<sup>27</sup>

The Special Rapporteur sided with the northern delegates, deciding that his proposal should remain unchanged, and as such should not to include an express provision on economic or political coercion. Indeed, he believed that the Commission's task was to codify the law of treaties by upholding the current doctrine on the limits of the use of force and by simply identifying the *lex lata*, which only amounted to military coercion. To appease the critics, he affirmed that the final formulation, based on the threat or use of force as defined by the principles of the UN Charter, remained sufficiently open-ended:

Under this general formulation the article is, as it were, open-ended: any interpretation of the principle that States are under an obligation to refrain from the threat or use of force in violation of the principles of the Charter which becomes generally accepted as authoritative will automatically have its effects on the scope of the rule laid down in the present article. On the other hand, if the Commission were itself to attempt to elaborate the rule contained in the article by detailed interpretations of the principle, it would encroach on a topic which has been remitted by the General Assembly to the Special Committee and the detailed study of which would seem to belong rather to the topic of State responsibility.<sup>28</sup>

The 1966 Draft Articles, which later on served as the working text at the 1968/69 Vienna Conference, had the following wording on coercion of the State:

Article 49. Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.<sup>29</sup>

During the Vienna Conference, a group of 19 States from the Third World (Afghanistan, Algeria, Bolivia, Congo/Brazzaville, Ecuador, Ghana, Guinea, India, Iran, Kenya, Kuwait, Mali, Pakistan, Sierra Leone, Syria, Tanzania, the United Arab Republic, Yugoslavia and Zambia) proposed an amendment to

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<sup>27</sup> ILC, 'Fifth Report' (n 23) 18.

<sup>28</sup> Ibid 19.

<sup>29</sup> ILC, 'Yearbook of the International Law Commission, 1966, vol. II' UN Doc A/CN.4/SER.A/1966/Add. 1, 183.

Article 49 of the 1966 Draft Articles. Their aim was to include economic and political pressure within the scope of the threat or use of force: 'A treaty is void if its conclusion has been procured by the threat or use of force, including economic or political pressure, in violation of the principles of the Charter of the United Nations'.<sup>30</sup> Due to the great reluctance of some negotiators, especially on the part of the US representative, the alternative wording was not pressed to a vote, and it was alternatively proposed that a declaration be adopted on the theme.<sup>31</sup> The *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*<sup>32</sup> was the outcome of this process. After negotiations, Article 52 of the VCLT was then approved with minor changes:

Article 52. Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

### III. THE POLITICS OF CODIFICATION/PROGRESSIVE DEVELOPMENT AT THE ILC

In spite of Waldock's response that the interpretation of the notion of 'threat or use of force' was open-ended and could change over time, one question looms large over the action of the ILC: why not opt for progressive development in drafting Article 52? The mandate of the ILC is not limited to the codification of international law. The ILC is also entrusted with the progressive development of international law.<sup>33</sup> The Rapporteur's choice to

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<sup>30</sup> UN Doc A/CONF.39/C.1/L.67/Rev.1/Corr.1. Available in UN, 'Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions (Documents of the Conference)' (26 March – 24 May 1968 and 9 April – 22 May 1969) UN Doc A/CONF.39, 172.

<sup>31</sup> Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 642; Georges Ténékidès, 'Les effets de la contrainte sur les traités à la lumière de la Convention de Vienne du 23 mai 1969' (1974) 20 *Annuaire français de droit international* 79, 89-93.

<sup>32</sup> Doc. A/CONF.39/20. Available in UN, 'Official Records' (n 30) 285.

<sup>33</sup> In 1981, after a period where the ILC's usefulness was called into question due to the growing trend of States pursuing codification and progressive development through *ad hoc* bodies, a United Nations Institute for Training and Research

limit his inquiry to elements which undoubtedly formed the *lex lata* and not to encompass further developments in Article 52 stands as a political choice. This does not mean that this choice is inherently bad or good, but only that it can be linked both to a set of value-laden premises and a set of political consequences. When Special Rapporteurs expressly take sides with codification, they act in favor of the *status quo* – using an apologetic language ('the law as it is') to displace further utopian projects ('the law as it should be'). According to Koskenniemi, codification relies on a seemingly neutral and objective process that is supposedly immune to political pressures, but in reality, it also brings about political consequences.<sup>34</sup>

Hersch Lauterpacht, in the 1949 *Survey of International Law in Relation to the Work of Codification of the International Law Commission*,<sup>35</sup> noted that codification within the ILC must not be interpreted as mere registration, or otherwise it would effectively act as 'a brake upon progress'.<sup>36</sup> According to him, codification must entail harmonizing the available sources in order to achieve a systematic and comprehensive final proposal. Therefore, the ILC should not restrict its activities to the search for the least common denominator. According to Lauterpacht, existing practices should be considered *as a whole* in order to bring about a regulation which was neither fragmentary nor incompatible with 'a peaceful and neighbourly intercourse

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(UNITAR) working paper made similar points to the ones I intend to raise in this part of the article. First, the paper identified that there were important ideological discrepancies within the ILC that led to it being too conservative, in such a way that its final drafts only reflected the minimal content of international obligations. Moreover, it suggested that the ILC was not giving proper attention to progressive development, which was all the more needed in newer international regimes that relied on extensive cooperation. The ILC, therefore, was traditionally resorting to a narrow view of codification, which led it not to address certain issues properly. Mohamed El Baradei, Thomas M Franck and Robert Trachtenberg, *The International Law Commission: The Need for a New Direction*, UNITAR Policy and Efficacy Studies no. 1 (1981).

<sup>34</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (first published 1989, Cambridge University Press 2005) 20.

<sup>35</sup> ILC, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission' (10 February 1949) UN Doc A/CN.4/1/Rev.1.

<sup>36</sup> Ibid 7–11.

of States'.<sup>37</sup> When Special Rapporteur Waldock remarked that some 'unequal' treaties lacked essential validity,<sup>38</sup> but chose not to delve further into this, he opted for a narrow view of codification. By filtering out some practices, he merely consolidated certain existing situations, instead of fully grasping the principles underlying the rule in order to reach the protection of true consent.

The final text of Article 52 of the VCLT is also hampered by the 'framing effect': the content of Article 52 is inherently linked to the way the issue was initially framed by the ILC. Discussions on the use of force are very important when it comes to fully grasping the idea of coercion. However, they are not sufficient to deal exhaustively with the issue of coercion. Coercion, corruption, error and fraud are linked to the duty to conduct negotiations in good faith.<sup>39</sup> Whilst error and fraud deal with cases in which a party has imperfect will, corruption and coercion deal with cases in which a party goes against its own will. In coercion cases, a party contradicts its own will due to physical or psychological constraints imposed by the other party. These constraints, mainly psychological ones, are imposed by different means that are not adequately summarized by the idea of the use of force, which is linked to materialistic pressures, mainly of a military nature. The final wording of Article 52 of the VCLT demands the difficult process of translating economic menaces into the language of the use of force. Thus, it ignores that the reasoning in these cases may be quite different.

Waldock's final decision to remit questions over economic coercion to the preferential analysis of the Special Committee on State Responsibility, under the heading of the limits of the use of force, does not make his position politically neutral. The work of the ILC on the topic of State responsibility was in a state of slumber since 1961. Thus, by indicating that the Special Committee on State Responsibility would better address these issues, Waldock's decision ended up 'freezing out' these controversial discussions. Moreover, the limits of economic and political coercion ended up not being properly studied by the Special Committee on State Responsibility. After

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<sup>37</sup> ILC, 'Survey' (n 35) 9.

<sup>38</sup> ILC, 'Second report' (n 19) 52.

<sup>39</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, Cambridge University Press 2006) 106-109.

limiting the scope of its mission to examining secondary norms, following Special Rapporteur Roberto Ago's proposal, the Special Committee on State Responsibility set aside all further discussions on the concept of the use of force, considered by it to be a primary norm.

By leaving the wording of Article 52 of the VCLT interpretively open, one may think that the ILC created a level playing field for case-by-case interpretive disputes. However, the solution to leave the determination of other means of coercion to State practice and to case law is an imperfect solution. It is extremely difficult to depart from the starting point described by Special Rapporteur Waldock, which is not conducive to outlawing economic and political coercion. The procedure of Articles 65 and 66 of the VCLT, unlike the one proposed by Lauterpacht, is weak, as it: (i) only refers to Article 33 of the UN Charter on the pacific settlement of disputes and (ii) at most provides States with non-binding decisions by the Conciliation Commission, according to paragraph 6 of the Annex to the 1969 Convention. Moreover, one should hardly expect UN organs (and even less so the Security Council) to address these questions directly through an authoritative source and not only through *soft law*.

The final decision of the Vienna Conference to condemn 'the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty' in *soft law*<sup>40</sup> does not suffice to give effect to those pressing needs. If it were clear, as the wording of the declaration points out, that such acts violate good faith and sovereign equality,<sup>41</sup> why not strive to include them in

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<sup>40</sup> *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, (Doc A/CONF.39/20). Available in UN, 'Official Records' (n 30) 285.

<sup>41</sup> The Preamble is written as follows: 'The United Nations Conference on the Law of Treaties, Upholding the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith, Reaffirming the principle of the sovereign equality of States, Convinced that States must have complete freedom in performing any act relating to the conclusion of a treaty, Deploing the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States, Desiring to ensure that in the future no such pressure will be exerted in any form by any State in connexion with the conclusion of a treaty'.



the final text? By coupling soft law with soft enforcement,<sup>42</sup> the symbolic message of the declaration may only shine as fool's gold.

#### IV. CREEPING COLONIALISM

The political question which should be brought to the limelight is this: who is favored by the maintenance of the *status quo*?

Since the 1990s, a growing body of literature on the history of international law has pointed out the maintenance of colonial arguments in contemporary international law.<sup>43</sup> As Matthew Craven has shown, a stereotypical depiction of colonialism simply as colonial annexation, which was supposedly brought to an end by the era of decolonization, will do us no favor. Most colonial structures intend to keep advancing free trade and economic exploitation under the color of equality and objectivity. 'It is in the idea of informal empire [...] that a critique of colonialism might retain an enduring value for the current project of international law'.<sup>44</sup>

This was also a common change for TWAILers. The transition from TWAIL I to TWAIL II added new layers of complexity to the depicting of colonial structures.<sup>45</sup> It effected the transition from what James Thuo Gathii calls the *weak* form of anti-colonial scholarship to the *strong* form of anti-colonial scholarship.<sup>46</sup> Acquiring sovereignty was no longer seen as the final answer to colonialism, since informal mechanisms of empire continued to pervade many dealings between sovereign States.

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<sup>42</sup> Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International & Comparative Law Quarterly* 901.

<sup>43</sup> Eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Martti Koskenniemi, 'Empire and International Law: the Real Spanish Contribution' (2011) 61 *University of Toronto Law Journal* 1.

<sup>44</sup> Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 *Nordic Journal of International Law* 335, 342.

<sup>45</sup> Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, 79-86.

<sup>46</sup> James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184, 187-189.

Anne Orford points out that it is important to ask whether and how far the decolonization project has gone. Finding an answer to this question demands attention to the role of the past in shaping the present.<sup>47</sup> The universalist project constantly rewrites its tradition and displaces its forefathers and turning points from one context to another. Drawing from Orford's analysis, one may notice that simply relying on codification and setting aside attempts of progressive development is a 'politics of time': it boils down to mimicking the past, and to fostering the project of historical continuities.

The modernization of colonial legal technologies<sup>48</sup> and their coupling to an ever-renewing universalism is also a theme of great interest to critical international lawyers, not necessarily linked to TWAIL scholarship. A good example of this is David Fidler's depicting of Structural Adjustment Policies (SAPs).<sup>49</sup> According to him, SAPs resemble the classical system of capitulations. Both instruments impose harmonization in order to foster a supposedly advantageous legal, economic and political environment, but essentially rely on unequal relations, which are concealed behind managerialism.

Matthew Craven points out that the disappearance of the discussions regarding unequal treaties has had detrimental effects on our current understanding of international law. As a result, the responses given by the law of treaties to tackle those issues are insufficient.<sup>50</sup> By restraining the discussions on coercion to the threat or use of force, the regime of the VCLT left unanswered some of the most important problems of international politics related to systemic inequalities and vitiated consent. Thereby, it crystallized the North/South cleavage. According to Craven, the analysis of the ICJ in the 1973 *Fisheries Jurisdiction* case constitutes another difficulty for the application of coercion as a ground of the invalidity of treaties. When

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<sup>47</sup> Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz-Fabri (eds), *Droit International et Nouvelles Approches sur le Tiers-Monde: Entre Répétition et Renouveau* (Société de Législation Comparée 2013).

<sup>48</sup> Anghie, *Imperialism, Sovereignty* (n 43) 107.

<sup>49</sup> David A Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization' (2000) 35 *Texas International Law Journal* 387.

<sup>50</sup> Craven, 'What Happened to Unequal Treaties?' (n 44).

denying that the presence of naval forces off the coast of the State did not amount to *clear evidence* of a threat of the use of force, the ICJ raised the burden of proof to a nearly untenable standard, which is only clearly met by military attacks.<sup>51</sup> The ICJ's decision to demand strict material evidence was especially troubling since menaces usually do not 'stay on record'. Searching the *travaux préparatoires* or diplomatic exchanges for a clear statement on the issue is hardly successful.

Other of Craven's poignant reflections relate to the negative role that the doctrine of sovereign equality plays in the law of treaties. Indeed, a presumption of equality is usually positive for the *implementation* of the treaty, as it insists on charging both parties with the duty of performance, guaranteeing that whatever was agreed will effectively be implemented. However, this presumption is not particularly useful when it comes to the moment of the *conclusion* of the treaty – it is then that power relations may lead to abusive pressures and unwanted concessions and should therefore be susceptible and subject to legal analysis.<sup>52</sup>

Stanislaw Nahlik noticed that the idea of a presumed consent was not definitely abandoned by the ILC in the discussions on the law of treaties.<sup>53</sup> According to him, Special Rapporteur Waldock waged *pacta sunt servanda* against substantive consent, giving preference to the former in spite of the latter. Waldock constantly emphasized the idea that invalidity is an exceptional condition that should not be easily summoned. Otherwise, it would undermine the sanctity of treaties, which is a necessary condition to general welfare. This inversion appears as an argumentative strategy to contradict the liberal postulates on which the universalist tradition rests – that without free consent, no obligations are born. However, this argument is not convincing as it does not evince which overarching principle would trump other forms of coercion. This tactic echoes Martti Koskenniemi's description of the conundrum of tacit consent: tacit or presumed consent is an international legal argument supposedly based on consent, but that

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<sup>51</sup> Craven, 'What Happened to Unequal Treaties?' (n 44) 373.

<sup>52</sup> Ibid 337-341.

<sup>53</sup> Stanislaw E Nahlik, 'The Grounds of Invalidity and Termination of Treaties' (1971) 65 *American Journal of International Law* 736.

actually supports non-consensual justice.<sup>54</sup> It may be summarized as follows: once the treaty is signed, we *presume* consent and raise the bar for displacing it, instead of primarily considering whether it was signed or not in free will.

The line of reasoning followed by Special Rapporteur Waldock is quite similar to the one followed by the authors who defended the system of capitulations in international law.<sup>55</sup> In both cases, the need to facilitate international relations was summoned to justify greater or lower tolerance towards certain practices. In the case of coercion, the 'normal working of the relations between States' implied that the invalidity of treaties is a last resource; in the case of capitulations, exceptions to the principle of territoriality would 'smoothen' the contacts between non-civilized and civilized nations. The strong presumption against invalidity and the preservation of sacrosanct agreements trample on the question of their regularity.

To conclude this section, I will reply to the question posed at the beginning of it. The maintenance of the *status quo*, in the case of Article 52 of the VCLT, is beneficial to power-relations and hard power in international politics and supports the 'carrots and sticks' model. The lack of a definitive position on the limits of coercion and the idea that these grounds of invalidity should only be summoned as a last resource incentivize the assertion of power in treaty negotiations and poses weak resistance to power politics instruments.<sup>56</sup>

## V. CONCLUDING REMARKS

The invalidity of treaties concluded under coercion must not be taken lightly, considering the risks that the acceptance of economic and political menaces as tools of negotiation brings to international relations. Many underdeveloped countries have a single big commercial partner who is capable of dictating its integration into chains of commerce, and who, by blocking the trade of goods with the weaker State or shunning its access to

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<sup>54</sup> Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, 20-27.

<sup>55</sup> Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th Centuries* (Oxford University Press 1967) 97-128.

<sup>56</sup> Martin Wight, *Power Politics* (first published 1946, Bloomsbury 2002).

international mechanisms, may lead entire populations to famine. In situations like this, the weak negotiating country has no alternative but to bow down.

I strongly disagree with Sir Gerald Fitzmaurice's reasoning that private law analogies are not useful in the case of coercion against the State. The private law analogy is extremely useful to point out that international law's response to coercion lags far behind. Unlike international law, most national legal systems have already developed legal mechanisms that provide special protection for the weaker party in excessively unequal negotiations, embedding public law values in private law dealings. Labor law and consumer protection are great examples of these mechanisms. It is extremely important that we take consent seriously in international law, by outlawing the use of other forms of coercion in the conclusion of treaties.

The outcome of the VCLT negotiations is tainted by the decision not to give proper attention to intolerable forms of coercion. As such, it perpetuates the mechanisms of informal empire. The final choice to assert that alternative forms of pressure can be detrimental to good faith and sovereign equality through a *soft law* instrument, that is, the *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, provides only a minor silver lining to the issue.<sup>57</sup>

As true as these criticisms may be, they do not answer the question of what to do next. TWAILers often face the 'chicken or egg dilemma': should they abandon the whole system due to its problems or should they try to work within the system in order to enhance it? This brings to the fore an already well-established criticism: the first TWAILers generally chose the latter option and were often accused by their younger peers of being too

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<sup>57</sup> Georges Ténékidès suggests that the *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties* be given at least the same value as the preamble of the VCLT in helping assess its meaning, since it was approved at the Vienna Conference and included in its Final Act – Ténékidès, 'Les effets de la contrainte' (n 31) 91. This reading is hardly compatible with the general rules on treaty interpretation, but it is important to emphasize that the *Declaration* may at least be summoned as evidence regarding the 'context' of the treaty (Article 31.1) or as an important part of its 'preparatory work' (Article 32) – Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2010) 79–80.

mainstream and optimistic in that regard; at the same time, many recent TWAILers fall prey to launching empty criticism, as they choose the former option. The choice seems to come down to being too much of a bureaucrat or too much of a utopian.

In cases like the one at hand, we test the limits of TWAIL's division into two – or more – subgroups that supposedly have distinctive characteristics and different approaches.<sup>58</sup> After all, TWAILers from both (or more) generations share the same objective – namely, to build an equal world that is neither insensitive nor negative to the South. In order to achieve this objective, one is not obliged to adopt a sole strategy, and this is all the more true when we think of TWAIL as an interdisciplinary movement. TWAILers should keep on criticizing the colonial traits of international law, but criticism does not preclude effective action under the spaces granted by international law.

As I have pointed out, it is true that the current architecture of Article 52 of the VCLT makes most formal mechanisms for constraining non-military coercion barely useful at most. The criticisms formulated against Article 52 and the demands for its revision are all well-warranted. Political action is still the main mechanism for the outlawing of non-military coercion as an instrument in treaty negotiations.<sup>59</sup> However, TWAILers should not refrain from trying to exploit the small leeway that is available. Shadow reporting to human rights bodies, highlighting the incongruences of traditional institutions of international law, cooperating with non-governmental and civil organizations, using internal mechanisms to report governmental abuse – these are some of the parallel tracks that may be used to mount a challenge against a narrow interpretation of coercion.

Moreover, TWAILers should not refrain from taking up the task of using mainstream reasoning against mainstream actors. The doubts over methodological originality and specificity<sup>60</sup> should not hinder TWAILers in

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<sup>58</sup> George RB Galindo, 'Splitting TWAIL?' (2016) 33 Windsor Yearbook of Access to Justice 37.

<sup>59</sup> Tzanakopoulos, 'The Right to Be Free' (n 4).

<sup>60</sup> Olivier Corten, 'Les TWAIL: Approche Scientifique Originale ou Nouveau Label Fédérateur?' in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz-Fabri (eds), *Droit International et Nouvelles Approches sur le Tiers-Monde: Entre Répétition et Renouveau* (Société de Législation Comparée 2013) 358-362.



pursuing their objective. TWAILers must wage legal arguments as political instruments to foster dissent and to bring about change in international relations.<sup>61</sup>

In this sense, as the ILC has indicated that Article 52 may embrace other interpretations, TWAILers should strive to make this recognition of an opening pay off. Treaty interpretation, after all, involves its own politics and allows as such for different solutions based on different methods none of which is exclusively correct.<sup>62</sup> Firstly, TWAILers should not fall into the trap of affirming that all exceptions must be interpreted restrictively (*exceptio est strictissimae interpretationis*). It is clear that the clause on coercion of the State should also be given an effective interpretation, as it safeguards fundamental values.<sup>63</sup>

Secondly, TWAILers may subvert the idea of restrictive interpretation in their favor, as it stands as a technique that can safeguard sovereignty. If the right to enter into treaties and to be bound by them amounts to the exercise of a sovereign prerogative, as the *Lotus* and *Wimbledon* cases have pointed out, the right to be bound only by a treaty to which full consent was given is also a sovereign prerogative. In this sense, when Articles 2.1.f and 2.1.g of the VCLT refer to 'a State which has consented to be bound by the treaty', a narrow interpretation would displace cases in which the treaty was effectively imposed.

Finally, a teleological interpretation of Article 52 of the VCLT also evinces the central role that consent plays in the conclusion of treaties, so much so that validity should be considered to depend on it. It should be up to detractors of this view to demonstrate both why setting aside non-military coercion and distinguishing it from military coercion is justifiable and how true consent is preserved in these contexts.

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<sup>61</sup> David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

<sup>62</sup> Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 3-32.

<sup>63</sup> Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 424-430.



## GENERAL ARTICLES

### AN ANALYSIS OF THE DIPLOMATIC CRISIS BETWEEN TURKEY AND THE NETHERLANDS IN LIGHT OF THE EXISTING INTERNATIONAL LEGAL FRAMEWORK GOVERNING DIPLOMATIC AND CONSULAR RELATIONS

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*Some of the most heated events related to the 2017 Turkish referendum, which significantly amended the country's constitution, did not take place in Turkey but in several European countries where a large number of Turkish citizens reside. The tension escalated when the Netherlands barred a plane carrying the Turkish Minister for Foreign Affairs from landing on Dutch soil and then prevented the Turkish Family and Social Policies Minister from accessing the Turkish Consulate in Rotterdam. This triggered what has been described as an unprecedented diplomatic crisis between two NATO allies. Turkey vigorously claimed that the Netherlands' behaviour breached the law of diplomatic and consular relations. The Netherlands, in turn, defended its actions, stating that they did not amount to a violation of international law. The present article will first provide an overview of these events and introduce the claims that were made by each side. Secondly, this article will briefly analyse the relevant treaty provisions and customary rules to ascertain whether Foreign Ministers enjoy a special status while visiting a third country and whether consular premises can legitimately be used to carry out political activities, ultimately challenging Turkey's claims that the Netherlands violated international law.*

**Keywords:** Vienna Convention on Diplomatic Relations, Vienna Convention on Consular Relations, customary international law, diplomatic immunities and privileges

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## TABLE OF CONTENTS

I. INTRODUCTION .....	62
II. AN OVERVIEW OF THE LEGAL CLAIMS BROUGHT FORWARD BY TURKEY AND THE NETHERLANDS .....	66
1. <i>The Alleged Violations of International Law Claimed by Turkey</i> .....	68
2. <i>The Counter-Arguments Advanced by the Netherlands</i> .....	69
III. AN ANALYSIS OF THE CLAIMS AGAINST THE BACKDROP OF THE CURRENT INTERNATIONAL LEGAL FRAMEWORK.....	72
1. <i>The Immunities and Privileges Enjoyed by Foreign Ministries in a         Third Country</i> .....	72
2. <i>The Legal Status of Diplomatic and Consular Premises</i> .....	77
IV. CONCLUDING REMARKS .....	78

### I. INTRODUCTION

The Turkish constitutional referendum, which took place on the 16<sup>th</sup> of April 2017, has not been treated merely as a matter of internal affairs. The referendum was a source of escalating tensions between Turkey and several European Union ('EU') Member States, including Germany, Austria, Belgium and the Netherlands. Relations between Turkey and the EU deteriorated last year when the Member States harshly criticised Turkish President Recep Tayyip Erdoğan for a mass crackdown on political opponents in the wake of a failed coup. The referendum to change the Turkish Constitution from a parliamentary to a presidential system further exacerbated the divide between Turkey and its historical Western allies, because the proposed constitutional amendments were likely to result in 'the excessive concentration of powers in one office, with serious effects on the necessary checks and balances and on the independence of the judiciary'.<sup>1</sup> Now that the constitutional changes have been approved, they will allow President Recep Tayyip Erdoğan to run for the redefined office of President

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<sup>1</sup> European Commission, Joint Statement by High Representative/Vice-President Federica Mogherini and Commissioner Johannes Hahn on the Venice Commission's Opinion on the amendments to the Constitution of Turkey and recent events (2017) Statement/17/588.

for another two terms in the next Turkish elections in 2019, meaning that he could hold power until 2029.

Even though it was contrary to Turkey's own domestic legislation,<sup>2</sup> ahead of the referendum, Turkey dispatched high-level politicians, particularly Government Ministers, to a number of European countries. To campaign for the 'Yes' vote, Turkey sought to organise rallies in European cities and towns that had large populations of Turkish expatriates.<sup>3</sup> It is estimated that the number of Turkish nationals living abroad exceeds 5.5 million, around 4.6 million of which live in Western European countries<sup>4</sup> such as Germany and the Netherlands. The campaign in these countries was thus crucial for gaining the vote of the 'diaspora' community.<sup>5</sup> In the end, the diaspora's vote indeed played a decisive role in the outcome of the referendum, showing greater support for the constitutional reform than the home vote.<sup>6</sup>

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<sup>2</sup> Art 94/A of Turkish electoral law explicitly bans campaigning abroad or in foreign diplomatic missions: Law No 298 of 1961 on Basic Provisions on Elections and Voter Registers, 4.t. Register, vol I – 2553.

<sup>3</sup> See Betigül E Argun, *Turkey in Germany: The Transnational Sphere of Deutschkei* (Routledge 2003); Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review* 2939; as explained by the author, the term 'expatriates' refers to citizens who live permanently or temporarily outside their country of citizenship.

<sup>4</sup> Françoise de Bel-Air, 'Migration Profile: Turkey' (2016) Policy Brief, Robert Schuman Centre for Advanced Studies 9 <[www.cadmus.eui.eu/bitstream/handle/1814/45145/MPC\\_PB\\_2016\\_09.pdf?sequence=1](http://www.cadmus.eui.eu/bitstream/handle/1814/45145/MPC_PB_2016_09.pdf?sequence=1)> accessed 20 June 2017.

<sup>5</sup> On the external voting rights of foreign citizens residing abroad, see generally Jean-Michel Lafleur, *Transnational Politics and the State: The External Voting Rights of Diasporas* (Routledge 2013); Francesco Ragazzi, 'A Comparative Analysis of Diaspora Policies' (2014) 41 *Political Geography* 74; Sybil Rhodes and Arus Harutyunyan, 'Extending Citizenship to Emigrants: Democratic Contestation and a New Global Norm' (2010) 31 *International Political Science Review* 470, 475-480; Jose Itzigsohn, 'Immigration and the Boundaries of Citizenship: The Institutions of Immigrants' Political Transnationalism' (2000) 34 *International Migration Review* 1126.

<sup>6</sup> The highest level of support was seen among Turks in Germany, Belgium, Austria and the Netherlands, with some 63, 75, 73 and 71 percent respectively being in favour of the proposed reforms. In contrast, in Turkey, the 'Yes' vote had about 51.3 percent, as compared to 48.7 percent for the 'No' vote. The close referendum

The tension between Turkey and the EU countries began in Germany, on the 2<sup>nd</sup> of March 2017, when the Turkish Justice Minister, Bekir Bozdağ, was expected to speak at a public rally organised by the Turkish community in the German town Gaggenau. The event was cancelled following the municipality's declaration that the hall allocated for the rally had been withdrawn due to concerns about parking space. Over the next couple of days, municipalities all over Germany cancelled several rallies in support of the Turkish referendum due to security concerns and/or technical issues. For example, the city of Hamburg banned a planned appearance of the Turkish Minister for Foreign Affairs, Mevlüt Çavuşoğlu, on the pretext that fire protection measures were insufficient. In a speech delivered in Istanbul on the 5<sup>th</sup> of March 2017, President Erdoğan called the German actions 'fascist' and claimed that 'they demonstrated that Germany has not moved on from its Nazi past'.<sup>7</sup>

Later in March, while the row continued to escalate between Germany and Turkey, the Netherlands significantly worsened existing tensions. The Dutch government, first, barred a plane carrying the Turkish Foreign Affairs Minister from landing on Dutch soil. Furthermore, the Turkish Family and Social Policies Minister, Fatma Betül Savaş Kaya, who had reached the Netherlands from Germany by car, was prevented from visiting her country's consulate in Rotterdam. Fearing a serious disturbance of public order, the Mayor of Rotterdam issued an emergency order for the area outside of the Turkish Consulate General, and a police cordon was placed around it. The Dutch government explained that it considered the visits undesirable and that it 'could not cooperate in the public political campaigning of Turkish

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result prompted a reaction on the part of the European Commission, which called on the Turkish authorities to seek the broadest possible national consensus in the implementation of the constitutional amendments: see European Commission, Statement by President Juncker, High Representative/Vice-President Mogherini and Commissioner Hahn on the referendum in Turkey (2017) Statement/17/981.

<sup>7</sup> Presidency of the Republic of Turkey, 'I Believe All Citizens will Unite at 'Yes' for the Future of Turkey' (5 March 2017) <<https://www.tccb.gov.tr/en/news/542/72226/turkiyenin-istikbali-icin-tum-vatandaslarin-evette-birlesecegine-inaniyorum.html>> accessed 7 May 2017.

Ministers in the Netherlands'.<sup>8</sup> Turkey, in return, claimed that the Netherlands' actions violated international law, making explicit reference to the Vienna Convention on Diplomatic Relations ('VCDR'),<sup>9</sup> the Vienna Convention on Consular Relations ('VCCR')<sup>10</sup> and international human rights law ('IHRL'). Moreover, Turkey threatened to impose sanctions against the Netherlands and take the case before the European Court of Human Rights ('ECtHR').<sup>11</sup>

Leaving aside political considerations and motivations, which have certainly played a major role in shaping these events, especially since the Dutch parliamentary elections took place just a few days after the 'diplomatic incident' with Turkey,<sup>12</sup> the present article will analyse the feud from a legal point of view, which has not been adopted thus far. The article will first provide an overview of the key international legal claims and counter-claims that were raised by the parties involved in this unprecedented and much debated diplomatic dispute. Secondly, the article challenges the allegations vehemently brought forward by Turkey, that the Netherlands' actions amounted to a violation of the law of diplomatic and consular relations. The article will demonstrate that Turkey, to foster the engagement of Turkish nationals residing abroad in the upcoming referendum, took actions that required the expressed consent of the receiving State. In fact, Turkey wrongly assumed that its Ministers enjoyed a special status in a third country

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<sup>8</sup> The Netherlands Government statement concerning Turkish Minister Kaya's escorted departure (12 March 2017), <<https://www.government.nl/latest/news/2017/03/12/government-statement-concerning-turkish-minister-kaya-s-escorted-departure>> accessed 7 May 2017.

<sup>9</sup> Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR).

<sup>10</sup> Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR).

<sup>11</sup> Tuvan Gumrukcu and Tulay Karadeniz, 'Turkey Targets Dutch with Diplomatic Sanctions as 'Nazi' Row Escalates' *Reuters* (Ankara, 14 March 2017) <<http://www.reuters.com/article/us-turkey-referendum-netherlandsidUSKBN16JoIU>> accessed 7 May 2017.

<sup>12</sup> Tim Boersma, 'The Netherlands' Complicated Election Result, Explained' (Brookings Institute, 20 March 2017) <<https://www.brookings.edu/blog/order-from-chaos/2017/03/20/the-netherlands-complicated-election-result-explained/>> accessed 12 May 2017.

and autonomously decided to use consular premises to carry out political activities, taking for granted the compatibility of this behaviour with the correct exercise of consular functions.<sup>13</sup>

Since the focus of this analysis is limited to the law of diplomatic and consular relations, the present article will not discuss the other major question triggered by this row, i.e. whether the 'external' (or 'out-of-country') voting rights of third country citizens residing abroad are embedded in the current IHRL framework and to what extent such rights must be implemented and/or can be legitimately limited.<sup>14</sup>

## II. AN OVERVIEW OF THE LEGAL CLAIMS BROUGHT FORWARD BY TURKEY AND THE NETHERLANDS

Prior to diving into the legal issues that emerged during this diplomatic feud, a few caveats are necessary. In a nutshell, diplomatic relations entail 'the exercise by the sending government of state functions on the territory of the receiving state by licence of the latter'.<sup>15</sup> Once the receiving State has agreed to the establishment of diplomatic relations, which in the case of the Netherlands and Turkey occurred in 1612,<sup>16</sup> it must enable the sending State to benefit from the content of the licence. This obligation results, *inter alia*,

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<sup>13</sup> Art 5 VCCR (n 10).

<sup>14</sup> See on this point, Richard Lappin, 'The Right to Vote for non-Resident Citizens in Europe', (2016) 65 International & Comparative Law Quarterly 859, 861-63; Michael Collyer, 'A Geography of Extra-Territorial Citizenship: Explanations of External Voting' (2014) 2(1) Migration Studies 55, 67; Ruth Rubio-Marin, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81 New York University Law Review 117; Frédéric Mégret and Raphaël Girard, 'Diasporas, Extraterritorial Representation and the Right to Vote' (2014) 52 Canadian Yearbook of International Law 189.

<sup>15</sup> See Alan James, 'Diplomatic Relations and Contacts' (1992) 62 (1) British Yearbook of International Law 347, 354-57; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2013) 397.

<sup>16</sup> As reported by the Dutch Government, 'Relations between the Netherlands and Turkey', <<https://www.government.nl/topics/international-relations/overview-countries-and-regions/turkey>> accessed 20 June 2017.



in a body of privileges and immunities,<sup>17</sup> in the observance of legal duties by the receiving State,<sup>18</sup> and in the mission's inviolability.<sup>19</sup>

Formally speaking, consular relations are distinct from diplomatic relations,<sup>20</sup> meaning that two States may have consular relations but not diplomatic relations, and vice versa. In part, this distinction is derived from the fact that historically, the functions of a consul were quite different from those of a diplomat, with the former being regarded as an agent 'deprived of representative character'.<sup>21</sup> This difference ultimately led to the codification of two separate Conventions, i.e. the VCDR and VCCR, both of which are relevant to the present analysis and form the core of diplomatic and consular law.<sup>22</sup> While the VCDR codifies the customary rules regarding bilateral diplomatic relations between States and its provisions have largely become part of general international law, the VCCR embodies a general framework of minimum standards for consular relations.<sup>23</sup> Furthermore, both

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<sup>17</sup> Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4<sup>th</sup> edn, Oxford University Press 2016) 232; Ivor Roberts, *Satow's Diplomatic Practice* (6<sup>th</sup> edn, Oxford University Press 2009) 97; Bhagevatula Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (Springer 1989) 5; Jonathan Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 *International & Comparative Law Quarterly* 53.

<sup>18</sup> See *United States Diplomatic and Consular Staff in Tehran (Hostages Case) (United States of America v Iran)* (Merits) [1980] ICJ Rep, para 62. The Court highlighted that such obligations concerning the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission continued even in cases of armed conflict or the breach of diplomatic relations. See Kazimierz Gryzbowski, 'The Regime of Diplomacy and the Tehran Hostages' (1981) 30 *International & Comparative Law Quarterly* 42.

<sup>19</sup> Crawford (n 15) 402.

<sup>20</sup> James (n 15) 356.

<sup>21</sup> John R Wood and Jean Serres, *Diplomatic Ceremonial and Protocol, Principles, Procedures, and Practices* (Macmillan 1970) 64.

<sup>22</sup> Jan Wouters, Sanderijn Duquet and Katrien Meuwissen, 'The Vienna Conventions on Diplomatic and Consular Relations' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press 2013) 510-543.

<sup>23</sup> Luke T Lee and John B Quigley, *Consular Law and Practice* (3<sup>rd</sup> edn, Oxford University Press 2008) 107.



Conventions affirm the inviolability of the mission's premises, which are defined as the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post or the diplomatic mission.<sup>24</sup> The consular and diplomatic premises cannot be accessed by the agents of the receiving State without the expressed consent of the head of the mission, and the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.<sup>25</sup>

This brief overview of the law of diplomatic and consular relations is essential in framing the issues brought forward by Turkey and the Netherlands' response. In light of the existing legal framework, it is possible to identify the main claims advanced in the dispute, which can be summarised in two points. The first concerns the immunities and privileges enjoyed by Foreign Ministries in a third country, while the second pertains to the legal status of diplomatic and consular premises.

#### *1. The Alleged Violations of International Law Claimed by Turkey*

Following the events briefly presented in the introduction, the Turkish government was not shy in voicing its disappointment with and anger towards the Netherlands. President Erdoğan accused the Dutch government's behaviour as violating 'diplomacy and international law'.<sup>26</sup> With regard to the status of the two Turkish Ministries involved in the row, the Turkish President initially only protested the denial of landing permits to the Minister for Foreign Affairs and denounced it as 'a scandal in every way'. Later he also affirmed that 'a woman minister of Turkey does not need any permission to meet with her citizens inside her own country's

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<sup>24</sup> Art 1 VCCR (n 10) and Art 1 VCDR (n 9). In the case of the VCDR, the premises of the mission also include the residence of the head of the mission.

<sup>25</sup> Art 22 VCDR (n 9) and Art 31 VCCR (n 10). It shall be noted that Art 31 para 3 of the VCCR provides for an explicit exception to the inviolability principle because it states that 'the consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.'

<sup>26</sup> Presidency of the Republic of Turkey, 'I Call on All International Organizations to Impose Sanctions on the Netherlands', 12 March 2017, <<https://www.tccb.gov.tr/en/search/?s=the%20Netherlands>> accessed 20 June 2017.

consulate'.<sup>27</sup> Furthermore, President Erdoğan asserted that '[a]ccording to international law, embassies and consulates *are territories of the States they represent*. In other words, both the Embassy and the Consulate in the Netherlands are our territory'.<sup>28</sup> He also openly condemned the municipality of Rotterdam's declaration of a state of emergency for the area surrounding the Turkish Consulate-General. According to him, this declaration breached the obligation to respect the inviolability of the consular premises, solely in order to prevent the Minister from leaving her car and to halt the 'peaceful demonstration' of the Turkish citizens who had gathered outside the building to protest against the Netherlands government's actions.<sup>29</sup>

In response to the Dutch government's conduct, Turkey retaliated by barring planes carrying Dutch diplomats or envoys from landing in Turkey or using Turkish airspace. Moreover, based on the assumption that the Netherlands' actions gave rise to breaches of international law, Turkey called on international organizations to implement sanctions against the Netherlands and ultimately submitted an official note to the UN Secretary-General to complain about violations of the VCDR and the VCCR.<sup>30</sup>

## *2. The Counter-Arguments Advanced by the Netherlands*

In response to Turkey's accusations, the Dutch government made its counter-claims public. With regard to the denial of landing rights to the Turkish Minister of Foreign Affairs, the Netherlands reported that discussions with the Turkish authorities were underway regarding the Minister's visit. According to a statement published by the Dutch government, the two parties had talked about possibly 'moving the meeting to a Turkish consulate or embassy, closing it to the public and organising it

<sup>27</sup> Presidency on Turkey (n 26).

<sup>28</sup> Ibid (emphasis added).

<sup>29</sup> Presidency of the Republic of Turkey, 'The Whole Europe Has Got Mobilized for 'No' in April 16 Referendum', 15 March 2017, <<https://www.tccb.gov.tr/en/search/?s=the%20Netherlands>> accessed 15 May 2017.

<sup>30</sup> The original text of the note has not been made public, but the news has been reported by several news agencies. See Canberk Yüksel, Turkey Notifies UN of Dutch Government's International Law Breaches, Anadolu Agency, 16 March 2017, <<http://aa.com.tr/en/americas/turkey-notifies-un-of-dutch-govts-intl-law-breaches/772544>> accessed 15 May 2017.

on a smaller scale'.<sup>31</sup> The Dutch government had indicated that in any case, Turkey's Minister of Foreign Affairs would 'not be welcome in his official capacity, but that arrangements could be made for a visit by him as a private individual'.<sup>32</sup> While discussions were still in progress regarding the details (with a view to maintaining public order) of the Minister's visit as a private individual, Mr. Çavuşoğlu appeared on CNN Turk on the morning of Saturday, the 11<sup>th</sup> of March 2017, and threatened the Netherlands with economic and political sanctions, should his aircraft be prevented from landing.<sup>33</sup> These threats made the quest for a reasonable compromise impossible and led to the Dutch government's decision to deny landing rights.<sup>34</sup> The Dutch government also explained that in principle, it had no objections to hosting meetings to inform the Turkish citizens residing on its territory about the referendum; however, such meetings had to comply with the Netherlands' 'justified concerns regarding public order'.<sup>35</sup>

In relation to the Turkish Minister of Family and Social Policies, the Dutch government stressed that the decision to organise the visit was made unilaterally. The Turkish authorities did not agree to share information about the Minister's travel plans, and deliberate efforts were made to mislead the Dutch authorities so as to ensure that Ms. Kaya could travel to Rotterdam without hindrance.<sup>36</sup> According to the Netherlands, Ms. Kaya did not enjoy any special status in the Netherlands, because:

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<sup>31</sup> Government statement on the denial of Turkish landing rights, 11 March 2017, <<https://www.government.nl/latest/news/2017/03/11/government-statement-on-the-denial-of-turkish-landing-rights>> accessed 15 May 2017.

<sup>32</sup> Letter of 10 April 2017 from the Prime Minister, the Minister of Social Affairs and Employment and the Minister of Foreign Affairs, in conjunction with the Minister of Security and Justice and the Minister of the Interior and Kingdom Relations, to the House of Representatives on attempted campaign appearances by Turkish ministers (Letter to the House of Representatives), 10 April 2017, <<https://www.government.nl/documents/parliamentary-documents/2017/04/13/letter-to-the-house-of-representatives-on-campaign-appearances-by-turkish-ministers>> accessed 15 May 2017.

<sup>33</sup> Ibid.

<sup>34</sup> Government statement on the denial of Turkish landing rights (n 31).

<sup>35</sup> Letter to the House of Representatives (n 32).

<sup>36</sup> Ibid.

International law grants a special status only to (1) heads of State, heads of Government and foreign ministers, (2) diplomatic and consular staff who have been accredited or whose appointment has been notified to the Netherlands, and (3) foreign officials on official missions, for which an invitation from the Netherlands is required. Ms. Kaya did not fall within any of these categories.<sup>37</sup>

In other words, the Dutch government reached the conclusion that even though Ms. Kaya was a foreign government official, she did not enjoy the privileges and immunities given to specific officials under the current international legal framework. Furthermore, the Dutch government underlined that a foreign government official does not have the right to enter the Netherlands in order to carry out political activities. Once present in the Netherlands, a foreign government official has the right to freedom of expression, but 'restrictions can be applied if there are sufficient grounds'.<sup>38</sup> This is consistent with the European Convention on Human Rights ('ECHR'),<sup>39</sup> in particular, with the provision enshrined in Article 16, according to which 'nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens'.<sup>40</sup>

With regard to the emergency order issued for the area surrounding the Turkish Consulate in Rotterdam, the Dutch government did not provide any legal justification and simply reiterated that the decision was made to avoid 'a serious public order disturbance'.<sup>41</sup>

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<sup>37</sup> Letter to the House of Representatives (n 32).

<sup>38</sup> Ibid.

<sup>39</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>40</sup> The European Court of Human Rights' jurisprudence concerning Art 16 is very limited. See, for instance, *Piermont v France* (1995) 20 EHRR 301.

<sup>41</sup> Letter to the House of Representatives (n 32). See also Government statement concerning Turkish Minister Kaya's escorted departure, 12 March 2017, <<https://www.government.nl/latest/news/2017/03/12/government-statement-concerning-turkish-minister-kaya-s-escorted-departure>> accessed 18 May 2017.

### III. AN ANALYSIS OF THE CLAIMS AGAINST THE BACKDROP OF THE CURRENT INTERNATIONAL LEGAL FRAMEWORK

The following section addresses the two main claims brought forward by Turkey and assesses their legitimacy or lack thereof, in light of the existing legal framework governing diplomatic and consular relations between States. By expanding and deepening the counter-arguments already presented by the Dutch government (outlined in the section above), the following section will provide a detailed overview of the international treaty provisions and customary rules that are most relevant to the present analysis.

#### *1. The Immunities and Privileges Enjoyed by Foreign Ministries in a Third Country*

The first question to address concerns the status enjoyed by foreign ministers abroad – more specifically, whether the denial of landing rights to the Turkish Minister of Foreign Affairs and the lack of recognition of any privileges pertaining to the Turkish Minister of Family and Social Policies amount to violations of the law of diplomatic and consular relations. With regard to the dispute over the alleged violations committed against Mr. Çavuşoğlu, it is worth noting that the status of a Minister of Foreign Affairs is not fully outlined in the existing treaty law.<sup>42</sup> However, in the *Arrest Warrant* case, the International Court of Justice ('ICJ') provided a brief analysis of the nature of the functions attached to this role:

There is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State [...] In the performance of these functions, *he or she is frequently required to travel*

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<sup>42</sup> Art 21, para 2 Convention on Special Missions (adopted 8 December 1996, entered into force 21 June 1985) 1400 UNTS 231, which states that '[t]he Head of the Government, the Minister of Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law'. See Art 7, para 2(a) Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, according to which 'In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty [...]'.

*internationally, and thus must be in a position freely to do so whenever the need should arise.*<sup>43</sup>

In sum, according to the ICJ, under international law, a Minister of Foreign Affairs is recognised as the representative of the State solely by virtue of his or her office. He or she must be in a position to travel and communicate freely in the performance of this function.<sup>44</sup> A Minister of Foreign Affairs thus enjoys all privileges and immunities granted by the VCDR.

However, as stated in the Convention, 'it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. *They also have a duty not to interfere in the internal affairs of that State.*'<sup>45</sup> Furthermore, according to the VCDR, '[a]ll official business with the receiving State entrusted to the mission by the sending State *shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.*'<sup>46</sup> The Dutch government explained that it had no intention of welcoming the Turkish Minister of Foreign Affairs in his official capacity. First, the Netherlands could not be used as a political campaign area for other countries and the rallies would have the potential to create divisions within the Dutch Turkish minority, which had both pro- and anti-referendum camps.<sup>47</sup> Therefore, it seems reasonable to conclude that the Dutch government denied landing rights and access to its territory to the Turkish Minister of Foreign Affairs as a form of retorsion following his public threats.<sup>48</sup>

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<sup>43</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, paras 53-54 (emphasis added).

<sup>44</sup> Neil Boister, 'The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law' (2002) 7(2) *Journal of Conflict and Security Law* 293, 298.

<sup>45</sup> Art 41, para 1 VCDR (n 9) (emphasis added).

<sup>46</sup> Art 41, para 2 VCDR (n 9) (emphasis added).

<sup>47</sup> Letter to the House of Representatives (n 32).

<sup>48</sup> Measures of retorsion amount to unfriendly acts at most, i.e. acts that are wrong not in the legal sense but only in the political or moral sense, or a simple discourtesy. Moreover, acts of retorsion may include the prohibition of or placing of limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or the withdrawal of voluntary aid programmes. See ILC, 'Report of the International Law Commission on the work of its 53rd Session' (23 April – 1 June and 2 July – 10



With regard to the Minister's threats, two further considerations can be made. Firstly, calling on international organizations to impose sanctions against the Netherlands highlights Turkey's firm and *de facto* unjustified notion of itself as the victim of conduct that is contrary to international obligations.<sup>49</sup> Secondly, it could be argued that even though the Netherlands did not raise this claim, these threats amounted to a breach of international customary law, according to which 'no State may use or encourage the use of economic, political or any other type of measures *to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind*'.<sup>50</sup>

In relation to the Turkish Minister of Family and Social Policies, the main argument advanced by Turkey was that she – like the Minister of Foreign Affairs – also enjoyed a special status, whereas the Netherlands claimed that she did not. As stressed by international law expert, Ivor Roberts, 'the conduct of business with other States is no longer confined to the Minister

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August 2001) UN Doc A/56/10, 128. See also Christian Tomuschat, 'Repressalie und Retorsion: Zu einigen Aspekten ihrer innerstaatlichen Durchführung' (1973) 33 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 179; Thomas Giegerich, 'Retorsions' in *Max Planck Encyclopedia of Public International Law* <<http://opil.ouplaw.com/home/EPIL>> accessed 18 May 2017; Richard B Lillich, 'Requiem for Hickenlooper' (1975) 69(1) *American Journal of International Law* 97; Chittharanjan Amerasinghe, 'The Ceylon Oil Expropriations' (1964) 58 *American Journal of International Law* 445.

<sup>49</sup> On the imposition of international sanctions for acts of wrongdoing, see Roberto Ago, 'Le Délit International' (1939–II) 69 *Recueil des cours* 430–40; Kim R Nossal, 'International Sanctions as International Punishment' (1989) 43 (2) *International Organization* 301, 305.

<sup>50</sup> See UNGA 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States' UN GAOR 25th Session Supp No 18 UN Doc A/8018 (1970) (emphasis added). See also Helen Keller, 'Friendly Relations Declaration (1970)' in *Max Planck Encyclopedia of Public International Law* <<http://opil.ouplaw.com/home/EPIL>> accessed 19 May 2017; Ian M Sinclair, 'The Significance of the Friendly Relations Declaration' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge 1994) 1–32; Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65 *American Journal of International Law* 713, 715.



for Foreign Affairs.<sup>51</sup> This position is shared by the ICJ, which in regard to the authority of a Minister other than the Minister of Foreign Affairs to bind the State in matters of international relations, noted that:

[...] with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.<sup>52</sup>

It can also be assumed that the Turkish Minister of Family and Social Policies was sent to the Netherlands in her capacity as an official visitor within the framework of so-called 'special missions', also known as '*ad hoc* diplomacy'.<sup>53</sup> Official visitors who are members of a special mission and represent the sending State in its bilateral or multilateral relations enjoy, for the duration of the visit, the same inviolability of the person and immunity from criminal jurisdiction as persons of equivalent rank accredited to a permanent diplomatic mission. This includes the receiving State's obligation to treat them with due respect and to take all appropriate steps to prevent any attack on their persons, freedom or dignity.<sup>54</sup>

The legal status of such missions, which pre-dates the creation of the current system of permanent diplomatic missions, has begun to draw greater attention in recent years.<sup>55</sup> The Convention on Special Missions seeks to set

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<sup>51</sup> Roberts (n 17) 31.

<sup>52</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 47.

<sup>53</sup> See Crawford (n 15) 413-414; Michael Wood, 'The Immunity of Official Visitors' (2012) 16 Max Planck Yearbook of United Nations Law 35; Michael Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', (1971) 31 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 246; Adolfo Maresca, *Le Missioni Speciali* (Giuffrè 1975); Murty (n 17) 262-66, Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcom D Evans, *International Law* (4th edn, Oxford University Press 2014) 379-411.

<sup>54</sup> Wood (n 53) 71.

<sup>55</sup> Wickremasinghe (n 53) 389.

out the rules governing the conduct of *ad hoc* diplomacy. This Convention defines a 'special mission' as 'a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task'.<sup>56</sup> However, this Convention has attracted limited participation, and neither the Netherlands nor Turkey is party to it. It is therefore challenging to ascertain the extent to which persons occupying high-ranking offices are entitled to 'special mission status' and, thus, enjoy absolute immunity from criminal jurisdiction or inviolability *ratione personae* while on an official visit to a third country.

Nonetheless, the relevant State practice and the broad outlines of customary law confirm that two key requirements must be met: i) that the official visitor represents the sending State and ii) that the receiving State has consented to the visit as a visit attracting immunity.<sup>57</sup> Concerning the latter key requirement, it should be noted that the receiving State's consent entails the following:

[...] at a minimum, that the receiving State has agreed with the sending State that the sending State shall send the person to the receiving State as an official visitor entitled to immunity. It is not normally sufficient, to establish 'consent', that the immigration authorities have permitted the person to enter, or that a visa has been issued.<sup>58</sup>

The Netherlands did not consent to the Minister's visit, nor could the necessary consent be implied from the surrounding circumstances, because the Dutch authorities had clearly expressed their unwillingness to host political rallies organised by the Turkish Government.<sup>59</sup> It follows that the Netherlands did not violate international law by denying special status to the Turkish Minister of Family and Social Policies.

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<sup>56</sup> Art 1, para (a) Convention on Special Missions (n 42).

<sup>57</sup> Klaus Bockslaff and Michael Koch, 'The Tabatabai Case: The Immunity of Special Envoys and the Limits of Judicial Review' (1982) 25 German Yearbook of International Law 539.

<sup>58</sup> Wood (n 53) 66.

<sup>59</sup> Letter to the House of Representatives (n 32), '[the Turkish authorities] were also informed that no Turkish government minister would be welcome in the Netherlands to campaign on the referendum in the run-up to 16 April'.

## 2. *The Legal Status of Diplomatic and Consular Premises*

The second main point raised in the dispute between the Netherlands and Turkey concerns the status of diplomatic and consular premises. Turkey's claim that embassies and consulates are territories of the States they represent is ill-founded and ultimately wrong. The inviolability of the diplomatic and consular premises,<sup>60</sup> in fact, must not be confused with extraterritoriality, because such premises do not constitute part of the territory of the sending State.<sup>61</sup> The maintenance of public order remains a prerogative of the receiving State, and therefore, the emergency order issued by the Netherlands outside the premises of the Turkish Consulate in Rotterdam did not breach any of the obligations of the receiving State. Pushing this argument further, it could even be argued that the emergency order was a measure taken to fulfil the receiving State's duty to prevent the disturbance of the peace of the mission or the impairment of its dignity.<sup>62</sup>

Whereas the Netherlands' actions do not appear to be in violation of the law of consular relations, it should be stressed that Turkey's intention to use the consular premises to host a political rally may have been contrary to the VCCR. The Convention states that '[t]he consular premises shall not be used in any manner *incompatible with the exercise of consular functions*.'<sup>63</sup> Political activities are not excluded *tout court*, because non-enumerated consular

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<sup>60</sup> The inclusion of an exception to the principle of inviolability was the issue that caused the greatest controversy during the formulation of Art 22 of the VCDR and Art 31 of the VCCR. See Diplomatic Intercourse and Immunities, Yearbook of the International Law Commission, vol I, Summary records of the tenth session (28 April – 4 July 1958) UN Doc A/CN.4/114; Report of the International Commission covering the Work of its thirteenth session, Yearbook of the International Law Commission, vol II, Documents of the thirteenth session including the report of the Commission to the General Assembly (1961) 110.

<sup>61</sup> See Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 551; Jordan J Paust, 'Non-Extraterritoriality of 'Special Territorial Jurisdiction' of the United States: Forgotten History and the Errors of Erdos' (1999) 24 Yale Journal of International Law 305.

<sup>62</sup> Art 31, para 3 VCCR (n 10).

<sup>63</sup> Art 55, para 2 VCCR (n 10) (emphasis added).

functions are possible under the VCCR.<sup>64</sup> Such functions, however, must not be prohibited by the laws and regulations of the receiving State *or be openly objected to by the receiving State*. Inasmuch as the Dutch authorities expressed a clear aversion to the possibility that Turkey would carry out an electoral campaign on Dutch territory, these exceptions did not apply in the case at issue.

In conclusion, a diplomatic row that risked the relationship between two historic allies was triggered by Turkey's erroneous assumption that certain types of conduct could be carried out in another State's territory without that State's expressed consent and in compliance with the law of diplomatic and consular relations.

#### IV. CONCLUDING REMARKS

The diplomatic crisis between Turkey and the Netherlands was predominantly guided by political considerations. Despite – or perhaps because of – the row, in the end, President Erdoğan declared victory in a narrowly divided referendum, and the results of the Dutch parliamentary elections succeeded in halting the advance of resurgent nationalism. The votes of Turkish citizens residing abroad were of crucial importance, because the highest level of support for the referendum was registered in Western European countries. In the aftermath of the referendum, journalists, experts, politicians and academics have questioned why many Turkish voters opted for the authoritarian changes, despite the fact that they had lived in liberal democracies for many years. Furthermore, much consideration has been devoted to understanding the extent to which the tension with several EU countries boosted President Erdoğan's campaign.

Little attention, instead, was paid to the aspects of the diplomatic crisis that concerned the international legal framework. In order to fill this gap, the present article focused on the law of diplomatic and consular relations and showed that the Netherlands' conduct did not violate any of the relevant rules. Furthermore, this article has demonstrated that Turkey's arguments

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<sup>64</sup> Art 5, para (m) of the VCCR (n 10) affirms that the consular post may perform 'any other functions entrusted to a consular post by the sending State'. See Mégret and Girard (n 14) 194.

rested on incorrect legal assumptions, i.e. the alleged enjoyment of a special status by its Ministers while on foreign soil and the claim that embassies and consulates are *de facto* parts of Turkish territory.

Notably, the row between Turkey and the Netherlands has also triggered a number of issues pertaining to the sphere of IHRL, which have not been addressed in this article, given its focus on the law of diplomatic and consular relations. For example, it could be argued that the emergency order issued by the municipality of Rotterdam had an impact on the Minister's freedom of movement and expression, and one could question whether the restrictions implemented were in line with the provision enshrined in Article 16 ECHR.<sup>65</sup> Those issues could perhaps form the focus of an unlikely inter-State application should Turkey move forward with its threat to lodge a case before the ECtHR.<sup>66</sup> In conclusion, even though some measure of politics will always guide each and every interaction among States,<sup>67</sup> it is worth stressing that over the centuries, diplomatic and consular practice has been duly systematised into legal rules. States' subjective needs and desires must be restricted by non-political deliberations, at least in those fields of international law that are sufficiently developed to provide States' representatives with adequate tools to avoid actions and/or reactions that rest on incorrect legal assumptions.

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<sup>65</sup> See Robert E Norris and Paula Desio Reiton, 'The Suspension of Guarantees' (1980) 30 *American University Law Review* 189; Brendan Mangan, 'Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform' (1988) 10 *Human Rights Quarterly* 372; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2<sup>nd</sup> edn, Cambridge University Press 2014) 339-76. See also Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 *Human Rights Law Review* 761; Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 118.

<sup>66</sup> Art 33 ECHR (n 39).

<sup>67</sup> See generally Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7.



# THE APPLICATION OF THE EU-TURKEY AGREEMENT: A CRITICAL ANALYSIS OF THE DECISIONS OF THE GREEK APPEALS COMMITTEES

Mariana Gkliati\*

*The article discusses the first case law issued on the EU-Turkey deal that authoritatively answers the question whether Turkey constitutes a safe third country for refugees. In 390 out of 393 decisions Greek Asylum Appeals Committees ruled that the safe third country requirements are not fulfilled with respect to Turkey, essentially impeding the application of the EU-Turkey deal. The purpose of this article is, on the first level, through empirical research, to shed light on the reasoning of the decisions of the Appeals Committees and investigate the impact of the EU-Turkey agreement upon them. On a second level, it focuses on evaluating from the perspective of effective legal protection the legislative amendment, subsequent to these decisions, which modifies their composition. The analysis is of significant societal relevance, as it aspires to inform further law, policy, and jurisprudence in the field, especially since it provides access to sources that due to language and other practical barriers would remain far from the reach of legal and policy experts.*

**Keywords:** EU asylum law, EU migration law, EU-Turkey agreement, Asylum Appeals Committees, Greece, Syrian refugees, resettlement, safe third country

## TABLE OF CONTENTS

I. INTRODUCTION .....	82
II. THE SITUATION ON THE GROUND: GREEK ISLANDS .....	85
III. THE EU-TURKEY AGREEMENT: A SHORT INTRODUCTION .....	86
IV. RELEVANT NATIONAL LEGISLATIVE FRAMEWORK.....	89
1. Turkey .....	89

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A. Law on Foreigners and International Protection .....	89
B. Temporary Protection Regime .....	90
2. <i>Greece</i> .....	91
V. THE APPEALS COMMITTEES DECISIONS .....	93
1. <i>Methodological Note</i> .....	93
2. <i>Analytical Description of the Decisions</i> .....	95
A. The Principle of Non-refoulement .....	98
B. Refugee Protection Equivalent to the Refugee Convention .....	101
C. Link of the Applicant with Turkey .....	106
D. Criteria that are Fulfilled: a) Persecution, c) Subsidiary Protection ...	109
E. Intermediate Summary .....	110
3. <i>Impact of the EU-Turkey Agreement</i> .....	111
VI. TURKEY AS STC FOR THE GREEK APPEALS COMMITTEES .....	114
VII. THE RE-ORGANIZATION OF THE APPEALS COMMITTEES .....	115
VIII. CONCLUSIONS .....	121

## I. INTRODUCTION

Since its adoption in March 2016, the EU-Turkey agreement has been in the midst of significant political<sup>1</sup> and legal turmoil. The agreement has been widely criticised by migration experts, especially regarding the presumption that Turkey is a safe third country (STC) for refugees.<sup>2</sup> Many domestic and

<sup>1</sup> Nikolaj Nielsen, 'EU-Turkey readmission deal in doubt' *EU Observer* (Brussels, 6 June 2016) <<https://euobserver.com/migration/133712>> accessed 15 November 2016.

<sup>2</sup> Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?' (*EU Law Analysis Blog*, 05 February 2016) <<http://eulawanalysis.blogspot.nl/2016/02/the-eu-turkey-and-refugee-crisis-what.html>> accessed 15 November 2016; Emanuela Roman, Theodore Baird, Talia Radcliffe, 'Why Turkey is Not a 'Safe Country'' *Statewatch Analysis* (London, February 2016) accessed 15 November 2016; Peter Rodrigues, 'EU-Turkey deal: good on paper, bad in practice' (*Leiden Law Blog*, 12 April 2016) <<http://www.leidenlawblog.nl/articles/eu-turkey-deal-good-on-paper-bad-in-practice>> accessed 15 November 2016; For an insight into the structural deficiencies or the Turkish asylum system that does not allow the country to be regarded a safe haven for refugees, see Orçun Ulusoy, 'Turkey as a Safe Third Country?' (*Border Criminologies Blog*, 29 March 2016) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>> accessed 15 November 2016.

international NGOs have highlighted the deficits of the Turkish system with respect to the protection required by the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and violations with respect to non-refoulement, but also the right to life and freedom from torture and the right to asylum.<sup>3</sup>

The deal has been in force since May 2016, with hundreds of Syrians having been readmitted to Turkey.<sup>4</sup> The Greek Asylum Service, the authority responsible for dealing with asylum applications, has been implementing the deal, judging that the return of failed asylum seekers to Turkey is not objectionable, as Turkey is a safe third country and can offer adequate protection to refugees. However, this presumption has been rebutted by the Greek Appeals Committees in 390 out of 393 decisions,<sup>5</sup> impeding the application of the EU-Turkey agreement.

These decisions have been hailed by several human rights organisations,<sup>6</sup> while the European Commission officially recognised them as proof that there will not be blanket or automatic returns to Turkey following the agreement, and that the 'safeguards provided by the Asylum Procedures

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<sup>3</sup> Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey deal' (14 February 2017) <<https://www.amnesty.org/en/documents/eur25/5664/2017/en/>> accessed 16 February 2017.

<sup>4</sup> European Commission fact-sheet, Implementing the EU-Turkey Statement – Questions and Answers, Brussels, 15 June 2016 <<http://tinyurl.com/grmqab3>> accessed 15 November 2016; Apostolis Fotiadis, 'So the Greece deportations are going 'smoothly'? Take a closer look' *The Guardian Opinion* (London, 04 April 2016) <<https://www.theguardian.com/commentisfree/2016/apr/04/greece-deportations-eu-turkey-refugees>> accessed 15 November 2016.

<sup>5</sup> 393 decisions have been issued in total by the Greek Asylum Appeals Committees, Amnesty International, 'Blueprint for Despair' (n 3), 14; At the time of writing only 72 decisions had been issued, only two of which considered Turkey a safe third country. Communication from the Commission to the European Parliament, the European Council and the Council Second Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016) 349 final.

<sup>6</sup> See for instance Amnesty International, 'Greek Decision Highlights Fundamental Flaws in EU Turkey Refugee Deal' (Press Release, 20 May 2016) <<http://www.publicnow.com/view/3B898DE7C36AA20F112DEBAA79F2DE425084E338?2016-05-20-21:00:48+01:00-xxx2372>> accessed 15 November 2016.

Directive [...] are in place and respected'.<sup>7</sup> However, one month after the first decision of the Appeals Committees, following allegations of lack of objectivity of their members, the Greek Parliament, in a fast-track legislative procedure, adopted an amendment that modifies their composition.<sup>8</sup>

The purpose of this paper is, through empirical research, to shed light on the reasoning of the decisions of the Asylum Appeals Committees as far as the examination of the issue of the safe third country is concerned (in particular, what the Committees conclude on the issue of Turkey as a STC, and what has been the influence of the EU-Turkey deal on these decisions) and evaluate the legislative amendment creating new Appeals Committees focusing on the element of effective legal protection.

The article deals with the first case law issued on the EU-Turkey agreement that authoritatively answers the question of whether Turkey constitutes a safe third country. The analysis is considered of significant societal relevance, as it aspires to inform further law, policy, and jurisprudence in the field, especially since it provides access to sources that due to language and other practical barriers would remain far from the reach of legal and policy experts.

After the description of the situation on the ground on the basis of the latest available information in section II, the applicable EU and national legal framework is presented in sections III and IV. Furthermore, the content of the decisions is described and analysed in section V with particular emphasis on each individual element considered in order to regard a third country as safe. The impact of the EU-Turkey agreement upon these decisions is also examined. Section VI covers the evaluation of the decisions in terms of logical and methodological soundness. The image is completed in section VII with the most recent developments concerning their reorganization and the practice of the new committees so far.

The developments in Turkey following the military coup and its influence upon the situation of Syrians in the country are interesting and necessary to

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<sup>7</sup> Communication from the Commission to the European Parliament, the European Council and the Council, Second Report on the progress made in the implementation of the EU-Turkey Statement, 15.06.2016, COM(2016) 349 final, 6.

<sup>8</sup> Art. 86 para. 3 of Law 4399/2016.

study as far as the sustainability of the EU-Turkey agreement is concerned.<sup>9</sup> This nevertheless falls outside the scope of this paper, which focuses on the returns of Syrians to Turkey and the relevant decisions of the Greek Appeals Committees in the period immediately prior to the coup. This article takes into account legal and policy developments that had taken place until 1 January 2017, unless stated otherwise.

## II. THE SITUATION ON THE GROUND: GREEK ISLANDS

According to the report of Amnesty International, 'Blueprint for Despair', 27,000 individuals have arrived at the Greek islands from the time of entry into force of the EU-Turkey deal, on 20 March 2016, until 1 January 2017. About 4,500 have been allowed to move to the mainland. Specifically, 2,906 individuals (including family members) have been transferred on account of an identified vulnerability, 1,476 have been reunited with their families on the basis of the relevant Dublin family reunification provisions, 148 have acquired refugee status and 15 have acquired subsidiary protection status.<sup>10</sup>

At the other end, 548 individuals have been returned to their countries of origin and 900 have been transferred to removal centres on the mainland pending their deportation. Next to them, 865 individuals, of which 151 Syrians have been returned to Turkey on the basis of the EU-Turkey deal. According to the Greek authorities, none of these returns to Turkey concern asylum seekers whose claim has been rejected at the admissibility stage.<sup>11</sup> However, Amnesty International, the UN Refugee Agency (UNHCR), and other organisations have registered a number of returns 'under highly questionable circumstances'. In particular, the UNHCR has reported that 13 individuals returned in April 2016, had communicated their wish to seek asylum on the island of Chios, but their applications were not registered.

Officially, no asylum seeker has been returned to Turkey on the inadmissibility ground that Turkey is a safe third country for them. Such

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<sup>9</sup> Patrick Kingsley, 'Turkish police withdrawal from Greece stalls EU migration pact', *The Guardian*, 31 August 2016 <<http://www.theguardian.com/world/2016/aug/31/turkish-police-withdrawal-greece-stalls-eu-migration-pact-unhcr>> accessed 15 November 2016.

<sup>10</sup> Amnesty International, 'Blueprint for Despair' (n 3) 6.

<sup>11</sup> Ibid 17.

returns have been essentially blocked by the Appeals Committees that overturned the first instance decisions in an overwhelming majority, but also due to 'the efforts of non-governmental organizations and lawyers in Greece that assisted many asylum-seekers to appeal the first instance inadmissibility decisions'.<sup>12</sup>

Presently, 15,000 individuals remain on the Greek islands in a state of limbo. Out of the 27,000 arrivals on the islands, 10,699 have lodged asylum applications, while further 7,097 have communicated their wish to seek asylum during their registration upon arrival.<sup>13</sup>

On the first instance, 1,701 decisions have been issued on admissibility, of which 1,317 deny the claim on the basis of the EU-Turkey deal. On the second instance the Appeals Committees, until their reorganization, had issued 390 decisions overturning the first instance decisions on the basis that Turkey is not safe for refugees. Only in three cases the Appeals Committees upheld the first instance inadmissibility decision.<sup>14</sup>

In a complete change of course, the new Appeals Committees created by legislative amendment on 16 June 2016 (see section VII), in the 20 inadmissibility decisions they have issued so far, uphold the inadmissibility decision, ruling that Turkey is a safe third country.<sup>15</sup>

### III. THE EU-TURKEY AGREEMENT: A SHORT INTRODUCTION

While the EU-Turkey agreement is being widely discussed in the public sphere since the spring of 2016,<sup>16</sup> the negotiations on the readmission agreement between Turkey and EU were in fact initiated in 2002, following

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<sup>12</sup> Amnesty International, 'Blueprint for Despair' (n 3) 17.

<sup>13</sup> Ibid 12.

<sup>14</sup> Ibid 14; The data presented by the European Commission deviate slightly, stating that in 6 cases the Appeals Committees confirm the first instance inadmissibility decision. Communication from the Commission to the European Parliament, the European Council and the Council Second Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016) 349 final 6.

<sup>15</sup> Amnesty International 'A Blueprint for Despair' (n 3) 15.

<sup>16</sup> European Council, 'EU-Turkey statement' (Press Release, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 15 November 2016.

the adoption of the related directive by the European Council.<sup>17</sup> The negotiations were suspended in 2006 after four rounds of formal meetings and the parties returned to the negotiating table in 2009. After three years of meetings in Ankara and Brussels, a final draft was prepared and initialled in June 2012. The first roadmap on implementing the agreement was introduced in December 2013 foreseeing the readmission of the third country nationals to Turkey starting at the end of 2016. Yet, the agreement was never implemented officially except for a few symbolic attempts.<sup>18</sup>

In 2016, at the peak of the unprecedented cross-border movement towards Europe from Middle Eastern and African countries, EU officials and state representatives, under the pressure of the new arrivals, chose to re-negotiate the agreement with Turkey. After several rounds of intensive negotiations, on 18 March 2016 the EU Heads of State and Turkey agreed on several operational issues aiming to reduce the irregular migration to the EU. The instruments composing the agreement can be gathered under two categories: a) provisions on an extended version of the readmission agreement between EU and Turkey, b) incentives (or carrots) for Turkey to sign and implement the agreement. These include allocation of considerable funds (up to 6 billion Euros) by the EU for refugees in Turkey, accelerating the visa liberalisation roadmap and re-energising the EU accession negotiation. Due to the aim of this article, this section will limit itself to the analysis of the readmission agreement between the EU and Turkey.

The readmission agreement foresees three operational procedures. First, all irregular migrants who crossed from Turkey to the Greek islands are to be returned and readmitted to Turkey. This includes asylum seekers, whose claims have been declared inadmissible. Second, Syrian refugees are to be resettled from Turkey to the EU. The EU is obliged to resettle the same

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<sup>17</sup> Proposal for a Council Decision of [...] concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, COM/2012/0239 final - 2012/0122 (NLE).

<sup>18</sup> Emanuela Roman, Theodore Baird, and Talia Radcliffe (n 2); Marieke Wissink and Orçun Ulusoy, 'Navigating the Eastern Mediterranean: The Diversification of Sub-Saharan African Migration Patterns in Turkey and Greece' in Belachew Gebrewold & Tendayi Bloom (eds), *Understanding Migrant Decisions: From Sub-Saharan Africa to the Mediterranean Region* (Routledge 2016) 120 – 38.



number of Syrian refugees as those returned to Turkey from the Greek islands. As the third step, a 'Voluntary Humanitarian Admission Scheme' will be activated.

The implementation of the readmission agreement requires certain processes in Turkey and Greece, such as pre-screening and identification of refugees and other migrants in Greece, human rights guarantees and dignified humanitarian conditions for the readmitted migrants in Turkey, as well as a working (and meaningful) resettlement system at the EU level.

As far as the human rights safeguards in Turkey are concerned, several NGO reports raise major concerns about Turkey's capacity to fulfil its obligations towards refugees, as will be discussed in section V. These concerns include Turkey's geographical limitation on the 1951 Refugee Convention, possible violations of the non-refoulment principle, and finally the shortcomings of the Turkish asylum system, which is still in its infancy.<sup>19</sup>

Turkey was one of the first countries to sign and ratify the Refugee Convention and become party to its 1967 Protocol, but retains a geographical limitation for non-European asylum seekers. According to this limitation, Turkey grants refugee status only to asylum seekers originating from European countries, which excludes the readmitted Syrian nationals. As noted in the press release of the Turkish NGO Mülteci-Der's<sup>20</sup> and its following report in April 2016,<sup>21</sup> the first non-Syrian migrants readmitted to Turkey under the agreement on 4 April 2016 were immediately transferred to a removal centre to be deported to their country of origin without getting access to international protection. Lawyers were denied access to their clients even when they provided a list of names of people they were representing. Furthermore, in April 2016 Amnesty International's research in Turkey revealed large-scale forced returns of refugees from Turkey to

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<sup>19</sup> Orçun Ulusoy (n 2).

<sup>20</sup> Mülteci-Der, 'Readmissions from Greece to Turkey: What Happens After Readmission?' <<http://www.multeci.org.tr/haberdetay.aspx?Id=140>> accessed 15 November 2016.

<sup>21</sup> Mülteci-Der, 'Observations On Refugee Situation In Turkey' <<http://www.multeci.org.tr/haberdetay.aspx?Id=141>> accessed 15 November 2016.



Syria,<sup>22</sup> raising concerns about the adherence to the non-refoulement principle. Syrian refugees, including women and children, were denied registration in Turkey and forced to collectively return to Syria.

Finally, in the last two decades, the European Court of Human Rights (ECtHR) has found serious human rights violations regarding the conditions of migrants and asylum seekers in Turkey. The ECtHR underlined the grave situation of asylum seekers in detention and concluded in its landmark decision, *Abdolkhani and Karimnia v Turkey*,<sup>23</sup> that there are no meaningful domestic juridical instruments or safeguards for asylum seekers and other migrants in Turkey.

#### IV. RELEVANT NATIONAL LEGISLATIVE FRAMEWORK

##### I. Turkey

Certain legislative developments have marked an improvement in the level of international protection in Turkey in the recent years.

##### A. Law on Foreigners and International Protection

In 2014 Turkey adopted a new Law on Foreigners and International Protection (LFIP), which provides guarantees for asylum seekers and refugees.

The adoption of LFIP was one of the key achievements of the Europeanization process of the Turkish asylum and migration system.<sup>24</sup> It guaranteed basic rights for asylum seekers and refugees in Turkey and paved the way for establishing a civilian body for the management of migration: the

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<sup>22</sup> Amnesty International, 'Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal' (1 April 2016) <<http://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>> accessed 15 November 2016.

<sup>23</sup> *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR, 22 September 2009).

<sup>24</sup> Kristen S Biehl, 'Migration 'securitization' and its everyday implications: an examination of Turkish asylum policy and practice', (2009) CARIM IV Summer School on Euro-Mediterranean Migration and Development Best Participant Essays Series No. 2009/, <<http://hdl.handle.net/1814/11761>> accessed 15 November 2016.

Directorate General for Migration Management (DGMM). The system faces serious gaps in capacity and expertise, while supporting bodies and mechanisms, such as appeals committees and a country of origin information system have still not been put in place.

## B. Temporary Protection Regime

Since the beginning of the Syrian refugee crisis in 2011, Turkish governmental officials insisted on defining the Syrian refugees as 'guests'.<sup>25</sup> However, the terminology of 'guest' is meaningless both within international and within Turkish law. This deliberate policy, aiming at evading responsibilities towards refugees, resulted in lack of protection and an uncertain future for Syrian nationals.

In 2014, following criticism by the UNHCR and other international actors, the Turkish Government officially revised its position and introduced the Temporary Protection Regulation (TPR), according to which Syrian refugees became beneficiaries of a 'temporary protection' regime.<sup>26</sup> It is important to underline that the TPR is loosely inspired by the EU Temporary Protection Directive, regulating situations of mass influx. The TPR is an implementing legislative act, enforcing in practice Article 91 of the LFIP.

The TPR was based on three principles: a) Turkey's borders shall remain open to border-crossers seeking safety in Turkey; b) no Syrian national shall be sent back to Syria against their will (non-refoulement principle); and c) basic humanitarian needs of persons arriving from the conflict in Syria shall be met.<sup>27</sup>

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<sup>25</sup> Umut Uras, 'Erdogan: Syrian refugees could become Turkish citizens' *Al-Jazeera* (4 July 2016); <<http://www.aljazeera.com/news/2016/07/erdogan-syrian-refugees-turkish-citizens-160703133739430.html>> accessed 15 November 2016.

<sup>26</sup> Refugee Rights Turkey, '2011-2014: Temporary protection based on political discretion and improvisation' *AIDA* <<http://www.asylumineurope.org/reports/country/turkey/2011-2014-temporary-protection-based-political-discretion-and-improvisation>> accessed 15 November 2016.

<sup>27</sup> Ibid; UNHCR Turkey, 'Information Notice Regarding Syrian Nationals Seeking International Protection' (Ankara, 23 November 2011) <[http://archiv.proasyl.de/fileadmin/proasyl/fm\\_redakteure/Newsletter\\_Anhaenge/181/UNHCR\\_Turkey\\_Syrian\\_Information\\_Note\\_Nov\\_2011.pdf](http://archiv.proasyl.de/fileadmin/proasyl/fm_redakteure/Newsletter_Anhaenge/181/UNHCR_Turkey_Syrian_Information_Note_Nov_2011.pdf)> accessed 15 November 2016.

## 2. Greece

In Greece asylum and subsidiary protection requests are dealt with by the Asylum Service, which was created with L. 3907/2011.<sup>28</sup> The law was adopted following the infamous case *M.S.S. v Belgium and Greece*,<sup>29</sup> where the European Court of Human Rights (ECtHR) noted several breaches of the European Convention on Human Rights and Fundamental Freedoms (ECHR), due to the fundamental deficiencies of the Greek asylum system.<sup>30</sup> This judgment has caused the suspension of the implementation of the Dublin II Regulation<sup>31</sup> with respect to returns of asylum seekers to Greece.

One of the breaches found by the Court concerned the lack of an effective remedy at second instance, while the Court requested Greece to adopt general measures to prevent similar violations in the future on the basis of Art. 46 ECHR.<sup>32</sup> In response to this obligation, an Appeals Authority was established by the same law, which is responsible for the examination at second instance of asylum and subsidiary protection requests.<sup>33</sup> An action for annulment against the decision of the Appeals Committees, albeit one that does not have an automatic suspensive effect, may be brought before the national administrative courts.

<sup>28</sup> The official translation in English of L. 3907/2011 is available at: <<http://www.yptp.gr/images/stories//2011/law%203907.pdf>> accessed 15 November 2016.

<sup>29</sup> Mariana Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece' (2011) 4(1) *Inter-American and European Human Rights Journal* 85, 101-103.

<sup>30</sup> *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011). Violations were found with respect to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 3, and Art 3 in conjunction with Art 13; The outcome was confirmed by the CJEU in Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865.

<sup>31</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

<sup>32</sup> *M.S.S. v Belgium and Greece* (n 30), para 400.

<sup>33</sup> Art 3 Law 3907/2011.

In accordance with Art. 33(2)(c) of the Asylum Procedures Directive,<sup>34</sup> as it has been transposed in national law by Art. 18 PD 113/2013, a claim for international protection may be considered inadmissible if a country, which is not a Member State, is considered to be a safe third country for the applicant. The requirements for considering a third country safe have been laid down in national law. Pursuant to Art. 20(1) PD 113/2013, a country is considered as a safe third country when a person seeking international protection will be treated there in accordance with the following principles:

- a) The applicant's life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) The country respects the principle of non-refoulement in accordance with the 1951 Refugee Convention;
- c) The applicant is not at risk of suffering serious harm as described in [the Qualification Directive];
- d) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected by this country;
- e) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention.
- f) The applicant has a link with the third country concerned, which would reasonably allow him or her to move to that country.

In accordance with EU law, criteria a-e correspond word-by-word to Article 38(1)(a-e), and criterion f corresponds to Art. 38 (2)(a) of the Asylum Procedures Directive.

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<sup>34</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

## V. THE APPEALS COMMITTEES DECISIONS

### *1. Methodological Note*

The Appeals Committees have issued 393 decisions, since the EU-Turkey agreement came into force, reviewing first instance decisions that have ruled at the admissibility stage that Turkey constitutes a safe third country for the individual applicants. This made the examination of the merits of the requests unnecessary.

For the purposes of the present article, eight out of these decisions have been studied. The examination of the total number of decisions was not deemed possible for reasons of time management, while it should also be noted that the Committees continued issuing decisions during the time of writing and editing of the publication. Most importantly the responsible authorities refused to disclose the decisions for the purpose of academic research, in spite of the privacy and data protection safeguards offered, pleading reasons of protection of the sensitive personal data of the applicants. In conformity with domestic and EU law, in particular the need for confidentiality and data protection, the cases have been acquired through field workers' networks and have been used in an anonymized form for the purposes of this article. All necessary measures have been taken in order to protect the privacy of asylum seekers and all other parties involved. The cases are referred to here as *Case 1*, *Case 2*, etc.<sup>35</sup> The personal information regarding the applicants is restricted to nationality (all applicants are Syrians), ethnicity, gender, and family relations where relevant. All elements that could lead to the identification of the applicants have been omitted. The cases studies are deposited to an offline depository, which ensures long-term preservation and accessibility to curated scientific data and guarantees their security and recoverability.

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<sup>35</sup> The first case issued has become available in the public domain. The original case number is Case 05/133782, but for reasons of simplicity it is referred in this article as *Case 1*. The translated summary is available here: <[https://www.eerstekamer.nl/bijlage/20160603/griekse\\_uitspraak\\_inzake\\_het\\_niet/document3/f=vk4m914hdass.pdf](https://www.eerstekamer.nl/bijlage/20160603/griekse_uitspraak_inzake_het_niet/document3/f=vk4m914hdass.pdf)> accessed 15 November 2016. The full text in Greek can be found here: <[http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Backlog%20Committees%20decision\\_inadmissibility.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Backlog%20Committees%20decision_inadmissibility.pdf)> accessed 15 November 2016.

Access to the data can be granted by the author to interested researchers for the purpose of verification of the research.

Notwithstanding the practical hindrances, this random sample is representative and is sufficient to provide a basic understanding of the reasoning of the Committees and of the circumstances in which the legislative change concerning the composition of the Committees took place. The decisions follow a similar line of reasoning, while often the text is transferred word-by-word from one decision to others, even when the committees are composed of different members.<sup>36</sup>

At this point, it is necessary to note that the most important decisions have been included in the sample. These are a) the first decisions following the entry into force of the EU-Turkey agreement, published on 17 May 2016, which consider Turkey not to be a safe third country and create the first precedent, laying down the argumentation for the decisions that followed, and b) two out of the only three decisions that differentiate from the rest, agreeing with the first instance that Turkey is indeed a safe third country.

The article employs, to a large extent, the method of analytical description in order to illustrate in a clear and comprehensive manner the reasoning of the decisions. For this purpose, the relevant indicators/criteria have been clearly identified in the following section and the tools of simple typology (e.g. negative v positive decisions), taxonomy (e.g. Figure I), and configurational typology (e.g. Table II) have been used in sections V and VI. These sections include the synthesis of the relevant indicators/criteria providing the answer of the Appeals Committees to the central question of whether Turkey constitutes a safe third country. This is complemented by the evaluation of the decisions in terms of methodology and argumentation rather than on the basis of the substantive evidence. The second and shorter part of the article is characterised by analytical and persuasive writing, as the re-organisation of the Appeals Committees is evaluated mainly in terms of independence and the right to an effective remedy.

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<sup>36</sup> Eg, *Cases 8 and 7*.

## 2. Analytical Description of the Decisions

Out of the 393 decisions, 390 are *positive*, in the sense that they overturn the ruling of the first instance and decide that *the applicant's claim is admissible*. The admissibility decision is based on a ruling that Turkey cannot constitute a safe third country for the applicant and therefore, his or her claim is admissible and needs to be considered on its merits.<sup>37</sup> Six of these decisions are examined here. These are: *Case 4*, *Case 1*, *Case 5*, *Case 6*, *Case 7*, and *Case 8*.

Only 3 out of the 393 decisions are *negative*, upholding the ruling of the first instance, considering Turkey a safe third country, thus, deciding that *the applicant's claim for international protection in Greece is inadmissible*. The two of these decisions studied here are: *Case 2* and *Case 3*. The applicants of these cases have lodged an appeal before the national administrative courts to challenge their return to Turkey. Pending the outcome of the appeals, the Administrative Court of First Instance of Mytilene has suspended the applicants' returns to Turkey.<sup>38</sup> One of the two applicants had also applied for interim measures against their deportation before the ECtHR. The Court responded negatively to the request. However, the Court has not made available its reasoning, since it is not under the obligation to issue motivation of decisions concerning Rule 39 (interim measures) of the Rules of the Court.

This section deals with a qualitative study of the eight judgments, aiming at providing a conclusive picture of the argumentation of the Committees with respect to the issue of Turkey as a safe third country. The analysis is made on the basis of the examination of each of the cumulative conditions of Art. 20(1) PD 113/2013, which need to be fulfilled in order for a third country to be considered safe.

There are three features of interest, concerning the safe third country issue, which concern conditions b) and d), dealing with the principle of non-refoulement, e) regarding refugee protection, and finally, f) concerning the link of the applicant with the third country. The other conditions of Art.

<sup>37</sup> Art 18 PD 113/2013, Art. 33(2)(c) Asylum Procedures Directive. These cases have been referred back to the responsible Asylum Offices in accordance with Art. 26(6) PD 113/2013, in order to be considered in their merits.

<sup>38</sup> Dimitris Angelidis, 'Παράταση ελπίδας για δύο Σύρους πρόσφυγες', *EFSYN* (Athens, 29 July 2016) <<http://www.efsyn.gr/arthro/paratasi-elpidas-gia-dyo-syroys-prosfyges>> accessed 15 November 2016.



20(1) PD 113/2013 were either regarded fulfilled or their examination was deemed unnecessary by the Appeals Committees. This is clearly demonstrated in Table II.

An overview of the decisions, including the conditions that were found not to be fulfilled, is provided in Table I. The table can be read from left to right, showing the votes of each member/affiliation, or from right to left, showing the final outcome of each decision and whether it was a unanimous or a majority decision (where the cell vote/conditions is not split the decision was unanimous).

The Appeals Committees are composed of one public servant (Ministry of Interior), one human rights expert selected by the government from a list compiled by the National Commission on Human Rights (NCHR), and one UNHCR representative. For reasons of protection of personal data, the names of the members of the Committees have been encoded.

Table I: Overview of the Appeals Committees decisions

Committee Member	Affiliation	Vote per condition (Art.18 PD 113/2013)	Outcome	Case
Min1	Ministry	Criteria fulfilled	STC	Case 2 Case 3
UN1	UNHCR			
NC1	NCHR			
Min1	Ministry	Criterion f not fulfilled	Not STC	Case 4
UN1	UNHCR			
NC1	NCHR			
Anonymous	Ministry	Criteria b and d not fulfilled. Criterion e fulfilled	Not STC	1 (first case issued, 17.05.2016)
Anonymous	UNHCR	Criteria b, d and e not fulfilled		
Anonymous	NCHR			
Min2	Ministry	Criteria b, d, e, and f not fulfilled	Not STC	Case 5, Case 6
UN2	UNHCR			
NC2	NCHR			
Min3	Ministry	Criteria fulfilled	Not STC	Case 7
UN3	UNHCR	Criteria e, and f not fulfilled		
NCHR3	NCHR			
Min1	Ministry	Criteria fulfilled	Not STC	Case 8
UN4	UNHCR	Criteria e, and f not fulfilled		
NCHR4	NCHR			

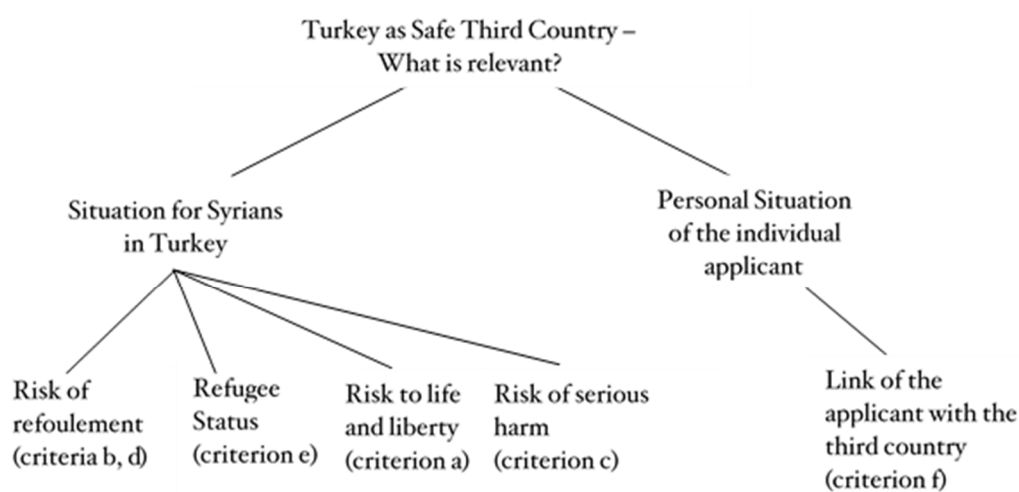
(Source: Mariana Gkliati, August 2016.)

All cases concern Syrian refugees that arrived in Greece through Turkey in order to seek asylum. In some cases, the applicants had only transited through Turkey, while in others they had spent a considerable amount of time living in Turkey before they attempted to reach the EU. In a number of cases, particular circumstances completed the profile of the applicants, such as ethnicity, religion, state of health, sexuality, and adulthood. These were taken into account in the examination of the admissibility of their request.

The following part focuses on the description of the reasoning of the decisions on the issue of whether Turkey is a safe third country. As can be

observed in Figure I, the Committees based their decisions on arguments concerning the general situation of Syrians in Turkey (criteria a-e Art. 20(1) PD 113/2013) or the circumstances of the individual applicant. Here, each factor is examined separately in order to provide a comprehensive picture of the reasoning of the decisions. In the footnotes, the sources used and referenced by the Committee decisions are cited along with the respective case number. Since the decisions are not publicly available, reference to the direct sources is deemed essential.

Figure I: Qualitative Categorization – Relevant Factors for the Decision on whether Turkey is a STC



#### A. The Principle of Non-refoulement

Different instances of the prohibition of refoulement, as it is enshrined in the ECHR<sup>39</sup> and the Refugee Convention<sup>40</sup>, are expressed in criteria b and d of Art. 20(1) PD 113/2013, which for this reason are examined together in the case law of the Appeals Committees. In particular, criterion b explicitly states that a country is considered safe if it respects the principle of non-refoulement, while criterion d makes implicit reference to chain-refoulement requiring from the country that is to be considered safe that it

<sup>39</sup> Mainly Arts 2, 3 and 8 ECHR.

<sup>40</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150, Article 33.

prohibits removal in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment.

Examining criteria b and d of Art. 20(1) PD 113/2013, the Committees ruled in three decisions that the criteria are not fulfilled with respect to Turkey (Table II).<sup>41</sup> In two cases the criteria concerning refoulement were fulfilled,<sup>42</sup> and in one case the examination of these criteria was deemed unnecessary, as the Committee had already ruled that Turkey does not fulfil other criteria.<sup>43</sup> Finally, in the cases where the Appeals Committees agreed with the first instance that Turkey is the safe third country that is responsible for the examination of the claims,<sup>44</sup> the issue of non-refoulement is not examined separately and in detail. The members of the Committees contented themselves to mentioning that the fears of the applicants are not substantiated and that the applicants are not credible.

As it becomes obvious in Table I, in all cases the conclusion on the issue of refoulement was unanimous. In all three positive cases, the Presidents of the Committees, representing the Ministry, voted that Turkey is not a safe third country because the principle of non-refoulement is not respected.

The first decision issued, *Case 1*, concerned a Syrian man of military age who fled to Turkey out of fear that he would be forced to join the fight either on the side of ISIS or on that of the Syrian army. Circumstances in Turkey did not reassure him of his safety from recruitment and from persecution by the Assad regime.

In this case, the Committee acknowledges that protection from refoulement is established in Art. 4 of the Turkish LFIP, and Art. 6(1) of the Turkish TPR.<sup>45</sup> According to the Asylum Information Database AIDA,<sup>46</sup> the new legislative framework in the country provides protection notwithstanding

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<sup>41</sup> *Cases 5, 6 and 1.*

<sup>42</sup> *Cases 7 and 8.*

<sup>43</sup> *Case 4.*

<sup>44</sup> *Cases 1, and 3.*

<sup>45</sup> *Case 1*, p 11.

<sup>46</sup> *Case 1*, p 11; Oktay Durukan, 'Country Report, Turkey' *AIDA* (December 2015), 19 <[http://www.asylumineurope.org/sites/default/files/report-download/aida\\_tr\\_up date.i.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_up date.i.pdf)> accessed 15 November 2016.

the fact that the applicants do not originate from a European country.<sup>47</sup> However, it distinguishes between law in the books and law in action and concludes that there is a serious chance of non-fulfilment of these criteria. It notes that recent NGO reports show that the principle of non-refoulement is systematically violated in Turkey, recalling incidents of violent rejection at the borders and mass deportations to Syria.<sup>48</sup>

In *Cases 5* and *6* the Committees also first look at the law in Turkey. They reiterate that Turkey maintains the geographical limitation to the Refugee Convention, however Syrians are protected by the new law from refoulement and are afforded legal stay. They note that in the beginning, Turkey had an open borders policy towards Syrians, with more than 2 million Syrians having found refuge there. They go on, however, to note that more recent reports provide adequate proof of a new state of closed borders, reporting multiple incidents of push-back operations, opening fire to border-crossers including children, torture and inhuman treatment, and even deaths.<sup>49</sup> The Committees make particular mention of collective expulsions and systematic

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<sup>47</sup> As already mentioned in section IV, Turkey still upholds the geographical limitation to the Refugee Convention, being bound by it to afford asylum only to asylum seekers from countries of origin that are members of the Council of Europe, as it has not signed the New York Protocol to the Refugee Convention.

<sup>48</sup> *Case 1*, p 12; Amnesty International, 'Turkey: illegal mass returns' (n 22).

<sup>49</sup> *Case 5*, p 10 and *Case 6*, p 9; Amnesty International, 'Turkey: Struggling to Survive: Refugees from Syria in Turkey' (20 November 2014), 12-13 <[http://www.amnestyusa.org/sites/default/files/eur\\_440172014\\_0.pdf](http://www.amnestyusa.org/sites/default/files/eur_440172014_0.pdf)> accessed 15 November 2016; Will Worley, 'Turkey 'shooting dead' Syrian refugees as they flee civil war' *The Independent* (London, 31 January 2016) <<http://www.independent.co.uk/news/world/middle-east/turkey-shooting-dead-syrian-refugees-flee-civil-war-a6960971.html>> accessed 15 November 2016; Amnesty International, 'Injured Syrians fleeing Aleppo onslaught among thousands denied entry Turkey' (19 February 2016) <<http://www.amnesty.org/en/latest/news/2016/02/injured-syrians-fleeing-aleppo-onslaught-among-thousands-denied-entry-to-turkey/>> accessed 15 November 2016; Human Rights Watch, 'Turkey: Open border to displaced Syrians shelled by government' (20 April 2016) <<http://www.hrw.org/news/2016/04/20/turkey-open-border-displaced-syrians-shelled-government>> accessed 15 November 2016.

violations of the principle of non-refoulement,<sup>50</sup> and find that conditions b and d are not fulfilled.

At this point, the argumentation in the cases where no violation was found needs to be noted as well, in order to allow for the examination of both sides of the argument.

The ruling in *Case 7* that Turkey is not safe is based on criteria other than the principle of non-refoulement. As far as the latter is concerned, the Committee takes into account reported systematic incidents of refoulement.<sup>51</sup> However, it concludes in the end that the prohibition of refoulement is respected, putting forward the argument that the Turkish authorities had detained the applicants, and although they were threatened that they would be returned to Syria, they were eventually let go, without the threat actually materializing. This incident provides, according to the Committee in this case, sufficient evidence to rule that there is no risk of violation of the principle of refoulement. The Committee in *Case 8* repeated the same argumentation, adding that the evidence provided by the NGO reports is not sufficient to establish risk of refoulement in the individual case.

## B. Refugee Protection Equivalent to the Refugee Convention

In order for a non-EU-country to be considered safe, it is essential, according to criterion e of Article 20(1) PD 113/2013 for the applicant to have the

<sup>50</sup> *Case 5*, p 10 and *Case 6*, p 9; Human Rights Watch (n 49); Amnesty International, 'Turkey: Illegal mass returns' (n 22).

<sup>51</sup> *Case 7*; ProAsyl, 'Im Transit. Zur Lage von Flüchtlingen in der Türkei' (Berlin, May 2012) <[http://archiv.proasyl.de/de/themen/eupolitik/detail/news/ueberleben\\_im\\_transit\\_zur\\_lage\\_von\\_fluechtlingen\\_in\\_der\\_tuerkei/](http://archiv.proasyl.de/de/themen/eupolitik/detail/news/ueberleben_im_transit_zur_lage_von_fluechtlingen_in_der_tuerkei/)>; Amnesty International, 'Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey' (16 December 2015) <<https://www.amnesty.org/en/documents/eur44/3022/2015/en/>>; Amnesty International, 'The human cost of Fortress Europe: human rights violations against migrants and refugees at Europe's borders in Turkey' <<https://www.amnesty.org/Pn/documents/EUROS/001/2014/en/>>; Amnesty International, 'Report 2015/16 – Turkey' (24 February 2016); Amnesty international, 'Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal' (23 March 2016) <<http://www.amnesty.org/en/press-releases/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/>> all accessed 15 November 2016.

possibility to request and receive asylum in accordance with the Refugee Convention.

It is not necessary for a country to be signatory to the Refugee Convention, as long as equivalent protection is provided by the national legislation. Turkey is party to the Refugee Convention, but has not signed the additional New York Protocol that abolishes the geographical limitation to the Convention. As a consequence, the Refugee Convention is applicable and binding upon Turkey only as far as European applicants are concerned. Nevertheless, the recent national legislation provides protection to Syrians that seek refuge in the country. The question that is raised in this respect is whether the protection afforded in Turkey is equivalent to the standards of the Refugee Convention. Such protection goes beyond the prohibition of refoulement and constitutes fully-fledged refugee protection.

In all cases that Turkey was not regarded safe, the Committees agreed on the non-fulfilment of this criterion, with the exception of *Case 4*, where, since the Committee found criterion f not fulfilled, it considered it unnecessary to discuss the other questions including that of the possibility to request and receive refugee protection (Table II).

In the examination of this condition, the Committee in *Case 1* examines closely the legal framework in Turkey, noting that the new LFIP reaffirms Turkey's obligations towards refugees regardless of the non-European origin of the applicant. Moreover, the Temporary Protection Regulation governs the protection of Syrians, which are afforded temporary protection as a group, rather than through individual examination of their claims.

Particular attention is paid to the fact that the refugee system established with the amended LFIP and the TPR constitute two separate and mutually exclusive legal frameworks.<sup>52</sup> In particular, according to Article 16 of the TPR, the individual claim for international protection will not be examined for the period of the duration of the temporary protection, while those entitled to temporary protection that have arrived in Turkey since 28.04.2011 (when the TPR came into action) are excluded from issuing a separate claim for international protection.

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<sup>52</sup> *Case 1*, pp 14-17.



Next to that, the Committee finds that the temporary protection status is considerably inferior to that of a fully-fledged refugee status.<sup>53</sup> It notes, for instance, that the temporary protection status guarantees legal stay in Turkey, protection from criminal prosecution for irregular entry and stay and protection from refoulement.<sup>54</sup> However, the possibility of long-term integration is excluded,<sup>55</sup> while the temporary protection card does not constitute a residence permit or a basis for one.<sup>56</sup> Moreover, the time of residence in Turkey may not be calculated for the purposes of naturalization. The facilitation of the assimilation and naturalization of refugees, envisaged in Article 34 of the Refugee Convention is apparently not satisfied in Turkish law.

An element that weighed considerably in the decision is that the temporary protection status may be restricted or suspended for reasons of national security, public order, public safety or public health by decision of the Council of Ministers.<sup>57</sup> In this case, there is no guarantee that the beneficiaries will acquire access to the regular international protection procedure. The duration of the temporary protection is also determined by the Council of Ministers.<sup>58</sup> It is upon the discretion of that authority to decide, following the termination of the temporary protection, whether all former beneficiaries are returned to their country of origin, whether they will be afforded *prima facie* international protection status, whether their claims are examined individually, or whether they will be allowed to stay under conditions.<sup>59</sup>

Moreover, the Committee observes, refugees that have been afforded temporary protection are subject to restrictions of movement prohibited under Article 26 of the Refugee Convention. Beneficiaries may be required to stay in an assigned province, temporary residence centre, or other location, while in August 2015 the Turkish authorities issued guidelines on controls and restrictions of movement exceptionally of Syrians in Turkey, including

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<sup>53</sup> *Case I*, pp 17-18.

<sup>54</sup> Arts 31 and 33 Refugee Convention.

<sup>55</sup> Art 25 TPR.

<sup>56</sup> Arts 42 and 43 LFIP.

<sup>57</sup> Art 15 TPR.

<sup>58</sup> Art 10 TPR.

<sup>59</sup> Art 11 LFIP.

systematic document checks throughout the country.<sup>60</sup> In another case,<sup>61</sup> the Committee noted that Syrians may leave their assigned area only with prior permit.<sup>62</sup>

Last but not least, the right to wage-earning employment was taken into account. According to Turkish law, employers cannot hire more than one Syrian for every 10 Turkish employees, while the ratio for other foreign nationals is 1 to 5. The ratio places Syrians at a disadvantage compared to other aliens, and therefore fails to rise to the standards of Articles 17-19 of the Geneva Convention that provides that refugees are accorded the most favourable treatment accorded to foreign nationals.<sup>63</sup>

Taking due regard of the aforementioned legal framework, the Committee draws the conclusion that the Turkish protection system affords considerably fewer rights compared to the Refugee Convention. The Committee reaffirms its findings referring to Resolution 2109 of Parliamentary Assembly of the Council of Europe that states that returns of Syrians or non-Syrians to Turkey under the safe third country presumption are not compatible with EU and international law, since Turkey does not provide protection equivalent to that of the Refugee Convention and several incidents of push-backs have been registered.<sup>64</sup>

The findings were confirmed in four other cases,<sup>65</sup> while in *Case 5*, the Committee added that access to the labour market may be facilitated by the LFIP, but is not guaranteed,<sup>66</sup> while several restrictions and strict requirements<sup>67</sup> result in the majority of applicants not having access to wage-earning employment. Only 3,673 out of 2 million Syrians present in Turkey have managed to acquire a work permit in a period of four years.<sup>68</sup> Those that

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<sup>60</sup> *Case 1*, pp 14, 18 and 19.

<sup>61</sup> *Case 5*.

<sup>62</sup> *Case 5*, p 12; European Council on Refugees and Exiles, 'National Country Report: Turkey, December 2015' *AIDA*, 128; United States Department of State, 2015 Country Reports on Human Rights Practices – Turkey, 13 April 2016, section b.

<sup>63</sup> *Case 1*, p 19.

<sup>64</sup> *Case 1*, p 19.

<sup>65</sup> *Cases 5, 6, 7, and 8*.

<sup>66</sup> Art. 89 (4)a, c LFIP.

<sup>67</sup> *Cases 5 and 14*; European Council on Refugees and Exiles (n 62) 83 - 5.

<sup>68</sup> EC on Refugees and Exiles (n 63).

have managed to become employed, work in exploitative conditions, being discriminated against *vis-à-vis* their Turkish co-workers.<sup>69</sup>

In this case, the application concerned a Syrian family with three underage children, the mother of which was in need of medical care. This gave the opportunity to the Committee to examine other relevant issues concerning the living conditions of Syrian refugees in Turkey.

To begin with, the Committee notes that only the children that live in state-managed refugee camps (15% of all the children of school age) and 25% of the rest of the children that live in the cities go to school.<sup>70</sup> Among the reported reasons are overpopulation in schools and Temporary Education Centers, tuition fees, but also high rates of child labour among Syrian children.<sup>71</sup>

Concerning access to healthcare, beneficiaries of temporary protection have no right to free access to public healthcare, with the exception of emergencies, while there are no interpreters to facilitate the process.<sup>72</sup>

The Committee also noted several other economic and social problems that have arisen due to the high number of refugees residing in Turkey that impede their long-term integration in the country, and often lead to stereotyping, discrimination, tensions or even violence by the locals.

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<sup>69</sup> *Case 5*, p 15; United States Department of State (n 62) section d; Danish Refugee Council, International Rescue Committee, Norwegian Refugee Council, OXFAM, Save the Children and World Vision, 'Joint Agency Briefing Paper, Right to a Future: Empowering refugees from Syria and host governments to face long-term crisis' (9 November 2015) 7 <<http://www.savethechildren.net/sites/default/files/Report%20of%20final%20Syria.pdf>> accessed 15 November 2016; Emanuela Roman, Theodore Baird and Talia Radcliffe (n 2).

<sup>70</sup> *Case 5*, p 15; Human Rights Watch, 'When I Picture My Future, I See Nothing'-Barriers to Education for Syrian Refugee Children in Turkey' (8 November 2015) 5, 6, 19, 22 <[http://www.hrw.org/sites/default/files/report\\_pdf/turkey1115\\_brochure\\_web.pdf](http://www.hrw.org/sites/default/files/report_pdf/turkey1115_brochure_web.pdf)> accessed 15 November 2016.

<sup>71</sup> *Ibid* 19, 21, 35; *Case 5*, p 15; Integrated Regional Information Networks (IRIN), 'School's out for Syrian children in Turkey' (4 November 2015) <<http://bit.ly/2kO8Bc7>> accessed 15 November 2016.

<sup>72</sup> *Case 5*, p 16; Athina Gkouti, 'Women at Risk: Syrian Refugees and Healthcare in Turkey' *Research Turkey – Center for Policy and Research on Turkey* (16 November 2015) <<http://bit.ly/2kQAAna>> accessed 15 November 2016.

With respect to legal aid, although the law provides for the possibility of free legal aid,<sup>73</sup> in practice, this happens in very few cases, while public safety and public order restrictions considerably impede the beneficiaries and their lawyers from being fully informed about their case.<sup>74</sup>

Concerning the right to housing, TPR does not guarantee housing by the state. In practice a very small proportion, namely 263.134 out of the 2 million Syrians present in Turkey, is hosted in the 25 camps,<sup>75</sup> where living conditions are appalling<sup>76</sup> and basic humanitarian needs are not met.<sup>77</sup>

These circumstances illustrate, according to the Committee in this case, that the temporary protection regime cannot be considered equivalent to the protection of the Refugee Convention, due to its discretionary and precarious character, lack of guarantees, and limited rights, including housing (Article 21), education (Article 22), access to courts (Article 16) and wage-earning employment (Articles 17-19).<sup>78</sup>

### C. Link of the Applicant with Turkey

The final criterion for the consideration of a third country as safe, the link of the individual to the country, has also played a role in the Appeals Committees' decisions.

The examination of criterion f of Article 20(1) PD 113/2013 does not as such add to the debate on whether Turkey constitutes a safe third country in general terms and the application of the EU-Turkey deal, since it concerns

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<sup>73</sup> Art 53 TPR.

<sup>74</sup> *Case 5*, p 12; European Council on Refugees and Exiles (n 62) 121.

<sup>75</sup> *Ibid* 128.

<sup>76</sup> *Case 5*, p 13; Matt Broomfield, 'Pictures of Life for Turkey's 2.5 million Syrian Refugees' *The Independent* (London, 5 April 2016) <<http://www.independent.co.uk/news/world/europe/pictures-of-life-for-turkeys-25-million-syrian-refugees-crisis-migrant-a6969551.html>>; Eric Reldy, 'Syrian Refugees in Turkey Face Uncertain Future in Informal Encampments' *The Huffington Post* (New York, 22 April 2016) <[http://www.huffingtonpost.com/entry/torbali-refugee-trail\\_us\\_571a86e0e4bod4d3f7236083](http://www.huffingtonpost.com/entry/torbali-refugee-trail_us_571a86e0e4bod4d3f7236083)> both accessed 15 November 2016.

<sup>77</sup> *Case 5*, p 13; Mosab al-Shihab, 'Syrian Refugees Forced to Share Housing in Turkey' *Institute for War and Peace Reporting* (21 January 2015) <<https://iwpr.net/global-voices/syrian-refugees-forced-share-housing-turkey>> accessed 15 November 2016.

<sup>78</sup> *Case 5*, pp 21 - 22.

the personal situation of the applicants (Figure I). However, the fact that some of the cases have been decided on this criterion, and the issue of legal interest that arises, cannot be neglected in this analysis.

The provision states that there needs to be a link between the applicants and the third country that would reasonably allow them to move there. This link was found to be absent in five<sup>79</sup> out of the eight cases examined here, while one of the decisions was solely based on the non-fulfilment of this criterion, with the Committee considering the examination of further criteria superfluous. In these cases, the Committees found that the applicants had only transited through Turkey on their way to Europe. In one case the Kurdish ethnicity of the applicants was also considered as an obstacle for establishing a link with Turkey.

In one of the remaining three cases,<sup>80</sup> the Committee found it unnecessary to examine this criterion, since it had already overturned the first instance decision based on other criteria (Table II).

In only two decisions,<sup>81</sup> namely the ones that upheld the first instance rulings, considering Turkey as a safe third country, the Committees found that the applicant had established an adequate link that would justify their return to Turkey with the expectation to seek protection and establish themselves there. Both cases concerned male applicants who had lived for more than a year in Turkey before they crossed the border to Greece. One of them had already received protection status in Turkey.

In the analysis of criterion f, we observe a tension with respect to the interpretation of the 'link', in particular the circumstances under which that is established. The antagonism between the two opposing views becomes most vividly apparent in *Case 8*, where it is made explicit in the main decision of the Committee on the one hand and in the dissenting opinion of its President on the other.

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<sup>79</sup> *Cases 4, 5, 6, 7, and 8.*

<sup>80</sup> *Case 1.*

<sup>81</sup> *Cases 2 and 3.*

The Committee, in a majority decision, takes into account the views of the UNHCR concerning the concept of the safe third country,<sup>82</sup> according to which transit alone through a country cannot establish such a link as it is often coincidental. The same holds for the right to enter a country. A substantial link could be established due to the presence of family members in the third country, or links to the wider community there, such as studies or linguistic and cultural bonds. The Committee holds that such circumstances should be examined together with the fact of transiting.<sup>83</sup> In this particular case two family members of the applicant were residing in Turkey but were considered to be there coincidentally and were planning to leave the country. Moreover, the applicant was found to not have linguistic, cultural or other links with Turkey.

In her dissenting opinion, the President of the Committee started from a different premise by referring to the opinion of the European Commission that transit through Turkey can be considered sufficient to establish a link with the country.<sup>84</sup> She furthermore considers that the applicant's relatives had been residing in Turkey for an adequate time so that they could be considered the 'link' of the applicant to the country, notwithstanding that they were planning to leave the country.

The underlying arguments based on the two lines of interpretation coming from the UNHCR and the European Commission appear either explicitly or implicitly in all decisions that deal with the question of the fulfillment of criterion f (Table II). The influence of the policy document issued by the European Commission suggesting that transit suffices to substantiate a link with Turkey seems to have decisively influenced the two decisions

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<sup>82</sup> *Case 8*, pp 16 - 17; UNHCR, 'Legal Considerations on the return of asylum-seekers from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept' (23 March 2016) <<http://www.unhcr.org/56f3ec5a9.pdf>> accessed 15 November 2016.

<sup>83</sup> *Case 8*, pp 16 - 17; United Nations High Commissioner for Refugees 'Section 12: The safe third country concept' 18 <<http://www.refworld.org/cgi-bin/tehis/vtx/rw/main/opendocpdf.pdf?reldoc=y&docid=4bab55e22>> accessed 15 November 2016.

<sup>84</sup> *Case 8*, pp 20-21; Communication from the Commission to the European Parliament, the European Council and the Council Next Operational Steps in EU-Turkey Cooperation in the Field of Migration, COM (2016) 166 final, 3.

considering Turkey safe, as well as the dissenting opinions of the Presidents of the Committees in *Cases 7 and 1* (Table I).

Table II: Quantitative Categorization – Basis for the Decision 'Is Turkey Safe Third Country?'

Safe Third Country Criteria	Case 1	Case 2	Case 3	Case 4	Case 5	Case 6	Case 7	Case 8	Cases where the criterion was not fulfilled	Cases where the criterion was fulfilled
<i>No risk of refoulement (b,d)</i>	X				X	X	X	X	3	2
<i>Refugee Status (e)</i>	X				X	X	X	X	5	0
<i>Link with the country (f)</i>		X	X	X	X	X	X	X	5	2
<i>Risk to life or liberty (a)</i>	X	X			X	X		X	0	5
<i>Risk of harm (c)</i>	X	X			X	X		X	0	5
STC		X	X							
Not STC	X			X	X	X	X	X		

Source: Mariana Gkliati, August 2016.

#### D. Criteria that are Fulfilled: a) Persecution, c) Subsidiary Protection

The criteria of Article 20(1) PD 113/2013 concerning a direct risk to the life and liberty of the applicant on account of race, religion, nationality, membership of a particular social group or political opinion (criterion a) and the risk of suffering serious harm, as defined in the Qualification Directive, were considered separately and were found to be fulfilled in some cases, while in others they were not mentioned separately (Table II).

In the leading *Case 1* the Committee concluded that the general situation of Syrians in Turkey does not suggest such a risk. Notably 2,290,000 Syrians live currently in Turkey with temporary protection status, from which 263,000 stay in 25 refugee camps and the rest stay in rented houses. Based on recent reports of Amnesty International, Human Rights Watch, and the United States Department of State, the Committee finds that there are no incidents of violence against Syrians in Turkey.<sup>85</sup> Furthermore, those that enjoy a temporary protection status are in principle not subject to detention. Finally,

<sup>85</sup> *Case 1*, p 9.



with respect to criterion c, the Committee notes that the evidence does not suggest a state of generalised violence that would justify finding an indiscriminate serious risk of harm.<sup>86</sup>

The Committee in *Case 5* added that, according to the European Council on Refugees and Exiles,<sup>87</sup> the beneficiaries of temporary protection status are in principle not detained, but the TPR provides for the possibility of administrative detention,<sup>88</sup> while there is no judicial remedy against the relevant decisions. Furthermore, one of the camps in Duzici has been reformed into a *de facto* detention centre, and Amnesty International has reported detentions and mistreatment in the hands of the authorities.<sup>89</sup> Nevertheless, the Commission expressed doubts as to whether the evidence presented in the reports is adequate to conclude that the individual applicants would face risk to their life, liberty or physical integrity.<sup>90</sup>

In no decisions from the sample studied here have the Committees found that criteria a and c are not fulfilled.

#### E. Intermediate Summary

At this point, it would be useful to summarise the findings of the analysis of the Appeals Committees decisions on the question of whether Turkey is a safe third country for Syrian refugees.

First of all, the Committees agree that the dangerous situation in the country is not generalised to the extent that every return to Turkey would be prohibited *a priori*.<sup>91</sup> The individual circumstances of the applicants still play a role as to whether Turkey is safe for them. The Committees also rule that

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<sup>86</sup> *Case 1*, p 13.

<sup>87</sup> *Case 5*, p 8; European Council on Refugees and Exiles (n 62).

<sup>88</sup> Arts 6 and 8 TPR; Arts 57 and 68 LFIP.

<sup>89</sup> *Case 5*, p 8; Amnesty International, 'Turkey: EU risks complicity in violations as refugees and asylum-seekers locked up and deported' (16 December 2015) <<http://www.amnesty.org/en/latest/news/2015/12/turkey-eu-refugees-detention-deportation/>> accessed 15 November 2016.

<sup>90</sup> *Case 5*, p 9; COM (2016) 166 final (n 84), 3.

<sup>91</sup> *NA v the United Kingdom* App no 25904/07 (ECtHR, 17 July 2008); *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).

the evidence provided is not substantial enough to suggest direct risk to the life and liberty of Syrian refugees or risk of serious harm.

On the issue of *refoulement*, the Committees in three out of the five cases in which it is examined, find unanimously that the principle of non-*refoulement* is systematically violated in Turkey, recalling incidents of violent rejection at the borders and mass deportations to Syria. In the two cases where no risk of *refoulement* is found, the Committees refer to reported systematic incidents of *refoulement*, but base their final conclusion on the fact that the Turkish authorities had detained the applicants, and although they were threatened that they would be returned to Syria, they were eventually let go without the threat actually materializing. The main weakness of this argument is that it fails to explain how this incident guarantees the safety of the applicants from being arbitrarily returned to Syrian upon their readmission to Turkey in the face of the general situation of collective expulsions and violent rejection at the borders.

### *3. Impact of the EU-Turkey Agreement*

At this stage, it is relevant to examine what the impact of the EU-Turkey agreement has been upon the Appeals Committees' decisions following its adoption.

It follows from the examination of the sample that the adoption of the agreement was seen by the Appeals Committees as an important development that sets the circumstances for their rulings. They have, nevertheless, also taken into account other decisive factors. In most cases the Committee explicitly takes into account the EU-Turkey agreement as well as important policy documents related to it, such as the first progress report on the implementation of the EU-Turkey Statement,<sup>92</sup> the Commission Communication on the next operational steps in EU-Turkey cooperation in the field of migration,<sup>93</sup> and a letter by the European Commission (DG Migration and Home Affairs) to the Greek Secretary General of Migration Policy on the same topic. According to this letter, following the legislative

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<sup>92</sup> Communication from the Commission to the European Parliament, the European Council and the Council, First Report on the progress made in the implementation of the EU-Turkey Statement COM(2016) 231 final.

<sup>93</sup> COM (2016) 166 final (n 84).

changes in Turkey, the protection afforded is equivalent to that of the Refugee Convention, and Turkey has taken all the necessary measures for it to be considered safe for the purposes of returns from Greece.<sup>94</sup>

Only in *Cases 5, 6, and 8* was the EU-Turkey agreement not mentioned by the Committee, besides pointing out that the Committee adopts the opinion of the UNHCR that the safe third country question cannot be answered in a general manner, for instance through legislation, but needs to be determined on a case-by-case basis,<sup>95</sup> which is also required by Article 38 of the Asylum Procedures Directive.<sup>96</sup>

It is important to note that the representative of the Ministry and President of the Committee in *Case 8* based her decision that criterion e, concerning refugee status, is fulfilled, explicitly and solely on the EU-Turkey deal. The dissenting opinion noted that Turkey has provided assurances that all those returned will benefit from the temporary protection regime and that the ECtHR recognises that such assurances are an important factor in the determination by the Court of the risk of refoulement.<sup>97</sup> The President considers the guarantees provided by the Turkish law, combined with the assurances, to be protection equivalent to that of the Refugee Convention.

In the leading *Case 1*, the issue of the EU-Turkey agreement is discussed in detail. The Committee holds (in majority) that the notion of safe third country needs to be interpreted by the authority that decides on the claim for international protection. The national legislature or administration or EU institutions are in principle empowered to establish the presumption that a third country is safe. However, such an act would limit the discretion of the asylum authorities and would shift the burden of proof to the applicant.

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<sup>94</sup> Letter from Matthias Ruetem Director General Migration and Home Affairs to Vasileios Papadopoulos, Secretary-General, General Secretariat for Population and Social Cohesion, Ref. Ares(2016)2149549 - 05/05/2016 <<http://statewatch.org/news/2016/may/eu-com-greece-turkey-asylum-letter-5-5-16.pdf>> accessed 15 November 2016.

<sup>95</sup> *Case 5*, p 19; *Case 6*, p 16; *Case 8*, p 10; United Nations High Commissioner for Refugees (n 83) 12.

<sup>96</sup> *Case 5*, p 19.

<sup>97</sup> *Case 8*, pp 19-21; *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 9 May 2012); *Tarakhel v Switzerland* Appl no. 29217/12 (ECtHR 2 November 2014).

Because of the shifting of the burden of proof, this presumption should be able to be challenged at court with respect to the correct application of EU law.<sup>98</sup>

Regardless of the legal nature of the EU-Turkey agreement (the Committee does not directly engage in this discussion),<sup>99</sup> the Committee, in an alternative interpretation, holds that the agreement does not concern the application of the concept of the STC to Turkey, but instead the obligation of Turkey to accept Syrians whose claim for international protection has been denied. If it were to be concluded that the presumption that Turkey is a STC had been established by the deal, the Committee continues, it would have been a necessary requirement for this presumption to be included in a legislative or administrative act that could be challenged before courts.<sup>100</sup>

It can be concluded that, although the Committees take into account the EU-Turkey deal, they do not accept an umbrella presumption of Turkey as a safe third country for Syrians. This becomes obvious from the explicit interpretation of the leading *Case I*, but also from the fact that in all the cases, while acknowledging the deal, the situation is examined on an individual basis. With respect to the two exceptional cases that recognise Turkey as safe, we could argue that the lack of in depth discussion and argumentation on the basis of institutional and state reports shows that the Committees in these two cases heavily relied on the EU-Turkey agreement. Their members seem to accept a strong presumption that is, however, not irrebuttable. This can be deduced from the fact that the possibility of serious risk of persecution is at least superficially examined and rejected. However, it is difficult to draw any definitive conclusions, due to the fairly limited argumentation that does not allow for an adequate examination of the motivation of the decisions.

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<sup>98</sup> *Case I*, p 8.

<sup>99</sup> See Steve Peers and Emanuela Roman (n 2); Maarten den Heijer and Thomas Sprijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (*EU Law Analysis Blog*, 07 April 2016) <<https://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>> accessed 15 November 2016.

<sup>100</sup> *Case I*, p 9.

## VI. TURKEY AS STC FOR THE GREEK APPEALS COMMITTEES

This section will cover the evaluation of the decisions in terms of logical and methodological soundness. An evaluation on the substantive level would be exceeding the scope of this article.

The most important basis for considering that Turkey is not a safe third country for the Committees seems to be the possibility to apply for, receive, and enjoy refugee status, as that is provided in the Refugee Convention. All Committees in the positive decisions agreed that this requirement is not fulfilled. Two of the Committees ruled unanimously on the issue,<sup>101</sup> while in the remaining three it was the President of the Committees that issued a dissenting opinion (Table I). This is perhaps the most stable ground for considering Turkey not safe for two further reasons. First, because the outcome is based on a large number of grounds, and second, because the analysis does not solely rely upon the situation on the ground, as described in NGO and institutional reports, but relies greatly upon the examination of the legal framework itself.

We should not omit to comment on the decisions, where the basic factor was not the general situation in the country, but the personal situation of the individual applicant (Figure I). In *Case 4* the Committee avoided getting into the issue of discussing the general situation concerning Syrians in Turkey by basing its decision on the link of the applicant with Turkey. Also, the negative decisions were based on the fact that the applicants had established a link with the country, paying little to no attention to the other criteria.<sup>102</sup> This does not allow us to draw conclusions about their position on the issues of refoulement and the refugee status of Syrians in Turkey. It is relevant to note that all three decisions were issued by the same Committee (Table I). It seems that these three members (Table I) chose to focus on the existence of the link with the third country, avoiding a discussion based on evidence on widespread refoulement of Syrians and the issue of their refugee status.

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<sup>101</sup> Cases 5 and 6.

<sup>102</sup> In both cases in identical wording, the Committees find the applicants' claim with respect to condition a not credible, while they rule that all other criteria are fulfilled in Turkey for Syrian refugees that reside and work in Turkey since 2014, face no risk of persecution, and do not belong to a vulnerable group, citing a letter sent by the UNHCR to the Asylum Service.

Although this approach is methodologically sound in *Case 4*, since the non-fulfilment of one condition suffices to reach a conclusion on the issue of the safe third country, one cannot say the same about the two negative decisions. The conditions in Article 20(1) PD 113/2013 and Article 38 Asylum Procedures Directive are cumulative and not alternative. In other words, the superordinate category of the 'safe third country' needs to contain all the attributes included in the Article. Thus, having decided that a condition is fulfilled the responsible authority needs to consider the other conditions, and only in the case that all of them are fulfilled, finally decide that a country is to be considered safe for the purposes of return.

This methodological error fundamentally challenges the quality of these two decisions, while combined with the limited emphasis on the motivation of the decisions,<sup>103</sup> creates uncertainty as to the precise legal reasoning.

Another element that puts the quality of these decisions at a disadvantage is their documentation. Their members placed confidence in the declaration of Turkey as a STC by the EU-Turkey agreement, while failing to take into account the general situation in law and practice concerning Syrian refugees, as this has been documented by NGO, institutional, and academic sources.

At the other end of the spectrum, the positive decisions are well informed about Turkish law and are thoroughly documented concerning the situation on the ground. The Committees, in order to examine the credibility of the claims of the applicants, resorted to NGO and institutional reports, as well as academic articles often presenting a clash between law and practice in Turkey.

The first decision, *Case 1*, seems to be the most clearly reasoned with well-structured and elaborate explanations and references to the legal framework. It also laid the groundwork and produced the research and the basic argumentation that was used by the decisions that followed.

## VII. THE RE-ORGANIZATION OF THE APPEALS COMMITTEES

One month after the first decision of the Appeals Committees the Greek Parliament, in a fast-track legislative procedure, adopted an amendment that

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<sup>103</sup> The negative decisions are in average half in size compared to the positive ones.

modifies the composition of the Committees (Art. 86 of Law 4399/2016).<sup>104</sup> Up until then the administrative Committees were composed of one representative of the Ministry of Interior, one human rights expert selected by the government from a list compiled by the National Commission on Human Rights (NCHR), an official consultative organ to the state, and one UNHCR representative.

Following political pressure on the Greek government from the European Council<sup>105</sup> and the Commission to expedite returns to Turkey and to 'rethink this system with the committees',<sup>106</sup> the legislative amendment created new Appeals Committees. These were renamed 'Independent Appeals Committees' and are composed of two judges of the Administrative Courts and one member proposed by the UNHCR or the NCHR in case the former has not proposed one within the deadline.

The Greek government supports this change on the basis of reinforcement of independence and the right to an effective remedy, arguing that this brings Greece closer to European safeguards.<sup>107</sup>

On a substantive level, the analysis of the decisions above disproves the responsible Minister's accusations of bias by the 'members of civil society' composing the Committees.<sup>108</sup> Next to the fact that the UNHCR and the NCHR do not represent civil society but are respectively a UN body and an official consultative organ to the state, there are several arguments that support the unbiased nature of the decisions.

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<sup>104</sup> Article 86 of Law 4399/2016 amending Article 5 Law 4375/2016. The new Law 4375/2016 governing the Asylum Service and the Appeals Authority had been adopted two months prior to the sudden amendment included in an unrelated piece of legislation.

<sup>105</sup> Irene Kostaki, 'EU Council: Why Greece should consider Turkey safe for Syrian refugees', *New Europe* (9 June 2016) <[www.neweurope.eu/article/eu-council-greece-consider-turkey-safe-syrian-refugees/](http://www.neweurope.eu/article/eu-council-greece-consider-turkey-safe-syrian-refugees/)> accessed 15 November 2016.

<sup>106</sup> Eszter Zalan, 'EU pushes Greece to set up new asylum committees', *EU Observer* (Brussels, 15 July 2016) <<https://euobserver.com/migration/133841>> accessed 15 November 2016.

<sup>107</sup> Petros Katsakos, 'Γιάννης Μουζάλας: Το Brexit και η άδικη κριτική', *AVGI Newspaper* (Athens, 26 July 2016) <[www.avgi.gr/article/10842/7020509/to-brexit-kai-e-adike-kritike#](http://www.avgi.gr/article/10842/7020509/to-brexit-kai-e-adike-kritike#)> (in Greek) accessed 15 November 2016.

<sup>108</sup> Ibid.



In particular, in 3 out of the 5 relevant cases examined here the decisions were unanimous with the Ministry representative holding that Turkey is not a safe third country. The two negative decisions were also unanimous, with all three members agreeing that Turkey is safe for the applicants concerned.

As far as the legislative framework is concerned, EU law and the ECHR leave sufficient discretion to member states to develop their domestic asylum systems. However, this must be done in a way that is compatible with the right to an effective remedy. For the practical and effective implementation of this right the ECHR in Art.13 requires a review before a national authority that is not necessarily a tribunal.<sup>109</sup> Under EU law, Art. 47 of the EU Charter of Fundamental Rights, however, provides a stricter interpretation requiring that the right to an effective remedy is guaranteed by 'a court or tribunal'.<sup>110</sup>

Many EU member states, such as Germany, Bulgaria, the Netherlands, Ireland, Slovenia, Italy, and Finland, have assigned the review of asylum decisions in the second instance to judicial authorities, while France has a specialised Asylum Court.

At this point it should be noted that judicial review is not absent in the Greek system, as under Greek administrative law administrative courts can review the decisions of the Appeals Committees.

The involvement of a judicial authority is, in principle, an important safeguard of objectivity and independence. However, it is not an absolute one. The ECtHR has established several elements that constitute an 'independent' tribunal for the purposes of Article 6 (1), including safeguards against external pressures. With respect to the impartiality of the tribunal, one of the tests applied by the ECtHR is whether there are legitimate reasons

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<sup>109</sup> *Klass and Others v Germany*, App no 5029/71, (ECtHR, 6 September 1978); *Silver v the United Kingdom*, App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 February 1983).

<sup>110</sup> Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Art. 47, 29 and 30 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>> accessed 15 November 2016.

to fear that the impartiality is compromised, in particular whether this fear can be objectively justified.<sup>111</sup>

At this stage the question of whether the new national authority remains a quasi-judicial body or constitutes a tribunal for the purposes of Article 47 of the Charter needs to be addressed. The issue is not a matter of definition by the constituting national authorities, but is determined in the context of EU law. Article 39 (1)(a) of the Procedures Directive states that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum.<sup>112</sup> The Court of Justice of the European Union (CJEU) has set out a number of criteria that serve as requirements for an authority to be considered as 'a court or tribunal' in *H. I. D. and B. A. v Refugee Applications Commissioner and Others*.<sup>113</sup> Some of these criteria are whether the body is established by law, whether its jurisdiction is compulsory, whether it applies rules of law and whether it is independent. In the context of this test the CJEU deemed it necessary 'to assess as a whole the Irish system of granting and withdrawing refugee status in order to determine whether it is capable of guaranteeing the right to an effective remedy'.<sup>114</sup>

The issue has been at the centre of a heated debate on the constitutionality of the legislative amendment, with members of the Greek Parliament, and the National Commission of Human Rights<sup>115</sup> having expressed doubts as to whether the new body constitutes a judicial authority.<sup>116</sup> The Council of

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<sup>111</sup> *Gautrin and Others v France*, App nos 21257/93, 21258/93, 21259/93 et al. (ECtHR, 20 May 1998).

<sup>112</sup> Art 47 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

<sup>113</sup> Case C-175/11 *HID and BA v Refugee Applications Commissioner and Others* EU:C:2013:45.

<sup>114</sup> *Ibid*, para 102.

<sup>115</sup> National Commission on Human Rights, 'Δημόσια Δήλωση για την τροπολογία που αλλάζει τη σύνθεση των ανεξάρτητων Επιτροπών Προσφυγών', (Athens, 17 July 2016) <[http://nchr.gr/images/pdf/apofaseis/prosfuges\\_metanastes/Dimosia%20dilwsi%20EEDA.pdf](http://nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf)> (in Greek) accessed 15 November 2016.

<sup>116</sup> ECRE, 'Greece amends its asylum law after multiple Appeals Board decisions overturn the presumption of Turkey as a 'safe third country'' (Brussels, 24 July 2016)

State, the highest administrative court, has ruled on the issue of the participation of judges in Committees, holding in its established case law that the latter do not constitute a judicial authority in the meaning of Article 89(2) of the Greek Constitution, since they issue decisions on administrative acts, following the rules of administrative procedure, which do not afford fair trial guarantees, such as public hearings, cross examination, and the right to be heard.<sup>117</sup> This issue is raised among others in a case brought recently before the Council of State, challenging the reorganization of the Appeals Committees.

The Appeals Committees have been part of the asylum system in Greece since 2012. Until then the Council of State was responsible for the review of asylum decisions in the second instance. In this period, the ECtHR held in *M.S.S. v Belgium and Greece* that serious deficiencies made the system of appeals ineffective, whilst the protection it provided was theoretical and illusory.<sup>118</sup> One of the factors taken into account by the ECtHR when judging the fairness of the procedure was the recognition rates of refugee status under the Geneva Convention, which were as low as 2.87% in 2008, and of humanitarian reasons or subsidiary protection, which were 1.26%, according to the UNHCR. By comparison, the average success rate in first instances was 36.2% in the five countries which, along with Greece, received the largest number of applications that year.<sup>119</sup> In implementing the *M.S.S.* judgment the Greek Government established the Asylum Service, which dealt with claims in the first and the second instance. In 2015 the recognition rates of the Appeals Committees were around 23%, according to Eurostat.<sup>120</sup>

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<<http://www.ecre.org/greece-amends-its-asylum-law-after-multiple-appeals-board-decisions-overturn-the-presumption-of-turkey-as-a-safe-third-country/>> accessed 15 November 2016.

<sup>117</sup> Greek Council of State 3503/2009 and 717/2011 Department B, 449/2012 Department F, 629/2012 Department D, 1770/2012 Department E, 99/2015 Department E; Greek Council of State 3503/2009 and 99/2015 Department E.

<sup>118</sup> *M.S.S. v Belgium and Greece* (n 30).

<sup>119</sup> Ibid, paras 125 - 7.

<sup>120</sup> Eurostat, 'EU Member States granted protection to more than 330 000 asylum seekers in 2015 Half of the beneficiaries were Syrians' (20 April 2016) <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 15 November 2016.

Thus, the analysis of the legal framework and the domestic practice, indicate that judicial review is not an absolute and exclusive safeguard for effective legal protection. Moreover, the empirical research did not show signs of bias by the members of the 'civil society'. To the contrary, the decisions were well argued and thoroughly documented. Furthermore, many of them were unanimous. By contrast, the negative decisions are not equally sealed from accusations of bias. Finally, the issue of the impartiality and independence of the new body cannot be judged with scientific certainty without access to the text of the decisions of the new Appeals Committees. However, the timing of the amendment, which coincides with decisions of the Appeals Committees blocking returns to Turkey, is alarming and must certainly result in the question being raised. All the more so, since the first indication of the practice of the new Appeals Committees confirms their alignment with the EU-Turkey deal and the opinion of the Greek government and the European Commission. As mentioned already in section II, the new Appeals Committees have issued so far 20 decisions, all of which uphold the inadmissibility decision of the first instance, ruling that Turkey is a safe third country.

A development that is worth mentioning is that two appeals are pending currently before the Greek Council of State that challenge the administrative acts establishing the new Appeals Committees and one of their decisions considering Turkey a safe third country.<sup>121</sup> At the regional level, the first case regarding the implementation of the EU-Turkey Joint Statement is pending before the ECtHR.<sup>122</sup> The ECtHR has also issued interim measures to stop the deportation of an Iranian applicant on the basis of the EU-Turkey deal.<sup>123</sup> In a parallel development, the CJEU, has distanced itself from the EU-

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<sup>121</sup> With Decision 477/2017 the responsible chamber of the Greek Council of State referred on 21 February 2017 the issue to the Grand Chamber.

<sup>122</sup> The European Court of Human Rights communicated the case of *B.İ. v. Greece* and has addressed the Greek government with specific questions (30 May 2017) <<http://bit.ly/2sdZC6O>> accessed 26 July 2017.

<sup>123</sup> EFSYN, 'Μήνυμα ΕΔΔΑ κατά των απελάσεων' (02 May 2017) <<http://www.efsyn.gr/arthro/minyma-edda-kata-ton-apelaseon>> accessed 26 July 2017

Turkey agreement, ruling that that was in fact not an EU act, and therefore not subject to the jurisdiction of the court.<sup>124</sup>

Furthermore, it should be noted that, in a common report, ECRE, the Dutch Refugee Council, the Greek Refugee Council, the Nationale Postcode Lotterij, ProAsyl, and the Italian Refugee Council point out that the excessive application of the 'safe third country concept' at the admissibility stage of the review of the asylum applications has resulted in a sort of 'filtering of newly arrived migrants before they enter the asylum procedure'.<sup>125</sup> This new trend at the admissibility stage, which appeared after the entry into force of the EU-Turkey agreement, essentially preselects those that can enter the asylum system, blocking access to the asylum procedure for the rest.

The EU-Turkey agreement provides for the readmission to Turkey of all new irregular migrants that crossed from Turkey to Greece, including asylum seekers whose applications have been refused. The readmission, according to the agreement, comes as a result of holding the asylum application inadmissible or unfounded. Nevertheless, the agreement is systematically used at a prior stage in order to exclude access to the asylum procedure itself.

## VIII. CONCLUSIONS

To sum up, in 390 out of the 393 decisions issued by the Greek Asylum Appeals Committees, the requirements of national law and the Asylum

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<sup>124</sup> Orders of the General Court in Cases T-192/16, T-193/16, and T-257/16, *NF, NG and NM v European Council*, EU:T:2017:128, EU:T:2017:129, and EU:T:2017:130. The General Court of the European Union ruled on 28 February 2017 that it lacks jurisdiction to hear actions against the EU-Turkey deal. The order of the General Court came in response to the actions for annulment brought by three asylum seekers in Greece lodged on 22 April 2016. The General Court in a rather unconvincing creative interpretation held that the EU-Turkey deal was not a measure adopted by the Union, but it was in fact an agreement between its Member States and Turkey. The applicants have lodged an appeal against the judgment.

<sup>125</sup> ECRE, Dutch Council for Refugees, Greek Council for Refugees, Nationale Postcode Lotterij, ProAsyl, and Italian Council for Refugees, 'The implementation of the hotspots in Italy and Greece – A Study' (05 December 2016) <<https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016.pdf>> accessed 15 November 2016.

Procedures Directive in order to consider Turkey a safe third country are not fulfilled.

From the sample of the decisions analysed here, it can be concluded that the main issues, on the basis of which the Appeals Committees draw their conclusions, concern the risk of refoulement and the lack of protection equivalent to that provided by the Refugee Convention.

Another core issue that results from the analysis of the decisions studied here concerns the impact of the EU-Turkey agreement upon them. The Appeals Committees take into consideration the EU-Turkey deal. They do not however consider it binding as to the interpretation of the safe third country requirement. They hold that national authorities have autonomy on the interpretation of the concept, which should be carried out on a case-by-case basis taking into account the particular circumstances of each case.

With respect to the two exceptional decisions that consider Turkey a safe third country, it would be safe to conclude that the Committees heavily relied on the EU-Turkey agreement. They seem to accept a strong presumption of Turkey as safe, that is, however, not irrebuttable.

These decisions have essentially impeded the application in practice of the EU-Turkey agreement, as the applicants could not be returned to Turkey. As a result, the decision was made for the reorganisation of the Committees and they were essentially replaced by new Committees that are composed of two administrative law judges and one person proposed by the UNHCR or the NCHR. The hypothesis on which that decision was based, i.e. that this would bring greater objectivity and independence and would provide more effective judicial protection is not substantiated by the conclusions of this empirical study or by the analysis of the legal framework. Next to the fact that the allegations that motivated the amendment are not confirmed here, the timing of the amendment itself, which coincides with decisions of the Appeals Committees blocking returns to Turkey, is also alarming. All the more so, since the first indication of the practice of the new Appeals Committees confirms their alignment with the EU-Turkey deal and the opinion of the Greek government and the European Commission. Hence, although no concrete scientific conclusions can be drawn as to the impartiality and independence of the new Committees without access to the text of their decisions, there are enough arguments to support that the

decision for the reorganization of the Committees was purely political aiming to circumvent the legal obstacles blocking the application of the EU-Turkey deal.

In the light of the challenges concerning migration management in Europe, this contribution aspires to inform the discussion concerning one of the most controversial topics amongst scholars, policy makers, and the general public, i.e. the EU-Turkey agreement. The effective application of this agreement is of broader importance, since cooperation with third countries is one of the main priorities for migration policy at the national (e.g. cooperation agreements of Italy with Gambia and Sudan) and at the EU level (e.g. Commission agreements, Frontex working arrangements) for the coming period.

By delving into the untapped and highly inaccessible resource of the decisions of the Greek Asylum Appeals Committees, this study examines issues concerning the interpretation and the enforcement of the EU-Turkey agreement. This can essentially contribute to the debate that started at the policy level, has moved to the field, and is to be continued before the courts.





# NATIONAL PARLIAMENTS' THIRD YELLOW CARD AND THE STRUGGLE OVER THE REVISION OF THE POSTED WORKERS DIRECTIVE

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*The Treaty of Lisbon strengthened the role of national parliaments in the EU legislative process by creating the Early Warning System. This procedure offers them the possibility to send reasoned opinions to the European Commission if they have subsidiarity concerns about a legislative proposal. Since 2009 the necessary threshold (i.e. one third of the total number of votes) has only been reached three times. The most recent of these 'yellow cards' was triggered by the Commission's proposal to revise the Posted Workers Directive, an event that allows us to shed some light on how national parliaments use this mechanism and how the European Commission has reacted. The subsidiarity concerns were rejected by the Commission and the legislative process continues despite deep divisions between old and new Member States over the controversial policy issue of revising the Posted Workers Directive.*

**Keywords:** National parliaments, subsidiarity, posting of workers

## TABLE OF CONTENTS

I. INTRODUCTION .....	126
II. COMPARISON WITH THE PREVIOUS YELLOW CARDS .....	128
III. BACKGROUND AND CONTENT OF THE COMMISSION'S PROPOSAL FOR THE REVISION OF THE PWD .....	134
1. <i>A Highly Controversial Issue Despite Its Marginal (Numerical) Significance</i> ..	134
2. <i>Content of the Commission's Proposal</i> .....	139
IV. DYNAMICS OF INTERPARLIAMENTARY COORDINATION FOR THE THIRD YELLOW CARD .....	144

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V. CONTENT OF THE REASONED OPINIONS AND CONTRIBUTIONS SUBMITTED BY NATIONAL PARLIAMENTS .....	147
VI. WHAT HAS HAPPENED SINCE AND WHAT CAN WE EXPECT NEXT? .....	151
1. <i>The Response of the European Commission to the Yellow Card</i> .....	152
2. <i>The On-Going Legislative Process and the East-West Divide</i> .....	154
VII. CONCLUSION .....	158

## I. INTRODUCTION

In 2016, the Early Warning System (EWS) for the control of the respect of the principle of subsidiarity by national parliaments was activated for the third time. 14 parliamentary chambers<sup>1</sup> totalling 22 votes had informed the European Commission (the Commission) by 10 May 2016 that they considered its Proposal for a Directive concerning the posting of workers in the framework of the provision of services<sup>2</sup> (hereafter: the PWD or the Directive) to be in breach of the principle of subsidiarity.

The right for national parliaments to control the respect of the principle of subsidiarity of new European Union (EU) legislative proposals,<sup>3</sup> when the EU has no exclusive competence, was granted to them by the Lisbon Treaty. Since 2009, national parliaments each have two votes in the framework of the EWS; in bicameral systems, each chamber has one vote.<sup>4</sup> If the reasoned opinions forwarded by national parliaments to the European Commission

<sup>1</sup> With the number of votes in brackets: Romanian Chamber of Deputies (1), Romanian Senate (1), Czech Chamber of Deputies (1), Czech Senate (1), Polish Sejm (1), Polish Senate (1), Seimas of the Republic of Lithuania (2), Danish Parliament (2), Croatian Parliament (2), Latvian Saeima (2) Bulgarian National Assembly (2), Hungarian National Assembly (2), Estonian Parliament (2) and the National Council of the Slovak Republic (2).

<sup>2</sup> Proposal for Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final.

<sup>3</sup> This means that national parliaments cannot review existing legislation unless a proposal for its amendment is presented.

<sup>4</sup> Articles 6 and 7 Protocol No. 2 annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/C1 ('the Treaties')

within the eight weeks following the transmission of an EU legislative proposal amount to one third of the total number of votes – one fourth in the Area of Freedom, Security and Justice – this triggers a 'yellow card'.<sup>5</sup> If this total amounts to half of the total number of votes, it is an 'orange card'.<sup>6</sup> The Commission has not received an orange card yet.

This article aims at analysing the third yellow card triggered in 2016. In particular, it highlights the dynamics of interparliamentary cooperation which allowed the threshold to be reached. Special attention is further devoted to the East-West divide that came up in relation to the issue of Posting Workers. We contend that the Juncker Commission's attitude is similar to the one adopted by the Barroso Commission after national parliaments had triggered the second yellow card. The Barroso Commission did not want to change its proposal for political reasons and unless it concludes to have committed a subsidiarity breach, the Commission's hands are tied by the letter of the Treaty and the Commission may not modify a legislative proposal for other reasons after the EWS has been activated.

This article is structured as follows. The next section provides an analysis of the previous two yellow cards (II). Then the background and the content of the proposal for a revision of the PWD (III), as well as the dynamics of interparliamentary cooperation between national parliaments to activate the EWS are examined (IV). Building on this assessment, this article looks at the actual content of the reasoned opinions (V). Subsequently, the ongoing legislative process, i.e. what has happened since the yellow card was triggered, is described (VI). The final part draws some conclusions and discusses the effects that the third yellow card may have on the future role of national parliaments in the EU (VII).

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<sup>5</sup> Article 7(1) Protocol No. 2 annexed to the Treaties.

<sup>6</sup> Article 7(3) Protocol No. 2 annexed to the Treaties.

## II. COMPARISON WITH THE PREVIOUS YELLOW CARDS

The third yellow card, on the PWD, was preceded by two other yellow cards: in 2012 on the 'Monti II' proposal<sup>7</sup> and in 2013 on the European Public Prosecutor's Office proposal (EPPO).<sup>8</sup>

The first yellow card, triggered in 2012, concerned the 'Monti II' Proposal for a Council Regulation. The proposal aimed at 'lay[ing] down the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services' (Article 1(1)). This proposal was particularly short (five articles only) and it was heavily criticised by national parliaments for failing to demonstrate the existence of any added value of action at EU level, for lacking proper justification, and for the choice of the legal basis that supposedly allowed the Commission to take action in this domain – although national parliaments mentioned other arguments unrelated to subsidiarity, their main points of criticism strictly focused on subsidiarity.<sup>9</sup>

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<sup>7</sup> Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130.

<sup>8</sup> Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534.

<sup>9</sup> Indeed, if the Commission has no competence to act in the first place, there cannot be any question of subsidiarity, as this principle applies in the domain of non-exclusive EU competences. See for more details on the arguments raised by national parliaments, the context and content of this proposal: Federico Fabbrini and Katarzyna Granat, 'Yellow Card, but no Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 *Common Market Law Review* 115; Diane Fromage, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. La participation des Parlements Allemands, Britanniques, Espagnols Français et Italiens* (L'Harmattan 2015) 359f; and Marco Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation' (2014) 10 *European Constitutional Law Review* 90. All reasoned opinions are available on the Platform for EU interparliamentary exchange (IPEX) <<http://www.ipex.eu>> accessed 2 April 2017.

The proposal was made on the basis of the flexibility clause (Article 352 Treaty on the Functioning of the European Union (TFEU)) whose usage the Commission justified as follows: 'Article 352 TFEU (reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties) is the appropriate legal basis for the proposed measure'.<sup>10</sup> The Commission did not see any contradiction with the clear prohibition contained in Article 153(5) TFEU which reads: 'The provisions of this Article [Art. 153] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'. In its view, the fact that the Court has issued rulings on this matter shows that collective actions cannot be deemed to remain outside of the scope of EU law.<sup>11</sup> The *Viking Line* and *Laval* rulings<sup>12</sup> had indeed already encroached upon the prohibition contained in Article 153(5) TFEU. In *Laval*, the Court of Justice of the European Union (CJEU) was asked to answer the question whether a strike that violated the freedom of services was allowed; the Court replied that this was not the case since the object of the strike was to demand acceptance of wages higher than set by the systems allowed in the PWD. Hence, the Court in this judgment adopted a new approach by considering, among other things, the minimum pay level in the host State as a ceiling, thus implying that host States could not apply higher terms and conditions of employment to workers than the minimum levels.<sup>13</sup> This decision gave rise to significant criticism and critical comments, in particular by trade unions and academics.<sup>14</sup> In an attempt to

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<sup>10</sup> Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130, 10.

<sup>11</sup> Ibid 11.

<sup>12</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809, respectively.

<sup>13</sup> Claire Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers' (2009) 34 *European Law Review* 6, 844 and 848.

<sup>14</sup> Among these many sources, for instance: Anne Davies, 'One Step Forward, Two Steps Back? *Laval* and *Viking* at the ECJ' (2008) 37 *Industrial Law Journal* 126; Mark

respond, in 2012 the Commission proposed an Enforcement Directive<sup>15</sup> and a Regulation on the exercise of the right to take collective action in the context of the freedom of establishment and the freedom to provide services (the 'Monti II' Regulation object of the second yellow card). Despite the *Laval* and *Viking* judgements, it is still hard to imagine that the Commission may be authorised to propose measures such as the Regulation in question on the basis of this sole justification. As a matter of fact, 7 (out of 12) parliamentary chambers/parliaments<sup>16</sup> were of the opinion either that the Commission lacked the competence to make the proposal at stake, or that Article 352 TFEU was not an appropriate legal basis. For what concerns the respect of the principle of subsidiarity more specifically, the justification the Commission provided is particularly short, as it simply contended that 'the objective of the Regulation, to clarify the general principles and EU rules applicable to the exercise of the fundamental right to take industrial action within the context of the freedom to provide services and the freedom of establishment, including the need to reconcile them in practice in cross-border situations, *requires action at European Union level and cannot be achieved by the Member States alone*'.<sup>17</sup>

The Commission undoubtedly failed to fulfil its obligation to justify its respect of the principle of subsidiarity in a detailed statement as prescribed

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Freeland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart 2014); Kilpatrick (n 13); Norbert Reich, 'Free Movement v Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases Before the ECJ' (2008) German Law Journal 125; Also, many press releases by the European Trade Union Confederation (ETUC) available at: <[https://www.etuc.org/issue/posting-workers?type=All&field\\_document\\_type\\_tid=All](https://www.etuc.org/issue/posting-workers?type=All&field_document_type_tid=All)> accessed 2 April 2017.

<sup>15</sup> Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/57.

<sup>16</sup> Dutch House of Representatives, Portuguese Assembly, Luxembourgish Chamber of Deputies, Latvian Parliament, French Senate, German Bundesrat, Belgian House of Representatives.

<sup>17</sup> Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130, 11 (emphasis added).



by Article 5 Protocol No. 2.<sup>18</sup> It also clearly did not show how it took into due consideration the two criteria laid down by Article 5(2) Treaty of the European Union (TEU) to assess the respect of the principle of subsidiarity: the fact that the proposed action cannot be sufficiently achieved at Member State level while simultaneously being better achieved at Union level. Almost 4 months after 12 national parliaments amounting to a total of 19 votes had raised the first yellow card ever, on 12 September 2012 the Commission announced its intention to withdraw its proposal, although it still did not consider that there had been any breach of the subsidiarity principle.<sup>19</sup>

After the second yellow card had been triggered in 2013, the Commission decided to maintain its proposal in its original form.<sup>20</sup> This second yellow card concerned the Proposal for a Council Regulation on the European Public Prosecutor's Office and it was raised following the issuance of reasoned opinions by 14 national parliaments representing a total of 18 votes.<sup>21</sup> In this case, there was no doubt that the Commission had the competence to make such a proposal since Article 86(1) TFEU reads: 'In order to combat crimes affecting the financial interests of the Union, the Council [...] may establish a European Public Prosecutor's Office from Eurojust'. However, as was also the case when the first yellow card was

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<sup>18</sup> Art 5 Protocol 2 annexed to the Treaties: 'Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a *detailed statement* making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level *shall be substantiated by qualitative and, wherever possible, quantitative indicators*' (emphasis added).

<sup>19</sup> European Commission, Commission Decision to withdraw the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130.

<sup>20</sup> See on this second yellow card: Diane Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member States Parliaments?' (2015) 35 Yearbook of European Law 1, 5.

<sup>21</sup> As stated above, in the Area of Freedom, Security and Justice, the threshold to trigger a yellow card has been lowered to one fourth of the total number of votes.

triggered as described above, the justification provided by the Commission fell short of showing clearly why it considered that the principle of subsidiarity had been duly respected. Whereas the impact assessment was very detailed, the justification contained in the proposal itself did not go into much detail as it was limited to the following statements: 'There is a need for the Union to act because the foreseen action has an intrinsic Union dimension'<sup>22</sup> and 'this objective can only be achieved at Union level by reason of its scale and effects [given that ..] the present situation, in which the prosecution of offences against the Union's financial interests is exclusively in the hands of the authorities of the Member States is not satisfactory and does not sufficiently achieve the objective of fighting effectively against offences affecting the Union budget'.<sup>23</sup> Consequently, in this case there also appears to have been a breach by the Commission of its obligation of justification contained in Article 5 Protocol No. 2; this breach is visible in the fact that alternative scenarios, such as the possible reinforcement of OLAF, were not considered.<sup>24</sup>

With the exception of the French Senate and the Irish *Oireachtas*, all parliamentary chambers raised subsidiarity-related issues in their reasoned opinions, i.e. they did not make improper use of the EWS to show their overall opposition, even if some of them also raised non-subsidiarity related matters. Still, some chambers (Cypriot House of Representatives, Swedish Parliament) considered both proportionality and subsidiarity in their assessments, even if the EWS solely encompasses the latter. In any case, on that occasion the effects of the yellow card were different: in the outcome of the Commission's review in itself and in the speed with which it was produced, but also in the way in which the relationship between the Commission and national parliaments evolved.

The Commission's decision to maintain its proposal in its original form was published only three weeks after the yellow card had been triggered. Later on, differently from what it had done when the first yellow card was triggered, it wrote individual replies to each chamber that had submitted a reasoned

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<sup>22</sup> Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534, 4.

<sup>23</sup> Ibid.

<sup>24</sup> Fromage (n 20).

opinion.<sup>25</sup> Interestingly, some of the national parliaments and the Commission subsequently entered into a sort of dialogue and some national parliaments submitted a second and even a third contribution. It may therefore be said that the Commission's attitude vis-à-vis national parliaments was more open in that it showed a certain readiness to thoroughly consider parliaments' opinions and to discuss the issue with them.

Against this background, it appears that the circumstances under which these two first cards were shown to the Commission are very different from the third card analysed here. The differences between the three yellow cards are not necessarily visible in the outcome of the procedure, since, in the present case as in that of the EPPO proposal, the Commission decided to maintain its proposal as it had presented it initially. By contrast, on the first occasion it decided to simply withdraw its proposal. The third yellow card is also different because in 2014, when it entered into office, the new Commission (the addressee of the yellow card) had made a clearer commitment to taking into account national parliaments' views than its predecessor: Jean-Claude Juncker promised to forge a 'new partnership'<sup>26</sup> with national parliaments. In addition, the constellation that triggered the third yellow card highlights an East-West divide: ten out of the eleven Member States whose parliamentary chambers issued reasoned opinions are located in Central and Eastern Europe.<sup>27</sup> Finally, the division goes beyond the question of respecting the subsidiarity principle which, as shown below, was used as an instrument to express an overall opposition to the 'Social Europe' agenda that the Juncker Commission has presented. Interestingly, both the first and the third yellow card relate to the question of social rights in the European Union and were issued on legislative proposals submitted after the controversial *Laval* case.<sup>28</sup>

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<sup>25</sup> All these replies are available on the Commission's website: <[http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/index\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm)> accessed 2 April 2017.

<sup>26</sup> Jean-Claude Juncker, Mission Letter to First Vice-President Frans Timmermans (European Commission, 1 November 2014, <[http://ec.europa.eu/archives/juncker-commission/docs/timmermans\\_en.pdf](http://ec.europa.eu/archives/juncker-commission/docs/timmermans_en.pdf)> accessed 2 April 2017).

<sup>27</sup> Only Denmark is an exception.

<sup>28</sup> Case C-341/05 *Laval* (n 12).

### III. BACKGROUND AND CONTENT OF THE COMMISSION'S PROPOSAL FOR THE REVISION OF THE PWD

This section deals more specifically with the third yellow card: it examines the highly controversial issue of the Posting of Workers (despite a marginal importance in numerical terms) and it considers the content of the Commission's proposal in detail.

#### 1. *A Highly Controversial Issue Despite Its Marginal (Numerical) Significance*

Contrary to the legislative proposals which gave rise to the first and second yellow cards, the PWD aims at amending an existing directive and therefore is not a new piece of legislation. The issue of posted workers 'plays an essential role in the Internal Market'<sup>29</sup> and allows companies to (temporarily) post workers in another Member State to provide a service. In the case of posted workers, to whom the norms relating to the provision of services and not those to the free movement of workers apply, it is necessary to determine which of the host State labour laws applies.

The Directive covers three different forms of posting: 'the direct provision of services between two companies under a service contract, posting in the context of an establishment or company belonging to the same group ('intra-group posting'), and posting through hiring out a worker via a temporary work agency established in another Member State'.<sup>30</sup> Actually, the issue of posted workers has been controversial for a long time,<sup>31</sup> and more acutely so

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<sup>29</sup> European Commission, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 53 final, 5.

<sup>30</sup> Ibid 5-6.

<sup>31</sup> Controversies were already visible when the Directive was adopted in 1996. Werner Eichhorst, 'European social policy between national and supranational regulation: Posted workers in the framework of liberalised services provision' [1998] MPIfG discussion paper 98/6, 5f. Also, previous attempts at adopting rules in this field at EU level had failed in the past, notably in the 1970s. On this historical development and how some issues that arose at the time can still be recognized in the PWD: Stein Evju, 'Revisiting the Posted Workers Directive: Conflict of Law and Laws in Contrast' (2009-2010) 12 Cambridge Yearbook of European Legal Studies 151.

since the 2004 EU enlargement which increased the gap between the highest and the lowest wages among Member States,<sup>32</sup> and numerous academic articles and studies have echoed this controversy.<sup>33</sup> As stated above, the CJEU's *Laval*<sup>34</sup> decision constituted a clear illustration of the difficult reconciliation between the two objectives pursued by the Directive, namely that of the encouragement of the provision of services within the internal market and that of the protection of the rights of workers.<sup>35</sup> *Laval* also represented the turning point towards a strict interpretation of the Directive by the CJEU subsequently visible in the cases that followed – *Commission v. Luxembourg* and *Rüffert*.<sup>36</sup> This concern additionally arose again in a similar case, *Sähköalojen ammattiliitto ry*<sup>37</sup> in 2015, where some Polish workers posted in Finland had not received the minimum pay established by the Finnish

<sup>32</sup> On this gap, which grew from 1:3 to 1:10 between 1996 and 2016: European Commission, Impact Assessment (n 29), 13. On the other hand, France for instance has long been advocating a stricter regime and was actively involved in the debate on the previous revision of the Directive launched in 2012 by the Commission. Cécile Barbière, 'La France part en guerre contre les travailleurs low cost' (*Euractiv.fr*, 5 November 2013) <<http://www.euractiv.fr/section/europe-sociale-emploi/news/la-france-part-en-guerre-contre-les-travailleurs-europeens-low-cost/>> accessed 2 April 2017; French Senate, Résolution européenne sur les normes européennes en matière de détachement des travailleurs, 16.10.2013 and French National Assembly, Résolution européenne sur la proposition de directive relative à l'exécution de la directive sur le détachement des travailleurs, 11 July 2013.

<sup>33</sup> See n 14.

<sup>34</sup> Claire Dhéret and Andreia Ghimis, 'The revision of the Posted Workers Directive: towards a sufficient policy adjustment?' European Policy Centre discussion paper, 20 April 2016, 6-7 <[http://www.epc.eu/pub\\_details.php?cat\\_id=17&pub\\_id=6475](http://www.epc.eu/pub_details.php?cat_id=17&pub_id=6475)> accessed 2 April 2017.

<sup>35</sup> The choice of the legal basis for this Directive, namely Articles 53 and 62 TFEU on the provision of services and the right to establishment, nevertheless shows that this is the primary aim of the Directive, ie not in the social protection of workers. On this predominance of the economic over the social dimension, also: Evju (n 31) 154.

<sup>36</sup> Case C-319/06 *Commission v Luxembourg* EU:C:2008:350 and Case C-346/06 *Dirk Rüffert v Land Niedersachsen* EU:C:2008:189. On this development in case law: Kilpatrick (n 13) 848-850.

<sup>37</sup> Case C-396/13 *Sähköalojen ammattiliitto ry contre Elektrobudowa Spółka Akcyjna* EU:C:2015:86.

collective agreement.<sup>38</sup> The issue of posted workers has therefore recurrently and frequently been examined by the CJEU in the past ten years. It is unsurprising that such controversies arise, as the text of the Directive finally adopted in 1996 after five years of hard intergovernmental negotiations constituted an "umbrella" regulation which w[ould] safeguard national autonomy, but w[ould] not put an end to regime competition in the Single European Market'.<sup>39</sup> In addition, some have argued that 'clear(er) definitions of posting and posted worker are necessary'.<sup>40</sup>

Evidence shows that the number of posted workers has increased sharply in recent years<sup>41</sup> – by 44.4% between 2010 and 2014 – which explains why the European Commission and some Member States felt the need to revise the existing legislation. Numerous abuses in the form of, among other things, false self-employment or 'letter box companies' also called for a revision of the PWD.<sup>42</sup> The countries that have the highest numbers of workers posted to other EU Member States in absolute terms are France, Germany and Poland.<sup>43</sup> Taking into account the actual size of the Member States' labour markets, the Member States that proportionally have the largest number of posted workers are Luxembourg, Slovenia and Slovakia.<sup>44</sup>

Despite its highly controversial character, as illustrated not only by the yellow card but also by France's threat to suspend EU legislation on posted workers in July 2016<sup>45</sup> and by the introduction of the '*clause Molière*' that requires

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<sup>38</sup> On this case: Rebecca Zahn, 'Revision of the Posted Workers' Directive: Equality at Last?' [2016] Working Paper Centre of European and Transnational Legal Studies Belfast 6 <[http://strathprints.strath.ac.uk/58911/1/Zahn\\_CETLS\\_2016\\_Revision\\_of\\_the\\_posted\\_workers\\_directive.pdf](http://strathprints.strath.ac.uk/58911/1/Zahn_CETLS_2016_Revision_of_the_posted_workers_directive.pdf)> accessed 2 April 2017.

<sup>39</sup> Eichhorst (n 31) 30.

<sup>40</sup> Aukje van Hoek and Mijke Houwerzijl, 'Posting' and 'Posted Workers': The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive' (2011-2012) 14 Cambridge Yearbook of European Legal Studies 419, 439.

<sup>41</sup> European Commission, Impact Assessment (n 29) 6.

<sup>42</sup> On these instances of abuse: Dhéret and Ghimis (n 34) 6-7.

<sup>43</sup> European Commission, Impact Assessment (n 29) 7.

<sup>44</sup> Ibid.

<sup>45</sup> 'La France pourrait ne plus appliquer la directive sur les travailleurs détachés' (*Euractiv.fr*, 4 July 2016) <<http://www.euractiv.fr/section/justice-affaires-interieures/news/la-france-pourrait-ne-plus-appliquer-la-directive-sur-les-travailleurs-detaches/>> accessed 2 April 2017.



French to be the language spoken on construction sites financed by the State in some French regions,<sup>46</sup> the phenomenon of posted workers is actually very limited in scale. It only concerns 0.7% of the total of EU workers, 0.4% of whom are unique posted workers,<sup>47</sup> which means that only 0.3% of the EU workforce is recurrently posted. Yet, these figures hide important differences between sectors, as the construction sector for instance heavily relies on posted workers – hence the introduction of the '*clause Molière*' in France – whereas other sectors are much less affected. But then again, the impression is often conveyed that posted workers are unskilled workers whereas actually 10.3 % of them are highly skilled.<sup>48</sup> It is also commonly assumed that posted workers come from 'new' Member States whereas in France and Belgium for example the majority of posted workers come from 'old' Member States.<sup>49</sup> As stated by the Commission, 'strong data limitations on posting of workers remain an on-going problem'.<sup>50</sup> In any event, it is certainly not true that all posted workers are Romanian builders or Polish plumbers. The wage gap observable for labour-intensive jobs, such as in the construction sector or in road transport, is much higher than that existing in high-end services sectors though.<sup>51</sup> This is because the difference in costs between a local and a posted worker plays a more important role in the labour-intensive sectors and often constitutes a key incentive in the decision to post workers, whereas in the high-end services sector the cost has a more

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<sup>46</sup> For example, in the Hauts-de-France and Normandy regions. 'Marchés publics: la Normandie exige le français sur les chantiers', *Le Parisien* (Paris, 23 November 2016) and Valerie Sauvage, 'Une «clause Molière» pour faire parler français sur les chantiers du conseil régional', *La Voix du Nord* (27 May 2016). Introducing this clause in the construction sector was not a random decision, as according to the European Builders Confederation's estimate, around 8% of French employees of the building construction sector lost their jobs between 2011 and 2014 due to the posting of foreign workers. European Builders Confederation, Press Release 'Posting of Workers: European Small Construction Entrepreneurs Welcome Revision', 8 March 2016 available at: <[http://www.ebc-construction.eu/fileadmin/Publications/Press\\_releases/2016/2016\\_03\\_08\\_EBC\\_on\\_EC\\_PWD\\_revision\\_EN.pdf](http://www.ebc-construction.eu/fileadmin/Publications/Press_releases/2016/2016_03_08_EBC_on_EC_PWD_revision_EN.pdf)> accessed 2 April 2017.

<sup>47</sup> European Commission, Impact Assessment (n 29) 8.

<sup>48</sup> Ibid 6.

<sup>49</sup> Dhéret and Ghimis (n 34).

<sup>50</sup> European Commission, Impact Assessment (n 29) 8.

<sup>51</sup> Ibid 13.



residual effect. This means that 'unequal wage treatment particularly affects workers posted from low- to high-wage countries'.<sup>52</sup>

The Commission duly notes that this situation could be improved by the effective implementation of the 2014 Enforcement Directive<sup>53</sup> due on 18 June 2016,<sup>54</sup> and by the envisaged revision of the Regulation on social security coordination.<sup>55</sup> It also clearly establishes that the revision it envisages will not affect the Enforcement Directive or the measures adopted to transpose it. Rather 'it focuses on issues which were not addressed by it and pertain to the EU regulatory framework set by the original 1996 Directive. Therefore, the revised Posting of Workers Directive and the Enforcement Directive are complementary to each other and mutually reinforcing'.<sup>56</sup> In the Commission's eyes, this argument justifies its action.

Interestingly, right before the Commission published its proposal in March 2016, the European Trade Unions Confederation (ETUC), BusinessEurope, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the European Centre of Employers and Enterprises (CEEP) – i.e. both employer organisations and trade unions at the EU level – jointly regretted that the Commission did not comply with their request to organise a social partner consultation.<sup>57</sup> This lack of consultation was later strongly criticised by parliaments as illustrated below (V).

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<sup>52</sup> European Commission, Impact Assessment (n 29) 14.

<sup>53</sup> Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/57.

<sup>54</sup> European Commission, Impact Assessment (n 29) 8.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 9.

<sup>57</sup> ETUC, BusinessEurope, UEAPME and CEEP, Letter to President Juncker of 2 March 2016, <[https://www.etuc.org/sites/www.etuc.org/files/document/files/02.03.16\\_letter\\_president\\_juncker\\_posting.pdf](https://www.etuc.org/sites/www.etuc.org/files/document/files/02.03.16_letter_president_juncker_posting.pdf)> accessed 2 April 2017; see also: ETUC, Press release, 'Posted workers – Revision must deliver equal pay – Lack of consultation 'big mistake'', 4 March 2016 <<https://www.etuc.org/press/posted-workers-revision-must-deliver-equal-pay-lack-consultation-big-mistake>> accessed 2 April 2017.

## 2. Content of the Commission's Proposal

The proposed Directive corresponds to President Juncker's promise to revise the legislation on posted workers to avoid social dumping made on 15 July 2014 in his opening statement<sup>58</sup> and reiterated in his State of the Union 2015 speech.<sup>59</sup> Despite the adoption of the Enforcement Directive in 2014, an acute need for a revision of Directive 96/71/CE was still there to turn Jean-Claude Juncker's wish to ensure that 'the same work at the same place should be remunerated in the same manner'<sup>60</sup> into reality.<sup>61</sup> As identified by the Commission itself in the impact assessment, the currently observable wage differentiation is based on three mechanisms contained in the PWD. First, there is 'an in-built structural wage gap between posted and local workers'<sup>62</sup> as it defines strict criteria for the application of the salaries agreed in sectoral collective agreements and hence leaves the possibility for the statutory minimum wage established in the Member State in question to apply. Second, the PWD fails to clearly define what the minimum rate of pay is composed of, although case law and in particular the recent case *Sähköalojen ammattiliitto ry* have provided some indications in this regard.

It is true of course that Article 153(5) TFEU defines that '[t]he provisions of this Article *shall not apply to pay*, the right of association, the right to strike or the right to impose lock-outs'.<sup>63</sup> Yet, this does not mean that the PWD cannot define any uniform criteria of application at all, especially as – and this is the third mechanism identified by the Commission – in Denmark and in

<sup>58</sup> Jean-Claude Juncker, 'A new start for Europe', Opening statement in the European Parliament plenary session, 15 July 2015 <[http://europa.eu/rapid/press-release\\_SPEECH-14-567\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-567_en.htm)> accessed 2 April 2017.

<sup>59</sup> Jean-Claude Juncker, 'State of the Union 2015' (European Commission, 9 September 2015), 10 <[http://europa.eu/rapid/press-release\\_SPEECH-15-5614\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-15-5614_en.pdf)> accessed 2 April 2017.

<sup>60</sup> Juncker (n 58).

<sup>61</sup> See in this line the European Builders Confederation's call for a targeted review of the Directive in its letter to Commissioner Thyssen of 5 October 2015, <[http://www.ebc-construction.eu/fileadmin/Policies/Social\\_Affairs/Posting\\_of\\_workers/EBC\\_Open\\_Letter\\_to\\_Comm\\_Thyssen\\_Posting\\_of\\_workers\\_October\\_2015.pdf](http://www.ebc-construction.eu/fileadmin/Policies/Social_Affairs/Posting_of_workers/EBC_Open_Letter_to_Comm_Thyssen_Posting_of_workers_October_2015.pdf)> accessed 2 April 2017.

<sup>62</sup> European Commission, Impact Assessment (n 29), 11.

<sup>63</sup> Emphasis added.

Sweden minimum rates of pay are set by collective agreements applicable on their whole territory while still leaving ample margin for the conclusion of company-level agreements. In addition, Article 57 TFEU also sets out a principle of equality in the cross-border provision of services as it states that '[w]ithout prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*'.<sup>64</sup>

Further to this, in the impact assessment, the Commission highlights the difficulties resulting from the 'one-size-fits-all' approach adopted in the original PWD.<sup>65</sup> These difficulties arise in the context of subcontracting, temporary agency workers, and intra-corporate posting, and are caused by the lack of a time limit for the posting of workers despite the fact that the Directive does consider posting as something that is limited in time. To tackle these issues, the proposed revision of the Directive foresees that after 24 months the posted worker will be considered as working in the host Member State (preamble, 8). Additionally, in the new Article 2bis the proposal adds safeguards if a posted worker is replaced by another posted worker performing the same task. It is further requested that Member States publish the constituent elements of remuneration online, and it is established in which documents the terms and conditions of employment may be contained to serve as a benchmark (Article 3(1) amended). Note that the term 'remuneration' has replaced 'minimum rates of pay' and that whereas previously only the construction sector was concerned, now all sectors of the economy are subjected to these rules, the transport sector being an exception. However, the definition of remuneration used in the proposed revision is still quite vague, as it deems remuneration to be

all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreement or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration

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<sup>64</sup> Emphasis added.

<sup>65</sup> European Commission, Impact Assessment (n 29), 14f.

awards within the meaning of paragraph 8 second subparagraph [which defines the invocable collective agreements and arbitration awards], in the Member State to whose territory the worker is posted (Art. 3(1) amended).

The provision regarding subcontracting, however, leaves the Member States ample margin, as it reads:

If undertakings established in the territory of a Member State are obliged by law, regulation, administrative provision or collective agreement, to subcontract in the context of their contractual obligations only to undertakings that guarantee certain terms and conditions of employment covering remuneration, the Member State *may*, on a non-discriminatory and proportionate basis, provide that such undertakings shall be under the same obligation regarding subcontracts with undertakings referred to in Article 1(1) [i.e. 'undertakings established in a Member State which, in the framework of the transnational provision of services, post workers [...] to the territory of Member State'] posting workers to its territory [emphasis added] (paragraph 1a added).

The use of the verb 'may' implies that Member States are under no obligation whatsoever to adopt norms in this sense. Temporary agency workers also see their status better defined and protected (paragraph 1b, added).

As regards subsidiarity, the Commission's justification is particularly brief as it simply reads without any further justification: 'An amendment to an existing Directive can only be achieved by adopting a new Directive'.<sup>66</sup> In fact, the European Scrutiny Committee of the House of Commons was very critical of this lack of justification, as it concluded during its meeting held on 13 April 2016: 'Of particular concern is the failure to offer any analysis of the proposal's compliance with the principle of subsidiarity. It is *unacceptable* to simply repeat the Commission's logic which, in this instance, amounts to the factual statement that EU legislation can only be amended through a further piece of EU legislation. This is not in itself a satisfactory subsidiarity justification'.<sup>67</sup> Such criticism is indeed greatly justified. Admittedly, a directive can only be amended by a directive but this does not automatically mean that the objective set for the revision of said directive can automatically

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<sup>66</sup> European Commission, Explanatory Memorandum to the Proposal for a revision of the PWD, point 2.2.

<sup>67</sup> House of Commons, European Scrutiny Committee, Documents considered on 13 April 2016, point 6 bis (emphasis added).

be achieved by this means only. In this regard, the impact assessment also fails to shed much light on the matter: despite being fairly detailed and 103 pages long, the justification for the respect of the subsidiarity principle is quite succinct. The part dedicated to 'EU right to act' that includes the justification is a little more than one paragraph long, and the wording on subsidiarity is as follows:

The Directive currently provides for a uniform and EU-wide regulative framework setting a hard core of protective rules of the host Member State which need to be applied to posted workers, irrespective of their substance. Therefore, in full respect of the principle of subsidiarity, the Member States and the social partners at the appropriate level remain responsible for establishing their labour legislation, organising wage-setting systems and determining the level of remuneration and its constituent elements, in accordance with national law and practices. *The envisaged initiative does not change this approach. It thus respects the principles of subsidiarity and proportionality and does not interfere with the competence of national authorities and social partners.*<sup>68</sup>

It is true that the posting of workers has a cross-border dimension and that Member States would not be able to regulate the issue on their own. The Commission correctly recalls that a directive already exists in this field and that it proves insufficient to prevent the current problems from developing. Against this background, a thorough justification may appear to be less urgently needed than in other cases. But it is nonetheless surprising that the Commission provided such a limited justification.<sup>69</sup> First, the obligation to provide a detailed assessment is contained in Article 5 Protocol No. 2. Second, Advocate General Kokott recently issued a clear warning in this regard to the Commission in her opinion on the case C-547/14 *Philip Morris Brands SARL*: Although she did not find any breach of the subsidiarity principle, she very clearly stated that 'it is strongly advisable that in future the Union legislature avoids set formulas like the one contained in recital 60 in

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<sup>68</sup> European Commission, Impact Assessment (n 29), 19-20 (emphasis added).

<sup>69</sup> As rightly pointed out by Davor Jancic, this lack of justification would be sufficient for national parliaments to take the matter before the CJEU. National parliaments have in fact not used this possibility opened to them so far. Davor Jancic, 'EU Law's Grand Scheme on National Parliaments. The Third Yellow Card on Posted Workers and the Way Forward' in Davor Jancic (ed), *National Parliaments After the Lisbon Treaty and the Euro Crisis* (Oxford University Press 2017) 304.

the preamble to the Directive and instead enhances the preamble to the EU measure in question with sufficiently substantial statements regarding the principle of subsidiarity which are tailored to the measures in question'.<sup>70</sup> And third, the question of justification was already an issue when the previous yellow cards were triggered and it could therefore be somewhat disappointing for national parliaments to realise that even after they had managed to reach the high threshold to trigger the EWS, the Commission not only maintained its proposal unchanged but it also failed to improve its respect of the duty of justifying EU action.

Be this as it may, the proposal has been welcomed by many, particularly the ETUC, although it still considered it to be insufficient on the ground that, in some Member States, it excludes most sectoral collective agreements in addition to excluding all company-level agreements.<sup>71</sup> Additionally, it regretted that trade unions were not given the right to collectively bargain for posted workers and that main contractors were not made jointly liable with their subcontractors with respect to terms and conditions of employment.<sup>72</sup> Also, another issue lies in the fact that the Directive foresees a maximum duration of 24 months, which ETUC deems to be too long, especially as the average duration of posting is four months at present.<sup>73</sup> Even if these arguments are arguably well-founded, given the controversy the current proposal has already created, it is hard to imagine how a proposal could have been more protective of posted workers. Perhaps this step in the right direction, however small it is, should be praised, especially as it will provide greater clarity and represents an improvement in comparison to the current situation as resulting from the CJEU's case law.

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<sup>70</sup> Opinion of Advocate General Kokott in Case C-547/14 *Philip Morris Brands SARL* EU:C:2015:853, para 188.

<sup>71</sup> The European Trade Union Confederation's Press release, 'Posted workers revision – equal pay for some', published 8 March 2016 <<https://www.etuc.org/press/posted-workers-revision-%E2%80%93-equal-pay-some>> accessed 3 April 2017.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.



#### IV. DYNAMICS OF INTERPARLIAMENTARY COORDINATION FOR THE THIRD YELLOW CARD

The European Commission presented the proposal for a revision of the PWD on 8 March 2016, which meant that the deadline for reasoned opinions was 10 May 2016. Before turning to the timing and sequence of the reasoned opinions adopted by national parliaments – leading to the gradual emergence of a 'regional block' of Central and Eastern European national parliaments –, it is important to briefly review the factors that have a positive influence on the likelihood of a national parliament to submit a reasoned opinion, as they have been identified in the literature on the role of national parliaments in the EWS.

The EWS gives national parliaments a collective role and it was expected to enhance interparliamentary coordination which would be indispensable to reach the threshold for triggering a yellow card.<sup>74</sup> The first assessments of the EWS identified the short time period of eight weeks, a lack of resources, and the division between majority and opposition parties in national parliaments as the main challenges, but more recent studies have shown that stronger political contestation over EU integration in national parliaments as well as salient or urgent draft legislative acts increase the likelihood of issuing a reasoned opinion.<sup>75</sup> In the case of the PWD, the period for scrutiny and institutional capacity of a national parliament were identical to other legislative proposals, but national parliaments and national governments of Central and Eastern European countries agreed on subsidiarity concerns about the revision of the PWD. Thus, national parliaments did not turn against their governments, they expressed their support by adopting reasoned opinions. The salience of the issue is beyond doubt, as was shown

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<sup>74</sup> Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012), Ch 3 and Ch 7; Ben Crum, 'The EU as Multilevel Democracy: Conceptual and Practical Challenges', PADEMIA Online Papers on Parliamentary Democracy 4/2016, 15 <<http://www.pademia.eu/publications/online-papers-on-parliamentary-democracy/online-papers-on-parliamentary-demcoracy-iv2016/>> accessed 3 April 2017.

<sup>75</sup> Katjana Gattermann and Claudia Heffler, 'Beyond Institutional Capacity: Political Motivation and Parliamentary Behaviour in the Early Warning System' (2015) 38 *West European Politics* 305.



above. Finally, the interparliamentary coordination that helped to trigger the first and second yellow card<sup>76</sup> also seems to have played a role in this case.

To analyse the timing and sequencing of the reasoned opinions that ultimately triggered the third yellow card, it is necessary to recall that each national parliament has different procedures for adopting a reasoned opinion<sup>77</sup> and that some of the parliaments that became active in the case of the PWD had only adopted very few reasoned opinions since 2010. In the run-up to 10 May 2016, however, a dynamic emerged that saw nine national parliaments/chambers adopt their reasoned opinions in the seven final days before the deadline.

The first chamber to adopt a reasoned opinion, after the Commission had transmitted its revision proposal on 8 March, was the Czech Chamber of Deputies on 31 March. Its European Affairs Committee had decided on 17 March to deliberate on the document and appointed a rapporteur.<sup>78</sup> With its early decision and adoption of the reasoned opinion the Czech lower chamber was able to set the stage for further reasoned opinions. The Polish *Sejm* (13 April) and the Romanian Chamber of Deputies (also 13 April) followed. Similar to the two previous cases of yellow cards, the 'vote count' for expressing reasoned opinions stood at only three votes (out of the 19 votes required) about four weeks before the deadline. On 20 April the Bulgarian National Assembly adopted its reasoned opinion; the Czech Senate followed on 27 April. However, on 1 May reasoned opinions that would represent 13

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<sup>76</sup> Ian Cooper, 'A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike' (2015) 22 *Journal of European Public Policy* 1406; Mette Buskjaer Christensen, 'The Danish Folketing and EU Affairs: Is the Danish Model of Parliamentary Scrutiny Still Best Practice?' in Claudia Hefftlér et al (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015) 283; Christine Neuhold and Anna-Lena Högenauer, 'An Information Network of Officials? Dissecting the Role and Nature of the Network of Parliamentary Representatives in the European Parliament' (2016) 22 *The Journal of Legislative Studies* 237, 251.

<sup>77</sup> All procedures are detailed on COSAC's website <<http://www.cosac.eu/subsidiarity-control-in-nation/>> accessed 2 April 2017.

<sup>78</sup> Information retrieved from the IPEX website: COD/2016/0070 – Czech Chamber of Deputies, <<http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160070/czpos.do>> accessed 2 April 2017.

votes were still lacking to reach the 19-vote threshold for a yellow card by 10 May. A series of reasoned opinions adopted by the Lithuanian *Seimas* (3 May), the Romanian Senate (3 May), the Danish Parliament (4 May), as well as three reasoned opinions on 5 May (by the Croatian Parliament, the Latvian *Saeima* and the Polish Senate) increased the number of votes to 16. On the final day, 10 May, when there were still three votes lacking to activate the EWS, the unicameral parliaments of Estonia, Hungary and Slovakia (each of them with two votes) adopted reasoned opinions. The number of votes rose to 22 and the yellow card was triggered.

13 out of 14 chambers that submitted reasoned opinions on the revision of the PWD came from Central and Eastern Europe. As suggested by Cooper, a yellow card should be taken as 'a kind of 'alarm bell' triggered in unusual circumstances'.<sup>79</sup> It is noteworthy that ten out of these 14 chambers had submitted less than one reasoned opinion per year between 2010 and May 2016.<sup>80</sup> The fact that these national parliaments, generally not very active in the EWS, used this tool on this occasion shows that they have the capacity and willingness to use it if necessary. Furthermore, the sequence of the opinions' approval indicates a probable coordination in a 'regional block' of national parliaments that managed to establish closer coordination around one specific topic with shared preferences. In fact, given that their respective governments, with the exception of Croatia and Denmark, had submitted a joint letter to the Commission during the consultation phase (see details below), it is most likely that coordination of some sort also took place among these national parliaments.

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<sup>79</sup> Cooper (n 76).

<sup>80</sup> Their total numbers of reasoned opinions are the following: Bulgarian National Assembly: 4; Croatian Parliament: 1; Czech Chamber of Deputies: 4; Czech Senate: 5; Estonian Parliament: 1; Hungarian National Assembly: 2; Latvian Parliament: 2; Romanian Chamber of Deputies: 6; Romania Senate: 3; Slovakian National Assembly: 6. Data retrieved from Agata Gostynska-Jakubowska, 'The Role of National Parliaments in the EU: Building or Stumbling Blocks?' (2016) Policy Brief, Centre for European Reform.

## V. CONTENT OF THE REASONED OPINIONS AND CONTRIBUTIONS SUBMITTED BY NATIONAL PARLIAMENTS

Before embarking on the analysis of the reasoned opinions, it is interesting to note that in the preparation phase the Commission had conducted consultations abiding by its obligation contained in Article 10(3) TEU as well as in Article 2 Protocol No. 2. In this framework, 16 Member States expressed their views<sup>81</sup> in the form of two letters: the first one sent on 18 June 2015 by Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden and the second one on 31 August 2015 submitted by Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania. Whereas the first letter was supportive of the modernisation of the PWD,<sup>82</sup> the second letter considered that 'a review of the 1996 Directive [was] premature and should be postponed after the deadline for the transposition of the Enforcement Directive ha[d] elapsed and its effects carefully evaluated and assessed'.<sup>83</sup> Except for Croatia and Denmark, the signatories of this letter are the same Member States whose parliaments adopted reasoned opinions.

The proposal did not only attract the attention of these 14 national parliaments/chambers that submitted reasoned opinions, but another six<sup>84</sup> submitted mere contributions in the framework of the Political Dialogue, i.e. opinions that do not address the issue of subsidiarity and are forwarded to the Commission.<sup>85</sup> Of course, as is usually the case, the parliaments/chambers

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<sup>81</sup> European Commission, Impact Assessment (n 29), 4.

<sup>82</sup> European Commission, Explanatory Memorandum to the Proposal for a Revision of the PWD, SWD(2016)53 final, point 3.1.

<sup>83</sup> Ibid.

<sup>84</sup> Both French Chambers, the Italian Chamber of Deputies, the Portuguese Parliament, the Spanish Parliament and the UK House of Commons. It seems slightly surprising that neither of the German chambers issued any opinion given how deeply Germany is affected by the phenomenon of posted workers.

<sup>85</sup> Reasoned opinions and contributions available on the Platform for interparliamentary information exchange (IPEX): <[http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/united\\_kingdom/2016\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/united_kingdom/2016_en.htm)>, accessed 2 April 2017.

that submitted reasoned opinions also added other remarks not related to subsidiarity.

For what concerns the parliaments/chambers that did find a subsidiarity breach, all of them (except Denmark) considered in some way that the Commission had violated its obligation contained in Article 5 Protocol No. 2 to justify its action and especially its added value. Many considered that the EU should refrain from acting to reach the objectives set by this Directive, i.e. ending the existence of unfair practices and ensuring that the principle of equal pay for equal work applies. Instead, they suggested that time, development of the low-wage markets, and the possibilities of introducing more restrictive rules at national level would be sufficient to achieve these goals.

National parliaments' reasoning on the lack of justification, as explained above, is perfectly in line with the principle as it is defined in the Treaty and its protocol and may indeed amount to a breach of its obligations by the Commission. Another argument that could potentially be acceptable is that related to the fact that the proposal intervenes prematurely (Czech Senate, Estonian Parliament, Latvian Parliament, Lithuanian Parliament, Romanian Chambers and Slovak National Council). As we recalled, the deadline for the transposition of the Enforcement Directive only expired on 18 June 2016, i.e. after the proposal for a revision of the PWD had been presented. It is true that the Commission explicitly declared both norms to be complementary and as not addressing the same issues. However, given the fact that the subsidiarity assessment indeed has an EU added-value dimension, the Commission's revision initiative might have been more convincing for reluctant parliaments if it had been possible to evaluate the effects of the Enforcement Directive. This raises the question as to why the Commission decided to make this proposal at this point in time. In this regard, three possible reasons can be formulated. First, the Brexit referendum was approaching and the question of migrant EU workers had played a very important role in the debates about the UK's EU membership. Second, the Juncker Commission had made a commitment to create a more social Europe. Third, as the number of posted workers has continued to grow sharply, it is likely that the Commission did not want to wait much longer to

launch the debate on a revision, especially given the fact that the adoption of the PWD had taken six years in the 1990s.

Other arguments used by parliaments to substantiate the existence of a subsidiarity breach are, however, beyond the scope of the subsidiarity test. The Lithuanian Parliament for example declared in its reasoned opinion that 'the legal regulation proposed might be contrary to the principle of subsidiarity enshrined in Article 5(3) of the Treaty of the European Union and Protocol No 2 on the Application of the Principle of Subsidiarity and Proportionality *by unreasonably restricting the opportunities and incentives for businesses to provide cross-border services, thus possibly working against consumers' interests*'.<sup>86</sup> Clearly, this assessment is not in line with what national parliaments are expected to assess, i.e. whether an objective cannot be sufficiently achieved at Member States' level while at the same time being better achieved at Union level. What this opinion appears to be doing is expressing criticism on the *content* of the proposal and its *aim* instead of an assessing the respect of the principle of subsidiarity. Similarly, the Romanian Chamber of Deputies concluded that 'the Directive proposal does not have enough added value and consequently, it decided that the principle of subsidiarity is infringed, *mainly from the perspective of the usefulness of the regulation*'.<sup>87</sup> This opinion is based on the Commission's failure to introduce full clarity concerning the definition of what the remuneration entails and on the already existing possibility for Member States to impose stricter norms than those contained in the PWD. However, this argument is only partially related to subsidiarity. The lack of full clarification in the definition of remuneration is indeed likely to hamper the full attainment of the goal set for the revision but the possibility for Member States to introduce restrictions is not in line with subsidiarity because it amounts to calling into question the goal of the revision itself, i.e. whether a revision is needed at all in the first place. In other words, the EU's need to act is not questioned, what is doubted is whether it should take stronger action than at present or whether the *status*

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<sup>86</sup> Opinion issued by the Lithuanian Parliament on 20 April 2016, (emphasis added). Note also the use of the verb 'might' in relationship to the subsidiarity, also used in the concluding statement of this reasoned opinion. Of course, this opinion is a translation from Lithuanian, which triggered the use of an inappropriate verb, but this use of 'might' conveys some uncertainty in this Parliament's opinion.

<sup>87</sup> Opinion issued by the Romanian Chamber of Deputies on 13 April 2016.

*quo* in this field is best. In the same vein, many parliaments considered that the differences in labour costs are 'a legitimate element of companies' competitiveness in the EU internal market'.<sup>88</sup> The Danish Parliament interestingly enough supported the Commission's initiative to foster the application of the principle of equal pay for equal work. Yet, it did still find a breach of subsidiarity since, in its opinion, some parts of the proposed revision cause lacks of clarity as to the remaining national competence in this field.<sup>89</sup>

In sum, it appears that the reasoned opinions rightfully claimed that a breach of the principle of subsidiarity had occurred, but solely on the basis of procedural grounds. Actually, the Commission could easily have justified the proposal in an appropriate manner. Then it would have been impossible for parliaments to use the EWS for their political disagreement or, if they had still used the EWS for that (unlawful) purpose, the reasoned opinions would not have resisted a thorough legal assessment.

Not all of the arguments unrelated to subsidiarity can be considered here. They were linked to the legal basis for example, i.e. whether it was still appropriate (Romanian Chamber of Deputies).<sup>90</sup> Seven parliaments/chambers further noted that the consultations carried out by the Commission were insufficient (Czech Senate, Hungarian Parliament, Latvian Parliament, Lithuanian Parliament, Romanian Chambers and Slovak National Council). This certainly amounts to a breach by the Commission of its obligations contained in Article 10(3) TEU and in Article 2 Protocol No. 2 but it does not automatically amount to a breach of subsidiarity. This would only be the case if it could be proven beyond any doubt that the premises of the Commission's proposal were terribly inaccurate due to the absence of adequate consultation. The marginal importance of the phenomenon of the posting of workers and its consequent limited impact on the internal market was raised by the Latvian Parliament and the Romanian Chamber of Deputies.<sup>91</sup> Admittedly this argument does hold. However, as indicated

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<sup>88</sup> Opinion issued by the Croatian Parliament on 6 May 2016.

<sup>89</sup> Opinion issued by the Danish Parliament on 6 May 2016.

<sup>90</sup> Romanian Chamber of Deputies (n 87).

<sup>91</sup> Romanian Chamber of Deputies (n 87), and opinion issued by the Latvian Parliament on 5 May 2016.



above, the numerical importance of this phenomenon is certainly underestimated. It has had additional consequences in certain sectors, e.g. in the Belgian and French construction sectors. Both arguments can certainly justify the Commission's action.

In addition to these reasoned opinions, six parliaments/chambers also submitted contributions to the Commission in the framework of the Political Dialogue. Some of them did so within the eight-week period available for the control of the respect of the principle of subsidiarity, whereas others, such as the House of Commons, did so after 10 May 2016.<sup>92</sup> It is noteworthy that some were clearly conceived as contributions in the framework of the Political Dialogue and labelled as such (French Senate) whereas others (French National Assembly and UK House of Commons) simply reused a document prepared at domestic level and forwarded it to the Commission (respectively a resolution and a letter between Committee chairs). The other contributions focused specifically on subsidiarity, finding that no breach had occurred, although they did occasionally touch upon other issues, too. Interestingly the Portuguese Parliament, despite being supportive of the Commission's initiative, noted that said initiative might have been tabled prematurely.

## **VI. WHAT HAS HAPPENED SINCE AND WHAT CAN WE EXPECT NEXT?**

The European Commission replied to national parliaments' reasoned opinions on 20 July 2016, more than two months after the yellow card had been triggered. The time span corresponds to the period needed after the first yellow card, but is longer than it was for the second yellow card (three weeks). As the Commission maintained its proposal in its original form, the legislative process continues. Recent months have shown, however, that the split between East and West, between 'old' and 'new' Member States, has not only divided parliaments and led to the emergence of a regional block of reasoned opinions from national parliaments in Central and Eastern Europe (plus Denmark), but also that the East-West split has divided government representatives in the Council and even Members of the European Parliament.

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<sup>92</sup> Opinion issued by the UK House of Commons on 25 May 2016.



### *1. The Response of the European Commission to the Yellow Card*

In its Communication of 20 July 2016 (hereinafter: Communication),<sup>93</sup> the Commission justified its proposal, rejected the subsidiarity concerns and other concerns raised by national parliaments, and announced that the revision of the Directive was still going to be pursued: a withdrawal or an amendment was not required.<sup>94</sup> The Communication only addressed the arguments related to the principle of subsidiarity in line with Article 6 of Protocol No 2. Other arguments were addressed in the Commission's individual replies to national parliaments, as in the case of the second yellow card.<sup>95</sup>

Regarding the argument by several national parliaments that the current Directive was sufficient and adequate as it gives Member States the possibility to go beyond the general rules, the Commission stated that only an obligation, but not the option, to apply such rules in sectors other than the construction sector allows to fully achieve the objective 'to provide a more level playing field between national and cross-border service providers and to ensure that workers carrying out work at the same location are protected by the same mandatory rules'.<sup>96</sup> In contrast to what eight parliamentary chambers argued, the objective of revising the Directive was not to align wages across Member States, but to ensure that 'mandatory rules on remuneration in the host Member State are applicable also to workers posted to that Member State'.<sup>97</sup>

With respect to concerns (by all national parliaments except the Danish Parliament) that the adequate level of action was not the Union level, but the Member State level, or that it had not been sufficiently proven why the aim

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<sup>93</sup> Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 20 July 2016, COM(2016) 505 final.

<sup>94</sup> Ibid 9.

<sup>95</sup> All these replies are available on the Commission's website: <[http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/index\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm)> accessed 2 April 2017.

<sup>96</sup> Communication (n 93) 6.

<sup>97</sup> Ibid.

of the revision should be achieved at the Union level, the Commission responded that national actions 'could lead to a fragmentation of the Internal Market as regards the freedom to provide services'.<sup>98</sup> It referred to the 'inherent cross-border nature of the posting of workers'<sup>99</sup>, the facilitation of exercising the rights enshrined in Article 57 TFEU, and difficulties in bringing legal consistency throughout the Internal Market by individual actions of Member States.

The Commission continued with the comment made by the Danish Parliament that the proposal failed to make an explicit reference to Member States' competences on remuneration and conditions of employment. According to the Commission, the proposal merely provided that rules, as set by Member States, 'should apply in a non-discriminatory manner to local and cross-border service providers and to local and posted workers'.<sup>100</sup> The provision that 'cross-border temporary agency workers are given the same rights as [...] national temporary agency workers'<sup>101</sup> was also adequate and would leave the competence of each Member State to determine these rights intact.

Finally, concerning the argument that the justification in the proposal with regard to the subsidiarity principle was 'too succinct' and failed to comply with Article 5 of Protocol No 2 to the Treaty (raised in a total of nine reasoned opinions), the Communication cites the case law of the CJEU with case C-233/94 *Germany v Parliament and Council*,<sup>102</sup> accepting 'an implicit and rather limited reasoning as sufficient to justify compliance with the principle of subsidiarity'<sup>103</sup>, and more recently case C-547/14 *Philip Morris*,<sup>104</sup> demanding an evaluation 'not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case'.<sup>105</sup> The Commission acknowledged that the phrase in the explanatory memorandum '[a]n amendment to an existing Directive can only be achieved

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<sup>98</sup> Communication (n 93) 7.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid 8.

<sup>101</sup> Ibid.

<sup>102</sup> Case C-233/94 *Germany v Parliament and Council* EU:C:1997:231.

<sup>103</sup> Ibid.

<sup>104</sup> Case C-547/14 *Philip Morris* EU:C:2016:325.

<sup>105</sup> Ibid.

by adopting a new Directive'<sup>106</sup> was succinct, but also referred to the recitals of the draft Directive and the Impact Assessment Report and considered that 'that information is sufficient to allow both the Union legislature and national Parliaments to determine whether the draft legislative act at issue complies with the principle of subsidiarity'.<sup>107</sup>

The Commission promised that it would 'pursue its political dialogue with all national Parliaments' and that it was 'ready to engage in discussions with the European Parliament and the Council in order to adopt the proposed directive'.<sup>108</sup> Here, the difference with the second yellow card is noteworthy: At the time, it had promised that 'during the legislative process the Commission will [...] take due account of the reasoned opinions'.<sup>109</sup>

## *2. The On-Going Legislative Process and the East-West Divide*

Legislative work on the revision of the Directive has continued. The dossier falls under the ordinary legislative procedure. To enter into force, the revision of the Directive will therefore need the support of a majority in the European Parliament and of a qualified majority in the Council. Although national parliaments/chambers from eleven Member States issued a yellow card and the European Commission decided to still pursue the revision of the Directive, the dialogue between the European Parliament, the Commission and national parliaments from all 28 Member States has continued: on 12 October 2016 the Employment and Social Affairs Committee of the

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<sup>106</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council, amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, Explanatory Memorandum, point 2.2.

<sup>107</sup> Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity COM(2016) 505 final, 9.

<sup>108</sup> Ibid 9-10.

<sup>109</sup> Communication from the Commission to the European Parliament, the Council, and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013, COM(2013) 851 final.

European Parliament (EMPL) organised an interparliamentary committee meeting on the draft revision of the PWD.<sup>110</sup> Such an involvement of national parliaments' sectoral committees is particularly welcome as the experts on specific policies are better able to discuss detailed questions related to legislative dossiers than members of European affairs committees of national parliaments who generally deal with a wide range of policies.<sup>111</sup> The co-rapporteurs of the European Parliament welcomed the meeting 'as an opportunity to learn more about the views from across Member States, as well as a forum to share information', but they also stressed that 'it was important [...] not to focus on the Reasoned Opinions and the arguments behind them.'<sup>112</sup> Commissioner Thyssen took part in the meeting and the exchange of views with and between national Members of Parliament and MEPs heard comments from both those in favour and those against the proposal. Another discussion between Commissioner Thyssen and European affairs committees of national parliaments had taken place at the COSAC chairpersons' meeting in Bratislava on 11 July 2016,<sup>113</sup> before the European Commission adopted its response to the yellow card. With respect to the overall progress on the dossier, the Commissioner acknowledged in December 2016 that it 'has slowly trudged through negotiations'<sup>114</sup>. The vote of the European Parliament's draft report, for example, will probably take place in the EMPL committee in July 2017. The decision by the Legal affairs

<sup>110</sup> Posting of workers in the framework of the provision of services (*European Parliament*, 11 November 2016), <<http://www.europarl.europa.eu/committees/fr/empl/events-other.html?id=20161012CHE00091>> accessed 10 April 2017.

<sup>111</sup> Diane Fromage, 'Increasing Inter-Parliamentary Cooperation in the European Union: Current Trends and Challenges' (2016) 22 *European Public Law* 749.

<sup>112</sup> Brussels Bulletin No 519: 14 October 2016, 10, <<https://www.parliament.uk/documents/commons-committees/european-scrutiny/Brussels-Bulletin/519-14-October-2016.pdf>> accessed 11 September 2017.

<sup>113</sup> Marianne Thyssen, Speech on the social dimension of the European Union at the Meeting of National Parliaments (COSAC), (European Commission, 11 July 2016) <[https://ec.europa.eu/commission/2014-2019/thyssen/announcements/speech-social-dimension-european-union-meeting-national-parliaments-cosac-bratislava\\_en](https://ec.europa.eu/commission/2014-2019/thyssen/announcements/speech-social-dimension-european-union-meeting-national-parliaments-cosac-bratislava_en)> accessed 2 April 2017.

<sup>114</sup> Catherine Stupp, 'Thyssen proposes rules to fight 'populist' charges of welfare tourism', (*Euractiv.com*, 13 December 2016), <<https://www.euractiv.com/section/social-europe-jobs/news/thyssen-proposes-rules-to-fight-populist-charges-of-welfare-tourism/>> accessed 2 April 2017.

committee to give the directive a double legal basis by adding a social dimension to it might delay the negotiations even further.

In any case, negotiations promise to be tough as the opposition from Central and Eastern European Member States that triggered the third yellow card is not limited to their national parliaments. Central and Eastern European governments in the Council and many MEPs from these countries also reject the Commission's proposal. The 'regional block' against the revision of the PWD transcends the levels of the EU's multi-level system and the boundaries between the different institutions. At the same time, many 'old' Member States are pushing hard for changes: Employment ministers from Belgium, France, Germany, Luxembourg, the Netherlands, Austria and Sweden have publicly called for an ambitious reform of the current Directive.<sup>115</sup> This means that a real split between East and West, between 'old' and 'new' Member States, threatens the consensus-oriented political system of the EU.

Under the surface, the split indicates the opposition between those who are in favour of more EU regulation (to protect workers, often from Central and Eastern Europe who are posted to 'old' Member States, and to avoid social dumping) and those who are against tighter EU regulation in this area. In the case of posted workers, trade unions belong to the former group and employer associations belong to the latter group. While such divisions have often been observed in the process of European integration, it is striking to see that in this case the left-right cleavage exists, but some political actors seem to take their positions according to nationality (rather than to their affiliation to Pan-European political parties), including in the European Parliament, while other actors have aligned themselves along the 'capital versus worker' dimension.<sup>116</sup>

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<sup>115</sup> 'Travailleurs détachés : « La liberté de circuler ne doit pas être celle d'exploiter »' *Le Monde*, 12 December 2016, <[http://www.lemonde.fr/idees/article/2016/12/12/la-liberte-de-circuler-ne-doit-pas-etre-celle-d-exploiter\\_5047228\\_3232.html#1GwbokzAaifuVeBv.99](http://www.lemonde.fr/idees/article/2016/12/12/la-liberte-de-circuler-ne-doit-pas-etre-celle-d-exploiter_5047228_3232.html#1GwbokzAaifuVeBv.99)> accessed 2 April 2017.

<sup>116</sup> Simon Hix, Abdul G Noury and Gérard Roland, *Democratic Politics in the European Parliament* (Cambridge University Press 2007) 180f; Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal*, 711.

Irrespective of what the reasons are, the current conflict line is clear and despite promises to find a compromise,<sup>117</sup> it seems difficult to reconcile the different positions. The Juncker Commission is committed to a more 'social' Europe and sees itself as a 'political' Commission that pushes its policy priorities. In his State of the Union speech of September 2016, Jean-Claude Juncker emphasised that '[w]orkers should get the same pay for the same work in the same place. Europe is not the Wild West, but a social market economy.'<sup>118</sup>

One would therefore currently assume that the 11 Member States whose national parliaments objected to the revision of the PWD by issuing reasoned opinions will also oppose the proposal in the Council and vote against it. However, they do not carry enough weight to stop it: if these 11 Member States vote against it (and all other 17 Member States in favour of the proposal), the 'double majority' will be reached, as more than 55% (16) of the EU's Member States representing 79.1% of the population (requirement: 65%) will have voted for the revision of the Directive. Only under the transitional provision of Protocol No 36 annexed to the EU Treaties, Title II, Article 3(2), according to which between 1 November 2014 and 31 March 2017 a member of the Council may request to calculate the majority following the (old) voting rules of the Treaty of Nice, the situation would have been different: The proposal would not reach the necessary 260 votes, but only 241 votes (if we assume 111 votes against it – constituting a blocking majority of weighted votes in the Council).<sup>119</sup> The proposal, however, had not been tabled and voted in the Council before 31 March 2017 as it proved impossible to reach a political agreement in the Council.<sup>120</sup> The proposal has also been

<sup>117</sup> Cécile Barbière, 'Le Parlement veut réconcilier l'Est et l'Ouest sur les travailleurs détachés' (*Euractiv.fr*, 1 December 2016) <<http://www.euractiv.fr/section/europe-sociale-emploi/news/le-parlement-veut-reconcilier-lest-et-ouest-sur-les-travailleurs-detaches/>> accessed 2 April 2017.

<sup>118</sup> Jean-Claude Juncker, 'The State of the Union 2016' (European Commission, 14 September 2016), <[http://europa.eu/rapid/press-release\\_IP-16-3042\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3042_en.htm)> accessed 2 April 2017.

<sup>119</sup> All calculations were made in January 2017 using the Voting Calculator of the Council of the European Union, <<http://www.consilium.europa.eu/en/council-eu/voting-system/voting-calculator/>> accessed 6 January 2017.

<sup>120</sup> Catherine Stupp, 'Divides deepen between member states over posted workers bill' (*Euractiv.com*, 24 March 2017), <<http://www.euractiv.com/section/economy->



subject to parliamentary scrutiny reserves expressed by several national parliaments.<sup>121</sup>

The Member States that objected to the proposal when their parliaments submitted reasoned opinions will be unable to stop it in the Council. The same applies to MEPs from these countries in the European Parliament where the institutional position is usually determined by the two major political groups EPP and S&D, which support the proposal. It would be even more difficult for the opponents of the revision of the Posted Workers Directive to mobilise enough MEPs to block it.

## VII. CONCLUSION

At this stage, the success of the reform of the Posted Workers Directive is uncertain. Whether it will be possible to bridge diverging preferences, in particular between France and Poland, remains unclear, despite the European Parliament's efforts searching for a compromise. Perhaps this reform will also take several years, as was the case for the PWD itself: The Commission presented its proposal in 1991 and it was finally adopted in 1996.<sup>122</sup> What is beyond any doubt however, as the preceding analysis has shown, is the fact that the current deadlock was not provoked by the third yellow card; it merely revealed conflicting positions among Member States and made them more visible. The EWS and the possibility for national parliaments to issue reasoned opinions served as the vehicle for Central and Eastern European Member States to express opposition beyond mere subsidiarity concerns.

If we compare this third yellow card with the two previous ones, the key difference is this 'regional block'. The Juncker Commission's attitude and response were different, but not as different as one would have expected if one considers the rhetoric Jean-Claude Juncker used at the start of its term in 2014 when he promised to 'forge a new partnership' with national

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jobs/news/divides-deepen-between-member-states-over-posted-workers-bill/>, accessed 2 April 2017.

<sup>121</sup> Harry Cooper, 'Worker protection rules trigger East-West battle' *POLITICO Europe*, 14 December 2016, <<http://www.politico.eu/article/worker-protection-rules-trigger-east-west-battle/>> accessed 2 April 2017.

<sup>122</sup> On this adoption procedure: Zahn (n 38) 2-3.



parliaments. If this pledge had been taken seriously, the justification regarding subsidiarity could have been expected to be in line with the obligation contained in Article 5 Protocol No. 2. Nevertheless, the Juncker Commission followed the 'good practice' that the Barroso Commission had established when it wrote individual replies to national parliaments regarding the second yellow card.

With respect to the overall role of national parliaments in the European Union, the question arises whether the EWS can be considered an efficient tool. Seven years after the Lisbon Treaty put it in place, the three yellow cards triggered so far are not in themselves a sign of the system's efficiency or inefficiency. National parliaments are dedicating significant time and resources to a procedure that has not yet had any direct impact: They have only reached the threshold three times and the Commission either retracted its proposal for other reasons (Monti II) or carried on its legislative initiative (EPPO, PWD). This has led to proposals to introduce a 'red card' in whose framework national parliaments could block legislation and bypass the Commission, possibly even beyond subsidiarity.<sup>123</sup> What should not be underestimated however, is the indirect effect of the EWS: The Commission has started to adapt incrementally and the Juncker Commission's focus on priority dossiers that 'make a difference' is a sign of this change, as is the improvement in the replies that it provides to national parliaments.<sup>124</sup>

Taking a broader perspective, EU policy makers must take into account that many national parliaments wish to have policy influence.<sup>125</sup> They used a provision that merely provides for subsidiarity control to try and change the content of the proposed revision of the PWD. Whether this effort will be

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<sup>123</sup> Even though the agreement (European Council, Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union. EUCO 4/16 [Section C]) has now become obsolete since on 23 June 2016 the British referendum saw a majority vote to leave the EU, the topic has not disappeared from the political agenda. The 'red card' was mentioned for instance in a background note for the COSAC plenary in November 2016 that had been prepared by the Slovak Presidency Parliament.

<sup>124</sup> COSAC, 26<sup>th</sup> bi-annual report, 23 <<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>> accessed 2 April 2017.

<sup>125</sup> See also Jancic (n 69) 306.

successful remains to be seen. What this third yellow card has highlighted, is the deep division when it comes to the objective to create a 'Social Europe'. While this featured prominently in Jean-Claude Juncker's manifesto and is shared by citizens in Western European Member States, many Central and Eastern Europeans do not perceive this as necessary and largely see it as an attempt at protectionism. The struggle about the revision of the Posted Workers Directive has emerged for exactly these reasons and is far from over yet.

# PARTY POLARIZATION AND ITS CONSEQUENCES FOR JUDICIAL POWER AND JUDICIAL INDEPENDENCE

Benjamin Bricker\*

*In this article I reconsider the party-level forces affecting the establishment of judicial review and judicial independence. Though most current theory examines the competitiveness of the party system, I argue instead that the level of party polarization should lead to demonstrable effects on the establishment of judicial review and judicial independence rules. Using data on party polarization from the Manifesto Project, I test this theory on 38 (mostly European) countries. Results indicate a robust relationship between polarization and the presence of strong judicial independence protections, and also reinforce the importance of party competition for the establishment of judicial review. These results have important implications for constitutional design and the development of judicial power, as well as practical implications for the ability of polarized societies to develop institutions that mediate conflict.*

**Keywords:** Judicial independence, judicial power, party polarization, judicial review

## TABLE OF CONTENTS

I. INTRODUCTION .....	162
II. BACKGROUND .....	164
III. PREDICTORS OF JUDICIAL POWER AND INDEPENDENCE .....	167
IV. PARTY POLARIZATION AND THE DEVELOPMENT OF JUDICIAL INDEPENDENCE.....	172
1. <i>The Governance-Enhancing Aspects of Judicial Independence in         Polarized Systems</i> .....	174

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2. <i>The Problem-Solving Benefits of Independent Courts to Polarized Party Systems</i> .....	175
V. RESEARCH DESIGN, DATA, AND VARIABLES .....	178
1. <i>Dependent Variables</i> .....	179
2. <i>Independent Variable</i> .....	183
3. <i>Control Variables</i> .....	186
VI. RESULTS AND DISCUSSION .....	187
1. <i>The Decision to Establish Judicial Review</i> .....	187
2. <i>The Establishment of Judicial Independence Rules</i> .....	189
VII. CONCLUSION .....	195

## I. INTRODUCTION

Independent and powerful judiciaries have long been seen as the best way to limit the power of government and promote the rule of law. Yet, political actors generally adopt the formal (*de jure*) rules of independence that protect courts, and the political response to court decisions largely determines the power provided to courts. Given the ability of independent courts to constrain the actions of elected leaders, scholars, jurists, and political thinkers have long sought to examine the circumstances in which political actors choose to adopt both strong judicial powers and strong independence protections for judges.

Most prominent theories today focus on competition among political parties as a primary influence on the level of independence and power granted to the judicial system.<sup>1</sup> According to this 'insurance' or 'electoral market' family of theories, political parties will be unlikely to seek any form of check on their lawmaking power when they believe their party will dominate the future

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<sup>1</sup> Mary Volcansek, 'Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance' (2010) 33 *West European Politics* 280; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003); Matthew Stephenson, 'When the Devil Turns...': The Political Foundations of Independent Judicial Review' (2003) 32 *Journal of Legal Studies* 59; J Mark Ramseyer, 'The Puzzling (In)dependence of Courts: A Comparative Approach' (1994) 23 *Journal of Legal Studies* 721.

legislative process. However, if parties believe they will, at some point in the future, be voted out of power, they should seek to implement minoritarian institutions and rules – notably, judicial review and judicial independence-enhancing rules – that will help them to maintain a check on government when they are out of power.<sup>2</sup>

In this article, I reconsider the party-level forces affecting the establishment of judicial independence and judicial power. Building on the large literature in American politics<sup>3</sup> and comparative politics<sup>4</sup> that examines the conditions under which legislatures will transfer policy-making authority to other actors, I investigate whether the level of party *polarization*, rather than the level of party competition, better reflects the desire by political parties to establish independent courts with strong judicial power. For parties within polarized political systems, characterized by large ideological divisions between parties on important policy areas, the introduction of both judicial review<sup>5</sup> and strong judicial independence protections can help to rectify failures of coordination and provide a practical solution to problems of governmental functioning that, as Sartori noted, may otherwise threaten the stability of the political system.<sup>6</sup>

I examine the role of party polarization both *statically* by using common factors present at the time when judicial independence rules are adopted in

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<sup>2</sup> Ginsburg (n 1); Ramseyer (n 1); see also Anna Grzymala-Busse, *Rebuilding Leviathan: Party Competition and State Exploitation in Post-Communist Democracies* (Cambridge University Press 2007) for an extension outside of courts.

<sup>3</sup> Gyung-Ho Jeong, Gary Miller, and Andrew Sobel, 'Political Compromise and Bureaucratic Structure: The Political Origins of the Federal Reserve System' (2009) *Journal of Law, Economics & Organization* 472–498; Terry Moe, 'The Politics of Bureaucratic Structure' in John Chubb and Paul Peterson (eds), *Can the Government Govern?* (Brookings Press 1989).

<sup>4</sup> Ginsburg (n 1); Ramseyer (n 1); Grzymala-Busse (n 2); Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics & Organization* 587.

<sup>5</sup> I refer to judicial review and constitutional review interchangeably in this paper. I use the term judicial review to denote a system in which at least one court has the power to interpret the constitution and potentially hold other governmental actors accountable under the constitution.

<sup>6</sup> Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis* (Cambridge University Press 1976).

each country, and *dynamically*, testing whether levels of polarization over time can contribute to the adoption of judicial review. Using Russell Dalton's well-established index of party polarization and Manifesto Project (MP) data from 38 countries, I find that *polarization* among political parties has a significant effect on the propensity of political actors to accept strong judicial independence protections.<sup>7</sup> However, there is also strong evidence to support the conclusion that party *competition* drives the decision to adopt judicial review. In proposing the importance of party polarization, I am not suggesting that the competition for policy-making power among parties does not matter in the establishment of judicial review or judicial independence protections. Quite the opposite, the competition between political parties should be critical to the dual decisions to establish judicial review and create strong independence rules. Rather, as Dalton notes, the degree of party competition may be a 'surrogate for a richer characteristic' of the political system – the *polarization*, or policy extremity, between parties.<sup>8</sup> And ultimately, party polarization should be associated with the decision to adopt strong judicial independence protections.

## II. BACKGROUND

Polarization in politics has long held negative connotations. From the dissolution of the Weimar Republic in Germany to the collapse of democracy in 1970s Chile, the consequences of polarization can be dramatic. Still, as Russell Dalton and others have shown, polarization can vary within countries over time, rising and falling according to the strategic and ideological choices political actors make.<sup>9</sup> We see this today in the second decade of the twenty-first century, where the effects of polarization – both good and ill – have become dominant topics in both the popular media and

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<sup>7</sup> Russell Dalton, 'The Quantity and the Quality of Party Systems: Party System Polarization, its Measurement, and its Consequences' (2008) 41 *Comparative Political Studies* 899. For an indication of how widely used the Dalton index is, see Konstantinos Matakos, Orestis Troumpounis, and Dimitrios Xefteris, 'Electoral Rule Disproportionality and Platform Polarization' (2015) 60 *American Journal of Political Science* 1026.

<sup>8</sup> Dalton (n 7) 918.

<sup>9</sup> *Ibid* 908.

the academic world.<sup>10</sup> Yet, what precisely is meant by polarization in the party system? *Party polarization* is defined most broadly as the degree of ideological differentiation among political parties on a common ideological space.<sup>11</sup> Polarization involves more than just political differences among parties: it refers to a system-wide differentiation among social groups or factions, with those groups defined by their strong within-group identity and their alienation from or opposition to other groups in society.<sup>12</sup> In practice, polarized systems are characterized by the presence of significant parties or factions on the extreme ends of the left-right spectrum. As Rehm and Reilly explain, if a relatively large party exists on the extremes of the left-right spectrum, we should witness (and should empirically measure) greater polarization.<sup>13</sup> Conversely, smaller parties at the extremes should contribute less to overall polarization, as their smaller numbers make their 'gravitational pull' on the party system weaker than the pull of political parties with many voters and many seats in parliament. Likewise, domination of the party system by one party should also result in lower levels of overall party system polarization: As a given party accumulates more and more voters, the ideological distance between that party and any other party will be offset by the low number of voters who associate with other parties.<sup>14</sup>

Both social and institutional factors can contribute to party polarization. Examining the United States from the 1950s to the present, McCarty, Poole,

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<sup>10</sup> Eduardo Porter 'A Threat to U.S. Democracy: Political Dysfunction' *New York Times* (New York, 3 January 2017) B1; Ronald Inglehart and Pippa Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash' (2016) Harvard Kennedy School Research Paper RWP 16-026 <[https://papers.ssrn.com/abstract\\_id=2818659](https://papers.ssrn.com/abstract_id=2818659)> accessed 28 February 2017; Noam Lupu, 'Party Polarization and Mass Partisanship: A Comparative Perspective' (2015) 37 *Political Behavior* 331.

<sup>11</sup> Eg Philipp Rehm and Timothy Reilly, 'United We Stand: Constituency Homogeneity and Comparative Party Polarization' (2010) 29 *Party Politics* 40, 40; Sartori (n 6); Dalton (n 7).

<sup>12</sup> Dalton (n 7); Joan Esteban and Gerald Schneider, 'Polarization and Conflict: Theoretical and Empirical Issues' (2007) 45 *Journal of Peace Research* 131, 134; Joan Esteban and Debraj Ray, 'On the Measurement of Polarization' (1994) 62 *Econometrica* 819.

<sup>13</sup> Rehm and Reilly (n 11).

<sup>14</sup> Ibid.



and Rosenthal find that periods of large income inequalities are associated with greater polarization among US political parties.<sup>15</sup> Others suggest polarization may be caused by members of the legislature adapting to increased homogenization within legislative districts.<sup>16</sup> Whatever its roots, scholars have long posited distinct political and social outcomes arising from polarized systems. Polarized party systems provide incentives for parties to take extreme positions on social and economic policy dimensions, which result in intense ideological debates over political outcomes.<sup>17</sup> For some scholars, notably Noam Lupu, the intense debates can be beneficial for society, as voter choices become clarified and party attachment is developed.<sup>18</sup> At the same time, the consequences of polarization present distinct challenges for governing in the short-term, while also potentially damaging the legitimacy and the stability of the entire political system over the long-term.<sup>19</sup>

*Judicial independence* refers to two related concepts. First, it refers to the expected effect from formal rules given to judges that should enable them to decide cases free of influence from outside actors, including other political actors, the parties to the case, and even the judicial hierarchy itself.<sup>20</sup> A second view of judicial independence is more behavioral: it refers to how judges make decisions and whether those decisions are respected by other governmental actors – particularly decisions these other actors disagree

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<sup>15</sup> Nolan McCarty, Keith Poole, and Harold Rosenthal, *Polarized America: The Dance of Political Ideology and Unequal Riches* (MIT Press 2006).

<sup>16</sup> Sean Theriault, 'Party Polarization in the U.S. Congress: Member Replacement and Member Adaption' (2006) 25 *Party Politics* 483.

<sup>17</sup> Dalton (n 7) 901; Sartori (n 6).

<sup>18</sup> Lupu (n 10); Corwin Smidt 'Polarization and the Decline of the American Floating Voter' (2017) 61 *American Journal of Political Science* 365.

<sup>19</sup> Timothy Frye, 'The Perils of Polarization: Economic Performance in the Postcommunist World' (2002) 54 *World Politics* 308; Sartori (n 6).

<sup>20</sup> James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) 3 *Journal of Law and Courts* 187; David O'Brien and Yasuo Okhoshi, 'Stifling Judicial Independence from Within' in Peter Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy* (University Press of Virginia 2001).

with.<sup>21</sup> This second conceptualization focuses on the *de facto* powers given to courts, while the first refers mostly to *de jure* powers.

In this paper, I focus on legislative preferences affecting *de jure* independence. Certain institutional rules, notably term lengths and guarantees on salaries, have long been thought to augment the independence of the judiciary by better allowing judges to rule in ways free of influence from outside actors. Salary and tenure guarantees mean that judges cannot face monetary loss or the loss of their position if they exercise judicial review or rule against the government, a belief that goes back to the foundations of modern democratic thought.<sup>22</sup> Alexei Trochev's discussion of efforts to change term lengths for high court judges in Spain, Italy, and Portugal show the continued importance of these institutional rules in political debates today.<sup>23</sup> The ultimate effect of judicial independence is to make judges free to decide cases sincerely, based on their own best interpretation of the law, without fear of reprisals from other actors.<sup>24</sup> Thus, independence-enhancing rules like term lengths and salaries also indirectly provide opportunities for judges to maximize their own influence in the policy realm. In fact, it is often stated that without judicial independence, judicial activism (understood as the practice of courts challenging the pronouncements of other branches of government) cannot take place.

### III. PREDICTORS OF JUDICIAL POWER AND INDEPENDENCE

Why would political actors ever willingly create independent courts with judicial review powers? After all, political actors place an important constraint on their own power when they allow for the judicial review of legislation. Given the potential that judges will use judicial review to overturn the decisions of the executive and the legislative branches, legal and political

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<sup>21</sup> Drew Linzer and Jeffrey Staton, 'A Global Measure of Judicial Independence, 1948-2012' (2015) 4 *Journal of Law and Courts* 223; Julio Rios-Figueroa and Jeffrey Staton, 'An Evaluation of Cross-National Measures of Independence' (2014) 30 *Journal of Law, Economics & Organization* 104.

<sup>22</sup> Charles Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press 2006), 42.

<sup>23</sup> Alexei Trochev, *Judging Russia* (Cambridge University Press 2008), 259.

<sup>24</sup> See Rios-Figueroa and Staton (n 21).

theorists have long sought to understand why politicians would place this type of constraint on their own policy making power. Mark Graber, for example, has focused on the potential benefits to politicians in having independent courts solve politically difficult or sensitive policy issues.<sup>25</sup> Graber describes several notable instances in US history in which legislative actors sought, both actively and implicitly, to foist off a problematic issue onto the Supreme Court. The Court's infamous *Dred Scott* decision, which ratified slavery in the United States, is one example in which legislative leaders saw benefits to judicially created policymaking.<sup>26</sup>

Alternatively, judicial independence may be necessary for courts to effectively utilize their information advantage when reviewing legislative policies. In exercising judicial review, courts can correct problems in the lawmaking process, striking down parts of laws that have not worked well while keeping those that have worked. However, courts can only do so effectively if given independence from political actors.<sup>27</sup> Landes and Posner's classic work on judicial power focused on the ability of independent courts to effectively enforce political bargains, thus encouraging and making credible the deal making done by politicians and interest groups.<sup>28</sup>

One particularly powerful line of argument focuses on the competitiveness of the party system as an important theoretical and empirical predictor of both the judicial review powers and the independence ultimately given to courts.<sup>29</sup> The 'insurance' or 'electoral market' model begins with the proposition that parties in power, or those groups vying for power at the initial stage of party competition, face competing goals and pressures. Parties would like to stay in office forever, yet in democratic systems with high levels of political competition parties know with great certainty that they will, at some point in the future, be voted out of office.<sup>30</sup> With this loss of office comes a loss of

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<sup>25</sup> Mark Graber, 'The Non-Majoritarian Difficulty' (1993) 7 *Studies in American Political Development* 35.

<sup>26</sup> *Dred Scott v Sandford* 60 US 393 (1857).

<sup>27</sup> James Rogers, 'Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction' (2001) 45 *American Journal of Political Science* 84.

<sup>28</sup> William Landes and Richard Posner, 'The Independent Judiciary in an Interest-Group Perspective' (1975) 18 *Journal of Law & Economics* 875.

<sup>29</sup> Ginsburg (n 1) 60; Ramseyer (n 1) 740.

<sup>30</sup> Ginsburg and Versteeg (n 4); Ginsburg (n 1); Ramseyer (n 1); Stephenson (n 1).

policy-making authority in government and the legislature. However, parties can hedge their bets against future electoral losses by establishing independent courts with the power to review and potentially overturn the laws passed by parliament. Independent courts, then, allow forward-looking political parties in competitive environments to minimize risks from political competition – that is, to provide 'insurance' against an uncertain political world. In the end, parties in these competitive political environments trade off some level of current policy freedom for the possibility to veto or limit future policy when they are out of power.<sup>31</sup>

The relevance of the political insurance theory can be seen vividly today in Hungary. In the 1990s and into the 2000s, Hungary's constitutional court developed a strong reputation for independence and power within the Hungarian political system, with one prominent observer of the country terming Hungary a 'courtocracy' due to the central role of the constitutional court in shaping the parameters of policy debates.<sup>32</sup> However, after Viktor Orban's Fidesz party won a surprising two-thirds supermajority in 2010, the party swiftly sought to clip the independence of the constitutional court and other independent actors in government. After the constitutional court ruled against Fidesz in several prominent cases, the party used its supermajority to curtail the jurisdiction of the court, even formally passing laws and amendments to eliminate the relevance of past court precedent.<sup>33</sup> Why would Fidesz take these actions? The insurance theory explains that limiting judicial power is a natural reaction to the *lack* of true political competition in the Hungarian political arena. With a commanding two-thirds supermajority and a weak, fragmented opposition, Fidesz was able to control the rules of the political game, and thus had no need for the political insurance that the constitutional court would otherwise provide. Ultimately, the decision to curtail the court's powers flowed from Fidesz's lack of real competition and

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<sup>31</sup> Ramseyer (n 1) 722.

<sup>32</sup> Kim Scheppele, 'Democracy by Judiciary: Or, Why Courts Can Be More Democratic than Parliaments' in Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (Central European University Press 2005).

<sup>33</sup> Kim Scheppele, 'The Fog of Amendment' (*New York Times*, 12 March 2013) <<http://krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/>> accessed 5 January 2017.

the absence of any political insurance requirements. Still, the insurance theory may have its limits. With a smaller majority in parliament, and a stronger opposition, the insurance theory arguably does not explain similar court curbing behavior taken by Law and Justice (PiS) in Poland since their ascendance to power in late 2015.<sup>34</sup>

Similar explanations also have been used to show how the political uncertainty arising from political competition can lead to the creation of constitutional review powers for the judiciary. Examining 204 countries, Ginsburg and Versteeg find that electoral competition between the two main parties is a primary contributor to the adoption of constitutional review over time.<sup>35</sup> Ran Hirschl uses a similar theory to show how new competition within political systems previously dominated by one party also can lead established regimes to adopt judicial review.<sup>36</sup> Country-based investigation has found that the insurance theory largely explains the establishment of judicial independence rules and expansion of judicial review powers in Mexico, and at least partly accounts for the motivations and actions of Italian parties during the creation and implementation of the Italian Constitutional Court.<sup>37</sup>

However, other research has questioned the positive relationship between political competition and the creation of rules favoring strong courts. In unconsolidated democracies, political competition may have no effect – or even a negative effect – on judicial independence. With potentially large costs in giving up power to often-mistrusted opponents, there may be incentives for incumbents to pressure courts to rule in their favor. In Ukraine, increased electoral competition has been shown to increase the pressure placed on courts by political actors, decreasing judicial

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<sup>34</sup> For a possible explanation, see Benjamin Bricker, 'Do Competitive Political Environments Always Lead to Judicial Empowerment?' (2017) Working Paper (unpublished manuscript).

<sup>35</sup> Ginsburg and Versteeg (n 4).

<sup>36</sup> Ran Hirschl, 'The Nordic Counternarrative' (2011) 9 I-CON 449; Hirschl, *Towards Juristocracy* (n 1).

<sup>37</sup> Volcansek (n 1); Jodi Finkel, 'Judicial Reform as Insurance Policy: Mexico in the 1990s' (2005) 46 *Latin American Politics & Society* 87.

independence in practice.<sup>38</sup> Similarly, Alexei Trochev found that the creation of sub-national constitutional courts in 1990s Russia was limited to regions in which local governors faced little to no political competition.<sup>39</sup> Rather than creating courts to hedge against political competition, local governors instead appeared to create these regional courts to consolidate their own power. Examining a large number of countries, Aydin finds the validity of the insurance or electoral market theory of judicial independence to be dependent on the level of democratization.<sup>40</sup> Notably, she concludes that high levels of political competition do not necessarily lead to increases in judicial independence in unconsolidated democracies, though this relationship is seen in advanced democracies.

While many scholars have examined the effects of party competition, few have examined the potential influence of polarized political systems. Hayo and Voigt studied the effects of socio-economic and linguistic fractionalization on judicial independence in a cross-national study of 39 countries, finding that countries dominated by large urban centers are less likely to adopt strong judicial independence protections. However, they do not directly examine polarization in the political arena.<sup>41</sup> In fact, Hanssen's study of state courts in the United States is one of the only previous works to examine whether policy differences can affect judicial independence rules.<sup>42</sup> Using the national voting records of members of Congress, Hanssen finds that greater within-state policy differences (ie, greater polarization) among Democrats and Republicans elected to represent their respective states in the US Congress is associated positively with the use of the Missouri Plan, a non-partisan selection and retention plan for state supreme court

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<sup>38</sup> Maria Popova, 'Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine' (2010) 43 *Comparative Political Studies* 1202, 1205.

<sup>39</sup> Alexei Trochev, 'Less Democracy, More Courts: A Puzzle of Judicial Review in Russia' (2004) 38 *Law & Society Review* 513.

<sup>40</sup> Aylin Aydin, 'Judicial Independence Across Democratic Regimes: Understanding the Varying Impact of Political Competition' (2013) 47 *Law & Society Review* 105.

<sup>41</sup> Bernd Hayo and Stefan Voigt, 'Mapping Constitutionally Safeguarded Judicial Independence' (2014) 11 *Journal of Empirical Legal Studies* 139.

<sup>42</sup> Andrew Hanssen, 'Is There a Politically Optimal Level of Judicial Independence?' (2004) 94 *American Economic Review* 712, 717.



appointments that, some contend, leads to greater judicial independence. Yet the Missouri Plan still involves an election to retain office, and not all scholars agree that the Missouri Plan necessarily leads to greater independence. Instead, it may simply trade one problem for another, establishing independence from politicians at the cost of dependence on majority electoral approval for judicial decisions. Though initially appointed to office by the state's governor (who generally works in conjunction with an independent selection committee to make the appointment), Missouri Plan judges are still subject to a public vote on whether to retain them in office, often after only a few years in office. Canes-Wrone, Clark, and Park found that Missouri Plan judges were particularly likely to respond to public opinion on 'hot-button' issues, possibly because of the need to gain future electoral approval.<sup>43</sup> These findings call into question whether the Missouri Plan of appointment followed by electoral 'retention' truly is independence enhancing.

The varying conclusions seen above leave questions regarding the exact effect that party competition has on the establishment of real judicial power and judicial independence protections. Still, despite these divergent findings in the existing literature, it nevertheless seems intuitive that some aspect of political competition should be related to the establishment of powerful courts with at least some amount of judicial independence. I expand on this thought in the next section, outlining how the extent of party polarization within countries can help to explain the development of judicial review and strong judicial independence rules.

#### IV. PARTY POLARIZATION AND THE DEVELOPMENT OF JUDICIAL INDEPENDENCE

In essence, works gathered or subsumed under the 'insurance' or 'electoral market' theory umbrella have established two different tracks with two distinct outcomes: one in which minimal party competition leads to minimal judicial independence guarantees, the other in which robust party competition leads to the establishment of strong judicial review and judicial

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<sup>43</sup> Brandice Canes-Wrone, Tom Clark, and Jee-Kwang Park, 'Judicial Independence and Retention Elections' (2012) 28 *Journal of Law, Economics & Organization* 211.



independence rules. Certainly, when one party or faction believes it will be politically dominant, there is little reason to believe it will seek to constrain its own governing power. Whether in party systems or in international relations, unipolarity generally results in the creation of rules favoring the interests of that actor.

However, given the range of empirical findings, the second outcome – that of greater judicial powers in response to anticipated party competition – may require greater specification. Rather than the basic presence of competition among parties, the true driving force behind the creation of strong and independent judiciaries could be the *extremity* of political differences between these politically viable groups. Specifically, the *polarization* of the party system should have an effect on the power and independence provided to courts, with greater polarization leading to greater power and independence provided to courts.

Why should one focus on the more specific concept of party polarization, rather than the broader notion of party competition as the driver of judicial power? In short, a greater extremity of differences between political parties should lead actors in those parties to realize the governance-enhancing and problem-solving benefits that come from establishing a third-party arbitrator of disputes over the constitutional text. And even though it is true that polarized and competitive political systems share some similarities, they are also quite distinct in many ways. Political systems with greater polarization are defined by large ideological divisions between major groups or parties in the system, with major parties being significant in size and having high within-group homogeneity.<sup>44</sup> These characteristics are thought by many scholars to produce particularly acrimonious political dialogues.<sup>45</sup> By contrast, competitive party systems do not require stark intergroup differences, merely a plurality of political parties – in other words, a system in which more than one party has a legitimate shot of being in government. In fact, it would be easy to imagine a highly competitive system in which parties compete among one another for voters – particularly parties close to one another on the political spectrum, a point noted by Esteban and Schneider.<sup>46</sup>

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<sup>44</sup> Rehm and Reilly (n 11).

<sup>45</sup> Dalton (n 7); Sartori (n 6).

<sup>46</sup> Esteban and Schneider (n 12) 134.

In a competitive party system that lacks strong antipathy or distance among parties, political actors might believe that conflicts within the political arena could be arbitrated within the legislature, and thus not feel the need to create a strong and independent outside body to adjudicate disputes. The same cannot be said for polarized party systems, where hostility for opposing groups is commonplace. However, as explained in detail below, this antipathy and mistrust between competing parties and groups could actually spur the provision of constitutional review powers and durable independence protections that will allow courts to act as both a problem solver and as a strong, governance-enhancing arbitrator.

### *1. The Governance-Enhancing Aspects of Judicial Independence in Polarized Systems*

Polarized party systems are defined by the large ideological divisions that separate parties. As a result, the potential policy implications from changes in government should similarly be more pronounced. Sartori found these ideological differences, and the swings in policy that can accompany them, potentially threatening to the integrity of the democratic system.<sup>47</sup> To solve this problem, parties or factions seeking a lasting political system have incentives to create minoritarian institutions, such as courts with judicial review powers. Courts can essentially act as third-party arbitrators between rival factions, providing re-enforcement of systemic political weaknesses as well as incentives for parties (and political and social interest groups) out of power to not abandon the political system. To prevent co-option by any one political group, all parties have an additional incentive to provide this third-party arbitrator (the court) with sufficient power and sufficient independence to act as a credible intermediary between political factions.

Past scholarship has long emphasized the benefits of powerful courts in divided societies. For Cass Sunstein, the creation of a strong and independent judiciary can serve as way to offset the natural tension that exists within a polarized political system.<sup>48</sup> Sartori concluded that 'polarized pluralist' systems can only endure if the centrifugal tactics of electoral competition taking place in these systems are 'lessened, or eventually counteracted in ...

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<sup>47</sup> Sartori (n 6).

<sup>48</sup> Cass Sunstein, 'On Property and Constitutionalism' (1993) 14 Cardozo Law Review 922.

other arenas' within society or government.<sup>49</sup> Though Sartori does not explicitly state what these other arenas are, courts are increasingly touted as forums to de-politicize these intractable social battles. This is not to say that the search for political advantage is non-existent in the development of high courts: parties can also attempt to create rules that favor their own ability to appoint preferred actors to the courts, for example. And by providing independence to the court of constitutional review, parties also open up the possibility of increased judicial activism – activism that can potentially work against any given political party's interests. At the same time, the participation of political actors in some appointment systems is not absolute: some countries allow the judiciary itself, or a judicial council, to play a role in high court appointments. For example, the Italian judiciary elects five of the 15 judges on the Italian Constitutional Court, and the Latvian Supreme Court elects two of the seven justices on the Latvian Constitutional Court. Later in the article I examine whether the actors involved in apex court appointments could influence the independence that courts receive.<sup>50</sup> However, the creation of institutional arrangements, such as independent courts with judicial review powers, should also serve as a method for opposing groups to strengthen the long-term viability of the political system.

## *2. The Problem-Solving Benefits of Independent Courts to Polarized Party Systems*

The more extensive differences between parties in polarized societies provide a second reason to expect stronger judicial powers in polarized party systems. Though these societies should be able to agree on the broad rules of

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<sup>49</sup> Sartori (n 6) 145.

<sup>50</sup> The importance of appointment rules shows how meaningful high courts have become to governing today. The search for advantage in this process can be seen prominently today in Poland and the United States. To mediate the role of politics, some countries turn to non-partisan judicial councils to select their career judiciary, while others emphasize the role of political actors (see Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2012) 57 *American Journal of Comparative Law* 201). In statistical testing later in the article, I include the number of actors involved in appointing supreme court or constitutional court judges as a potential factor explaining the commitment to judicial independence. See parts V and VI. In some countries, the judiciary, or a judicial council, is one of the actors involved in appointing constitutional judges.

government and institutions, greater polarization should make it less likely that the competing parties in these societies will be able to agree to key, specific details in any governing agreement. Thus, a constitution, a set of organic laws, or even a commercial code should be more likely to end up underspecified, and in need of future elaboration and adjudication. While all constitutions are in some ways incomplete contracts, polarized societies should be particularly less able to resolve key constitutional provisions with specific statements of policy or belief, and thus more likely to need a third party to adjudicate future problems.

At the same time, the legislative outputs from a polarized parliament are more likely to be displeasing to some significant portion of voters. However, as Georg Vanberg has shown through formal models of court-legislative behavior, the presence of a potential check from judges exercising constitutional review should force parliamentary majorities to move toward a more centrist position that will not be overturned by the high court.<sup>51</sup> Similar to Vanberg, Alec Stone Sweet uses specific examples from Spain, France, Germany, and Italy to show that successfully contesting legislation at the constitutional court can force otherwise intransigent governing parties or coalitions to moderate their legislative output.<sup>52</sup> Such exercises in moderation should have particular benefits to polarized political systems, where the pull of major parties toward the left-right ideological poles potentially threatens the democratic order.<sup>53</sup> Similarly, when discussing reasons why constitutional designers choose to establish strong court systems, Jon Elster notes the potential benefits from being able to 'dump a problem on the [...] Constitutional Court, [rather] than to try to resolve it immediately.'<sup>54</sup> For politicians in polarized societies, there may be no choice but to pass off unsolvable issues to the courts.

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<sup>51</sup> Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise' (1998) 10 *Journal of Theoretical Politics* 299.

<sup>52</sup> Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

<sup>53</sup> Sartori (n 6).

<sup>54</sup> Jon Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea' (1993) 71 *Public Administration* 169, 192.

The ability of independent courts to solve problems and moderate the behavior of distrustful actors also fits well with existing theories of agency and central bank independence. Jeong et al. find that political compromise among disparate, competing groups largely explains the institutional independence given to the US Federal Reserve System.<sup>55</sup> Competing interests, both in and out of the legislature, sought to check one another through the rules of the proposed Federal Reserve System; the result of this distrust was a compromise to create an independent organizational structure. Similarly, Terry Moe concludes that the uncertainty from competitive political systems contributes to the creation of independent agencies that protect the main political groups from the 'dangers of democracy' – notably, from being out of power and thus unable to shape the legislative agenda.<sup>56</sup>

Finally, it is worth noting that the very nature of polarized party systems means they are almost assured of being among those seeking through judicial review the political 'insurance' that is the hallmark of party competition theories. As noted earlier, polarized systems require more than one viable political party, with those parties being located far apart on a left-right scale. Thus, the greater independence given to some courts, which may at first glance be viewed as an issue of party *competition* or fractionalization, could instead be a product of party *polarization*.

In short, the establishment of judicial review powers and strong judicial independence rules should involve not just a prevalence of parties, but also the presence of serious debates and divisions within society such that parties will believe it in their respective interests to establish a strong and independent court that can both regulate policy and provide the possibility of future (or current) checks on the power of political opponents. Thus, it is reasonable to predict that when there is greater polarization in the party system at the time when judicial review is adopted, we will also see the adoption of greater formal independence for high court judges.

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<sup>55</sup> Jeong et al (n 3).

<sup>56</sup> Moe (n 3) 275. However, Moe does not find many positive consequences from agency independence.

## V. RESEARCH DESIGN, DATA, AND VARIABLES

To examine whether polarization of the political system contributes, first, to the adoption of judicial review and, second, to greater independence for judges, I employ two strategies. First, I use longitudinal data from 38 countries to see whether polarization over time is associated with the decision to adopt judicial review.<sup>57</sup> Second, I examine nearly all of those same countries at the time judicial review is adopted to answer a related question: is the adoption of judicial review also associated with greater formal protections given to the judiciary?

Thus, this article examines two questions: to what degree does polarization lead to the adoption of judicial review, and to what degree does it lead to the adoption of strong judicial independence rules. To avoid the problem of selection bias in answering the first question, countries included in this study were not selected based on whether they had adopted judicial review. Instead, selection is based on the availability of data – particularly, data on the party system within each country over a long period of time. As a practical reality, though, nearly all of the countries observed in this study (though not all) eventually do adopt some form of judicial review. As explained in detail below, I use the Manifesto Project's data on political parties because, with data going back to 1945, it covers the longest time period of any database on electoral parties.

However, the presence and timing of judicial review is crucial to answer the second question on the adoption of judicial independence protections, as the decision to create judicial review provides the necessary precondition for courts to potentially overturn legislative acts. With only statutory interpretation powers, courts do not have the final word on policy or on legal interpretation: legislatures could always modify any judicial interpretation of statutes by re-writing or amending the laws. By creating judicial review political actors limit themselves in a very real sense, which makes the independence protection they afford to courts a critical question. Thus, for this second question I examine only those countries that have adopted judicial review.

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<sup>57</sup> See appendix 3 for the list of countries.

I measure *party polarization* using the Manifesto Project's (MP) left-right party scores. The Manifesto Project is a longstanding, comprehensive effort by political scientists to collect all party statements and policy positions from official party manifestos, or platforms, and use them to create numerical left-right scores for every party competing in national elections. Currently, their database covers party preferences for over 1,000 parties in over 50 countries. Combined with its extensive coverage period, Manifesto Project scores are ideal for observing the presence and extent of polarization across multiple countries over time. However, several countries with current MP data and judicial review powers had to be excluded from study because the adoption of judicial review occurred before MP data begins. Australia, Norway, Brazil, Argentina, Mexico, Denmark, and the United States all initiated judicial review well before accurate MP party data is available, and thus were excluded from the study.<sup>58</sup> Appendix 3 lists the countries included in the study.<sup>59</sup>

### 1. *Dependent Variables*

To examine the onset of judicial review, I created a dichotomous variable that captures the year in which judicial review was adopted in each country.<sup>60</sup> With my party polarization measure based on Manifesto Project data, I am able to track the onset of judicial review as far back as their data allows me – generally, the first post-World War II election. Similar to the approach used

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<sup>58</sup> Ginsburg and Versteeg (n 4) conclude Denmark does not have judicial review, likely due to the Danish Supreme Court's historical reticence to use its power. See also Jens Rytter and Marlene Wind, 'In Need of Jurisotcracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 I-CON 470, 474.

<sup>59</sup> Greece is included in the study, though its unique constitutional court appointment structure could result in its exclusion. Judges on both the Court of Cassation and Council of State (who have life tenure) are selected randomly to serve two-year terms on the Supreme Special Court, which hears final constitutional claims (see Epaminondas Spiliotopoulos, 'Judicial Review of Legislative Acts in Greece' (1983) 56 Temple Law Quarterly 463). Thus, the judges on Greece's constitutional court could be considered to have two-year terms, or life terms. In line with Ginsburg (n 1), I chose to code the Greek constitutional court judges as holding two-year terms, a much harder test for my hypotheses.

<sup>60</sup> As noted in footnote 5, I define judicial review as the establishment of a court with the power to interpret the constitution and potentially hold other governmental actors accountable under the constitution.



by Ginsburg and Versteeg, observations from that country disappear from the dataset once judicial review is established.

To examine the strength of judicial independence rules, I use two common measures that indicate a commitment to judicial independence. The first is an additive judicial independence index created by Feld and Voigt.<sup>61</sup> That index consists of 12 factors that should promote greater judicial independence, including term lengths, salary guarantees, salary adequateness, reappointment possibilities, judicial review powers, publishing powers, and ease of constitutional amendment.<sup>62</sup> Their analysis included 71 countries, 31 of which overlap with the countries included in this study. I was able to complete Feld and Voigt scores for the six remaining countries by following the basic coding scheme set out in their paper. Though this index is commonly used for testing purposes, the Feld and Voigt index also has been criticized for its measurement strategy. Rather than 12 concepts affecting judicial independence equally, it is possible that a much smaller, core set of variables best captures the credibility of judicial independence rules.<sup>63</sup> An additional concern comes from the fact that Feld and Voigt's data are based on contemporary (as of 2003) observations of judicial independence institutions, though later studies indicate that constitutional change in any one of these variables is extremely rare.<sup>64</sup>

Because this study examines whether there is any link between the party system (specifically, party polarization) and the creation or ratification of judicial independence rules at the time the power of judicial review is

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<sup>61</sup> Lars Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators' (2003) 19 *European Journal of Political Economy* 497.

<sup>62</sup> The 12 factors are: (1) court powers specified in constitution; (2) ease of amendment to constitution; (3) appointments to court; (4) judicial tenure; (5) judicial removal procedures; (6) judicial re-appointment possibility; (7) salary guarantees; (8) adequate court pay compared to legal peers; (9) ability to access court; (10) case allocation rules; (11) constitutional review powers; (12) courts publish decisions.

<sup>63</sup> Eg Melton and Ginsburg (n 20); Ginsburg (n 1); Raphael La Porta, Florencio Lopez-de-Silanes, Cristian Pop-Eleches, and Andrei Shleifer, 'Judicial Checks and Balances' (2004) 112 *Journal of Political Economy* 445. All of these works use between one to six core variables to measure judicial independence.

<sup>64</sup> Hayo and Voigt (n 41).

established, I use as a second dependent variable the term length given to judges on the final court of constitutional review when judicial review was established.<sup>65</sup> Term lengths, the only common variable within the previous studies of *de jure* judicial independence mentioned above, should provide a strong indication of commitment on the part of political actors to judicial independence. Longer term lengths signal to judges that they will not be punished with loss of office by the current government for decisions made while on the court. Longer term lengths also help to avoid career-based independence pressures, notably the concern that departing high court judges would need to curry favor with the current government to advance their post-court career plans.<sup>66</sup> Similarly, as Geyh and Ginsburg both note, shorter term lengths allow current legislative majorities a greater ability to punish judges who rule against their interests.<sup>67</sup>

Though life tenure is often granted to judges, many countries also mandate retirement ages, typically at 65 to 70 years of age. Thus, 'life tenure' is often much shorter than initially assumed. Because of this caveat, Ginsburg makes the assumption for testing purposes that life tenure equals the longest fixed term in his dataset.<sup>68</sup> My own testing will consider life tenure in two ways. First, in line with Ginsburg's previous work, I will measure life tenure as one year longer than the longest fixed term in my dataset set – in this case 16 years (15 years is the longest fixed term in my dataset). Thus, the outcome I am examining ultimately is a count of the number of years in the terms given to

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<sup>65</sup> Using data from Zackary Elkins, Tom Ginsburg, and James Melton, *Comparative Constitutions Project* (2015) <<http://www.comparativeconstitutionsproject.org>> accessed 21 September 2016; Ginsburg (n 1); Robert Maddex, *Constitutions of the World* (CQ Press 1995).

<sup>66</sup> Eg Benjamin Bricker, *Visions of Judicial Review* (ECPR Press 2016); Lucia Pellegrina and Nuno Garoupa, 'Choosing Between the Government and the Regions: An Empirical Analysis of the Italian Constitutional Court Decisions' (2013) 52 *European Journal of Political Research* 1.

<sup>67</sup> Geyh (n 22); Ginsburg (n 1). O'Brien and Okhoshi (n 20) also discuss the importance of tenure in the context of the Japanese judiciary, though its importance to independence can be seen as far back as 1600s England (see Douglass North and Barry Weingast, 'Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England' (1989) 49 *Journal of Economic History* 803).

<sup>68</sup> Ginsburg (n 1).

constitutional judges that is 'top-censored' (that is, limited at the maximum number of years granted to judges), which calls for the use of a negative binomial model.<sup>69</sup> The negative binomial model is a commonly-used generalized linear model that provides accurate parameter estimates when the dependent variable is a count<sup>70</sup> and the data is overdispersed – that is, where the conditional variance exceeds the conditional mean, as occurs here.<sup>71</sup>

I have also created a second operationalization of the dependent variable in which judicial tenure is indexed into four groups, with life tenure receiving the highest score ('4'), tenures between 10 and 15 years receiving a score of '3,' tenures between seven and nine years a score of '2,' and tenures of one to six years receiving the lowest score ('1'). This second operationalization requires an ordered logit model to be used, as the response variable is categorical, contains more than two response categories, and can be ordered. Both the negative binomial and the ordered logit model are specific iterations of what is referred to as a 'generalized linear model,' or GLM. GLMs are a class of regression models that can be used when the classical Ordinary Least Squares

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<sup>69</sup> In Appendix 2, I report the results of tests using Ordinary Least Squares (OLS) regression in place of negative binomial regression. Substantive results do not change using OLS.

<sup>70</sup> In classical statistical terms, the count refers to the number of times some phenomenon occurs. This can include the number of wars that occur over a time period or the number of days until an event occurs, such as the number of days it takes to sign a contract.

<sup>71</sup> Variance represents the expectation of how far apart a random data point will be from the mean. In statistics, variance is measured by squaring the standard deviation. Here, the variance of tenure is 16.1 and the mean is 11.2. The negative binomial is appropriate in these circumstances, as it is essentially an extension of a Poisson model that allows for greater variance. In the negative binomial, the dependent variable count is assumed to follow a Poisson distribution while the variation in the mean follows a gamma distribution – thus the observed dependent variable is assumed to mix the Poisson and gamma distributions. The count is assumed to be a random variable, which makes it particularly well suited to examining heterogeneous data – for example, data from multiple countries. See Gary King, 'Variance Specification in Event Count Models: From Restrictive Assumptions to a Generalized Estimator' (1989) 33 *American Journal of Political Science* 762, 767-68; Michael Finkelstein and Bruce Levin, *Statistics for Lawyers* (Springer 2015).

(OLS) linear regression model is not appropriate. Specifically, GLMs can be used when certain OLS assumptions do not hold, including the assumption of a linear relationship between outcome and predictor variables and the assumption that data is normally distributed. Relatedly, with some data OLS regression may not be the most efficient – that is, the OLS estimator may not provide the lowest variance. Count data is one instance in which OLS is not the most efficient estimator. GLMs are most often used for binary data, count data, and ordered responses, and use a link function to linearize the relationship between the predictor variables and the response.

The use of either model is based on the type of outcome that is analyzed. The ordered logit is most appropriate for *categories* of outcomes, with the values within the categories having a true sequential order from low to high. Examples in which the ordered logit should be used include the level of happiness reported by individuals in a survey (low, medium, high), or bond ratings (A, AA, AAA).<sup>72</sup> The negative binomial is most appropriate when the outcome is a count of some phenomenon, including the number of wars fought by a country, the number of years given to judicial terms, or the number of days it takes to sign a contract, and the data is overdispersed.<sup>73</sup>

## 2. Independent Variable

For both sets of tests, the main *independent variable* is the left-right *party system polarization* score for each country in the election year immediately preceding, or closest to, the establishment of judicial review. As noted earlier, to measure polarization I begin by using the statements on major issues that are contained in each political party's official manifesto, as collected by the Manifesto Project (MP).<sup>74</sup> After collecting each party's official statements,

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<sup>72</sup> Peter Kennedy, *A Guide to Econometrics* (Blackwell 2008), 258–60; Alan Agresti, *Foundations of Linear and Generalized Linear Models* (Wiley 2015), 202–06.

<sup>73</sup> Joseph Hilbe, *Negative Binomial Regression* (Cambridge University Press 2011); King (n 71); Agresti (n 72) 247.

<sup>74</sup> MP uses their data to create a general right-left score (called RILE), which is comprised of 26 issue dimensions, including social and economic issues. The issues used to create the left-right polarization score are: 104, 201, 203, 305, 401, 402, 407, 414, 505, 601, 603, 605, 606, 103, 105, 106, 107, 202, 403, 404, 406, 412, 413, 504, 506, 701. For complete descriptions of each issue, see Manifesto Project Database,

MP researchers then code those statements numerically to create a left-right score for each party competing in every national election. Listed in Appendix 4, the statements used to create the left-right score run the gamut from party views on global trade and labor protections to statements on socio-political issues like nationalism, social harmony, and imperialism. The left-right scores created by MP are then used in Russell Dalton's party polarization index formula to create the polarization score for each country.<sup>75</sup> Dalton's formula utilizes the summed total of each party's vote share multiplied by that party's left-right score minus the party system left-right score, measured as follows:

Party system polarization score =

$$\sqrt{\{\sum(\text{party vote share}_i) * ([\text{party}_i \text{ R/L score} - \text{party system avg. R/L score}] / 5)^2\}}$$

By multiplying each party's vote share in a given election by their numeric difference from the average party system left-right score in that same election, the equation allows us to numerically observe the extent of polarization in every election within each country. Larger numbers from the equation indicate higher levels of polarization and smaller numbers indicate less polarized party systems.

Other researchers have developed similar left-right scores for political parties, though for my research Manifesto Project scores are preferable to other party system measurements.<sup>76</sup> First, the MP data extends over a much longer time period – their quantitative data covers democratic elections since 1945.<sup>77</sup> This temporal element is particularly important for this study, in that

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<<https://manifesto-project.wzb.eu>> accessed 21 September 2016. The issue categories are listed in Appendix 4.

<sup>75</sup> Dalton (n 7) 9.

<sup>76</sup> Prominent alternatives include the Comparative Study of Electoral Systems (CSES) and the Chapel Hill Expert Survey. See CSES, <<http://www.cses.org>> accessed 12 April 2017; Ryan Bakker and others, '2014 Chapel Hill Expert Survey' <[chesdata.eu](http://chesdata.eu)> accessed 12 April 2017.

<sup>77</sup> MP provides quantitative data analysis of elections since 1945. I do not expect any selection bias, or any correlation between the countries selected and party polarization as a result of this choice of data. In fact, the presence of competitive elections only makes successfully testing my theory more difficult. Andrea Volkens, Pola Lehmann, Theres Matthieß, Sven Regel, Nicolas Merz, and Annika

I seek to measure the positions of parties (and judicial independence rules) at the time judicial review was created. One prominent party scoring alternative, the Comparative Study of Electoral Systems (CSES), has relatively wide geographical coverage but is a relatively recent project: its coverage only goes back to 1996. Yet, virtually all of the countries studied here adopted judicial review previous to 1996. Similarly, another party placement estimator, the Chapel Hill Expert Survey, begins in 1999 – too late for the purposes of this project.<sup>78</sup>

Second, the Manifesto Project's focus on political party statements should lead to more accurate placements. One questionable feature of citizen surveys is the ability of citizens to accurately place all relevant parties on a left-right continuum.<sup>79</sup> At the same time, some have criticized reliance on party manifesto statements, viewing them as posturing or position taking designed to appeal to the party's core supporters, but that have little chance of becoming governing policy. In one sense, this could detract from the reliability of MP scores. Yet, for this study such posturing should only highlight the underlying polarization of society.

The observations used for the establishment of judicial independence rules represent the time at which the latest democratic constitution was established. Thus, the establishment of judicial review is often roughly concurrent with the establishment of constitutional democracy. However, in some countries tenure and access rules had already been created previous to the establishment of judicial review. For example, in Sweden constitutional revisions in the 1970s gave courts judicial review powers, and in Finland major legislative revisions in 2000 also provided judicial review for the first time in that country's history.<sup>80</sup> Yet even in circumstances in which tenure rules had been established previous to the establishment of judicial review, the polarization of the legislature at the time judicial review is established should

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Werner, *The Manifesto Data Collection* (Wissenschaftszentrum Berlin für Sozialforschung 2016).

<sup>78</sup> Marco Steenbergen and Gary Marks, 'Evaluating Expert Judgments' (2007) 46 *European Journal of Political Research* 347.

<sup>79</sup> G Bingham Powell, 'The Ideological Congruence Controversy: The Impact of Alternative Measures, Data, and Time Periods on the Effects of Election Rules' (2009) 42 *Comparative Political Studies* 1475, 1477.

<sup>80</sup> Hirschl, 'Nordic Counternarrative' (n 36) 450.



still matter. Notably, parliament, in introducing its new rules on judicial review, is free to take steps to alter the existing tenure of judges (as in the cases of Sweden in the 1970s, Canada in 1982, and Finland in 2000).

### 3. *Control Variables*

I include several control variables to account for other factors that could potentially influence the creation of (a) judicial review and (b) strong judicial independence rules. Regarding the establishment of judicial review, I largely follow the fixed effects variables used by Ginsburg and Versteeg in their own analysis of the decision to adopt judicial review.<sup>81</sup> Specifically, I include their data for variables capturing whether (a) sharing a common history of legal origin (eg common law, civil law, or other tradition), (b) sharing a common religion, and (c) sharing common borders with other countries that adopted judicial review could contribute to the likelihood that a given country will adopt judicial review itself.<sup>82</sup> I also use their over-time measure of party competition, which records the seat difference between the top two parties in parliament.

As with the adoption of judicial review, legal origins also could contribute to the differences seen among countries in the adoption of judicial independence rules, notably term lengths.<sup>83</sup> Common law systems often provide for life tenure. Conversely, civil law systems generally provide only limited terms for constitutional court judges. Thus, it may be expected that common law systems will exert a positive effect on judicial tenures and other independence rules, all else equal.

Additionally, the number of constitutional actors involved in the appointment and confirmation process could contribute to the formation of judicial independence rules. Shorter tenures and other limits on formal judicial independence may be particularly prevalent when one actor has sole discretion over appointments, as that actor holds sole power to alter the

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<sup>81</sup> Ginsburg and Versteeg (n 4).

<sup>82</sup> Ginsburg and Versteeg differentiate between Christian denominations in their data. Their categorization includes Catholicism, Eastern Orthodox, Anglican, and Protestantism. Thus, despite the fact that most countries are Christian, there is significant variation among the countries included in the study.

<sup>83</sup> La Porta et al (n 63); Ginsburg (n 1).



composition of the court. Accordingly, the variable *Constitutional Appointers* tracks the number of actors or institutions given at least partial responsibility over high court appointments.

Finally, I account for the effect of political competition in the creation of judicial independence rules. Previous testing has operationalized party competition as differences between party vote or seat percentages.<sup>84</sup> I follow this strategy, measuring the variable *Party Competition* as the percentage vote difference between the top vote-getting parties in the election closest to the establishment of judicial review.

## VI. RESULTS AND DISCUSSION

### 1. *The Decision to Establish Judicial Review*

The first set of tests examines to what extent party polarization affects the likelihood that countries will adopt judicial review. I examine every election held by 38 countries until the year in which constitutional judicial review is adopted.<sup>85</sup> Though the selection of cases was based on Manifesto Project data availability, all but one country in my dataset (the Netherlands) eventually did adopt some form of constitutional review procedure. Additionally, all observations of the rate of party polarization, party competition, and other variables are based on the data available in each election year until the year judicial review is adopted, after which the country disappears from the analysis.<sup>86</sup> Overall, a total of 109 election years are examined. Because the data can include multiple election years from one country, I use a logit model with robust standard errors clustered by country. The logit model is ideal for an outcome that is dichotomous. In this case, the outcome is whether a country adopts judicial review (1) or not (0) in a given year.

Examining the initial data on the adoption of judicial review, there is evidence that the level of party competition has a moderate influence on the likelihood that judicial review will be adopted, and no evidence that party

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<sup>84</sup> Ginsburg (n 1); Popova (n 38); Ginsburg and Versteeg (n 4).

<sup>85</sup> South Korea is excluded from this first analysis due to the absence of needed control data on legal origin and common religion (see Ginsburg and Versteeg (n 4)).

<sup>86</sup> Because polarization is measured based on party electoral manifestos, polarization of the party system is measured in each election year.

polarization influences the decision to adopt judicial review. This largely confirms Ginsburg and Versteeg's conclusion regarding the important role of party competition in the development of judicial review, though it should be noted that party competition reaches only a modest level of statistical significance (the 0.10 level). This somewhat weak connection between party competition and the establishment of judicial review could be the result of the shorter time frame I consider: Ginsburg and Versteeg do not consider party polarization, and so are able to utilize a longer time period for their analysis (which begins in the 1790s).

Table 1. Logit estimates of the decision to adopt judicial review, by election.

	<u>Model 1</u>
<u>Constant</u>	<u>-63.97</u> <u>(40.18)</u>
<u>Party Polarization</u>	<u>0.01</u> <u>(0.14)</u>
<u>Party Competition</u>	<u>1.87*</u> <u>(1.00)</u>
<u>Legal Origin</u>	<u>2.61*</u> <u>(1.42)</u>
<u>Common Borders</u>	<u>-0.16</u> <u>(1.09)</u>
<u>Common Religion</u>	<u>2.09**</u> <u>(1.01)</u>
<u>Year adopted</u>	<u>0.03</u> <u>(0.02)</u>
<u>N</u>	<u>109</u>
<u>Wald <math>\chi^2</math></u>	<u>24.15**</u>
<u>Pseudo-<math>R^2</math></u>	<u>0.24</u>
<u>Log Likelihood</u>	<u>-52.70</u>
<u>AIC</u>	<u>119.39</u>

\* $p \leq 0.10$ , \*\*  $p \leq 0.05$ . Robust standard errors clustered by country are in parentheses. Results are two-tailed. Squaring the 'year adopted' variable does not change results significantly.

## 2. The Establishment of Judicial Independence Rules

Though polarization has a limited relationship to the establishment of judicial review, its role in the creation and maintenance of strong judicial independence protections appears quite strong, as seen in Table 2 below. To analyze the connection between polarization and the creation of judicial independence rules, I estimate regression models for the two main dependent variables of interest: the Feld and Voigt 12-part index of judicial

independence, and judicial term lengths. The first dependent variable in this study is the number of years granted to judges on courts of constitutional review, and is estimated using a negative binomial model. The second dependent variable is an indexed measure of tenure, and is estimated using an ordered logit model. The final dependent variable is the 12-part Feld and Voigt judicial independence index, which takes values distributed as a proportion between 0 and 1. Beta regression models are the most appropriate estimator for modeling continuous dependent variables, like percentages and proportions, that are distributed within the 0 to 1 interval.<sup>87</sup>

From the first column of Table 2 (see Model 1), which presents the results of the negative binomial model, it is apparent that more polarized party systems exert a direct and significant effect on judicial independence protections. Notably, increased polarization leads to concomitant increases in the average term length given to high court judges. This remains true even when accounting for the effect of direct party competition, measured here as the difference between the vote percentages obtained by the first and second highest vote-getting parties.<sup>88</sup>

Further, the effect of polarization is strong and significant even with the presence of additional controls for common law legal origin, the level of democracy within each country, and the number of different institutional actors involved in the selection of judges. Regression coefficients from a negative binomial model cannot be interpreted in the same way as an Ordinary Least Squares (OLS) model: notably, the coefficients do not show the effect of a one-unit change in a predictor variable on the outcome variable. However, the coefficients can be interpreted as the 'average response,' with the average response being one estimate of the marginal

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<sup>87</sup> Silvia Ferrari and Francisco Cribari-Neto, 'Beta Regression for Modelling Rates and Proportions' (2004) 31 *Journal of Applied Statistics* 799. I also estimate this model using Ordinary Least Squares (OLS) regression. Results from OLS regression are substantively similar to the Beta regression model.

<sup>88</sup> The correlation between the Polarization variable and the Competition variable is minimal (correlation = 0.029), which suggests including both variables in one statistical test will not skew results. This also suggests that the two variables are capturing different aspects of the political world, and that the two concepts can meaningfully be separated out for analysis.

effect of a one-unit increase in the independent variable.<sup>89</sup> Using this average response, results from model 1 indicate that a country with high polarization will increase the average tenure of high courts by 1.1 years. For purposes of comparison, this average increase is similar to the result obtained using an OLS regression model (see Appendix 2).

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<sup>89</sup> A Colin Cameron and Pravin Trivedi, 'Essentials of Count Data Regression' in Badi Baltagi (ed), *A Companion to Theoretical Econometrics* (Blackwell Press 2001) 334.

Table 2. Results: Adoption of Judicial Independence Rules.

	<u>Model 1</u> <u>(term length, years)</u>	<u>Model 2</u> <u>(terms,</u> <u>indexed)</u>	<u>Model 3</u> <u>(Feld-Voigt</u> <u>Index)</u>
<u>Party Polarization</u>	<u>0.12**</u> <u>(0.04)</u>	<u>0.81**</u> <u>(0.29)</u>	<u>0.18**</u> <u>(0.07)</u>
<u>Party Competition</u>	<u>-0.01**</u> <u>(0.00)</u>	<u>-0.06**</u> <u>(0.03)</u>	<u>0.00</u> <u>(0.01)</u>
<u>Common Law Origin</u>	<u>0.43**</u> <u>(0.17)</u>	<u>17.68</u> <u>(227.97)</u>	<u>0.04</u> <u>(0.32)</u>
<u>Constitutional</u> <u>Appointers</u>	<u>0.03</u> <u>(0.06)</u>	<u>0.12</u> <u>(0.38)</u>	
<u>Constant</u>	<u>2.12**</u> <u>(0.18)</u>		<u>0.18</u> <u>(0.22)</u>
<u>Log-Likelihood</u>	<u>-90.82</u>	<u>-36.06</u>	<u>25.70</u>
<u>AIC</u>	<u>199.55</u>	<u>85.54</u>	
<u>Likelihood Ratio <math>\chi^2</math></u>	<u>19.24**</u>	<u>20.55**</u>	
<u>Pseudo R<sup>2</sup></u>	<u>0.10</u>	<u>0.22</u>	<u>0.16</u>
<u>Estimator</u>	<u>Negative Binomial</u>	<u>Ordered Logit</u>	<u>Beta</u>
<u>N</u>	<u>36</u>	<u>36</u>	<u>36</u>

\* $p \leq 0.10$ , \*\*  $p \leq 0.05$ . Standard errors are in parentheses. Results are two-tailed. The variables used in these tests do not suffer from problems of collinearity, or excessive covariance. A simple correlation tests finds only one pair of variables (common law origin and constitutional appointers at 0.37) has a correlation score above 0.15. A test to determine whether variables have equal means can be rejected at  $p \leq 0.05$ . Additionally, log-likelihood and AIC scores for all models are lower using the above models as compared to the null model. Luxembourg was removed from this analysis because the judiciary is solely responsible for appointments (Elkins et al (n 64)). However, results remain nearly identical with the inclusion of Luxembourg.

Perhaps most notable is the effect of polarization given the presence of a control for common law legal systems. Common law systems certainly have longer tenures, on average, than other legal systems, a finding that is in

accordance with previous research.<sup>90</sup> Yet, even accounting for this effect, countries with greater polarization at the time judicial review is established are given longer terms in office. Notably, no country with low polarization provides life tenure for courts of judicial review. Nor are the countries with life tenure exclusively common law systems: Austria, Belgium, Armenia, Estonia, and Turkey are some of the many countries providing judges with life tenure.

Table 2 also shows results of the ordered logit models using the four-part term length index (see Model 2). Results using this specification of the dependent variable are substantively similar to the first set of models: party polarization is associated with longer term lengths given to high court judges, even when accounting for numerous alternative explanations. One way of getting a better understanding of the coefficients from an ordered logit model is to examine predicted probabilities of the outcome (length of tenures) as party polarization increases. When polarization is at its mean level (2.8), the likelihood of adopting life tenure for courts of constitutional review is 63 percent. However, when polarization is high (a score of 4.1), the likelihood of adopting life tenure rises to over 82 percent. Conversely, when polarization decreases by one standard deviation (ie, when polarization falls from 2.8 to 1.5), the likelihood of adopting strong rules declines to under 39 percent. These dramatic differences in probability illustrate the strong role of party polarization at the time judicial independence rules are created.

Finally, I examine the effect of party polarization on the 12-part battery of judicial independence institutions described by Feld and Voigt.<sup>91</sup> As shown in Model 3, polarization remains a strong predictor of this larger set of judicial independence rules.<sup>92</sup> Due to potential endogeneity with the dependent variable, I exclude the number of constitutional appointers from the list of control variables in this test. Recall, however, that the Feld and Voigt index examines the existence of rules encouraging judicial independence as of 2003, which creates some temporal disconnect between my primary independent variable (party polarization at the time judicial review is established) and the

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<sup>90</sup> Ginsburg (n 1); La Porta et al (n 63).

<sup>91</sup> See n 61-62 for a full summary of the 12 factors in Feld and Voigt's index.

<sup>92</sup> Regression diagnostics of the model's residuals suggest no change is needed to the model specifications.



outcome measured. However, given the difficulty of institutional change, recent research by Hayo and Voigt has shown there is a large amount of consistency over time in the judicial independence rules contained in the Feld and Voigt index.<sup>93</sup> In fact, they find 85 percent of constitutions never experience a single change in judicial independence rules after those rules were created. Thus, the results from this final test indicate the perpetuation of strong judicial independence rules in polarized party systems while also showing (albeit more imperfectly) a connection between polarized party systems and the creation of judicial independence rules.

In sum, the findings from all models in Table 2 provide strong corroboration for the idea that polarization among political parties drives the creation and maintenance of strong judicial independence rules. Parties in polarized systems should be more concerned than parties in non-polarized systems about the potential consequences of being out of power. To mitigate the effects of being out of power, parties in polarized political systems are more likely to adopt judicial review and agree to institutional rules that provide the judiciary with independence from other political actors – specifically, from current legislative majorities. The results also indicate that it may be necessary to re-think previous theories that focus exclusively on party competition as the driver of judicial independence particularly and the establishment of minoritarian institutions in general. Though party competition, broadly conceived, should matter to these decisions, the findings in this study show that the more complex concept of party *polarization* – the quality or depth of division between parties on a left-right scale – ultimately contributes most to the decision to create independent courts.

These results also have substantive significance for modern governance. They show that polarized party systems – those potentially in greatest need of institutional safeguards – may be able to devise rules that help protect the integrity of democratic institutions and the political process. Severe policy splits among the major parties are potentially destabilizing to government

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<sup>93</sup> Hayo and Voigt (n 41) 188–89. Examining a 50-year period, their findings show that over 85 percent of all constitutions remain unchanged with regard to judicial independence rules. This is all the more remarkable when considering that there is 56 percent likelihood of political system breakdown.

performance, and polarization in the party system places those systems at the greatest risk for destabilization and poor governance outcomes.<sup>94</sup> Yet, independent courts can help to constrain such extreme position taking and encourage policy moderation – a statement that is all the more true at the highest court of constitutional review.<sup>95</sup> Similarly, independent courts can potentially punish recalcitrant officers in government, and can provide even a divided political system with a forum to legitimate government decisions. Yet, for these benefits to accrue political actors in those polarized systems must provide judges with the formal protections to encourage independence in thought and action. The results here suggest that political actors do provide courts with the independence to make government work.

## VII. CONCLUSION

Developing the rule of law has become an important marker for good democratic performance, and independent judiciaries with the power to oversee the grand constitutional bargain are increasingly viewed as the most significant institutional check on parliamentary and governmental actions. Given the potentially important role courts can have in overseeing government and society, political actors certainly have incentives to restrict court power, but also to allow judicial power to grow. While most existing theory focuses on party competition generally to explain why politicians provide judicial power, the evidence presented here suggests it is the *extremity* of policy difference between parties – ie, the polarization within party systems – that is more strongly associated with the willingness of parties to establish and maintain strong rules of judicial independence. By focusing on polarization, this study does not intend to depreciate the importance of competition among parties. Without meaningful party competition, the need to establish strong judicial powers likely would not arise. And, in fact, party competition does best explain why different countries choose to adopt the institution of judicial review. Yet, in systems in which parties do compete for power, a richer characteristic – the polarization that exists among the parties – better explains the establishment of longer term lengths, which encourages strong court independence. Higher polarization at the time of

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<sup>94</sup> Frye (n 19).

<sup>95</sup> Stone Sweet (n 52) 52; Landes and Posner (n 28).

adoption also encourages the perpetuation of strong independence rules, as seen through the Feld and Voigt index of judicial independence.

There are compelling reasons to believe that the polarization within political systems should lead to the development of strong checks on governmental power. The vast disparity of views within polarized systems may result in a greater need for a third-party actor to adjudicate disputes. Specifically, constitutional texts may be underspecified, and in need of judicial interpretation. Alternatively, legislation passed in parliament may be potentially threatening to the long-term functioning of the democratic system of government. Establishing a strong and independent court with the powers to adjudicate constitutional disputes can relieve some of the pressure polarized party systems place on the functioning of government.

At the same time, while the results presented here focus on judicial review powers and judicial independence, the ideas need not be limited to courts. This story could help us understand the establishment of and independence given to other non-majoritarian democratic institutions in government. A similar logic could apply to central bank independence. Jeong et al. find that the creators of the Federal Reserve System provided the bank with independence protections largely as a consequence of the competition and mistrust between the major competing interests seeking monetary policy reform – Wall Street bankers, rural farmers, populists, and small business owners.<sup>96</sup> This example suggests that the extent of partisan disagreement among political actors or interests could contribute to the desire of political actors to promote power and independence in other democratic institutions, as well.

Overall, this study demonstrates a clear relationship between polarized party systems and the development of strong judicial powers. The results indicate that parties in the legislature, or groups establishing a constitution, may recognize the potential need for third-party adjudication and respond to that need with appropriate institutions and rules. In this sense, the results shown here ultimately indicate something hopeful: that parties are able to correctly recognize and provide mechanisms to ease anticipated future problems in governing.

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<sup>96</sup> Jeong et al (n 3).

Appendix 1. Descriptive Statistics. This table presents the descriptive statistics for the variables used in Tables 1 and 2.

<u>Variable</u>	<u>Mean</u>	<u>Maximum</u>	<u>Minimum</u>	<u>Std. Dev.</u>
<u>Polarization:</u> <u>Establishment of</u> <u>Judicial Independence</u>	<u>2.81</u>	<u>5.36</u>	<u>0.57</u>	<u>1.27</u>
<u>Polarization:</u> <u>Establishment of</u> <u>Judicial Review</u>	<u>3.69</u>	<u>8.64</u>	<u>0.04</u>	<u>1.76</u>
<u>Common Law</u>	<u>0.10</u>	<u>1</u>	<u>0</u>	<u>0.31</u>
<u>Const. Appointers</u>	<u>2.13</u>	<u>4</u>	<u>1</u>	<u>0.96</u>
<u>Tenure</u>	<u>11.35</u>	<u>16</u>	<u>2</u>	<u>4.01</u>
<u>Party Competition</u>	<u>15.18</u>	<u>59.0</u>	<u>0.3</u>	<u>12.85</u>
<u>Feld-Voigt Index</u>	<u>0.66</u>	<u>0.89</u>	<u>0.39</u>	<u>0.13</u>
<u>Legal Origin</u>	<u>0.48</u>	<u>0.80</u>	<u>0</u>	<u>0.31</u>
<u>Common Borders</u>	<u>0.46</u>	<u>1</u>	<u>0</u>	<u>0.39</u>
<u>Common Religion</u>	<u>0.40</u>	<u>0.96</u>	<u>0</u>	<u>0.40</u>

### Appendix 2: OLS Regression results.

<u>Model</u>	<u>Model 1</u> (term length, years)	<u>Model 2</u> (term length, indexed)	<u>Model 3</u> (Feld-Voigt Index)
<u>Party Polarization</u>	<u>1.28**</u> (0.42)	<u>0.37**</u> (0.11)	<u>0.04**</u> (0.02)
<u>Party Competition</u>	<u>-0.10**</u> (0.04)	<u>-0.03**</u> (0.01)	<u>-0.00</u> (0.00)
<u>Common Law Origin</u>	<u>5.35**</u> (2.08)	<u>1.38**</u> (0.58)	<u>0.04</u> (0.08)
<u>Constitutional Appointers</u>	<u>0.34</u> (0.60)	<u>0.04</u> (0.16)	
<u>Constant</u>	<u>7.76**</u> (1.93)	<u>1.81**</u> (0.53)	<u>0.51**</u> (0.08)
<u>R<sup>2</sup></u>	<u>0.44</u>	<u>0.44</u>	<u>0.18</u>
<u>N</u>	<u>36</u>	<u>36</u>	<u>36</u>

Note: \*\* $p \leq 0.05$ . Standard errors are in parentheses.

### Appendix 3. Countries Studied

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Albania	Latvia
Armenia	Lithuania
Austria	Luxembourg
Belgium	Macedonia
Bulgaria	Moldova
Canada	Montenegro
Croatia	The Netherlands
Czech Republic	Poland
Estonia	Portugal
Finland	Romania
France	Russia
Georgia	South Korea
Germany	Serbia
Greece	Slovakia
Hungary	Slovenia
Ireland	Spain
Israel	Sweden
Italy	Turkey
Japan	Ukraine

**Appendix 4.** Categories used to create the Manifesto Project left-right score (used to create the party polarization index).

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103: Anti-Imperialism

104: Military: Positive

105: Military: Negative

106: Peace

107: Internationalism: Positive

201: Freedom and Human Rights

202: Democracy: Favorable

203: Constitutionalism: Positive

305: Political Authority

401: Free Enterprise

402: Economic Incentives

403: Market Regulation

404: Economic Planning

406: Protectionism: Positive

407: Protectionism: Negative

412: Controlled Economy

413: Nationalism

414: Economic Orthodoxy

504: Welfare State Expansion

505: Welfare State Limitation

506: Education Expansion

601: National Way of Life: Positive

603: Traditional Morality: Positive

605: Law and Order

606: Social Harmony

701: Labor Groups: Positive



## Appendix 5. Data used for Table 2.

Country	Adopted Jud. Rev.	Tenure	Tenure index	Appointer s	Civ. law	Com. law	Party Polarization	Party Competition
<u>Albania</u>	<u>1991</u>	<u>9</u>	<u>2</u>	<u>2</u>	<u>0</u>	<u>0</u>	<u>1.22</u>	<u>27.1</u>
<u>Armenia</u>	<u>1997</u>	<u>16</u>	<u>4</u>	<u>2</u>	<u>0</u>	<u>0</u>	<u>3.20</u>	<u>25.8</u>
<u>Austria</u>	<u>1945</u>	<u>16</u>	<u>4</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>4.20</u>	<u>5.2</u>
<u>Belgium</u>	<u>1980</u>	<u>16</u>	<u>4</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>2.82</u>	<u>6.6</u>
<u>Bulgaria</u>	<u>1991</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>0.57</u>	<u>1.3</u>
<u>Canada</u>	<u>1982</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>2.75</u>	<u>18.1</u>
<u>Croatia</u>	<u>1990</u>	<u>8</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>1.27</u>	<u>12.1</u>
<u>Czech Rep.</u>	<u>1993</u>	<u>10</u>	<u>3</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>1.51</u>	<u>3.2</u>
<u>Estonia</u>	<u>1991</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>3.92</u>	<u>8.4</u>
<u>Finland</u>	<u>2000</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.83</u>	<u>0.5</u>
<u>France</u>	<u>1958</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>5.18</u>	<u>10.9</u>
<u>Georgia</u>	<u>1995</u>	<u>10</u>	<u>3</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>1.94</u>	<u>16.8</u>
<u>Germany</u>	<u>1949</u>	<u>12</u>	<u>3</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>3.52</u>	<u>4.0</u>
<u>Greece</u>	<u>1974</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.45</u>	<u>34.3</u>
<u>Hungary</u>	<u>1989</u>	<u>9</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>1.46</u>	<u>3.3</u>
<u>Ireland</u>	<u>1945</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>4.96</u>	<u>28.4</u>
<u>Israel</u>	<u>1992</u>	<u>16</u>	<u>4</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>5.06</u>	<u>9.8</u>
<u>Italy</u>	<u>1948</u>	<u>12</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>3.21</u>	<u>17.5</u>
<u>Japan</u>	<u>1947</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>1</u>	<u>2.32</u>	<u>5.1</u>
<u>Latvia</u>	<u>1996</u>	<u>10</u>	<u>3</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>4.20</u>	<u>3.1</u>
<u>Lithuania</u>	<u>1993</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>2.52</u>	<u>22.8</u>
<u>Macedonia</u>	<u>1992</u>	<u>9</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>1.31</u>	<u>5.8</u>
<u>Moldova</u>	<u>1994</u>	<u>6</u>	<u>1</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>1.21</u>	<u>21.1</u>
<u>Montenegro</u>	<u>2007</u>	<u>9</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.16</u>	<u>6.8</u>
<u>Poland</u>	<u>1992</u>	<u>8</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.09</u>	<u>0.3</u>

<u>Portugal</u>	<u>1982</u>	<u>6</u>	<u>1</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>2.29</u>	<u>18.2</u>
<u>Romania</u>	<u>1991</u>	<u>6</u>	<u>1</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>2.96</u>	<u>59</u>
<u>Russia</u>	<u>1990</u>	<u>16</u>	<u>4</u>	<u>2</u>	<u>0</u>	<u>0</u>	<u>5.36</u>	<u>7.4</u>
<u>S. Korea</u>	<u>1988</u>	<u>6</u>	<u>1</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>1.60</u>	<u>10.0</u>
<u>Serbia</u>	<u>2006</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>1.65</u>	<u>52.0</u>
<u>Slovakia</u>	<u>1993</u>	<u>9</u>	<u>2</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>1.34</u>	<u>22.6</u>
<u>Slovenia</u>	<u>1992</u>	<u>9</u>	<u>2</u>	<u>2</u>	<u>1</u>	<u>0</u>	<u>3.77</u>	<u>9.3</u>
<u>Spain</u>	<u>1978</u>	<u>9</u>	<u>2</u>	<u>4</u>	<u>1</u>	<u>0</u>	<u>2.18</u>	<u>5.1</u>
<u>Sweden</u>	<u>1979</u>	<u>16</u>	<u>4</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>3.65</u>	<u>18.6</u>
<u>Turkey</u>	<u>1961</u>	<u>16</u>	<u>4</u>	<u>3</u>	<u>1</u>	<u>0</u>	<u>2.21</u>	<u>2.0</u>
<u>Ukraine</u>	<u>1996</u>	<u>9</u>	<u>2</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>1.09</u>	<u>7.6</u>

# MONTESQUIEU AND JUDICIAL REVIEW OF PROPORTIONALITY IN ADMINISTRATIVE LAW: RETHINKING THE SEPARATION OF POWERS IN THE NEOLIBERAL ERA

Lukas van den Berge\*

*The present era has seen an unprecedented fragmentation of the public sphere, a breakup of public imperium into separate pieces, not only left in the hands of supranational or subnational authorities, but also entrusted to private actors. With the abandonment of previously undisputed notions of strict legal verticality and the undivided general interest, the separation of powers doctrine as applied in most European systems of administrative law is in need of serious rethinking. Current debates on the judicial control of governmental discretion are still hampered by a discursive language and a legal grammar that tend to draw sharp lines between law and policy, awarding each of the three branches of government its own well-defined domain. Contrary to widespread belief, the trias politica as an ideology of disjointed powers and separate spheres cannot be traced back to Montesquieu's theory of law, but only from its philosophical rebuttal and inaccurate reception in subsequent times. Ironically, a proper analysis of Montesquieu's theory may indicate a viable way forward for a system of review of government actions that attunes to its modern social and institutional context.*

**Keywords:** Montesquieu, separation of powers, administrative law, proportionality, neoliberalism

## TABLE OF CONTENTS

I. INTRODUCTION .....	204
II. MONTESQUIEU'S <i>BOUCHE DE LA LOI</i> REVISITED .....	209
III. MONTESQUIEU'S PHILOSOPHICAL ADVERSARIES.....	213
IV. MONTESQUIEU'S LEGAL ADVERSARIES .....	217
V. THE ENDURING INFLUENCE OF MONTESQUIEU'S ADVERSARIES.....	221

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VI. THE NEED FOR A MONTESQUIVIAN REVIVAL.....	226
VII. CONCLUSION.....	231

## I. INTRODUCTION

A familiar image in modern law entails that government officials make some of their decisions within a 'sphere of discretion' in which they are free from binding legal standards, operating only under democratic control. As it has been almost endlessly repeated in many textbooks on administrative law, the administrative court should not take over the role of the executive. Instead, the court is expected to refrain from infringing the executive's area of free decision-making granted to it by the legislature, with the discretionary sphere of government officials being only under 'marginal review'.<sup>1</sup> Such spatial imagery of judicial deference and executive discretion is closely related to the classical understanding of the *trias politica* as a doctrine that prescribes a strict separation of powers, leaving matters of *policy* in the hands of the executive while strictly confining judiciary powers to matters of *law*. The disjunction of political will and legal judgment depoliticizes law, presenting jurists as the legitimate spokesmen for established principles and standards of public consent, 'passive dispensers of a received, impersonal justice'.<sup>2</sup> Staged as an institution that does not mingle in society's ongoing clash of interests, the court merely assesses the executive's abidance to a pre-ordained set of legal rules, upholding its rhetorical stance of strict neutrality and impartiality. As a master strategy of legitimation, the classical separation of powers doctrine sustains the legitimacy of the political order, but also of the judiciary itself. The authority of the courts comes with their fictional isolation from society as an area of political contestation, held to be the exclusive domain of the other powers of the triad. Striking a 'historic bargain', judicial institutions thus purchase formal independence at the price of

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<sup>1</sup> For the notion of a 'margin of discretion', see, for example, William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 308-310.

<sup>2</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law* (Harper and Row 1978) 57.

substantive subordination, having the last say in concrete cases only because they follow an external will, and not their own.<sup>3</sup>

Time and again, this bargain is struck under the aegis of two of Montesquieu's statements about the judge that tend to be mantra-like repeated.<sup>4</sup> The first of these statements is that judges are nothing but 'mouthpieces of the law' (*bouches de la loi*), 'inanimate beings' (*êtres inanimés*) incapable of modifying either its force or its rigour. The second entails that judges should not be annexed to any particular class or other social group, being, 'in some sense, inexistent' in society (*en quelque façon nulle*).<sup>5</sup> The Montesquivian judge is thus invoked as the emblem of mechanical adjudication, regarded as 'law's machine-like intermediary' (*l'organe, en quelque façon machinal de la loi*), or even as a '*juge-automate*', law's robotic middleman, impersonally applying abstract rules to concrete cases.<sup>6</sup> As it is repeatedly and convincingly established in serious academic scholarship on Montesquieu's intellectual legacy, the view of the Montesquivian judge as a '*juge-automate*' is untenable.<sup>7</sup> In legal circles, the belief in the myth of Montesquieu as mechanical adjudication's founding father has nevertheless proven to be amazingly persistent.<sup>8</sup> The persistence

<sup>3</sup> Nonet and Selznick (n 2) 57–60.

<sup>4</sup> Cf, for example, Christoph Möllers, *The Three Branches. A Comparative Model of Separation of Powers* (Oxford University Press 2013) 18.

<sup>5</sup> Charles de Montesquieu, *L'Esprit des lois* (first published 1748, Gallimard 1949), bk 11, ch 6.

<sup>6</sup> François Génay, *Méthode d'interprétation et sources en droit privé positif: essai critique* (LDGJ 1919) 101. For the image of the Montesquivian judge as a '*juge automate*', see Charles Eisenmann, 'La pensée constitutionnelle de Montesquieu' in *Bicentenaire de l'Esprit des lois 1748-1948* (Sirey 1952) 154. The mechanical view is dismissed by Eisenmann himself.

<sup>7</sup> Charles Eisenmann, 'L'Esprit des lois' et la séparation des pouvoirs' in *Mélanges R. Carré de Malberg* (Sirey 1933) 165–192; Karel Menzo Schönfeld, 'Rex, Lex et Judex: Montesquieu and la bouche de la loi revisited' [2008] *European Constitutional Law Review* 274 and, especially, Till Hanisch, *Justice et puissance de juger chez Montesquieu: une 'étude' contextualiste* (Garnier 2015), with further references.

<sup>8</sup> In the Dutch legal tradition, for instance, the mechanical interpretation of Montesquivian adjudication was picked up by influential scholar G.J. Wiarda, thus establishing itself as an uncontested truism in academic literature on legal interpretation. See GJ Wiarda, *Drie typen van rechtsvinding* (Tjeenk Willink 1972) 7; for a critical discussion of its pervasive influence, see Willem Witteveen, *De retoriek*

of the Montesquivian myth may be explained by the weak discursive links between intellectual history and political theory on the one hand, and law on the other.<sup>9</sup> With each domain typically being trapped within its own issues, a 'doctrinal story' could establish itself that tells a tale of the great Montesquieu as the intellectual champion of a classical model separation, replacing ideological and political struggle with the impersonal and timeless rationality of the rule of law.<sup>10</sup> Today, Montesquieu's legacy would be under threat, slowly but surely breaking down under one or more of such divergent threats as the rise of executivism, technocratic bureaucratism, the privatization of regulatory structures, the internationalization of national legal orders, judicial law-making and much more.<sup>11</sup>

However, the idea of an unspoilt Montesquivian age of separated powers which we now seem to lose contact with is misleading. As I will argue in this article, it does not only give an inaccurate representation of Montesquieu's original theory, but – perhaps even more important – tends to obstruct the development of a modern and balanced *trias politica* that is responsive to current social needs. Contrary to widespread belief, the *trias politica* as an ideology of disjointed powers and separate domains cannot be traced back to Montesquieu's own writings, but only to their philosophical rebuttal and inaccurate reception in subsequent times. With the rise of the managerial state of the neoliberal era, infused with a spirit of governmentality that tends to measure everything by standards of output and efficiency, a return to Montesquieu's original teachings seems more urgent than ever. Shifting 'from government to governance', modern public law typically awards far

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*in het recht. Over retorica en interpretatie, staatsrecht en democratie* (Tjeenk Willink 1988) 295ff. The 'Montesquivian myth' is widespread in other legal cultures as well. See, for instance, Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2009) 28: 'Montesquieu conceived of the judicial function primarily, if not solely, in terms of [...] the application of pre-existing rules to facts. For Antonin Scalia's frequent reference to Montesquieu in support of his theory of legislative primacy and originalism, see David A Schultz and Christopher E Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (Rowman & Littlefield 1996) 38.

<sup>9</sup> Cf Möllers (n 4) 3.

<sup>10</sup> Willem Witteveen, 'Doctrinal Stories' [1993] *International Journal for the Semiotics of Law* 179, 193.

<sup>11</sup> See also Möllers (n 4) 8–10, with further references.

reaching discretionary powers in the hands of a plethora of public, semi-public and private actors similarly put under benchmarks and policy targets.<sup>12</sup> For one thing, this makes the idea of legality as a functional restraint on government actions more and more obsolete. Moreover, the fragmentation and privatization of public law is at odds with the classical ideal of public powers exclusively serving the undivided common good, leaving the public sphere in the hands of a network of public and private actors that seem to be guided by comparable economic rationalities instead. Thus, textbook lessons of judicial deference and 'different domains' of law and policy do not seem to live up to the problems that contemporary public law is facing. Ironically, Montesquieu's *Spirit of the Laws* provides a conceptual understanding of the three branches' interrelation that may offer a viable way forward for a system of review of government actions that is more responsive to the needs of modern times.

In order to be convincing in indicating some way forward in the turmoil of today's most urgent problems and dilemmas, legal scholarship will inevitably have to engage with broader historical and philosophical horizons to which law is inextricably linked.<sup>13</sup> In times of academic specialization, however, much of constitutional and administrative law scholarship has come to show a preoccupation with the interpretation and schematization of recent legislation and case law, setting itself apart from the intellectual context from which public law originally developed. Paradoxically, it may be necessary to get a firm grip on the past before we can find a viable way forward into the future. As Skinner has it, the intellectual historian is like an archaeologist,

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<sup>12</sup> Samuel Tschorne, 'Neoliberalism and the Crisis of Public Law' in Anna Yeatman (ed) *Neoliberalism and the Crisis of Public Institutions* (Whitlam Institute 2015); Yannis Papadopoulos, *Democracy in Crisis? Politics, Governance and Policy* (Palgrave Macmillan 2013); Colin Crouch, *The Strange Non-death of Neo-liberalism* (Wiley & Sons 2011) 1-28.

<sup>13</sup> Martin Loughlin, *Public Law and Political Theory* (Oxford University Press 1992). See also Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 3, referring to the tale of the drunkard's search for his lost keys under a street lamp. A passer-by sees him searching and decides to help. After searching the keys for some time without success, the passer-by asks the drunkard if he can remember precisely where he dropped them. 'Over there, in that dark corner', he responds. 'Then why are you searching here?' asks the passer-by. 'Because', the drunkard says, 'there's much more light here'.



'bringing buried intellectual treasure back to the surface, dusting it down and enabling us to determine what to think of it'.<sup>14</sup> Law's basic grammar and the legal language with which we have become familiar may seem to be self-evident, but in fact belong to a contingent tradition that we inherited from earlier generations. In shaping the present, the past has a clear presentness, be it somewhat less visible as the pillars below the surface that the present is built on. Only with these pillars having been properly explored and ultimately laid bare for analysis can we think of reshaping them into new fundamentals for a legal and political order that lives up to today's social needs, and is fit to meet the challenges of the future. In its relative neglect of its intellectual history, however, law may remain trapped within a set of legal structures and concepts that it cannot really criticize or transcend.<sup>15</sup>

This article's main argument is that current debates on governmental discretion and marginal review in administrative law are hampered by the unreflected adherence to an inherited legal grammar that we fail to recognize as an invented tradition. The evolution of various systems of European administrative law is still disturbed by the idea of clear dividing lines that keep the three branches of government apart, strictly preventing any of them from overstepping its boundaries. The development of judicial review of proportionality in Dutch administrative law provides a clear case in point. Common Dutch textbook wisdom prescribes that the judiciary should never 'occupy the seat of the executive', leaving the government the exclusive control of a 'discretionary sphere' as it is granted to it by the legislature. Only when the government exceeds that sphere's outer margins by taking decisions that are clearly irrational can it be held accountable by the court; any more intense judicial interference with executive decision-making would comprise a brusque violation of Montesquieu's intellectual heritage.<sup>16</sup> However, marginal proportionality testing does not in any way conform to Montesquieu's philosophy of law, but rather to the philosophical and legal

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<sup>14</sup> Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press 1998) 112.

<sup>15</sup> Cf H Patrick Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (5<sup>th</sup> edn, Oxford University Press 2014) 1-32 on 'tradition' and 'the presence of the past'.

<sup>16</sup> For the Dutch tradition of 'marginal review' of government decisions, see especially Boudewijn de Waard, 'Proportionality: Dutch Sobriety' in Sofia Ranchordas and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) 109-124.

thought of those who either actively resisted his legal philosophy, or wrongly appropriated it to serve their own ideological agenda. Only a thorough analysis of Montesquieu's original theory and its reception in subsequent times may provide the groundwork for a model of judicial proportionality testing that lives up to the trends of administrative managerialism and privatized governance with which we are faced today.

## II. MONTESQUIEU'S *BOUCHE DE LA LOI* REVISITED

Historical reconstruction of Montesquieu's appropriation as mechanical adjudication's intellectual champion leads us back to François Géný's *Méthode d'interprétation* as a seminal work of European legal scholarship.<sup>17</sup> Citing French revolutionary and tribune Mallia-Garat's contribution to the discussion on the new French Civil Code with approval, Géný subscribes to the idea that '[t]he law in a republic is an emanation of sovereignty', expressing the 'national will' as 'the only power that free human beings can acknowledge'. In the brave new world of the French republic, 'the simplicity and uniformity of the laws are consequential of absolute equality as the constitution's most basic fundament'. Therefore, it should not be permitted to any human power 'to change the law or to modify it in its execution or to supplement its insufficiency', as such reckless practices would be most detrimental to the clear determination of its guarantees, and could ultimately even lead to 'anarchy disguised as a judge-made order'. In order to prevent such disasters, the court should always follow Montesquieu in being only the mouth that pronounces the commands of the law, itself a neutral and inanimate being.<sup>18</sup> The *travaux préparatoires* of the French Civil Code testify to Portalis' quick rebuttal of Mallia-Garat's selective and decontextualized reference to Montesquieu's writings, but his astute confutation of the tribune's words was left out of Géný's account of the discussion that would turn out to put a powerful spell on generations to come.<sup>19</sup> As Eisenmann noted, the idea of a strict separation of powers and Montesquieu's *Spirit of the*

<sup>17</sup> Géný (n 6). See also Karel Menzo Schönfeld, *Montesquieu en 'la bouche de la loi'* (New Rhine Publishers 1979) 74.

<sup>18</sup> Mallia-Garat, as cited by Pierre-Antoine Fenet (ed), *Recueil complet de des travaux préparatoires du Code Civil* (vol 6, 1827) 157-158; cf Hanisch (n 7) 150-151.

<sup>19</sup> See also Schönfeld (n 17) 74.

*Laws* soon became 'two terms inextricably linked' (*deux termes indissolublement liés*) for most, if not all scholars of public law.<sup>20</sup>

Despite the attempts of some to correct Génys's false rendering of Montesquieu's thought, the origin myth of his *trias politica* as a system that prescribes mechanical adjudication, tends to obscure the minds of many jurists and scholars up to the present day. Whereas Montesquieu used to be hailed by the positivists as their great enlightened predecessor, an early-modern tyrannicide who has liberated us from a dictatorship of judges,<sup>21</sup> contemporary scholarship is inclined to dismiss his doctrine of separated powers as a ghost from the past, a belief in legal determinacy that we have now come to know as very naive.<sup>22</sup> Both accounts of Montesquieu's doctrine are inaccurate, equally disconnected as they are from the relevant primary sources. A better-informed report on Montesquieu's theory is provided by Schönfeld, who explains that the Montesquivian image of judges as 'mouthpieces of the law' (*bouches de la loi*) does not refer to mechanical adjudication, but – quite contrarily – to the independence of the court towards the other branches of the *trias*. Widespread medieval wisdom has it that law is embodied by the king as 'the law animate' (*lex animata*), with the law being the 'dumb king' that can only come to life by the voice of the supreme ruler as the 'speaking law' (*lex loquens*). Consequentially, 'the king is above the law, as both the author and giver of strength thereto'.<sup>23</sup> In other words, the king's commands determine the law and not the other way round. Montesquieu's description of the court as the 'mouth of the law' (*la bouche de la loi*) implies the opposite. Not the *king*, but the *judge* is the 'speaking law' (*iudex est lex loquens*), with 'lex', 'loi' and 'law' not referring to statutory law, but to law and justice in general. The depiction of the judge as an 'inanimate being' (*être inanimé*), then, mirrors royal arbitrariness: the court does not

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<sup>20</sup> Eisenmann (n 7) 165.

<sup>21</sup> Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Giard 1921) 15–16.

<sup>22</sup> Laurence Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' [2005] *Oxford Journal of Legal Studies* 419.

<sup>23</sup> James I as quoted by Schönfeld (n 17) 42; see also Schönfeld (n 7) 274.

*invent* or *make* the law, but rather *finds* it as it derives from prepositive principles of natural law.<sup>24</sup>

Only quite recently has legal scholarship seen some comprehensive studies placing Montesquieu's theory of separated powers within its proper historical and philosophical context.<sup>25</sup> Montesquieu opens his *magnum opus* by defining the laws 'in their most general signification [...] as the 'necessary relations' (*rapports nécessaires*) arising from the nature of things'.<sup>26</sup> Opposing contractarians like Bodin and Hobbes, Montesquieu adheres to an Aristotelian anthropology of intersubjective relations that conceptually precede individual subjectivity.<sup>27</sup> Only to a limited extent should law be regarded as the artificial creation of autonomous human beings, only constrained by a set of self-imposed rules; in addition to 'the laws of their own making', they 'have some likewise which they never made'. Before there were even human beings, humans were possible, with possible relations and possible laws. 'Before laws were made', therefore, 'there were relations of possible justice'.<sup>28</sup> That is to say, relations determined by law are antecedent to their substantiation in material reality, like the radii of a circle are equal before it is drawn. To say that there is nothing just or unjust, but what is commanded or forbidden by positive laws would turn things upside down, ignoring the principles of natural law that underpin Montesquieu's legal philosophy. Resisting the voluntarist and imperativist Hobbesian absolutism that was dominant at the time, Montesquieu proposes a relational understanding of law that finds its conceptual point of origin not – with Hobbes – in some contract between previously unbound human beings, but

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<sup>24</sup> Schönfeld (n 17) 53-55.

<sup>25</sup> See Schönfeld (n 7), Schönfeld (n 17) and, especially, Hanisch (n 7), with further references.

<sup>26</sup> Montesquieu (n 5), bk 1, ch 1.

<sup>27</sup> Cf Paul Carrese, *Democracy in Moderation. Montesquieu, Tocqueville and Sustainable Liberalism* (Cambridge University Press 2016) 22ff.

<sup>28</sup> Montesquieu (n 5) bk 1 ch 1.

in relations governed by law that coincide with – necessarily intersubjective – human existence.<sup>29</sup>

Montesquieu's relational view of law and justice is also expressed in his idea of a *trias politica*. Political freedom as Montesquieu understands it is irreconcilable with monistic concepts of sovereignty that derives all powers from the central point of the 'body politic' (*corps politique*) of the people or the 'physical body' (*corps physique*) of the king. Instead, a pluralistic understanding of sovereignty would be required in which *imperium* is shared by multiple actors that wield their powers in equal interdependence.<sup>30</sup> In fact, little would be more despotic than the Jacobin ideal of 'absolute equality' as it would later be advocated by Mallia-Garat and Gény, mistakenly hiding behind 'our great Montesquieu' (*notre grand Montesquieu*) as their great intellectual hero.<sup>31</sup> In its dismissal of any discrimination on the basis of traditional aristocratic values, the 'spirit of extreme equality' would necessarily result in a ruthless democratic majoritarianism that leaves no room for such outdated notions as 'manners, order or virtue', having shaken off all standards of deference that would be given by nature.<sup>32</sup> In a democratic republic 'gone wrong', the people understand liberty mistakenly as the absence of opposition, leaving the legislature free to pass any law it wants and to impose its will at its unrestrained discretion. Equally corrupted is a monarchy in which the prince 'directs everything entirely to himself', dismissing his essential relatedness to others and eventually even confusing the state with his own person.<sup>33</sup> Political liberty can only exist under a 'moderate government' in which public *imperium* is shared by multiple actors entangled in a precarious balance in which no one has the final say, with the constitution establishing some

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<sup>29</sup> For Montesquieu's theory of law as a *relational* theory of law, see also Lukas van den Berge, *Bestuursrecht tussen autonomie en verbodding. Naar een relationeel bestuursrecht* (Boom juridisch 2016) ch 9, with further references.

<sup>30</sup> See also René Foqué and Joest 't Hart, *Instrumentaliteit en rechtsbescherming* (Gouda Quint 1990) 80-81.

<sup>31</sup> Gény (n 6) 101. For Montesquieu's dismissal of absolute equality, see Montesquieu (n 5) bk 8 ch 2.

<sup>32</sup> Montesquieu (n 3) bk 8 ch 3.

<sup>33</sup> Ibid bk 8 ch 6.

system of 'power corrected by power' (*le pouvoir arrête le pouvoir*) that prevents that the 'necessary relations' between these actors are disturbed.<sup>34</sup>

The relational mindset of essential intersubjectivity also determines Montesquieu's famous description of England as a nation that has political liberty as 'the direct end of its constitution'.<sup>35</sup> The legislative, executive and judicial branches of government that Montesquieu discerns are envisioned to acknowledge their mutual interdependence, with none of these actors regarding 'himself as his own rule' (*lui-même sa règle*).<sup>36</sup> In no case should legislative and executive powers be united 'in the same person, or in the same body of magistrates'; experience tells us that such persons or bodies tend to succumb to the temptation to enact 'tyrannical laws', and 'to execute them in a tyrannical manner'. Liberty would not be possible if the courts were to usurp the powers of the legislative and the executive. The life and liberty of the subject would then be exposed to arbitrary control, threatened by an unchecked government of judges setting its own rules and policies. Political liberty can only thrive when – like in Montesquieu's idealized England – none of the government's branches claim any kind of primacy or prevalence above the other. Instead, each of the actors of the *trias politica* should acknowledge its entangledness in a precarious equilibrium that constantly needs recalibration in the light of specific circumstances. Each actor should do its utmost to prevent that the balance is disturbed. Destabilization – with one actor outweighing the other – is disastrous; 'all would [then] be lost'.<sup>37</sup>

### III. MONTESQUIEU'S PHILOSOPHICAL ADVERSARIES

Montesquieu's relational account of the branches of government being entangled in a precarious balance has been criticized from several angles. With regard to the judicial assessment of proportionality in administrative law, two strands of criticism are particularly relevant. The first of those strands is well represented by Rousseau and Kant, who emulate Montesquieu in drawing up a political *triad*, but refuse to accept his pluralistic view on

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<sup>34</sup> Montesquieu (n 3) bk II ch 4.

<sup>35</sup> Ibid bk II ch 5.

<sup>36</sup> Ibid bk 6 ch 3.

<sup>37</sup> Ibid bk II ch 6.



sovereignty, ultimately resulting in a balance of powers that are mutually equivalent. Instead, both Rousseau and Kant adhere to a separation of powers doctrine in which the ultimate primacy clearly lies with the legislature as the only true sovereign. Fearing that a Montesquivian division of powers could rip the 'body politic' as he envisions it apart, Rousseau locates the source of all legitimate power with 'the general will' of the undivided people. The only way to escape the 'might makes right' of nature would be a social contract that entails 'the total alienation of each associate, together with all his rights, to the whole community', forging an artificial body with a united will that releases us from bare natural existence.<sup>38</sup> Guided by 'the general interest' (*le bien commun*) as its exclusive point of orientation, the general will is not misled by the dispersed variety of 'private interests' that threatens to pull the contractants in different directions, breaking the body politic and ultimately bringing back the state of nature. Liberating us from the chains of nature, the 'general will' should certainly not be confused with the 'will of all'. While the latter is no more than 'the sum of particular wills', misguided and confused by opposing private interests, the former derives its clear and focused infallibility by only taking the common interest of the integrated populace into account.<sup>39</sup>

Emphasizing the importance of the unfragmented integrity of the 'body politic' as the only way out of a natural state determined by the right of the strongest, Rousseau heavily criticizes Montesquieu for disregarding the importance of such integrity. With sovereignty divided up between three branches of government, with none of these branches outweighing the other, the Montesquivian state would be nothing more than a 'fantastic being' (*être fantastique*), a deplorable creature that consists of 'disperse components' (*pièces rapportées*) that are only superficially sewn together, not really making up an integrated whole. Theorists like Montesquieu would dismember the body politic, and then re-assemble the pieces into an incoherent body that seems like a man that is composed of 'several bodies, one with eyes, one with

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<sup>38</sup> Jean-Jacques Rousseau, *Du contrat social* (first published 1762, Gallimard 1964) bk 1 ch 6.

<sup>39</sup> Rousseau (n 38) bk 2 ch 3. On the mysterious notion of Rousseau's general will, see esp. Patrick Riley, *Will and Political Legitimacy. A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant and Hegel* (Harvard University Press 1982) 98-124.



arms, another with feet'.<sup>40</sup> Such erroneous thinking would result from a serious misunderstanding of what the allocation of tasks to different actors should really entail: not a division of sovereignty, but the institution of a *clear* hierarchy that helps the sovereign people to impose, and execute the general will as the state's one and only guiding principle. For Rousseau, 'every free action' (*toute action libre*) derives from the combination of 'will' (*volonté*) and 'power' (*force*) as its two constituent causes, with only the former of moral, and the latter of mere physical nature.<sup>41</sup> The same goes for the 'body politic' of the state: it could only do something when the people as the 'legislative power' (*puissance législative*) is assisted by an 'executive power' (*puissance exécutive*) without which the will of the people could not materialize. A proper 'rationale of government' (*raison du gouvernement*) thus entails the mere execution of the undivided will of the legislating people as the only true sovereign. The same goes for the judicial branch of government (*puissance judiciaire*): like the executive, it is subservient to the legislature, indispensable for the 'body politic' to function properly, but ultimately submitted to the people's 'general will' as its only point of moral reference.<sup>42</sup>

Something similar is expressed by Kant, who regards the idea of separated powers as an important safeguard for civic freedom. For Kant, a free republic requires 'the political severance of the executive power of the government from the legislative power', whereas despotism entails 'the irresponsible executive administration of the state by laws laid down and enacted by the same power that administers them'.<sup>43</sup> In his *Doctrine of Right*, Kant emulates Montesquieu in sketching a political triad consisting of a legislative, executive and judiciary power. Different from Montesquieu's account, however, these powers are not merely 'co-ordinate with one another', keeping each other in check, so as to prevent that any of them would come to regard 'himself as his own rule'. Like Rousseau, Kant acknowledges that the legislative power, belonging to 'the united will of the people', depends on the other powers for its actual realization in the material world. That is not to say

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<sup>40</sup> Rousseau (n 38) bk 2 ch 2.

<sup>41</sup> Ibid bk 2 ch 3.

<sup>42</sup> Rousseau (n 38) bk 3 ch 1. See also Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 132-139.

<sup>43</sup> Immanuel Kant, *Zum ewigen Frieden* (first published 1795, Suhrkamp 1977) 205.

that Kant's political triad lacks a clear hierarchy. Notwithstanding their mutual dependence, the governmental powers are subordinate to one another. The executive and the judiciary maintain their authority in their own domains, but both are subjected to the will of the legislative power as their 'supreme master' (*Oberbefehlshaber*) or *summus rector* to which they are ultimately submitted. Like the soul needs the body, the legislature needs the executive to substantiate its will in the physical world, issuing its decrees and promulgating its orders strictly 'in accordance with the law' (*zu Folge dem Gesetz*). Similarly, the judiciary branch of government is expected to derive its decisions from the legislature's will as a 'major premise' (*Obersatz*) ultimately determining the outcome by its deductive application to a given case.<sup>44</sup>

A second strand of philosophical criticism of Montesquieu's *trias politica* is represented by those adhering to the organic idea of the state as an 'ethical body', not created by means of some real or imagined contract between its individual citizens, but as a natural community – grown as a particular cultural and historical entity – that conceptually *precedes* the individual. Such organicist thinking – once widespread, but now largely forgotten – flourished especially in nineteenth-century Germany. Hegel, for instance, resists the contractarian tradition by maintaining that the state should not be regarded as an artificial 'union of men under law', but rather as 'a natural growth', 'an ethical whole' (*sittliches Ganze*), given shape by the culture and history of a particular people that would be impregnated with its own 'substantive will' as its essential intersubjective point of moral orientation.<sup>45</sup> With such monistic organicist thinking, Montesquieu's doctrine of shared sovereignty and balanced powers is irreconcilable. As a natural growth, a human body meshed up in pieces cannot survive. Similarly, the continuity of the organic state would be endangered by dividing its sovereignty between a plurality of actors without any sense of unbroken ethical commonality. By all means, the fragmentation of the state as an integrated 'ethical being' should be prevented. Montesquieu's system of checks and balances would only stimulate internal 'animosity' (*Feindseligkeit*), a spirit of 'mutual limitation'

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<sup>44</sup> Immanuel Kant, *Metaphysik der Sitten* (first published 1797, De Gruyter 1968) paras 45–48.

<sup>45</sup> Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (first published 1821, Meiner 2011) para 258.

with the reaction of each power to the others being one of 'hostility and fear'. In their determination to oppose one another, they would produce a fragmented equilibrium rather than a living unity, thus contributing to the 'destruction of the state' (*Zertrümmerung des Staates*) as an organic whole without which none of its members can survive.<sup>46</sup>

#### IV. MONTESQUIEU'S LEGAL ADVERSARIES

Both strands of philosophical criticism of Montesquieu's constitutional thought have remained of great influence up to the present day. For one thing, Montesquieu's model of balanced powers was opposed by legal positivists like Paul Laband (1838-1918). Giving the contractarian conception of the legal order as an artificial construct a formalist twist, Laband advocated an exclusive rule of deductive and syllogistic legal reasoning as the only way in which law could ever become a true 'science' (*Wissenschaft*). As an academic discipline, law should be kept pure as an abstract intellectual activity, released from any concern about its ethical and social environment as an obstacle of scientific progress.<sup>47</sup> Laband's legal world is filled with the legal commands of the sovereign lawmaker as an absolute master, establishing an impersonal 'government of laws' (*Regierung der Gesetze*) that only acknowledges the binding force of general provisions as the 'abstract laws of pure thought' (*die kahlen Gesetze des Denkens*).<sup>48</sup> On the one hand, Laband's legalistic understanding of law entails that the government can only require anything from its citizens on the basis of written provisions. As such, Laband's 'government of laws, not men' holds the promise of a rule of law instead of arbitrariness and despotism. On the other hand, however, it also entails the impossibility of any prepositive subjective rights of citizens towards the state.<sup>49</sup> Evidently, Laband's positivism is incompatible with Montesquieu's

<sup>46</sup> Hegel (n 45) para 272. On Hegel's stance towards Montesquieu's theory of separated powers, see also Fred R Dallmayr, *G.W.F. Hegel. Modernity and Politics* (Rowman & Littlefield 1993) 147ff; for Hegel's lasting influence on public law theory, see Loughlin (n 40) 146-153.

<sup>47</sup> Paul Laband, *Das Staatsrecht des deutschen Reiches*, vol 1 (2nd edn, Mohr 1887) ix, defending the idea of law as 'eine rein logische Denktätigkeit'.

<sup>48</sup> Cf Walter Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert* (Klostermann 1958) 79.

<sup>49</sup> Cf Michael Stolleis, *Geschichte des öffentlichen Rechts*, vol 2 (Beck 1992) 159.

legal universe of 'relations arising from the nature of things', resulting in a constitutional architecture of balanced powers and shared sovereignty. Therefore, it comes as no surprise that Laband dismisses Montesquieu's naturalism as a backward theory that stands in the way of the 'constructive work' of modern legal formalism. In its emphasis on a prepositive intersubjectivity, Montesquieu's legal theory opposes the pure 'government of laws' advocated by Laband. In his discussion of Montesquieu's teachings, Laband rests assured that detailed criticism of Montesquieu's intellectual legacy is no longer necessary, as modern scholars would be almost unanimous in rejecting his theory of balanced powers as an obsolete remnant of an unscientific past.<sup>50</sup>

Unlike Montesquieu, Laband refrains from any dilution of the lawmaker's public *imperium* as a dangerous threat of the unity of the state. Instead, he sticks to the idea that the lawmaker's acts of legislation are performed in a legal void, unbound by any prepositive restriction and therefore absolute in their legal validity.<sup>51</sup> The legislature thus possesses an unimpeded freedom that is unchecked by other actors. The practical administration of the state is in the hands of the executive, but only as the 'specific application' of general rules proclaimed by the lawmaker. As the ultimate source of the law, the legislature is the sole bearer of an unshared sovereignty, clearly defining the margins in which the executive is bound to operate. As the executive's counterweight, the judiciary is expected to review administrative actions on the basis of written laws and nothing else. As such, these laws are envisioned as the margins of an executive domain that the administration should never overstep. At the same time, however, it leaves the executive an uncontrolled area of discretion (*freies Ermessen*) as long as it stays within its own domain.<sup>52</sup> In Dutch legal thought, Laband's positivism is clearly echoed in the legal thought of scholar and politician J.A. Loeff (1858-1921) as one of Dutch

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<sup>50</sup> Paul Laband, *Das Staatsrecht des deutschen Reiches*, vol 2 (2nd edn, Mohr 1887) 7. In the fourth edition, appearing in 1911, Laband's contemptuous remark on Montesquieu's theory is omitted.

<sup>51</sup> Laband (n 50) 172-173: 'Die Akte der Gesetzgebung [...] sind [...] auf freier Willensbestimmung beruhende, und [...] auch der Rechtsordnung selbst gegenüber freie. [...] Der Wille des gesetzgebenden Organs ist dem Recht gegenüber der stärkere; das bisher geltende Recht muß ihm gegenüber weichen.' (emphasis added?)

<sup>52</sup> Cf Stolleis (n 49) 341-345.

administrative law's most prominent 'founding fathers'. The rule of law as Loeff understands it demands that the commands of the sovereign lawmaker are obeyed without exception, be it by those 'fallible human beings' who make up the administration or by other legal subjects. Therefore, he advances a system of judicial review of government actions that is geared towards the absolute maintenance of abstract legality, ultimately aiming at a 'pure legal order' that is cleared from any unlawful infringements.<sup>53</sup> As long as it remains within its area of discretion, the administration is free to act as it wishes. Any decision beyond these margins, however, should be annulled by the judiciary.<sup>54</sup>

The legal opposition to Montesquieu's relational theory of scholars like Laband and Loeff can thus be seen as the positivistic reflection of the primacy of the legislature as it was purported earlier by thinkers adhering to the contractarian tradition in political philosophy like Rousseau and Kant. A second strand of legal opposition to Montesquieu's relational theory, however, builds forth on the organicist thinking of philosophers like Hegel. In Hegel's footsteps, for instance, Prussian scholar and politician Friedrich Julius Stahl (1802-1861) describes the state as an 'ethical whole' (*sittliches Ganze*), with its individual citizens as its natural constituents. Determined by ethical principles rather than formal commands, the *Rechtsstaat* as Stahl understands it comprises much more than only upholding the commands of the lawmaker.<sup>55</sup> Most essentially, the protection of the *Rechtsstaat* would require the integrity of the state as an 'ethical entity' (*sittliches Reich*) that is not primarily held together by the dictates of rationalistic principles, but rather by the 'ethical ideas' that would be ingrained in the common identity of a particular community. In Stahl's theory, the integrity of the state as an ethical whole requires that the competence of independent courts only pertains to private and criminal law. Determined by much more than abstract legal reasoning alone, the ethical sphere of administrative law should remain

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<sup>53</sup> Joannes Aloysius Loeff, *Publiekrecht tegenover privaatrecht* (Ijdo 1887) 6-7.

<sup>54</sup> Ibid 62. On Loeff's legal thought, see also Lukas van den Berge, 'Der Staat soll Rechtsstaat Seyn'. Loeff, Struycken en de Duitse staatsfilosofie' [2014] *Rechtsgeleerd Magazijn Themis* 80, with further references.

<sup>55</sup> Cf Katharina Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und Verwaltungsrechtliche Aspekte* (Mohr 1997) 320 ff; Stolleis (n 49) 102-105

beyond their reach. With the administration curtailed by the abstract legal reasoning of the judiciary, the state would be at serious risk of losing its ethical integrity, with its orphaned citizens finding themselves as atomized legal subjects opposed to the state rather than living their full lives as its integral constituents.<sup>56</sup> Stahl may thus be described as an early opponent of a process of juridification that threatens public life by making everything into a 'matter of law' (*Justizsache*), not only subverting the state as an ethical whole, but also disturbing the lives of individual citizens as its organic constituents.<sup>57</sup>

Far removed as we tend to be from the organicist thinking of scholars and philosophers like Hegel and Stahl,<sup>58</sup> we may easily lose sight of the enormous influence that their monist ethics have had on the development of European public law. For Gerber, for instance, it was self-evident that the state is not some artificial entity, but a spirited being that reflects the essential unity of a people sharing a common culture and history. As such, the state would have a 'collective consciousness' in the undivided ethical 'Spirit' (*Geist*) of the populace.<sup>59</sup> Such monist organicism is incompatible with Montesquieu's pluralist theory of a

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<sup>56</sup> Friedrich Julius Stahl, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, vol 2 (Mohr 1845) 447: '[D]ie Unterthanen hätten aufgehört, ergänzende Glieder des Staates, dieses sittlichen Ganzen zu sein, sondern ständen ihm als einem Subjecte ausser ihnen als losgetrennte, unabhängige, gleichartige Subjecte gegenüber.'

<sup>57</sup> To contemporary scholars, Stahl is primarily known for his dictum that 'the state should be a Rechtsstaat' (*Der Staat soll Rechtsstaat seyn*). Thus, Habermas holds him (with Karl von Rotteck and Robert von Mohl) responsible for the colonization of the lifeworld that took place in the process of the 'Verrechtsstaatlichung' of society. See Jürgen Habermas, *The Theory of Communicative Action. The Critique of Functionalist Reason*, vol 2 (Polity Press 1987) 357-358. Far more than von Rotteck and von Mohl, however, Stahl was well aware that making everything into a 'Justizsache' may not only have positive, but also negative consequences. See also Dieter Grosser, *Grundlagen und Struktur der Staatslehre Friedrich Julius Stahls* (Springer 1963); Sobota (n 55) 320 ff.

<sup>58</sup> Though still reflected in modern conservative thought. See, for example, Roger Scruton, *The Meaning of Conservatism* (Macmillan 1984).

<sup>59</sup> Carl Friedrich Gerber, *Grundzüge des deutschen Staatsrechts* (Tauchnitz 1865) 20, where Gerber describes the state 'nicht als eine bloss begriffliche Erscheinung, sondern als ein auf natürlicher Grundlage, nämlich dem Volke beruhendes Wesen', having a 'eigenen Willensinhalt [...] in dem sittlichen, auf das staatliche Leben gerichteten Geiste des Volkes'.



shared sovereignty that lies distributed among several actors, depending on intersubjective relations rather than revolving around some essentialist ethical centre. In the development of Dutch administrative law, the organicist thinking of Hegel, Stahl, Gerber and others is echoed by A.A.H. Struycken (1873-1923) as Loeff's most prominent academic opponent.<sup>60</sup> Raising a polemical attack against his plans for a system of judicial review of administrative actions, Struycken dismisses Loeff's positivistic understanding of law as an emanation of a 'legalistic justiticism' that draws up boundaries between the government and its subjects as 'heterogeneous elements', thus severely disturbing the integrity of the political community.<sup>61</sup> As opposed to Loeff's 'pure theory of law', Struycken adheres to an anti-positivism grafted upon the mysterious idea of monist 'ethical life' (*Sittlichkeit*) as law's most essential fundament. Following the 'mighty voice of Hegel', Struycken rejects the 'all-reasonable [...] spirit of Enlightenment', intent as it would be on the destruction of existing cultural and historical structures and institutions.<sup>62</sup> Suspicious of the 'pure' judicial reason of the courts, Struycken rather puts his trust on review within the hierarchy of the government itself, better capable as they would be to judge administrative actions on the basis of their appropriateness and ethical quality.<sup>63</sup>

## V. THE ENDURING INFLUENCE OF MONTESQUIEU'S ADVERSARIES

In modern public law, the positivistic approach to administrative law is generally regarded as outdated. With the rise of the social state replacing the minimal state of nineteenth-century liberalism, the sphere of governmental activity has dramatically expanded. It is now generally agreed upon that, to some extent, positive state action is required for the proper regulation of society and the substantive protection of civil rights.<sup>64</sup> The social state came with greater powers for government agencies, often awarding them

<sup>60</sup> See Van den Berge (n 29) 81 ff; Van den Berge (n 54), with further references.

<sup>61</sup> Antonius Alexis Hendricus Struycken, *Administratie of rechter* (Gouda Quint 1910) 15.

<sup>62</sup> Antonius Alexis Hendricus Struycken, *Ons koningschap* (Gouda Quint 1909) 1-9.

<sup>63</sup> Struycken (n 61) 36-37.

<sup>64</sup> Cf, for example, Sabino Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa' in Armin von Bogdandy, Sabino Cassese and Peter Huber (eds), *Handbuch Ius Publicum Europaeum*, vol 3 (Müller 2010) 22-28, discussing the rise of the 'enabling state' or 'social state' (*Sozialstaat*) and the concomitant transformation of public law in various European jurisdictions.



significant degrees of discretion in their concrete exercise. With its wide discretionary powers enabling the government to penetrate deeply into society, the positivistic notion of the *Gesetzesstaat* – a rule of codified laws, not men – came under increasing pressure. The judiciary responded by supplementing its task as the guardian of formal legality with the assessment of administrative actions to principles of proper government. One of the most appropriate tools to control the interventionist use of discretionary governmental powers was found in the principle of proportionality, originally developed in German law, but swiftly spreading to European law and other jurisdictions in post-war Europe. Embracing the proportionality principle, the courts expanded the subsumptive method of adjudication by a balancing approach that takes into account whether government action in a certain case can be regarded as appropriate, necessary and proportional with regard to its aim.<sup>65</sup> Evidently, the balancing approach to administrative law comes with a redefined understanding of the doctrine of separated powers, with 'no walls separating the three branches, but bridges that provide checks and balances'.<sup>66</sup>

The organicist approach to administrative law seems even more disconnected from modern law. The organicist objections against judicial review of government actions were closely related to the idea of the monarch as the embodiment of the state's ethical unity and the related view of the executive as the guardian of the state's ethical integrity. It was once quite common to be very suspicious towards the reasoning of the independent judiciary as 'a class which makes itself exclusive even by the terminology it uses, inasmuch as this terminology is a foreign language for those whose rights are at stake'.<sup>67</sup> In the organicist view, the ratiocinations of independent judicial reason are particularly dangerous in administrative law as a legal domain that should be guided by a heartfelt common ethics, rather than by abstract legal principles. In his polemical attack on Loeff's plans for a system of independent judicial review of government actions, for example,

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<sup>65</sup> See Nicholas Emiliou, *The Principle of Proportionality in European Law. A Comparative Study* (Kluwer 1999) 5-22.

<sup>66</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012) 385.

<sup>67</sup> Hegel (n 45) para 228.

Struycken shows himself distrustful of the independent judiciary as an unworldly class of academicians that would be out of touch with the ethics of society. For the adjudication of administrative disputes, Struycken rather puts his trust in the administration itself as 'the embodiment and personification' of 'the common ideals' of the people. Unlike the independent court, the administration itself would not only dispose of the required technical and practical knowledge in administrative matters.<sup>68</sup> Proper ethical guidance would also ensure that government officials have 'the character' that enables them to reach decisions in administrative matters that do not only conform to abstract rules, but also to a common popular ethics as administrative law's most essential principle.<sup>69</sup> Needless to say, perhaps, such monistic ethical reasoning is incompatible with the pluralist legal ethics that have shaped the dominant jurisprudence of today.

The general dismissal of both the positivistic and the organicist stances to administrative law does not mean, however, that their influence on legal debates as they are waged today, has been reduced to zero. Their presence can be still felt in the discursive language in which problems of administrative law continue to be framed. Dutch academic debates on proportionality testing in administrative law provide a clear case in point, with other legal cultures in Europe and elsewhere dealing with similar problems.<sup>70</sup> The discussion on the intensity of judicial review of administrative decisions in Dutch law is still dominated by the spatial imagery of each branch of government controlling its own domain, with each branch inhabiting a 'seat'

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<sup>68</sup> Struycken (n 61) 30-31.

<sup>69</sup> See Hegel (n 45) paras 294-295 for an exposition on the proper '*Bildung der Beamten*', moulding their character in order to make sure that they would reach the right decisions. The importance of character for administrative judgment is similarly emphasized by Struycken. See Struycken (n 59) 36-37.

<sup>70</sup> See Sofia Ranchordas and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) for a handsome overview of proportionality testing in German, French, English, US and EU administrative law, with many further references. The Dutch tradition of judicial deference and 'marginal review' of government decisions more or less resembles the Wednesbury irrationality test as it was developed in English law. See Paul Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265 and Paul Daly, *A Theory of Deference in Administrative Law* (Cambridge University Press 2012) ch 5 for divergent opinions on the merits of the Wednesbury test.

that should be left unoccupied by others.<sup>71</sup> The government has the exclusive control of the 'discretionary sphere' as it is granted to it by the legislature. Within its own domain, the administration is free to balance the interests at hand and reach a decision as it seems most desirable. Only when it oversteps its domain by taking a decision that it 'could not reasonably have reached', the judiciary has the task of correcting that decision.<sup>72</sup> As such, the Dutch administrative court operates according to a logic of marginality that clearly echoes the positivistic notion of a governmental area of 'free discretion' (*freies Ermessen*). *Within* its discretionary sphere, the government is free to act as it pleases; legal obligations only exist *beyond* that sphere's margins. Moreover, the Dutch doctrine of 'marginal review' of government actions seems to be an enduring reflection of the organicist fears of invasive judicial reasoning by unworldly judges. The margins of the government's discretionary domain clearly fence off matters of *policy*, from matters of *law*, and thus make sure that the court only interferes with the latter.<sup>73</sup>

The roots of the Dutch doctrine of marginal review in positivistic and organicist thought clearly emerge from a seminal article by the influential legal scholar H.D. van Wijk as the doctrine's primary intellectual source. In Van Wijk's classical paper, it is argued that the 'ongoing withdrawal' of the almighty legislator that is typical of the rise of the social state does not demand an 'advancing court', but rather a more deferential court 'as the mirror image [that] must depart from the person who moves away from the mirror'.<sup>74</sup> Unlike its civil counterpart, the administrative court would not be a referee, adjudicating the concrete dispute that is presented to him, but only a linesman; all he can do is to judge beyond the 'margin of the free consent of the executive'.<sup>75</sup> Van Wijk's reasoning thus follows the logic of strictly separated powers and legislative primacy. Moreover, his ideas are

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<sup>71</sup> For a critical discussion of the pervasive imagery of the three branches of government each occupying their own 'seat', see also Witteveen (n 8) 282 et seq.

<sup>72</sup> Extensive explanation and ample references on governmental discretion in Dutch administrative law is provided by Raymond Schlössels and Sjoerd Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, vol 1 (Kluwer 2016) 118-133.

<sup>73</sup> See also Van den Berge (n 29) 271.

<sup>74</sup> Hendrik Daniël van Wijk, 'Voortgaande terugtrek' in *Besturen met recht* (VNG 1974) 99-100.

<sup>75</sup> Ibid 105-111.

reminiscent of the organicist view of the court as an eccentric institute of unworldly judges who would not dispose of the proper character and heartfelt acquaintance with administrative matters to reach adequate decisions in those matters. Acknowledging that the 'withdrawal of the legislature' has left citizens unprotected to the discretionary powers of government, Van Wijk argues that proper armour against such powers should not be sought in an administrative court that is moulded to its civil counterpart, but rather in specialized tribunals within the hierarchy of government itself. Detached from the problems and dilemmas of government, an independent administrative court would tend to follow abstract lines of reasoning that alienate it from society. Whereas the judge is distrusted as an ethical outsider, the administration is recognized as a force *within* society that would thus dispose of the ethical knowledge that enables it to take the right decisions.<sup>76</sup>

Van Wijk's model of 'marginal review' of government actions has remained the leading doctrine up to the present day. In the landmark case of *Maxis and Praxis*, the Dutch Council of State (acting as administrative court in highest instance) held that 'courts are not meant to assess [...] which weighing of interests is to be considered as the most balanced'.<sup>77</sup> Instead, the courts should stick to a 'restrained control' of the use of discretionary powers by the government. Article 3:4, section 2 of the General Administrative Law Act (GALA) reads that the adverse consequences of governmental decisions should not be disproportionate to their purposes. As the Council argued, the double negative in that provision implies that judicial interference with administrative decisions is only warranted in cases of manifest disproportionality or arbitrariness. Thus, the Council rejected to follow the German and European example of more pervasive proportionality testing, explicitly confirming the paradigm of 'marginal control' instead.<sup>78</sup> Only the testing of punitive sanctions is excepted from the marginal approach.<sup>79</sup> In the case of a 'criminal charge' as described in Article 6 of the ECHR, the right to

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<sup>76</sup> Cf Van den Berge (n 29) 287-290.

<sup>77</sup> *Maxis & Praxis* ABRvS 9 May 1996, JB 1996/158. The case is sometimes referred to as *Kwantumbal Venlo*.

<sup>78</sup> See also de Waard 'Proportionality: Dutch Sobriety' (n 16) 115-117, with further references.

<sup>79</sup> Schlössels and Zijlstra (n 72) 376-377.

a fair trial is taken to require a full judicial review of proportionality.<sup>80</sup> Thus, the courts gave shape to a rather binary practice in which the proportionality of government decisions is either fully or only marginally tested. Only recently, they seem to shift towards a more nuanced approach in which the intensity of judicial review is tailored to the particular case at hand. In a recent case on earthquakes caused by the production of natural gas in the province of Groningen, for instance, the Council of State reduced gas production, arguing that the government's decision for ongoing large-scale production was badly motivated, and therefore untenable towards those who saw their fundamental rights endangered because of it.<sup>81</sup> As commentators were quick to argue, the Council's decision in the Groningen case can only be understood by recognizing it as much more than only a correction of the government's failure to motivate its decision properly; what the court really aims to do, in fact, is to correct its disproportionality. Interestingly, however, the still prevailing doctrine of marginal review withholds it of doing so in a more explicit way.<sup>82</sup>

## VI. THE NEED FOR A MONTESQUIVIAN REVIVAL

At the backdrop of the rise of the social state, the idea of marginal proportionality testing as it was proposed by Van Wijk was arguably already obsolete when it was first invented. Based on a monist ideology of legislative primacy and ethical essentialism, it failed to deliver a system in which the strong intertwinement of executive and legislative powers was properly counterbalanced by a strong and independent judiciary.<sup>83</sup> Now that we have reached a neoliberal era in which public space has been infused with an unprecedented managerialism, the need for a strong and independent administrative court as a forceful counterpower has become even more urgent.<sup>84</sup> Exposed to the rigour of a globalized economy, modern states have

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<sup>80</sup> de Waard (n 16) 117-118.

<sup>81</sup> *Groninger gaswinning*, ABRvS 18 November 2015, JB 2015/218.

<sup>82</sup> See also Martha M Roggenkamp, 'The Position of Citizens in Energy Production in the Netherlands: Is a New Approach Emerging?' in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resources Activity: Legal Change and Impact on Communities* (Oxford University Press 2014).

<sup>83</sup> Emiliou (n 65) 267-274.

<sup>84</sup> Cf Tschorne (n 12) 10-17.

had little choice but to follow depoliticized economic policies of privatization, reduced public spending and marketization of the government itself, now more than ever focusing on quantitative standards of outcome and efficiency.<sup>85</sup> Some even argue that we have entered post-democratic times in which the democratic institutions have survived, but only to serve as little more than the humble servants of private or non-governmental actors as the real powers determining their policies behind the scenes.<sup>86</sup> While some mark the 2008 financial crisis as 'the end of neoliberalism', scholars like Colin Crouch have convincingly argued that, for the foreseeable future at least, the neoliberal order is there to stay, with democratic institutions still quite defenceless against non-governmental transnational organizations and large corporations.<sup>87</sup> Burdened with traditions of organicism and legislative primacy, leaving far reaching public powers in the hands of a diffused plethora of public and private agents largely unchecked, the judiciary cannot contribute much to defend us against such actors. Therefore, it seems time for a Montesquivian revival that takes the idea of balanced powers – of a system of force and counterforce (*le pouvoir arrête le pouvoir*) – seriously at last. Shifting 'from government to governance', modern public law has typically embraced a network theory of interdependent public and private actors that take common responsibility for public policy.<sup>88</sup> The present era of privatization, decentralization and individualization has seen an unprecedented fragmentation of the public sphere, a breakup of public *imperium* into separate pieces, with its broken fragments often invested with great discretionary powers. For one thing, the ongoing increase of discretionary powers in the neoliberal era seems to make the idea of formal legality as a functional restraint on the wielding of public powers more and more obsolete. Moreover, the governance model of interdependent regulation is at odds with the classical idea of state actors being strictly guided by rules and principles that serve the undivided general interest.

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<sup>85</sup> Andrew Massey, *Globalization and Marketization of Government Services: Comparing Contemporary Public Sector Developments* (Macmillan 1997); Mark Freedland, 'The Marketization of Public Services' in Colin Crouch, Klaus Eder and Damian Tambini (eds), *Citizenship, Markets, and the State* (Oxford University Press 2001).

<sup>86</sup> Colin Crouch, *Post-Democracy* (Polity Press 2004).

<sup>87</sup> Crouch (n 12) 162 ff.

<sup>88</sup> Papadopoulos (n 12) 117-139.



Instead, the neoliberal model tends to put public and private actors under similar benchmarks of outcome and efficiency, encouraging them to follow comparable patterns of goal-oriented economic behaviour.<sup>89</sup> Thus, a theory of 'marginal review' in public law that sticks to the classical notion of strictly separated powers and remains overly attached to the organicist idea of independent judges as dangerous outsiders seems unable to deliver the counterweight against governmental powers that is needed in its contemporary social and institutional context. Ironically, a return to Montesquieu's original theory of natural relations, shared sovereignty and balanced powers may provide a possible way forward.<sup>90</sup>

For one thing, the Montesquivian spirit of essential intersubjectivity is incompatible with the idea of the sovereign lawmaker as it is envisioned both in voluntarist and organicist theories of law. Like other legal subjects, public actors are legally bound by 'necessary relations' – that is to say, by prepositive obligations from which they cannot withdraw – the legislator no less than the administration. The idea of an essential and legally binding intersubjectivity is irreconcilable with the classical notion of an area of free discretion as a kind of empty space or vacuum in which the government is exempt from law. Instead, the Montesquivian spirit of forces and counterforces requires full and principled assessment to criteria of appropriateness, necessity and proportionality, binding public and private actors in like manner. That is not to say, of course, that nothing prevents the Montesquivian judge from interfering with matters of policy and law-making – on the contrary, any system in which a branch of government regards 'himself as his own rule' (*lui-même sa règle*) is dismissed by Montesquieu as a path towards dictatorship, as 'all would [then] be lost'.<sup>91</sup> In Montesquieu's 'moderate constitution' of balances and necessary relations, the actors of the classical triad each have their own task – be it law-making, administrating or judging. None of these tasks, however, is performed in splendid isolation, strictly removed from the

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<sup>89</sup> See also Mike Raco, *State-led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism in an Era of Regulatory Capitalism* (Routledge 2013).

<sup>90</sup> Cf René Foqué, 'Montesquieu en het recht', in Marc Groenhuijsen, Ewoud Hondius and Arend Soetemann (eds), *Recht in geding* (Boom Juridische uitgevers 2014).

<sup>91</sup> Montesquieu (n 3) bk 11 ch 6.



reach of the other branches of government. Instead, legislature, executive, and judiciary are inextricably entangled in a precarious balance – an ongoing debate in which no one has the final say.<sup>92</sup>

Moreover, the Montesquivian approach to law also dismisses the organicist tradition of conceptualizing the state as some unified natural body, a mysterious ethical entity with its citizens as its integral constituent. Unlike the ethical monism of Hegel, Stahl, and others, Montesquieu's theory fits well with the pluralist account of law that has become generally accepted today. The idea of some 'Archimedean point' from which to determine a common ethics (*Sittlichkeit*) seems incompatible with modern trends of anti-essentialism and differentialism as they have become *en vogue* in the contemporary western world.<sup>93</sup> As Lefort writes, 'democratic society established itself as a society without a body, as a society that resists its traditional representation as an organic totality'.<sup>94</sup> In a modern democratic society, the collective identity of the community escapes unequivocal determination, with none of its participants being able to impose its monistic will on others. The place of power should remain an 'empty space' (*lieu vide*), free from any permanent occupation, be it either by the mysterious notion of Rousseau's 'general will', or Hegel's common *Sittlichkeit*.<sup>95</sup> By no means does the 'empty space of power' entail that the idea of a common ethics or a collective sense of purpose should be abandoned, leaving legal subjects in an atomic state of fragmentation as feared most, in particular by organicist thinkers like Stahl. On the contrary, power's empty space necessitates an ongoing deliberation about its proper use, so that the emptiness that Lefort describes facilitates connections rather than destroying them. The open space as envisioned by Lefort is only compatible with a Montesquivian *trias*

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<sup>92</sup> Cf Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1992) 208-237.

<sup>93</sup> Neil Walker, 'Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism', in Paul Beaumont, Carole Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002).

<sup>94</sup> Claude Lefort, 'La question de la démocratie', in *Essais sur le politique (XIXe-XXe siècles)* (Seuil 1986) 28.

<sup>95</sup> Claude Lefort, 'L'image du corps et le totalitarisme', in *L'invention démocratique* (Seuil 1981) 172-173.

*politica* as a balance with none of its actors reigning supreme – bound as they are in a shared sovereignty that requires ongoing discussion.

Surely, the actors of the triad each bring their own special expertise to that debate. However remote they often function from the democratic process, administrative agencies usually have greater democratic legitimacy than courts. Moreover, they tend to possess greater expert knowledge and technical competence while laying out their policies.<sup>96</sup> Both advantages of the executive provide solid ground for judicial deference, preventing the court to install a 'government of judges' in which the judiciary only recognizes its own authority.<sup>97</sup> As Montesquieu reminds us, a political order in which 'the judge himself is his own rule' (*le juge est lui-même sa règle*), aiming to occupy the sovereign throne all by himself, will inevitably fall prey to arbitrariness and despotism.<sup>98</sup> Nevertheless, Montesquieu's theory of law is equally concerned about a legal order in which matters related to policy and law-making are removed from the judiciary's area of competence altogether, fended off from the court's influence by means of some imagined borderline that keeps law apart from politics. As Martin Loughlin has shown with such great force and learnedness in his work on the foundations of public law, the practice of drawing watertight divisions between the legal and the political has turned out to be inappropriate, obfuscating public law's inherently political nature. Therefore, it is time to re-examine and rejuvenate European public law's intellectual roots in the philosophical tradition of 'political law' (*droit politique*), with Montesquieu as one of its primary representatives.<sup>99</sup>

How could a Montesquivian approach to proportionality testing in administrative law take shape in practice? Perhaps the metaphor of 'total football' is a good candidate to replace the sunken imagery of the three traditional branches of government, each tied to their fixed positions. The tactical theory of total football was invented by the 'mighty Magyars' in the 1950s, further developed by Michels and Cruyff in the 1970s, and now elaborated upon by successful football managers like Guardiola and others.

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<sup>96</sup> Cf Daly (n 70) 7-35, with further references.

<sup>97</sup> Cf Adrian Vermeule, *Law's Abnegation. From Law's Empire to the Administrative State* (Harvard University Press 2016).

<sup>98</sup> Montesquieu (n 5) bk 6 ch 3.

<sup>99</sup> Loughlin (n 13); Loughlin (n 42).

In accordance with other strategies, the players enter the field in a predetermined line-up, each awarded with a specific task as a defender, midfielder or attacker, posted either on the left or right side, or at the centre of the pitch. Once the game has begun, however, there is nothing that forces them to stick to their position at all costs. On the contrary, they are encouraged to take up position on the field as the game demands it, moving into unoccupied spaces and filling the gaps that other players leave behind.<sup>100</sup> In the current context of privatization and fragmentation of the public sphere, with vast discretionary powers frequently awarded to agents living up to their benchmarks at great distance from the democratic process, there may often still be good reasons for the court to acknowledge the other branches' primary responsibilities in law and policy-making. More frequently than before, however, situations may occur that demand the judiciary to overstep the imaginary boundaries of the domain to which it has so anxiously restricted itself in many modern European systems of public law. The neoliberal administrative state in which we now live, requires a court that no longer hides behind a fixed constitutional architecture, but takes on the responsibilities with which modern administrative reality confronts it. The Montesquivian theory of balanced powers and shared sovereignty provides it with the theoretical tools enabling it to live up to those responsibilities. That is not to say, of course, that the branches of power should forget about their primary tasks altogether. In fact, one of the weaknesses of 'total football' is the disorganization that may come out of unwarranted position switching.

## VII. CONCLUSION

With the outlines of Montesquieu's original theory, its reception and his adversaries' and mistaken interpreters' enduring influence in the present era having been explored, it is time to draw some conclusions. Contrary to common belief, the idea of marginal review of the government's use of discretionary powers is unconnected to Montesquieu's relational account of law. Instead, it relies on the ideas of those who contributed to its refutation and distorted representation, burdening today's debate on executive discretion and judicial deference with a tenacious myth of the Montesquivian

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<sup>100</sup> See, for example, David Winner, *Brilliant Orange. The Neurotic Genius of Dutch Football* (2<sup>nd</sup> edn, Bloomsbury 2012).

judge as the emblem of mechanical adjudication. On the one hand, the practice of marginal review is driven by the notion of legislative primacy as it can be traced back to philosophers like Rousseau and Kant, whose voluntarist theories of unshared sovereignty were given a positivistic twist by lawyers and jurists like Laband and Loeff. In the empty legal universe of the positivists, the legislature – being the exclusive source of law – is the bearer of an undivided public *imperium* that remains unchecked by other actors, leaving the executive an uncontrolled area of discretion as long as it does not overstep its domain as it is fenced off by the legislature. On the other hand, the concept of marginal review and administrative discretion has organicist roots in the double image of the executive as integral part of the state's natural body, and of judges as unworldly outsiders, unfamiliar as they would tend to be with the common ethics that keeps the public community together.

Even with the positivistic and organicist stances to law becoming more and more obsolete, their influence can still be felt in the imagery, and the discursive language in which contemporary legal problems continue to be framed. The discussion on the intensity of proportionality testing in Dutch law – resembling similar discussions in other legal cultures – is a clear example here. That debate is still dominated by the spatial imagery of each branch of government controlling its own domain, with the legislature, the executive, and the judiciary inhabiting their own particular 'seats' that should be left unoccupied by others. As a distant echo from an obsolete past, leading Dutch doctrinal thought still envisions the governmental domain of discretion as a legal vacuum, sharply distinguished as an area of policy, and not of law. *Within* its discretionary sphere, the government is free to act as it pleases; legal obligations and judicial competence only exist *beyond* that sphere's margins. Originally invented to serve the minimal state of classical liberalism, that model of judicial deference was already at odds with the increase of administrative discretion and the expansion of governmental activity that is typical of the rising social state. We have now arrived in a neoliberal era in which public *imperium* is broken into pieces, left in the hands of a plethora of public, semi-public and private actors similarly put under benchmarks and policy targets. Against the backdrop of that neoliberal reality, the concept of marginal review has arguably become so strange to its social and institutional context that it has become untenable.

For one thing, the neoliberal state invests its agents with discretionary powers that even tend to exceed those of the social state. The ongoing increase of open powers in the hands of governmental bodies makes the idea of formal legality as a functional restraint even more obsolete than it already was in the days of the social state. Moreover, the trends of privatization, decentralization and the marketization of the government itself seem hardly compatible with the classical ideal of directing public power strictly to the enhancement of the undivided common good; instead, both public and private actors seem rather inclined to follow their own institutional interests, guided by similar economic rationalities of output and efficiency. Thus, proper protection of rights needs far more than a deferential court that only intermingles with the executive's task beyond the margins of some legal void as an area that is only political control. The present neoliberal era requires a return to Montesquieu's philosophical spirit of essential relations and mutual balance, with the court providing proper counterweight against the wielding of public power by principled and full constraint by norms of appropriateness, subsidiarity and proportionality. Only a constitution that is permeated with the idea of force and counterforce (*le pouvoir arrête le pouvoir*), envisioning the *trias politica* as a precarious balance in which none of the actors claims the final say, will ultimately deliver the checks and balances that we need in modern society. In that sense, Montesquieu's original doctrine of shared sovereignty and necessary relations provides for an urgent current need.



# RETHINKING THE STRUCTURE OF FREE MOVEMENT LAW: THE CENTRALISATION OF PROPORTIONALITY IN THE INTERNAL MARKET

Barend van Leeuwen\*

*This article analyses three important developments in EU free movement law from the perspective of the structure of free movement law. Each of these developments – market access, horizontal direct effect and the assimilation of justifications – is caused by structural changes in the application of the free movement provisions. Firstly, the Court of Justice of the European Union has used 'backwards reasoning', which means that the Court no longer maintains the consecutive order of the structure. Moreover, the Court has increasingly merged what were previously distinct stages of inquiry in free movement cases. The result is that the proportionality test has become the most likely tool to solve free movement cases. This process of centralisation can be explained by the Court's aim to guarantee the effet utile of the free movement provisions. However, the centralisation of proportionality has a number of important consequences. Ultimately, the (almost) exclusive reliance on proportionality to solve free movement cases does not improve the functioning of the internal market. Therefore, the Court should also develop and rely on the other pillars of the structure of free movement law.*

**Keywords:** Free movement law, market access, horizontal direct effect, justifications, proportionality

## TABLE OF CONTENTS

I. INTRODUCTION .....	236
II. THE STRUCTURE OF FREE MOVEMENT LAW .....	239
III. THREE DEVELOPMENTS IN FREE MOVEMENT LAW .....	244
1. Market Access: Interaction between Scope and Restriction.....	244
2. Horizontal Direct Effect: Interaction between Direct Effect and Restriction ....	249

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3. <i>Assimilation of Justifications: Interaction between Restriction and Justification</i> .....	254
IV. THE CENTRALISATION OF PROPORTIONALITY IN THE INTERNAL MARKET .....	257
1. <i>The Centralisation of Proportionality and the Effet Utile of the Free Movement Provisions</i> .....	257
2. <i>The Consequences of the Centralisation of Proportionality</i> .....	261
V. CONCLUSION .....	264

## I. INTRODUCTION

Free movement law has been built on solid foundations. Because of the open-ended nature of the Treaty provisions on free movement, the foundations of free movement law have primarily been developed through the case law of the Court of Justice of the European Union ('the Court'). They have resulted in what could be described as 'the structure of free movement law' – a framework of assessment that is used to assess free movement cases. In comparison with other sub-disciplines in EU law, it is this structure that makes free movement law such a clear and accessible subject. The structure is not only helpful to teach free movement law, but it is also used in practice. For example, in its preliminary reference in *Viking*,<sup>1</sup> the English Court of Appeal asked a number of questions that were structured precisely in accordance with the structure of free movement law.<sup>2</sup> This shows that the structure of free movement does not only facilitate students in studying free movement law, but that it is also applied by lawyers and courts in practice. Nevertheless, free movement cases are rarely analysed from the perspective of their structure. Such a structural approach is inevitably rather technical. However, this exercise in 'dissection' shows how various developments in free movement law are connected and how they lead to the same result. The structure of free movement law is a technique that is used by the Court to protect the functioning of the internal market. Transformations in this structure show how the Court has changed its approach to guarantee the *effet utile* of the free movement provisions. As such, a structural approach to

<sup>1</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP*, EU:C:2007:772.

<sup>2</sup> *Ibid*, para 27.

analysing free movement cases reveals the Court's vision of how free movement should be protected in the internal market.

The structure of free movement law has four different pillars. These pillars constitute four separate stages of inquiry. Furthermore, they are consecutive and cumulative. Therefore, a party can only successfully establish a breach of the free movement provisions if each of the four stages is passed. First of all, cases have to come within the *scope* of the free movement provisions. This normally means that cases must have a cross-border element. Secondly, the free movement provisions have to be *directly effective* – a party who is claiming that their free movement rights have been breached has to be able to rely on the free movement provisions against the defendant. The third step is to see if there has been a *restriction* on free movement. Fourthly, a restriction can still be *justified* by reference to one of the express derogations in the Treaty on the Functioning of the European Union ('TFEU') or one of the public interest requirements developed in the case law of the Court. Before measures are justified, it has to be shown that they comply with the principle of proportionality. It is within this structure that free movement cases are solved.

The starting point of this article is that developments in the Court's case law make it necessary to rethink the structure of free movement law. The argument is based on two observations. Firstly, there is an increasing amount of interaction between what were previously distinct stages of inquiry in free movement cases. Secondly, the consecutive order of the structure of free movement law is no longer maintained. The result is that the assessment of the existence of a restriction has an impact on the question of whether a case comes within the scope of free movement law in the first place. Similarly, the question whether there is a restriction on free movement might determine whether the free movement provisions have direct effect. The Court has increasingly applied this 'backwards' reasoning, which challenges the consecutive order of the structure. As a consequence, the four pillars of the structure of free movement law have become more merged.

This process of interaction will be analysed to explain three important developments in free movement law. These developments – or

transformations – have been discussed extensively over the last decade or so.<sup>3</sup> However, an analysis from the perspective of the structure of free movement law is able to show that the three developments are in fact interconnected and, moreover, that they lead to the same result. Firstly, the interaction between scope and restriction has resulted in a market-access approach in free movement law. Secondly, the interaction between direct effect and restriction has brought about an increasing number of cases in which the free movement provisions were held to have horizontal direct effect. Thirdly, the interaction between restriction and justification has resulted in the assimilation of the express derogations in the Treaty and the public interest justifications developed in the Court's case law. As a consequence, the nature of a restriction is no longer relevant for the kind of justifications defendants in free movement cases can rely on.

The next step is to show that all three developments lead to the same result: they make the proportionality test the most likely tool to solve free movement cases. The Court is increasingly confident to make the proportionality test decisive. The underlying reason for this development is that the Court believes that the proportionality test is the most suitable tool to guarantee the effective application of the free movement provisions. This process of centralisation of proportionality has important consequences, which will be analysed in the final part of the article. The focus will not be on

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<sup>3</sup> See, for example, on market access: Jukka Snell, 'The Notion of Market Access: a Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437; Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 *German Law Journal* 671; Max Jansson and Harri Kalimo, 'De Minimis Meets 'Market Access': Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 *Common Market Law Review* 523; on horizontal direct effect: Julio Bacquero Cruz, 'Free movement and Private Autonomy' (1999) 24 *European Law Review* 603; Christoph Krenn, 'A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods' (2012) 49 *Common Market Law Review* 177; on the (potential) assimilation of justifications: Eleanor Spaventa, 'On Discrimination and the Theory of Mandatory Requirements' (2002) 3 *Cambridge Yearbook of European Legal Studies* 45; Laurence Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *European Law Review* 925. More precise references can be found below.

the *substance* of the proportionality test,<sup>4</sup> but rather on the *role* that proportionality plays in the re-thought structure of free movement law. It will be argued that there is a risk in relying too much on proportionality to determine the outcome of free movement cases. The Court should not be afraid to explore its complete free movement toolbox and should also rely on other tools in the structure of free movement law (such as scope, direct effect and justification) to solve free movement cases. This variation in case-solving strategies will ultimately improve the functioning of the internal market.

## II. THE STRUCTURE OF FREE MOVEMENT LAW

Before the processes of interaction in the structure of free movement law can be analysed, it is necessary to set out the structure of free movement law as it has been developed by the Court. The approach will be horizontal across the various freedoms, although particular features of certain free movement provisions will be highlighted.

First of all, the free movement provisions are only applicable if cases come within their scope. The Court has developed three main mechanisms to find that cases fall outside the scope of the free movement provisions. The first is the 'wholly internal situation' rule.<sup>5</sup> The free movement provisions do not apply to situations that are internal to one Member State. If all aspects of a case relate to domestic matters, the cross-border element, which is necessary to justify the application of the free movement provisions, is missing. This approach has been used primarily for cases concerning the free movement of

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<sup>4</sup> See Takis Tridimas, *General Principles of EU Law* (Oxford University Press 2006), Chapter 5; Nicholas Emiliou, *The Principle of Proportionality in European Law* (Kluwer 1996).

<sup>5</sup> Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law* (Oxford University Press 2013), Chapter 4. See also Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 *Common Market Law Review* 741; Camille Dautricourt and Sébastien Thomas, 'Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?' (2009) 34 *European Law Review* 433. The rationale of the rule was strongly criticised by Advocate General Sharpston in her Opinion in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government*, EU:C:2007:398.

persons.<sup>6</sup> Secondly, the free movement provisions do not apply to national rules if their effect on free movement is 'too indirect and uncertain'.<sup>7</sup> This is another way of saying that cases lack a sufficient cross-border element for the free movement provisions to be applicable.<sup>8</sup> Because the focus is on the effect of a national rule, it could be argued that this approach already combines the concepts of scope and restriction.<sup>9</sup> However, it is clear that this approach focusses on the scope of the free movement provisions. The best way to show this is to analyse the third mechanism which the Court has developed only for goods. This mechanism is the so-called *Keck* proviso.<sup>10</sup> Rules which affect the circumstances under which products can be sold fall outside the scope of Article 34 TFEU, as long as they apply to all relevant traders and do not discriminate in law or in fact against products coming from another Member State.<sup>11</sup> If the *Keck* proviso is fulfilled, a case falls outside Article 34 TFEU because the effect on cross-border trade is too indirect or uncertain.<sup>12</sup> Because there is no *de minimis* rule for goods, such cases fall outside the scope of Article 34 TFEU altogether. Therefore, relying on the concept of remoteness is another way of saying that cases fall outside the scope of the free movement provisions.<sup>13</sup> This confirms that national rules whose effect

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<sup>6</sup> Case 175/78 *The Queen v Saunders*, EU:C:1979:88; Case C-299/95 *Friedrich Kremzow v Republik Österreich*, EU:C:1997:254. See Síofra O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' (2009) *Irish Jurist* 13.

<sup>7</sup> Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (Non)Economic European Constitution' (2004) 41 *Common Market Law Review* 743. See also Eleanor Spaventa, 'The Outer Limits of the Free Movement of Persons: Some Reflections on the Significance of Keck, Remoteness and Deliège', in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2008) 245-272.

<sup>8</sup> Case C-69/88 *H. Krantz GmbH v Ontvanger der Directe Belastingen and Netherlands State*, EU:C:1990:97 (goods) and Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH*, EU:C:2000:49 (workers).

<sup>9</sup> See Nic Shuibhne (n 5) Chapter 4. See also Catherine Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' (2001) 26 *European Law Review* 35, 52.

<sup>10</sup> Case C-267/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard*, EU:C:1993:905.

<sup>11</sup> *Ibid*, para 16.

<sup>12</sup> *Ibid*, para 17.

<sup>13</sup> Gormley (n 3) 925, 936.

on free movement is 'too indirect and uncertain' also fall outside the scope of the free movement provisions.<sup>14</sup>

If a case falls within the scope of the free movement provisions, the next step is to determine if the free movement provisions can be relied on against the defendant. In other words, are the free movement provisions directly effective against the defendant? The orthodox approach of the Court has been to hold that the free movement provisions have vertical direct effect and can be relied on against the State. However, they do not have horizontal direct effect. As a result, private parties are in principle not directly bound by the free movement provisions. This can most clearly be seen for goods, where the Court has always held that States are bound by the free movement provisions, while the conduct of private parties should be assessed under the competition law provisions. This statement does not adequately reflect the way the case law on direct effect has developed for the other freedoms. From early on in its case law, the Court has extended the application of the free movement provisions to private parties who were engaged in collective regulation and who exercised legal autonomy.<sup>15</sup> Through this approach the free movement provisions have been applied to organisations such as the UCI and the UEFA.<sup>16</sup> However, the Court has never explained what is meant by 'collective regulation' and 'legal autonomy'. Finally, there are some examples where the Court held that the free movement provisions were applicable to private parties in a purely horizontal situation even without a collective element. The best example is *Angonese*,<sup>17</sup> in which Article 45 TFEU was applied to a horizontal dispute between a job applicant and a private employer. As a result, Article 45 TFEU has horizontal direct effect in employment situations,<sup>18</sup> while Article 34 TFEU remains a 'fortress' of vertical direct effect only.<sup>19</sup>

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<sup>14</sup> Thomas Horsley, 'Unearthing Buried Treasure: Art. 34 TFEU and the Exclusionary Rules' (2012) 37 *European Law Review* 734, 741.

<sup>15</sup> Case 36/74 *Walrave and Koch v Union cycliste internationale*, EU:C:1974:140.

<sup>16</sup> Case 36/74 *Walrave and Koch* (n 15), and Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, EU:C:1995:463 (UEFA).

<sup>17</sup> Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, EU:C:2000:296.

<sup>18</sup> Alan Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect' (2008) 10 *Cambridge Yearbook of European Legal Studies* 525.

<sup>19</sup> Krenn (n 3).



Thirdly, the Court proceeds with the question of whether free movement has been restricted. Is there a *prima facie* breach which has to be justified by the Member State? Again, three main approaches to identify a restriction can be distinguished. First, the Court has used a discrimination test. This test is primarily used for persons – also because discrimination is explicitly referred to in Article 45 TFEU.<sup>20</sup> Both direct and indirect discrimination are prohibited. Direct discrimination means that there is a difference in treatment between national workers and non-national workers.<sup>21</sup> The discrimination is visible in how the rule has been formulated – as such, it is often called discrimination in law. With indirect discrimination, the formulation of the rule is neutral and does not appear to make a distinction between national workers and non-national workers. However, the effect of the rule is such that it is more difficult for non-national workers to comply with it.<sup>22</sup> This is called discrimination in fact. For goods, the Court does not use an approach based on discrimination. It uses the concepts of distinct and indistinct applicability. However, in essence, these concepts are the equivalent of direct and indirect discrimination for goods. A second approach which has been developed by the Court to identify a restriction is the so-called obstacle approach. Obstacles are national rules that make the exercise of free movement rights more difficult or less attractive. It is not strictly necessary to establish discrimination – in fact, the obstacle approach is also applied to genuinely non-discriminatory national rules.<sup>23</sup> However, because the test does not require an assessment of whether there is discrimination, it is also possible that discriminatory rules are classified as obstacles. In the analysis below, it will be shown that this has an impact on the interaction between restriction and justification. The application of the obstacle test is quite flexible and it is relatively easy to establish a restriction.<sup>24</sup> Thirdly, a restriction on the free movement of goods can be established

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<sup>20</sup> In *Bosman* (n 16), the Court held that non-discriminatory obstacles to free movement of persons were also a restriction of Article 45 TFEU.

<sup>21</sup> See Catherine Barnard, *The Substantive Law of the EU* (4th edn, Oxford University Press 2013) 279.

<sup>22</sup> See, for example, Case C-379/87 *Anita Groener v Minister of Education*, EU:C:1989:599.

<sup>23</sup> Case C-415/93 *Bosman* (n 16).

<sup>24</sup> Barnard (n 21) 281-282.



through the *Keck* proviso. Selling arrangements fall outside the scope of Article 34 TFEU as long as they apply to all relevant traders and they affect domestic and foreign products in the same manner. Therefore, *Keck* appears to rely on a discrimination test to bring national rules on selling arrangements back in the scope of Article 34 TFEU on the basis of the existence of a restriction. This is a good example of 'backwards' reasoning by the Court. The identification of a restriction brings the case back in the scope of free movement law. The next section will analyse how this interaction has resulted in the development of a market access approach.

Fourthly, once a restriction on free movement has been established, the burden of proof is on the defendant to show that this restriction can be justified. The justification stage consists of two steps: first, the defendant has to show that there is a ground of justification. Second, the measure has to be proportionate. The proportionality test assesses whether the measure is suitable and necessary.<sup>25</sup> The suitability test assesses the connection between the tool chosen and the aim to be achieved – the ground of justification. Is the measure taken suitable to achieve this aim? The necessity test focusses on the question whether any alternative measures could have been adopted that would have been less restrictive of free movement. As regards the grounds of justification that can be relied on, for each free movement provision a corresponding list of justifications has been included in the TFEU. These justifications are called express derogations. Because of the exhaustive nature of the Treaty derogations, and the fact that most of them were already included in the Treaties in the 1950s, the Court has developed a second case law-based category of justifications that can be used to justify restrictions on free movement. In *Cassis de Dijon*,<sup>26</sup> the Court held that indistinctly applicable restrictions on free movement of goods could also be justified on the basis of so-called 'mandatory requirements'.<sup>27</sup> They are a non-exhaustive list of good reasons that Member States – or private parties – can rely on to justify restrictions on free movement. It is always open to a Member State to

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<sup>25</sup> See Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999).

<sup>26</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*'), EU:C:1979:42.

<sup>27</sup> *Ibid*, para 8.

claim that a particular policy consideration constitutes a mandatory requirement. However, it is ultimately for the Court to assess whether a mandatory requirement should be accepted under EU law. The most commonly relied on mandatory requirements are consumer protection and environmental protection. This category of justifications has now also been extended to the other freedoms, where mandatory requirements are referred to as public interest requirements or objective justifications. The basic rule remains that these justifications can only be used to justify restrictions that are indirectly discriminatory, indistinctly applicable or obstacles. Rules that make a direct distinction between domestic and foreign products, or rules that discriminate directly on the ground of nationality, cannot be justified by mandatory requirements. The Treaty derogations are the only justifications that can be relied on to justify such restrictions. The distinction becomes more difficult to maintain if directly discriminatory rules are classified as obstacles by the Court. This could lead to interaction between restriction and justification. This process of interaction will be analysed below.

### III. THREE DEVELOPMENTS IN FREE MOVEMENT LAW

#### *1. Market Access: Interaction between Scope and Restriction*

In this section, three developments will be analysed to illustrate the changes that have taken place in the structure of free movement law. Again, the approach will be horizontal. Nevertheless, to be able to make a convincing case that these transformations have taken place across all freedoms, for each section at least two cases that concerned different freedoms will be discussed.

In the last two decades, the Court has increasingly made use of a market access test to identify restrictions on free movement. The concept of market access is not entirely new to EU law, since it has already been used in competition law.<sup>28</sup> In free movement cases, the Court appears to use the market access test to establish restrictions on the free movement provisions – national rules that prevent or hinder market access are considered to restrict free movement. However, market access is more than just the identification of a restriction. It has become a concept through which the

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<sup>28</sup> Snell (n 3) 438-440.

Court is able to combine the issue of the scope of free movement law with the issue of a restriction on free movement. Therefore, market access is not solely about a restriction, but also incorporates the determination of whether a case falls within the scope of free movement law. This determination is based on the identification of a restriction on market access. As such, market access is an example of a tool whereby the Court uses 'backwards' reasoning – the Court starts with the identification of a restriction and uses its finding on that issue to bring a case within the scope of free movement law. The problem with this market access approach is that it has been applied in such a way that it does not only apply 'backwards' reasoning from restriction to scope, but that it also fuses the two concepts in such a way that they can no longer be distinguished. The result of this process of (con)fusion is that the Court's reasoning has become less clear and less predictable.<sup>29</sup>

The 'father' – or 'mother' – of the market access test is the Court's judgment in *Keck*. This might come as a surprise to some, because *Keck* is generally considered as a case that attempted to limit the scope of application of Article 34 TFEU. The Court tried to do this by creating a new category of national rules – selling arrangements – that fell outside Article 34 TFEU. However, *Keck* was a balancing exercise between two different interests. On the one hand, the Court wanted to take into account the concerns of the Member States that were worried about the increasing number of national rules which were challenged under the free movement provisions. On the other hand, the Court did not want to create a regulatory safe zone for Member States, in which they could adopt rules that could not be reviewed by the Court. The result was a compromise that led to the *Keck* proviso. Selling arrangements are outside Article 34 TFEU if they apply to all relevant traders and if they affect domestic and foreign products in the same manner.

The *Keck* proviso already represented a new kind of interaction between scope and restriction: the identification of disparate treatment would bring a case into the scope of Article 34 TFEU. As such, the *Keck* proviso for the first time established a test that went from restriction to scope. This is an example of the Court's 'backwards' reasoning. Nevertheless, in *Keck*, the two were still regarded as separate concepts – only if there is disparate treatment are selling arrangements brought back in the scope of Article 34 TFEU. There has

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<sup>29</sup> Snell (n 3) 470; Jansson and Kalimo (n 3) 557.

always been discussion about the precise nature of the second *Keck* proviso.<sup>30</sup> In theory, the test requires the claimant to show that a selling arrangement has a negative effect on foreign products, and that there is indirect discrimination. However, in practice, the second proviso has been applied as a market access test by the Court.<sup>31</sup> This can clearly be seen in *De Agostini*,<sup>32</sup> which concerned a Swedish prohibition of advertisements aimed at children under the age of 12. An Italian publisher of children magazines about dinosaurs was prevented from showing commercials aimed at young children on Swedish television. This was a selling arrangement that complied with the first *Keck* proviso, as Swedish magazines could not show commercials aimed at young children either. It was less clear whether the prohibition on advertising also complied with the second proviso. De Agostini claimed that 'television advertising was the only effective form of promotion enabling it to penetrate the Swedish market'.<sup>33</sup> The Court held that, if this were true, the prohibition would not affect domestic and foreign products in the same manner, and there would be a restriction of Article 34 TFEU. This assessment had to be made by the national court on the basis of the evidence provided to it.<sup>34</sup> As a consequence, market access has become a criterion for the *Keck* proviso, but whether market access is restricted remains a factual assessment to be made by the national court. Furthermore, the two concepts of scope and restriction remain separate.

Market access has moved on since then. In *Commission v Italy (Trailers)*<sup>35</sup> and *Mickelsson and Roos*,<sup>36</sup> the Court for the first time introduced market access as

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<sup>30</sup> Daniel Wilsher, 'Does Keck Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle within the European Single Market' (2008) 33 *European Law Review* 3; Stefan Enchelmaier, 'The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck' (2003) 3 *Yearbook of European Law* 249; Stephen Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification' (1996) 33 *Common Market Law Review* 885.

<sup>31</sup> Barnard (n 9) 44.

<sup>32</sup> Case C-9/98 *Konsumentombudsmannen v De Agostini*, EU:C:1997:344.

<sup>33</sup> *Ibid*, para 43.

<sup>34</sup> *Ibid*, paras 44-45.

<sup>35</sup> Case C-110/05 *Commission v Italian Republic*, EU:C:2009:66.

<sup>36</sup> Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos*, EU:C:2009:336.

a self-standing test to establish a restriction of Article 34 TFEU.<sup>37</sup> It did so in the context of so-called bans or restrictions on use – national rules that did not ban the import of certain products, but that banned or restricted their use. Again, the Court reasoned from restriction to scope. However, the way this was done differed from the approach under the *Keck* proviso, since there was no clear distinction anymore between the two stages of inquiry.

*Mickelsson and Roos* concerned a Swedish ban on using jet skis. They could only be used on general waterways and on waters that had specifically been allocated by the Swedish authorities. At the time of the case, no waters had in fact been allocated. Therefore, it was very difficult to use jet skis in Sweden. The claimants argued that this ban constituted a restriction on the free movement of goods. The Court agreed. It held that this ban had 'a considerable influence on the behaviour of consumers'.<sup>38</sup> This may 'affect the access of that product to the market of that Member State'.<sup>39</sup> The Court accepted that the question of whether the Swedish rule had a disparate impact on foreign products should be answered by the national court. However, it held that rules which ban or greatly restrict the use of certain products have the effect of hindering access to the market and constitute a restriction on the free movement of goods.

Interestingly, while the Court left the assessment of whether a national rule banned or greatly restricted use to the national court, it automatically followed from such a finding that the rule hindered market access. This automatic link merges the concepts of scope and restriction. With the *Keck* proviso, it is the finding of a restriction that brings a case back in the scope of free movement law, but with this market access approach it is the presumption of a restriction on the basis of which a case is held to come within the scope of free movement law. The market access test is applied *in abstracto*.<sup>40</sup> The Court did not investigate where the jet skis in this case had been produced. The Court did not investigate the number of imports of jet

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<sup>37</sup> See also Eleanor Spaventa, 'Leaving Keck behind? The Free Movement of Goods after the Rulings in *Commission v. Italy* and *Mickelsson and Roos*' (2009) 34 *European Law Review* 914.

<sup>38</sup> Case C-142/05 *Mickelsson and Roos* (n 36), para 26.

<sup>39</sup> *Ibid.*

<sup>40</sup> Davies (n 3).

skis into Sweden. Mickelsson and Roos were both Swedish citizens who had used their jet skis on Swedish waters. As a result, the cross-border element was based on the abstract finding of a restriction on market access of parties that were not involved in the case. No assessment had to be conducted by the national court. The result is that market access has simply become a technique – or slogan<sup>41</sup> – to fuse the concepts of scope and restriction in such a way that Member States are put in a position where they have to justify restrictions on free movement.

The argument that market access is a technique rather than a test based on an economic or market assessment can most convincingly be made by making a link to the other freedoms. *Carpenter*<sup>42</sup> is often referred to. This case concerned an English service provider who claimed that his right to provide services in other Member States would be restricted if his wife, who was not an EU citizen, were deported to her home country. Again, the Court used an abstract finding of a restriction – the possibility that Mr Carpenter would have to travel to other Member States to provide services there – to bring the case within the scope of the free movement provisions. Although the language of market access was not used, the technique adopted by the Court was essentially similar.

This technique has even found its way into the Court's case law on citizenship. *Ruiz Zambrano*<sup>43</sup> constitutes the 'citizenship equivalent' of market access. A Colombian family was at risk of being deported from Belgium. The two children had been born in Belgium and had Belgian nationality. They had never left the Belgian territory. The result was that it was difficult for the family to claim that their case came within the scope of free movement law, since there was no cross-border element. The Court managed to find a way around this by focussing on the 'genuine enjoyment of the substance'<sup>44</sup> of the children's free movement rights under Article 20 TFEU. If the family were deported from Belgium, the children would not be able to exercise their free movement rights to move freely between EU

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<sup>41</sup> Snell (n 3).

<sup>42</sup> Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, EU:C:2002:434.

<sup>43</sup> Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi*, EU:C:2011:124.

<sup>44</sup> *Ibid*, para 42.



Member States. This would deprive them of the genuine enjoyment of their rights.

Although *Carpenter* and *Ruiz Zambrano* were strongly influenced by the Court's aim to protect the right to family life,<sup>45</sup> the technique used in both cases is similar to the market access test. In both cases, the Court reasoned from restriction to scope, and there was no clear distinction between the two steps. The burden of proof then shifted to the Member State to show that the restrictions could be justified and were proportionate.

## 2. Horizontal Direct Effect: Interaction between Direct Effect and Restriction

In the last decades, the free movement provisions have increasingly been applied to the actions of private parties. While there has never been much doubt that the free movement provisions had vertical direct effect, the extent to which private parties were also bound by them has been a topic of significant debate.<sup>46</sup> Already in 1974, the Court held in *Walrave and Koch* that the free movement provisions did not only apply to State measures, but that they also applied to actions of private parties that were 'aimed at regulating in a collective manner gainful employment and the provision of services'.<sup>47</sup> The Court based this on the need to preserve the effective and uniform application of the free movement provisions.<sup>48</sup> In some Member States certain activities were regulated by public authorities, while in other Member States these activities were regulated by private parties.<sup>49</sup> The actions of both

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<sup>45</sup> Spaventa, 'From Gebhard to Carpenter' (n 7) 767-768.

<sup>46</sup> See Bacquero Cruz (n 3); Krenn (n 3); Mirjam De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination' (2011) 18 Maastricht Journal of European and Comparative Law 109; Eva Lohse, 'Fundamental Freedoms and Private Actors – towards an 'Indirect Horizontal Effect' (2007) 13 European Public Law 159; Gareth Davies, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract' (2012) 3 European Review of Private Law 805; Jukka Snell, 'Private Parties and the Free Movement of Goods and Services' in Mads Andenas and Wulf-Henning Roth (eds), *Services and Free Movement in EU Law* (Oxford University Press 2002).

<sup>47</sup> Case 36/74 *Walrave and Koch* (n 15), paras 17-18.

<sup>48</sup> Stefaan van den Bogaert, 'Horizontality: The Court Attacks?' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 123-152.

<sup>49</sup> Case 36/74 *Walrave and Koch* (n 15), para 19.



public and private parties had to be open to review under free movement law to ensure that the free movement provisions were applied effectively and uniformly.

In *Walrave and Koch*, it appears that two criteria were used to determine whether the actions of a private party could be reviewed under free movement law. First of all, the actions had to regulate employment or services in a collective manner. Secondly, the obstacles to free movement had to result from 'the exercise of legal autonomy' of private parties. Presumably, this meant that the private party had to enjoy a position of independence from other institutions – in particular, from the State.

The two criteria in *Walrave and Koch* were never meant to be formalistic – they were always supposed to be functional. The problem with the criteria is that the Court has never defined what it means by 'collective regulation' and 'legal autonomy'. The *Walrave and Koch* formula is used to justify the application of the free movement to private parties without any attempt by the Court to show that these private parties are involved in collective regulation and that they exercise legal autonomy.<sup>50</sup> The criteria are no more than an empty slogan that is used to justify horizontal direct effect. As a result, it is unclear precisely how the criteria should be interpreted. How broad should the scope of the actions of private parties be for their actions to be regarded as 'collective regulation'?<sup>51</sup> If a private party is exercising regulatory power on the basis of State legislation that defines its powers and scope of action, does this private party enjoy 'legal autonomy'? These are all important questions that should be relevant to deciding whether the free movement provisions can be applied to horizontal disputes. The Court, however, has consistently ignored them. Rather, it has adopted an approach

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<sup>50</sup> Barend van Leeuwen, 'Private Regulation and Public Responsibility in the Internal Market' (2014) 33 Yearbook of European Law 277, 282.

<sup>51</sup> Catherine Barnard, 'Viking and Laval: An Introduction' (2008) 10 Cambridge Yearbook of European Legal Studies 462, 473; Anne CL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 Industrial Law Journal 26, 136.

based on the *impact* or *effect* of the actions of private parties on the exercise of free movement right by other private parties.<sup>52</sup>

This approach, based on an assessment of the effect of private parties' actions on the internal market, involves a similar kind of 'backwards' reasoning that was identified in the market access approach. It starts with the identification of a restriction, which is then used to justify the direct effect of the free movement provisions. There is no independent assessment of the direct effect issue – the impact of private action determines whether the free movement provisions are applicable.

This approach can most clearly be seen in *Fra.bo*.<sup>53</sup> Fra.bo was an Italian manufacturer of copper fittings that connected different pieces of water or gas piping. They wanted to place their products on the German market. The relevant German legislation on copper fittings required that the products be certified. Although they were not formally mentioned in the applicable legislation, the only body that offered this kind of certification was the Deutsche Vereinigung des Gas- und Wasserfaches ('DVGW'). Although Fra.bo's products were initially certified by DVGW, the certification was later withdrawn on the basis that Fra.bo did not comply with some of the requirements laid down in the technical standard that was used for certification by DVGW. Fra.bo wanted to challenge this standard under Article 34 TFEU. However, before they could do this, they had to show that Article 34 TFEU was directly effective against DVGW – in other words, that the certification activities of DVGW could be reviewed under Article 34 TFEU. A preliminary reference was made to the Court with the main question whether DVGW was bound by Article 34 TFEU in the exercise of its certification activities. The Court provided a positive reply to this question. The structure of its judgment clearly reveals the interaction between direct effect and restriction. The Court held that it had to be

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<sup>52</sup> Harm Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 *European Law Journal* 177. See also Laurence Gormley, 'Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?' (2015) 38 *Fordham International Law Journal* 993.

<sup>53</sup> Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV*, EU:C:2012:453.

determined whether 'the activities of a private-law body such as the DVGW [have] the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State'.<sup>54</sup> This statement makes it very clear that the question of direct effect has become dependent on the finding of a restriction. Article 34 TFEU was given direct effect *because* of the existence of a restriction.<sup>55</sup> Therefore, the two stages of direct effect and restriction have become merged. The result is again that DVGW was put in a position where it had to justify the restriction on Fra.bo's right to free movement of goods.

A similar approach can be seen in the Court's case law on the other freedoms. Two prominent examples are *Viking*<sup>56</sup> and *Laval*.<sup>57</sup> In these cases, Article 49 TFEU and Article 56 TFEU were applied to the activities of trade unions. In *Laval*, which concerned the right of a Latvian company to provide services in Sweden, the Court simply repeated the *Walrave and Koch* formula without investigating whether the trade unions in this case actually fulfilled the criteria.<sup>58</sup> As such, the Court did not investigate the role that the Swedish legislative framework played in the facilitation of the trade union's actions. Similarly, it did not analyse the complicated process of interaction between the Swedish State and the trade unions in the regulation of the labour market.<sup>59</sup> Article 56 TFEU was applied horizontally against the trade unions on the basis of the impact of their actions. The blockade created by the trade unions had made it impossible for Laval to provide services in Sweden.

In *Viking*, a Finnish ferry operator wanted to re-locate one of its ferries from Finland to Estonia. This would result in lower wages for the employees.

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<sup>54</sup> *Fra.bo SpA v Deutsche Vereinigung des Gas* (n 53) para 26.

<sup>55</sup> Barend van Leeuwen, 'From Status to Impact, and the Role of National Legislation: The Application of Article 34 TFEU to a Private Certification Organisation in Fra.bo' (2013) 4 *European Journal of Risk Regulation* 405, 407. See also van Leeuwen (n 50) 283.

<sup>56</sup> Case C-438/05 *Viking* (n 1).

<sup>57</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, EU:C:2007:809.

<sup>58</sup> *Ibid*, para 98.

<sup>59</sup> Barend van Leeuwen, 'An Illusion of Protection and an Assumption of Responsibility: The Possibility of Swedish State Liability after Laval' (2012) 14 *Cambridge Yearbook of European Legal Studies* 453.

Again, local trade unions – in co-operation with international trade unions – managed to prevent Viking from exercising its free movement rights. In *Viking*, the Court actually made an effort to apply the *Walrave and Koch* criteria to the case. First, the Court held that the actions of the trade unions were 'aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively'.<sup>60</sup> Second, although the trade unions were not public authorities, they 'exercise the legal autonomy conferred on them, inter alia, by national law'.<sup>61</sup> Nevertheless, the Court again integrated the concept of restriction into the direct effect analysis, when it stated that it did not matter that 'the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike'.<sup>62</sup>

Overall, in both cases, the Court was heavily influenced by the significant impact the actions of trade unions had had on the exercise of free movement rights by other private parties. The Court did not investigate whether it was legitimate to expect trade unions to comply with the free movement provisions in light of their role in the legislative framework which had been created by the Member States in which they were operating.

The result of this process of 'backwards' reasoning is that the concepts of direct effect and restriction have merged to such an extent that a finding of direct effect in horizontal situations automatically means that there is also a restriction. Again, this means that private parties will be required to justify the restriction and to show that it is proportionate. The broader consequence is that discussions about horizontal direct effect are no longer about the question of what sort of organisations or entities should be bound by the free movement provisions. The main focus has now shifted to the question of what impact is required for the free movement provisions to be applicable. The risk of such an approach is that private parties who are able to restrict free movement rights of other parties can be held accountable under free movement law. This includes the possibility of private liability for breaches of the free movement provisions. However, it is uncertain whether the

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<sup>60</sup> Case C-438/05 *Viking* (n 1), para 60.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, para 63.

imposition of liability on private parties is justified solely on the basis of an assessment of the impact of their actions.<sup>63</sup> It might be necessary to investigate more closely the context and the regulatory framework in which private action takes place. With an effects-based approach to direct effect, this important context is missing in the analysis.

### *3. Assimilation of Justifications: Interaction between Restriction and Justification*

The third process of interaction that will be analysed is the assimilation of Treaty and case law-based justifications. It will be shown that this involves a similar kind of backwards reasoning and merging of two stages of inquiry. Moreover, this process leads directly to the result that the outcome of cases is determined by the proportionality test.

In *Cassis de Dijon*, the Court held that indistinctly applicable measures could not only be justified by Treaty justifications, but also by mandatory requirements such as consumer protection or environmental protection.<sup>64</sup> It was based on the Court's recognition that the justifications listed in the Treaty were relatively limited and, moreover, that they did not reflect the current social and technological reality. The Court held that this could force Member States to take measures for reasons that were not anticipated at the time when the justifications were originally included in the Treaty. Furthermore, it reflects the idea that the internal market is about more than just market integration, and that it also respects non-economic values that are of importance not only to the Member States, but also to the EU. As a result, mandatory requirements provided a new source of justifications to Member States.<sup>65</sup> From the perspective of the Member States, the advantage of this source is that it is open-ended. In principle, it is always possible for a Member State to rely on a particular reason to restrict free movement. Through the case law it is possible to make a long list with very diverse mandatory requirements that have been accepted by the Court.<sup>66</sup> At the same time, the Court has always limited the kind of measures that could be justified

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<sup>63</sup> van Leeuwen (n 50) 294-296.

<sup>64</sup> Case 120/78 *Cassis de Dijon* (n 26), para 8.

<sup>65</sup> See also Joanne Scott, 'Mandatory or Imperative Requirements in the EU and the WTO' in Barnard and Scott (n 48) 269.

<sup>66</sup> See Barnard (n 21) 172-173.

by mandatory requirements – they could only justify indistinctly applicable or indirectly discriminatory measures. This is because distinctly applicable measures are considered to restrict free movement in the most serious way.

From early on, this rule has resulted in a tension between 'good reasons' and 'bad measures'. Even distinctly applicable measures are sometimes adopted for good reasons that have not been included in the Treaty. As a consequence, the Court has been confronted with a number of cases in which pressure was exercised by the Member State to accept that 'bad measures' had been adopted for good reasons. The Court has never expressly departed from the orthodox rule, but it has rather attempted to maintain 'a fiction of orthodoxy'. In doing so, the Court has reverted to a technique which is similar to the one it has used in market access and horizontal direct effect cases. It has reasoned backwards from justification to restriction. The two separate stages of inquiry have been merged with a view to provide the Member State the opportunity to justify the measure and to proceed to the proportionality test. In all cases, the process of merging the restriction and justification analysis necessarily meant that Member States were given the chance to show that their measures were proportionate. If this technique had not been used, the ground of justification would not have been accepted and the Court would not even have reached the proportionality stage.

One of the clearest examples of this technique is *PreussenElektra*.<sup>67</sup> In his Opinion, Advocate General Jacobs claimed that the classification of the restriction was separate from the assessment of the justification.<sup>68</sup> He used this to argue in favour of an approach whereby the Court would accept that mandatory requirements could be used to justify both distinctly and indistinctly applicable measures. His main argument in favour of this change was legal certainty – the current flexible application of the rule was unpredictable.<sup>69</sup> The main argument against this approach is that the Court would effectively be re-writing the Treaty, and that the Member States have

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<sup>67</sup> Case C-379/98 *PreussenElektra AG v Schleswag AG*, EU:C:2001:160.

<sup>68</sup> Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra* (n 68), para 225. He also argued that the Court had reasoned 'backwards' in Case C-2/90 *Commission v Belgium*, EU:C:1992:310.

<sup>69</sup> Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra* (n 68), para 229.



– despite numerous Treaty amendments – never made use of the possibility to include additional justifications in the Treaty.<sup>70</sup> This could lead to the conclusion that the Member States are actually quite satisfied with the current balance between the strict formulation of the rule and the application of the rule in practice. Regardless of whether the assimilation of the Treaty derogations and mandatory requirements is a good development, the focus will now be on the technique that the Court has used to 'keep up appearances'.

In *PreussenElektra*, Schleswig-Holstein – one of the German *Länder* – had adopted legislation that required energy suppliers in Germany to buy a certain percentage of renewable energy that had been produced in Germany. As such, the rule made a direct distinction between energy produced in Germany and energy produced in other Member States. Schleswig-Holstein wanted to justify this rule on the ground of environmental protection. However, a classification of the rule as distinctly applicable would prevent them from doing so, since environmental protection is not a Treaty derogation. For that reason, the Court deliberately avoided classifying the measure as distinctly applicable. All it did was to say that the measure was 'capable, at least potentially, of hindering intra-Community trade'.<sup>71</sup> The deliberate omission to mention the rule's distinct applicability enabled the Court to find that the restriction could be justified on the ground of environmental protection. However, the Court was well aware that this was a somewhat controversial move, and to mitigate its impact the Court also stated that environmental protection could in fact be regarded as part of the Treaty derogation to protect the health and life of humans, animals or plants. Overall, *PreussenElektra* provides a good example of a case where the Court's determination of the availability of a justification preceded its analysis of the restriction.

Although the discussion about the assimilation of justifications has been most prominent in the free movement of goods, there have also been cases in the other freedoms where the Court has used a similar approach. In *Kobll*,<sup>72</sup> a Luxembourg national applied for prior authorisation for his daughter to

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<sup>70</sup> Spaventa (n 3).

<sup>71</sup> Case C-379/98 *PreussenElektra* (n 67), para 71.

<sup>72</sup> Case C-158/96 *Raymond Kobll v Union des caisses de maladie*, EU:C:1998:171.



receive orthodontic treatment in Germany. Reimbursement of the costs of healthcare services in another Member State could only be obtained after prior authorisation had been given. Moreover, the procedure for prior authorisation did not apply to orthodontic treatment in Luxembourg. On that basis, the requirement clearly made a distinction between services received in Luxembourg and services received abroad. Despite this distinction, the Court stated that 'such rules deter insured persons from approaching providers of medical services established in another Member State and constitute, for them and their patients, a barrier to freedom to provide services'.<sup>73</sup> The classification of the restriction as a barrier was influenced by the fact that Luxembourg wanted to rely on an objective justification – maintaining the financial balance of the social security system. This would not have been possible if the rule had been classified as directly discriminatory or distinctly applicable. As a result, the Court again connected the concepts of restriction and justification to enable the Member State to provide a justification and to decide the case through the application of the proportionality test.

#### IV. THE CENTRALISATION OF PROPORTIONALITY IN THE INTERNAL MARKET

##### *1. The Centralisation of Proportionality and the Effet Utile of the Free Movement Provisions*

The analysis of the developments in free movement law has shown that the Court has used a similar technique in all three developments. Firstly, the Court has abandoned its consecutive approach to the structure of free movement law. The Court has used an approach which has been referred to as 'backwards' reasoning – it has reasoned backwards from one of the pillars of the structure of free movement law to what used to be a preceding stage of inquiry. Secondly, the Court has no longer made a clear distinction between what were previously distinct stages of inquiry. The two stages of inquiry have become fused or merged to such an extent that they can no longer be regarded as separate. The focus of the analysis so far has been on *how* these developments have taken place in free movement law. The next step will be

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<sup>73</sup> *Raymond Kohll v Union des caisses* (n 72) para 35.

to assess *why* these developments have taken place and what their consequences are. The aim will be to look at the motivation for the processes of restructuring that have taken place in free movement law, and to analyse their effects. Finally, a link will be made between the aim and the consequences of the processes of restructuring.

If the three developments are combined, it becomes clear that there is one concept that unites them all. This is the concept of restriction – the restriction stage of inquiry plays a central role in each of the developments. However, this role is not identical. With market access and horizontal direct effect, the Court has reasoned from restriction to scope and direct effect. As a result, the concept of restriction has become the starting point of the Court's analysis. This has been different for the assimilation of express derogations and public interest justifications, where the Court has reasoned from justification to restriction. As such, the concept of restriction was the destination – not the starting point. Nevertheless, the central position of the concept of restriction shows why the developments have taken place. The Court's main concern has been to protect the *effet utile* of the free movement provisions – to guarantee the effective functioning of the internal market. The term *effet utile* has often been used in a rather abstract way,<sup>74</sup> but a structural analysis shows which elements the Court considers important to guarantee the effective application of the free movement provisions. The impact of measures or actions on the exercise of free movement rights becomes crucial. The market access approach is based on an analysis of the impact of national rules on the ability of companies or individuals to exercise their free movement rights. Based on this presumption or finding of impact, cases are brought in the scope of free movement law. Similarly, horizontal direct effect has developed in such a way that the effect of the actions of private parties has become the Court's main yardstick in deciding whether private parties should be bound by the free movement provisions. In both situations, the impact of measures or conduct has encouraged the Court to rethink the structure of free movement law.

A similar argument cannot be made to explain the assimilation of the justifications. The reasoning from justification to restriction does not start

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<sup>74</sup> See Urška Šadl, 'The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law' (2015) 8 European Journal of Legal Studies 18.

by looking at the impact of actions. On the contrary, it directly affects the assessment of whether there is impact on free movement law. The classification of the breach is determined on the basis of the justification relied on by the Member State. The assimilation of the express derogations and public interest justifications shows that the Court considers the internal market – and the free movement provisions – as a balancing exercise between economic and non-economic interests. *Keck* already confirmed that the Court does not regard the internal market as a free market in which the unhindered pursuit of economic freedom can be exercised. The internal market is supposed to offer equal opportunities, but in offering equal opportunities different values – both economic and non-economic – should be taken into account. This means that the Court has to balance economic rights with social rights,<sup>75</sup> and economic rights with fundamental human rights.<sup>76</sup> The internal market in itself is a construct that involves a constant balancing exercise. As a result, it is not problematic for a justification relied on to have a direct impact on the Court's classification of the restriction, as long as this justification is consistent with the perceived aim of the internal market. As such, the aim of the free movement provisions is relied on to redefine the impact of measures on the internal market – and, in doing so, to redefine the concept of restriction in free movement law.

Finally, it should be analysed what the result of the restructuring of the structure of free movement law is. Each of the three developments makes it more likely – if not inevitable – that the outcome of free movement cases is determined by the application of the proportionality test. The assimilation of the justifications results directly in the application of the proportionality test – if the ground of justification is accepted and leads to a reclassification of the restriction, the immediate next step for the Court is to assess the proportionality of the measure. The market access approach and horizontal direct effect do not immediately lead to the application of the proportionality test. After all, it will first have to be shown that there is a ground of justification. However, in combination with the assimilation of the

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<sup>75</sup> Case C-438/05 *Viking* (n 1), and Case C-341/05 *Laval* (n 57).

<sup>76</sup> Case C-112/00 *Eugen Schmidberger v Republik Österreich*, EU:C:2003:333, and Case C-36/02 *Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614.

justifications, it is likely that the proportionality test will be decisive. As a result, the proportionality test has obtained a more prominent role in the structure of free movement. It could almost be said that 'all roads lead to proportionality'. This centralisation of proportionality shows that the Court is confident to rely on the proportionality test to decide free movement cases.

This central role for proportionality can be linked to the aim of the processes of restructuring. The increasing significance of proportionality shows that the Court believes that the effective application of the free movement provisions can best be guaranteed by the proportionality test. A direct link is made between the proportionality test and the *effet utile* of free movement law. This is not entirely surprising. Two important reasons for the Court's increasing reliance on proportionality can be identified. First, the proportionality test involves a balancing exercise. It provides a tool through which the various interests in a case can be balanced.<sup>77</sup> As such, it is consistent and compatible with a vision of the internal market as a balancing exercise between economic and non-economic interests.<sup>78</sup> This balancing exercise can directly be achieved through the application of the proportionality test.<sup>79</sup> Second, the Court has developed the proportionality test in such a way that its application is inherently flexible.<sup>80</sup> It is flexible in at least two ways. The intensity of review can be adapted – in more sensitive areas the Court is more willing to adopt a hands-off approach. Second, the Court has been flexible in deciding *who* should conduct the proportionality test – the Court itself or the national court. In certain cases, the Court is prepared to leave a broad margin of assessment to the national court, while in other cases the Court more or less reserves the proportionality test to itself. From this perspective, it is not surprising that proportionality has obtained such an important role in free movement law.

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<sup>77</sup> See Tridimas (n 4).

<sup>78</sup> Loïc Azoulay, 'The Court of Justice and the Social Market Economy: The Emergence of an Idea and the Conditions for its Realization' (2008) 45 *Common Market Law Review* 1335.

<sup>79</sup> Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 72 *Columbia Journal of Transnational Law* 72, 88.

<sup>80</sup> Wolf Sauter, 'Proportionality in EU Law: A Balancing Act' (2013) 15 *Cambridge Yearbook of European Legal Studies* 439.

## *2. The Consequences of the Centralisation of Proportionality*

It has been shown how and why proportionality has obtained a central position in the structure of free movement law. Two dimensions of this process of centralisation will now be analysed – the first is more procedural, the second more substantive. They are closely linked to the two characteristics of the proportionality test – the balancing exercise and its flexible application – that have made the test suitable for a central role in free movement law.

The first dimension that is affected by the centralisation of proportionality is the relationship between the Court and national courts. If free movement cases are increasingly decided through the application of the proportionality test, this has an impact on the role that national courts play in deciding free movement cases. There is a real risk that centralisation of the proportionality test might similarly result in a more central role for the Court. This is, first of all, because it is difficult for national courts to assess to what extent the proportionality test is within their own control. It is very difficult to systemise the Court's case law in such a way that national courts can say with a certain degree of certainty that they are able to conduct the proportionality test themselves. Secondly, it is very complicated for national courts to decide if the outcome of the proportionality test is sufficiently clear not to have to make a preliminary reference to the Court. The outcome of the balancing exercise involved in the proportionality test is not easy to predict.<sup>81</sup> This would be another reason for national courts to make a reference to Luxembourg. The result is that the Court obtains a central role in deciding free movement cases. Since cases in Luxembourg are not exactly dealt with quickly, it is doubtful whether this is helpful for the effective application of the free movement provisions. Furthermore, because of the inherent flexibility of the application of the proportionality test, a more central role for the Court does not help from the perspective of the uniform application of free movement law. The outcome of the proportionality test is often fact-specific. Therefore, cases that are decided through the proportionality test are generally not of much assistance to national courts or litigants who might be involved in litigation with similar characteristics.

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<sup>81</sup> Sauter (n 80).

The second dimension that is affected by the centralisation of proportionality is the relationship between the State and its citizens. More precisely, it affects the relationship between those who make rules that have an impact on the internal market – this could be the State or private parties – and those who are affected by these rules. The flexible application of the proportionality test leads to a certain degree of substantive uncertainty. This uncertainty makes it more difficult for parties with regulatory power to decide how to exercise that power. Similarly, it becomes more difficult for those who are affected by rules to decide whether to challenge them. As such, a central role for proportionality also affects legal certainty – not just in the relationship between courts, but also in the relationship between rule-makers and those affected by the rules. The significant variation in the intensity with which national rules or measures are reviewed makes it difficult to decide whether rules are proportionality-proof. It puts a significant burden on those who defend national rules and those who want to attack them to predict with what intensity rules could be reviewed and what the outcome of the review will be.<sup>82</sup> Moreover, legal certainty is necessary for individuals or companies to have the confidence to exercise their free movement rights. Although the proportionality test will always be important in free movement law, the other pillars of the structure of free movement law create more legal certainty in the internal market.

Overall, the centralisation of proportionality affects both the uniform application of the free movement provisions and legal certainty. These two concepts are also fundamental to the *effet utile* of the free movement provisions. Although the proportionality test might at first appear to be a suitable tool to guarantee the effective application of the free movement provisions, too much and too exclusive reliance on proportionality is ultimately not in the best interests of the internal market.<sup>83</sup> For that reason, the Court should not be afraid to rely more on the concepts of scope, direct

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<sup>82</sup> Jan Jans, 'Proportionality Revisited' (2000) 27 Legal Issues of Economic Integration 239. See also Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105.

<sup>83</sup> See also Tor Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158.

effect and justification to decide free movement cases. The advantage of these pillars of the structure is that their application is more predictable.

The centralisation of proportionality has resulted in the neglect of some of the other tools in the structure of free movement law. The Court has to provide more guidance on which cases fall within the scope of the free movement provisions,<sup>84</sup> on the question in which situations private parties are bound to comply with the free movement provisions, and on which justifications are available to justify restrictions on free movement. As regards the scope of free movement law, the Court should be more precise about the cross-border impact that is required for cases to come within the scope of the free movement provisions. Clarification is required about the circumstances in which a hypothetical impact on free movement is sufficient. For horizontal direct effect, the Court should provide more substance to the concepts of collective regulation and legal autonomy laid down in *Walrave and Koch*. Private parties have to know in which circumstances or under what conditions they are expected to comply with the free movement provisions. The Court has not provided the required clarification in cases like *Viking*, *Laval* and *Fra.bo*. Finally, the Court should provide a list of mandatory requirements that can be used to justify distinctly applicable or directly discriminatory restrictions. If the assimilation of justifications was only necessary to provide a more prominent role to environmental protection – which is often considered the 'special one' among mandatory requirements – the Court should explicitly acknowledge this. To conclude, the Court has to give more guidance on the application of the pillars of the structure. Such guidance cannot be developed if cases are predominantly decided by relying on the proportionality test.

In the end, a more developed and precise approach to the scope of free movement, to direct effect and to the justifications will improve legal certainty in the internal market. If these concepts are developed more precisely and coherently, this will increase the confidence of national courts in applying them. Furthermore, it will provide more legal certainty to public and private parties that are exercising regulatory power in the internal market. In combination with the proportionality test, this structure of free

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<sup>84</sup> A good start has been made in Case C-268/15 *Fernand Ullens de Schooten v État belge*, ECLI:EU:C:2016:874.



movement law provides a solid foundation that is able to guarantee the effective functioning of the internal market.

## V. CONCLUSION

Market access, horizontal direct effect and the assimilation of justifications – three phenomena that have dominated discussions about free movement law in the last decades. This article has not attempted to provide revolutionary new definitions or interpretations of these developments. Rather, it has sought to combine them by choosing the perspective of the structure of free movement law. This perspective shows that the three developments are connected and have had the same consequences. The analysis has resulted in three main conclusions.

Firstly, the Court has used the same technique in market access, horizontal direct effect and assimilation of the justifications cases. This technique is based on 'backwards' reasoning from one pillar of the structure to what used to be a preceding pillar of the structure. The consecutive order of the structure of free movement law has been abandoned. Moreover, what used to be two separate stages of inquiry are no longer regarded as separate. They have become merged in such a way that it has become difficult to distinguish between them.

Secondly, for all three developments, the concept of restriction is either the 'starting point' or the 'destination' of the Court's reasoning. As a result, it is clear that the Court is concerned with guaranteeing the effective application of the free movement provisions. In order to do this, it is necessary to keep the aim of the free movement provisions in mind. They represent a balancing exercise between economic and non-economic interests. Therefore, it is not surprising that the proportionality test has become the Court's favourite tool to decide free movement cases.

Thirdly, the centralisation of proportionality in the internal market has important consequences. It affects the relationship between the Court and national courts, and it also affects the relationship between the State and its citizens. Although it is understandable that the flexibility of the proportionality test makes it a suitable tool to decide free movement cases, the uniform application of the free movement provisions and

legal certainty are not necessarily improved by a central role for proportionality. As a consequence, the Court should be encouraged to not only rely on the proportionality test to decide free movement cases, but also to use other concepts in the structure of free movement law. This is not criticism of the proportionality test as such, but rather of the role that proportionality has been given. The centralised role of proportionality in free movement law should be reconsidered.



# TACKLING DIVERSITY INSIDE WTO: GATT MORAL CLAUSE AFTER *COLOMBIA – TEXTILES*

Silvia Nuzzo\*

*After lying dormant for more than five decades, WTO 'public morals' exceptions have been more frequently invoked in recent times. During the last fifteen years, the number of disputes settled through the application of GATT 1994 Art. XX(a) and the homologue GATS Art. XIV has gone from zero to four – and it is likely to keep growing. This could be partially due to WTO expanding membership which facilitates trade connections between countries with different, sometimes opposite cultural and social backgrounds. The interpretation and application of the moral clause entail difficult challenges for WTO Panels and for the Appellate Body (AB). They are called to find a balance not only between trade and non-trade values, but also and most of all between WTO Members' regulatory autonomy and their standard of review. However, WTO case law shows an ongoing struggle to find the best way to accomplish this task. Moving on from the analysis of the Colombia – Textiles dispute, this article will discuss the judicial application of the 'moral clause'. It will compare Colombia – Textiles with the former case law, paying particular attention to some crucial aspects of the AB's legal reasoning in Colombia – Textiles and their potential implications for future case law.*

**Keywords:** WTO, Art. XX GATT, public morals, standard of review

## TABLE OF CONTENTS

I. INTRODUCTION .....	268
II. COLOMBIA – TEXTILES: CASE SUMMARY .....	272
III. 'PUBLIC MORALS': IN SEARCH OF A DEFINITION .....	274
1. The Definition of 'Public Morals' .....	274
2. Proof of 'Public Morals' .....	279
V. APPLYING THE MORAL CLAUSE .....	283
1. The 'Design and Structure' of the Measure .....	283

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2. <i>The Necessity Analysis</i> .....	285
V. FINAL REMARKS .....	291

## I. INTRODUCTION

After both Liberia and Afghanistan successfully negotiated their accession terms in July 2016,<sup>1</sup> the World Trade Organization (WTO) now numbers a total of 164 Members, while several other countries are expected to join in forthcoming years.<sup>2</sup> During the last few decades, the WTO has thus developed into a complex mosaic of heterogeneous countries, which include a variety of cultures, religions, and customs.

The growing diversity inside the WTO gives rise to a challenge of the highest significance: given that a State may restrict trade in order to protect social, cultural or religious preferences, how should regulatory autonomy be balanced with core WTO substantive obligations, such as the Most-Favoured-Nation clause and the National-Treatment clause? To put it in other terms, where should the line be drawn between policy choices by Member States and the mere violation of trade liberalization commitments *vis-à-vis* the other Members?

WTO Members and adjudicating bodies have at their disposal the general exceptions enshrined in Article XX GATT to draw such a line. This provision allows WTO Members to pursue national policy objectives through trade restrictive measures that would otherwise be inconsistent with GATT, provided that the measures at stake comply with the requirements laid down by the Article.<sup>3</sup> The provision sets out an exhaustive list of

<sup>1</sup> See respectively, <[https://www.wto.org/english/news\\_e/news16\\_e/acc\\_lbr\\_14jul16\\_e.htm](https://www.wto.org/english/news_e/news16_e/acc_lbr_14jul16_e.htm)> and <[https://www.wto.org/english/news\\_e/news16\\_e/acc afg\\_29jul16\\_e.htm](https://www.wto.org/english/news_e/news16_e/acc afg_29jul16_e.htm)> accessed 1 October 2016.

<sup>2</sup> For a glance of the countries currently negotiating their accession, see <[https://www.wto.org/english/thewto\\_e/countries\\_e/org6\\_map\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm)> accessed 1 October 2016.

<sup>3</sup> See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). Also GATS provides for the same exceptions in Art. XIV: see General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement

objectives from (a) to (j) that may justify the enforcement of a policy deviating from a Member's obligations. In particular, for the purpose of this Article, paragraph (a) states that a *prima facie* protectionist measure may be justified if 'necessary to protect public morals'. Referred to as the 'moral clause', this provision allows cultural, religious and social considerations of a geographically-localized nature to be balanced against the commitments of free trade.<sup>4</sup>

The last of the four disputes settled applying the moral clause is *Colombia – Textiles*.<sup>5</sup> It should be noted that these four episodes only occurred during the last fifteen years, whereas WTO Members have been familiar with some of the other exceptions since the GATT era. For instance, they have frequently invoked paragraphs (b), (d) and (g) in disputes concerning environmental protection.<sup>6</sup> The first paragraph justifies trade-restrictive measures necessary

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Establishing the World Trade Organization, Annex 1B, 284 (1999), Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

<sup>4</sup> See *ex multis*, Jeremy C Marwell, 'Trade and Morality: the WTO Public Morals Exception after *Gambling*' (2006) 81 New York University Law Review 816.

<sup>5</sup> See *US – Gambling* (2003); *China – Audiovisual Products* (2007); *EC – Seal Products* (2009).

<sup>6</sup> See eg *Canada – Herring and Salmon* (1986); *Thailand – Cigarettes* (1989); *Tuna – Dolphin I and II* (1991 and 1992); *US – Car Taxes* (1994); *US – Gasoline* (1995); *US – Shrimps* (1997); *EC – Asbestos* (1998); *Brazil – Retreated Tyres* (2005); *China – Raw Materials* (2009); *China – Rare Earths* (2012). As above, the dates refer to the year in which consultations were requested. Since this body of decisions is now well established, the relevant literature on the issue is now vast: see eg Manjiao Chi, 'Exhaustible Natural Resource' in *WTO Law: Article XX (g) GATT Disputes and Their Implications* (2014) Journal of World Trade 939; Arwel Davies, 'Interpreting the Chapeau of GATT Article XX in Light of the New Approach in *Brazil – Tyres*' (2009) 43 Journal of World Trade 507; Lorenzo Schiano di Pepe, 'The World Trade Organisation and the Protection of the Natural Environment: Recent Trends in the Interpretation of GATT Article XX(b) and (g) GATT' (2000) Transnational Law & Contemporary Problems 272; Ilaria Espa, 'The Appellate Body Approach to the Applicability of Article XX GATT In the Light of China - Raw Materials: A Missed Opportunity?' (2012) Journal of World Trade 1399; Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate' (2002) Columbia Journal of Environmental Law 491.

to protect 'human, animal, or plant life or health'; the second addresses measures necessary to secure compliance with laws or regulations that are not inconsistent with the GATT; finally, the third refers to measures related to the conservation of exhaustible natural resources.<sup>7</sup> The widening WTO membership could have played a role in the growing of trade-morality conflicts among WTO Members, bringing together States with opposite socioeconomic compositions and cultural views.<sup>8</sup>

The traditional interpretation of Art. XX consists of a two-tier test: the measure must first be justified under one of the Art. XX exceptions, before being tested against the *chapeau* of Art. XX so as to verify that the measure is not applied in a manner which would constitute 'a means of arbitrary or unjustifiable discrimination'.<sup>9</sup> This judicial test was developed and applied for the first time by the AB in the case *US – Gasoline* and it has never been altered by the subsequent decisions.<sup>10</sup> Subsequent case law even bolstered this interpretation. In particular, the AB in *US – Shrimps* claimed that 'the sequence of steps indicated above in the analysis of a claim of justification under Art. XX GATT reflects, not inadvertence or random choice, but rather the *fundamental structure and logic* of Art. XX GATT'.<sup>11</sup>

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<sup>7</sup> For an overview of Art. XX exceptions and the relative case law, see Petros C Mavroidis, George A Bermann and Mark Wu, *The Law of the World Trade Organization (WTO) – Documents, Cases & Analysis* (WEST: American Casebook Series 2010) 692-709.

<sup>8</sup> See Marwell (n 4) at 816; Mark Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Moral Clause Doctrine' (2008) 33 *The Yale Journal of International Law* 215.

<sup>9</sup> As Art. XX *chapeau* is common to all the subparagraphs, it has been frequently applied and its interpretation is already consolidated. Among the most relevant doctrine concerning Art. XX *chapeau*, see Lorand Bartels, 'Current Developments: The Chapeau of the General Exceptions in the WTO GATT and GATS Agreement: A Reconstruction' (2015) (109)(1) *The American Journal of International Law* 95; Arwel (n 6) 518-521; Petros C Mavroidis, *Trade in Goods: Second Edition* (Oxford University Press 2012), 359ff; Mavroidis, Bermann and Wu (n 7) 685-692, 709-718.

<sup>10</sup> *US – Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996, at 22.

<sup>11</sup> See *US – Shrimp*, Report of the Appellate Body, WT/DS58/AB/R, 12/10/1998, para 119 (emphasis added). The Panel in *China – Raw Materials* supported this approach, maintaining that the legal consequence of the two-tier test is that, unless



Moreover, when this test is applied to the moral clause, the first tier of the test is divided into two additional steps. First, one needs to assess whether the measure is 'designed to protect public morals'; secondly, whether the measure is 'necessary to protect public morals', i.e. not disproportionately trade restrictive.<sup>12</sup> In addition, both the 'design' and the 'necessity' steps are themselves divided into two tiers. With regard to the design of the measure, WTO judicial bodies need to verify whether the policy objective concerns the protection of public morals as defined and applied by a regulating Member 'in its territory, according to its own system and scale of values'.<sup>13</sup> Then, they need to assess whether its design and structure allow the measure to effectively protect public morals, i.e. whether there is a *causal relationship* between the objective and the measure.<sup>14</sup> When assessing its necessity, in the first place a Panel needs to go through a 'process of weighing and balancing a series of factors', where the importance of the value at stake is balanced against the measure's trade-restrictiveness.<sup>15</sup> In the second place, it needs to ascertain whether a less trade-restrictive measure could achieve the same level of protection pursued by the responding State, without entailing unreasonably higher enforcement costs.<sup>16</sup>

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compliance with a subparagraph has been demonstrated, the test for the consistency of the measure with the *chapeau* is even superfluous: see *China – Raw Materials*, Report of the Panel, WT/DS394/R, WT/DS395/R, WT/DS398/R, 5/07/2011, para 7.469.

<sup>12</sup> *EC – Seal Products*, Report of the Appellate Body, WT/DS400/AB/R, WT/DS401/AB/R, 22/05/2014, para 5.169; *Colombia – Textiles*, Report of the Appellate Body, WT/DS461/AB/R, 07/06/2016, para 5.67.

<sup>13</sup> *EC – Seal Products*, Report of the Panel, WT/DS400/R, WT/DS401/R, 25/11/2013, paras 7.380–7.831.

<sup>14</sup> *Colombia – Textiles*, Report of the Panel, WT/DS461/R, 27/11/2015 paras 7.295, 7.297, 7.340 ff. See the cited Report for further references to previous case law. Among scholars, see eg Mads Andenas and Stefan Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective' (2007) 20 *Cambridge Review of International Affairs* 71, 74ff.

<sup>15</sup> *Korea – Various Measures on Beef*, Report of the Appellate Body, WT/DS161/AB/R, 11/12/2000, para 164.

<sup>16</sup> This part of the test was developed by the Panel in *US – Section 337 of the Tariff Act 1930*: see *US – Section 337 of the Tariff Act 1930*, Report of the Panel, L/6439 - 36S/345, 7/11/1989, para 5.26. It was later improved by the Panel in *US – Gasoline*: see *US – Gasoline*, Report of the Panel, WT/DS2/R, 29/01/1996, paras 6.20ff.

*Colombia – Textiles* represents the ultimate application of the judicial test. After a brief case summary, Part I of this article will try to define the notion of 'public morals' and explain how its burden of proof may be satisfied. Part II will then focus on the 'design and structure' of the measure and the 'necessity' test of Art. XX(a), putting the spotlight on the AB's legal reasoning in *Colombia – Textiles*. The latter will be also compared to the former case law, in order to highlight the points of convergence and divergence. In particular, when applying the traditional judicial test, the AB tried to clarify some of its crucial aspects. However, the AB's approach opens the door to more questions than it answers. In particular, the AB's interpretation of the necessity test seems affected by considerable flaws in logic. This article will thus try to shed light on the potential implications of the AB's conclusions, and also to propose some interpretative adjustments to the traditional paradigm.

## II. COLOMBIA – TEXTILES: CASE SUMMARY

After consultations with Colombia ended unsuccessfully, on 19 August 2013 Panama requested the Dispute Settlement Body to establish a Panel with respect to the imposition by Colombia of a compound tariff affecting the importation of textiles, apparel and footwear.<sup>17</sup> According to Panama's allegations, due to the tariff's composition and the values applied, the measure exceeded the levels bound in Colombia's Schedule of Concessions with respect to the relevant products. Consequently, Panama complained that Art. II 1(a) GATT had been violated.<sup>18</sup> According to Art. II GATT, a WTO Member must grant to all other Members a treatment no less favourable than what has been agreed under its own goods schedule. This requires the application of ordinary customs duties not higher than those provided in such schedules. The Panel agreed with Panama, and thus found the measure in violation of Art. II 1 GATT.<sup>19</sup>

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<sup>17</sup> *Colombia – Textiles*, Request for the establishment of a panel by Panama, WT/461DS/3, 20/08/2013.

<sup>18</sup> Ibid; For a deeper understanding of how the compound tariff would be applied by Colombia and how it would result in a violation of Art. II:1(a) and (b) according to Panama, see *Colombia – Textiles*, Report of the Panel (n 14) paras 7.42-7.54.

<sup>19</sup> *Colombia – Textiles*, Report of the Panel, (n 14) para 7.189.

Colombia, for its part, invoked *inter alia* as a defense the public moral exception under Art. XX(a) GATT. It argued that the compound tariff was necessary to prevent money laundering, one of the most profitable sources of financing for drug traffickers and organized criminal groups.<sup>20</sup> Money laundering, drug trafficking and terrorism were activities regarded as illegal not only in the Colombian society, but also by the international community. Through the imposition of a heavier tax on imports below a certain price threshold, the compound tariff aimed to discourage imports at artificially low prices and thus it was supposed to prevent laundering.<sup>21</sup> Setting prices too low would trigger the application of the compound tariff, which would make them soar to the level of ordinary market prices. Therefore, Colombia maintained that its measure was related to 'standards of right and wrong conduct', which corresponds with the definition of 'public morals' the Panel gave in *US – Gambling*.<sup>22</sup>

The Panel, however, did not find the moral clause applicable to the measure at stake, as it concluded that Colombia had failed to demonstrate not only that the compound tariff was designed to combat money laundering, but also that it was necessary to achieve the intended aim.<sup>23</sup> Moreover, the Panel found that the compound tariff constituted a means of arbitrary and unjustifiable discrimination under Art. XX *chapeau*, since Colombia was not able to justify the exceptions provided by its tariff regulation.<sup>24</sup>

The Panel thus applied the traditional two-tier test to assess the compatibility of the challenged measure with the moral clause. The AB then confirmed the Panel's findings adopting the same paradigm, even if its legal

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<sup>20</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.195 ff.

<sup>21</sup> *Ibid*, paras 7.351 – 7.352.

<sup>22</sup> *Ibid*, paras 7.205-7.206; *US – Gambling*, Report of the Panel, WT/DS285/R, 10/11/2004, para 6.465.

<sup>23</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.440 and 7.470.

<sup>24</sup> *Ibid*, paras 7.591ff. For example, the compound tariff is not applicable to imports originating from countries which have signed a free trade agreement with Colombia. The AB did not scrutinise the compound tariff under Art. XX *chapeau*, as it did not comply with subparagraph(a) requirements, and therefore the second step of the test was deemed unnecessary. See *Colombia – Textiles*, Report of the Appellate Body, (n 12), para 6.11.

reasoning diverged from the Panel's in some respects.<sup>25</sup> The interpretation and application of Art. XX GATT judicial test substantially followed the previous case law. However, the AB tried to clarify some aspects of the first step of the test. Due to their possible influence on future case law on 'public morals', they will be analysed in depth in the following sections, after a preliminary clarification of the notion of 'public morals'.

### III. 'PUBLIC MORALS': IN SEARCH OF A DEFINITION

#### 1. *The Definition of 'Public Morals'*

'Public morals' was defined for the first time by the Panel in *US – Gambling* as 'standards of right and wrong conduct maintained by or on behalf of a community or nation'.<sup>26</sup> The dispute concerned a US ban on the cross-border supply of gambling and betting services. The US invoked Art. XIV(a) GATS, maintaining that online gambling could benefit organised crime and affect the behaviour of children and compulsive gamblers.<sup>27</sup> Besides developing a definition, the Panel maintained that 'the content of [public morals] can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'.<sup>28</sup> Therefore, WTO Members 'should be given some scope to define and apply for themselves [the concept of public morals] in their respective territories, according to their own systems and scales of values'.<sup>29</sup> First the AB in *US – Gambling*, then the subsequent case law confirmed this definition, making *US – Gambling* a leading case.<sup>30</sup> In *Colombia – Textiles* the Panel explicitly recognized 'the

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<sup>25</sup> See *infra*.

<sup>26</sup> *US – Gambling*, Report of the Panel (n 22) para 6.463. The Panel resorted to the definition given by the *Oxford English Dictionary*, in order to interpret the notion of 'public morals' according to Art. 31.1 of the *Vienna Convention of the Law of Treaties* (hereinafter VCLT).

<sup>27</sup> *US – Gambling*, Report of the Panel (n 22) para 3.211.

<sup>28</sup> *Ibid*, para 6.461.

<sup>29</sup> *Ibid*.

<sup>30</sup> See *US – Gambling*, Report of the Appellate Body, WT/DS285/AB/R, 07/04/2005, para 296. *China – Audiovisual Products*, Report of the Panel, WT/DS363/R, 12/08/2009, para 7.759; *EC – Seal Products*, Report of the Panel (n 13) para 7.382, expanding the *US – Gambling* definition of 'public morals' also to Art. 2.2 *Agreement*

freedom of WTO members to define their own concept of public morals, in the light of factors such as the social, cultural, ethical and religious values prevailing in a society at a given moment in time'.<sup>31</sup> It thus confirmed the definition given in *US – Gambling*.

In this case law, WTO adjudicators undoubtedly aimed to grant a high degree of deference to national authorities in such a sensitive and uncertain matter like 'public morals'. What amounts to right or wrong conduct changes from one country to another, and it is often the result of cultural and political trade-offs. An international court thus finds itself ill-equipped to substantively scrutinise what may constitute 'public morals'. Indeed, it lacks democratic legitimacy,<sup>32</sup> while national courts have more awareness of national hierarchies of values as well as fact-finding expertise.<sup>33</sup>

Panels and the AB have thus considered applicable a non-intrusive standard of review for the specific assessment of what constitutes 'public morals'. In the context of international law, standard of review may be understood as the degree of deference or discretion that an international court accords to national legislators.<sup>34</sup> In other terms, it expresses the willingness (or unwillingness) of an international court to substitute their assessments for

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on *Technical Barriers to Trade* (hereinafter *TBT Agreement*), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 UNTS 120.

<sup>31</sup> *Colombia – Textiles*, Report of the Panel (n 14), para 7.338.

<sup>32</sup> Robert Howse and Kalypso Nicolaidis, 'Legitimacy through 'Higher Law'? Why Constitutionalising WTO Is a Step Too Far', in Thomas Cottier and Petros C Mavroidis (eds.), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press 2003) 307, 332ff.; Michael Ioannidis, 'Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach', in Lukasz Gruszczynski and Wouter Werner (eds.), *Deference in International Courts and Tribunals* (Oxford University Press 2014), 101; Andreas von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 *International Journal of Constitutional Law* 1023.

<sup>33</sup> Andrew T Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 *Cornell International Law Journal* 45, 64-69.

<sup>34</sup> Sungjoon Cho, 'Global Constitutional Lawmaking' (2010) 31 *University of Pennsylvania Journal of International Law* 621, 643-644; Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law', (2004) 7 *Journal of International Economic Law* 491, 493.

that of national authorities.<sup>35</sup> It is an interpretative tool that comes into question every time international tribunals are called to examine whether a domestic measure complies with international law. It may thus address both questions of fact and questions of law, depending on the issue the adjudicating body is facing.<sup>36</sup> To quote the AB in *EC – Hormones*, the standard of review affects 'the balance established [...] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competence retained by the Members for themselves',<sup>37</sup> thus allocating the power to decide upon factual and legal issues.

While in the context of public morals a high degree of deference may seem inevitable, WTO adjudicating bodies have also taken the direction of deferential review into other fields. An example could be that of the assessment of scientific evidence in the recent case law on risk regulation under both GATT and the *Agreement on Technical Barriers to Trade* (TBT Agreement).<sup>38</sup> In these disputes the AB focused on the reasonableness and coherence of the regulatory choice under scrutiny rather than verifying the correctness of the scientific data.<sup>39</sup> This approach allowed them to be more respectful of domestic policies, since a measure may validly be based on

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<sup>35</sup> Ioannidis (n 32) 94.

<sup>36</sup> See Matthias Oesch, 'Standards of Review in WTO Dispute Resolution' (2003) 6 *Journal of International Economic Law* 635, 639ff.

<sup>37</sup> *EC – Hormones*, Report of the Appellate Body, WT/DS26/AB/R, 16/01/1998, paras 115-117. According to the AB, the intensity of the applicable standard of review may vary between the two opposite poles of '*de novo* review' and 'total deference'. The former allows a Panel to completely substitute its own findings for those of the national authority and to arrive to a different factual or legal conclusion. The latter means that judicial review should not substantially interfere with national authorities findings of facts, legal interpretation or ultimate decisions, but contrariwise should be limited to the formal examination of whether procedural requirements for the adoption of a measure were complied with. See also Oesch (n 36) 638.

<sup>38</sup> *Agreement on Technical Barriers to Trade* (TBT Agreement), 1868 U.N.T.S. 120.

<sup>39</sup> See eg, *EC – Asbestos*, Report of the Appellate Body, WT/DS135/AB/R, 5/04/2001, para 168; *Brazil – Retreated Tyres*, Report of the Panel, WT/DS332/R, 17/12/2007, paras 7.61, 7.68; *US – Tuna II (Mexico)*, Report of the Panel, WT/DS381/R, 13/06/2012, para 7.504.



minority scientific opinions rather than mainstream science.<sup>40</sup> Given that deference is necessary in a field that may rely on scientific objectivity, *a fortiori* it may be appropriate when it comes to morality-related disputes.

Other international courts have proved to be highly deferential as well. For instance, it is worth mentioning the case of the European Court of Human Rights' (ECtHR) well-established doctrine of the margin of appreciation. According to this, national authorities are better placed than international judges to assess local values and their application.<sup>41</sup> Moreover, the Court of Justice of the European Union (CJEU) applied a similar standard of review when confronted with national risk regulation policies. In particular, it recognized that public institutions should enjoy a broad level of discretion in defining the level of protection pursued and the 'appropriate means of action'.<sup>42</sup>

Considering the shape the WTO has taken hitherto, this unilateralist approach may well be said to be the only sustainable solution, as it allows

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<sup>40</sup> Lukasz Gruszczynski and Valentina Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration: Converging Parallels?', in Gruszczynski and Werner (n 32) 165ff.

<sup>41</sup> See *Handyside v UK* 1 EHRR 737 (1976), para 48. A wide number of scholars have dealt with the margin of appreciation doctrine: see eg, Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80; Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012); George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705; Yuval Shany, 'Towards a General Margin of Appreciation Doctrine in International Law' (2005) 16 *European Journal of International Law* 926.

<sup>42</sup> Case C-333/08 *Commission v France* EU:C:2010:44, paras 85-86; Case C-192/01 *Commission v Denmark* EU:C:2003:492, paras 42-43. See Alberto Alemanno, *Trade in Food—Regulatory and Judicial Approaches in the EC and the WTO* (Cameron May 2007), 325ff; Alberto Alemanno, 'EU Risk Regulation and Science: The Role of Experts in Decision-making and Judicial Review' in Ellen Vos (ed), *European Risk Governance—Its Science, its Inclusiveness and its Effectiveness* (Mannheim: Connex Report Series No. 6, 2008) 59-63; Patrycja Dąbrowska-Kłosińska, 'Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union', in Gruszczynski and Werner (n 32) 198ff.



Members with minority views to undertake trade liberalization commitments without questioning their religious, cultural and ethnic specificity. Moreover, this approach appears more suitable with the negative integration paradigm on which WTO is premised. As long as WTO Members do not discriminate between imported and domestically produced goods or services of the same kind, they have a right to freely regulate in accordance with national public policy choices.<sup>43</sup> Imposing *de facto* a homogeneous definition of 'public morals' on Member States would thus not only be illegitimate, but also superfluous, given that the WTO's goal is ensuring non-discrimination and equal treatment in trade relations, rather than building a community based on cultural and religious homogeneity.<sup>44</sup>

Moreover, as scholars have suggested, a less intrusive scrutiny of what amounts to 'public morals' may be balanced out by a stringent one in the subsequent steps of the test, namely the necessity analysis and the application of Art. XX *chapeau*.<sup>45</sup> The case law seems to have already found this equilibrium. In the four disputes which have occurred hitherto, the objective pursued by the measures at stake was always recognized as a matter of 'public morals'. However, a measure was never found justifiable under Art. XX(a) GATT. In *China – Audiovisual Products* and in *Colombia – Textiles* the measure was not found 'necessary to protect public morals', whereas in *US – Gambling* and in *EC – Seal Products* it eventually failed the scrutiny under Art. XX *chapeau*.<sup>46</sup> A general mistrust of WTO Members seems thus to underlie these judicial decisions, as the adjudicating bodies, while according high deference to member States' moral concerns, eventually prevent them from enforcing measures apt to protect those values.

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<sup>43</sup> See *China – Audiovisual Products*, Report of the Appellate Body, WT/DS363/AB/R, 21/12/2009, para 222.

<sup>44</sup> Gisele Kapterian, 'A Critique of the WTO Jurisprudence on 'Necessity'' (2010) 59 *International and Comparative Law Quarterly* 89, 98.

<sup>45</sup> See Marwell (n 4) 827ff.

<sup>46</sup> *China – Audiovisual Products*, Report of the Appellate Body (n 43) paras 336f; *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.116; *US – Gambling*, Report of the Appellate Body (n 30) para 372; *EC – Seal Products*, Report of the Appellate Body (n 12) para 5.339.

## 2. Proof of 'Public Morals'

However, deference is directly proportional to the risk of national policies deviating from international law commitments. Were WTO adjudicating bodies to omit any kind of scrutiny, WTO Members may easily disguise protectionist measures behind Art. XX(a) GATT. In order to avoid such a drift, scholars have rightly suggested that Members invoking the moral clause should produce appropriate evidence that the measure's aim is an issue of moral significance for their own citizens.<sup>47</sup> Indeed, even if a Panel may not substitute its assessments for those of domestic decision-makers, nothing prevents it from reviewing whether States have exercised their discretion in *bona fide* and in a reasonable way.<sup>48</sup> In other words, an international tribunal may certainly not claim to be the authentic interpreter of a Member State's *Volksgeist*, imposing its own scale of values. Nonetheless, this should not obviate the need for sufficient evidence to support a particular claim.

In the light of the *US – Gambling* doctrine, relevant evidence may stem exclusively from WTO Members' domestic *fora*. The international community's consensus with regard to an issue of 'public morals' is thus not necessary to prove that the measure being challenged complies with Art. XX(a) GATT.<sup>49</sup> This of course does not mean that adjudicating bodies may

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<sup>47</sup> This approach was developed by Marwell (n 4). According to Marwell, evidence could include historical practice, legislative history of the measure, the country's international commitments previously undertaken, contemporary public opinion polls, results of political referenda, statements of accredited religious leaders. See also Tamara Perišin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges' (2013) 62 *International and Comparative Law Quarterly* 373, 394f: 'WTO generally does not require countries to have the same views on issues [...] but it has to be proven that the protected interest corresponds to the EU's 'public morals'.

<sup>48</sup> Shany (n 41) 910.

<sup>49</sup> In contrast, some scholars have argued that Art. XX(a) may be invoked to protect moral concerns that are shared universally, rather than crafted unilaterally within national borders. Countries would thus be required to show that the public moral is shared widely by a group of similarly situated countries. Among the major advocates of this approach, known as 'universalism' or 'transnationalism', see Miguel A Gonzalez, 'Trade and Morality: Preserving 'Public Morals' Without Sacrificing the Global Economy' (2006) 39 *Vanderbilt Journal of International Law* 939; Christian Häberli, 'Seals and the Need for More Deference to Vienna by

not take into consideration moral concerns expressed by the international community, but rather that they may use these trends only as arguments *ad abundantiam* when assessing the legitimacy of a trade restriction on moral grounds. In other words, on the one hand, a common understanding of a moral issue may reduce the risk of a hidden protectionist measure. On the other hand, its absence may not lead by itself to the failure of the justification under Art. XX(a) GATT.<sup>50</sup>

Since *US – Gambling*, in WTO case law the country invoking the general exceptions was always asked to prove that the moral concern at issue was felt by its citizens, and that it was the policy objective of the measure being challenged.<sup>51</sup> In *Colombia – Textiles*, the Panel relied on a wide range of evidence to conclude that combating money laundering was a policy objective designed to protect 'public morals' in Colombia. In particular, the Panel took into consideration both national pieces of legislation and international instruments ratified by Colombia, showing Colombia's commitment to fighting against money laundering.<sup>52</sup>

The Panel's reliance on evidence stemming from the international forum should not be deemed at odds with the unilateralist paradigm mentioned before. Indeed, the ratification of international instruments may represent the projection into foreign affairs of an internal moral concern. Therefore, a Member State's international commitments may constitute relevant evidence of what amounts to 'public morals' in its society. They may also

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WTO Adjudicators' (2014) Fourth Biennial Global Conference of the Society of International Economic Law (SIEL) Working Paper No 22 <<http://ssrn.com/abstract=2463680>> accessed 12 October 2016; Wu (n 7) 238-242.

<sup>50</sup> See Moonhawk Kim, 'Disguised Protectionism and Linkages to the GATT/WTO' (2012) 64 *World Politics* 426, 435; Tyler M Smith, 'Much Needed Reform in the Real of Public Morals: a Proposed Addition to the GATT Article XX(a) 'Public Morals' Framework Resulting from *China – Audiovisual*' (2011) 19 *Cardozo Journal of International and Comparative Law* 733, 762; Nicolas F Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2007) 11 *Journal of International Economic Law* 43, 63-64.

<sup>51</sup> See *US – Gambling*, Report of the Panel (n 22), paras 6.474ff; *China – Audiovisual Products*, Report of the Panel (n 30) para 7.751; *EC – Seal Products*, Report of the Panel (n 13) paras 7.386 ff.

<sup>52</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.335-7.337.

prove that the international community shares the same values. However, a coherent interpretation of the *US – Gambling* doctrine requires that international consensus should be *stricto sensu* unnecessary, as I have tried to explain above. Nonetheless, in its submissions Colombia frequently stressed that the international community supported its moral concerns regarding illicit trade, drug trafficking and money laundering in particular.<sup>53</sup> It expressly mentioned treaties and conventions it had ratified as evidence that 'money laundering [was] conduct deemed illegal by the international community'.<sup>54</sup>

Yet Colombia was not the first State to adopt this line of defense. In *China – Audiovisual Products*, the US accused China of restricting market access for foreign audiovisual entertainment products and for foreign suppliers seeking to engage in the distribution of those products.<sup>55</sup> Invoking Art. XX(a) GATT, China mentioned UNESCO Universal Declaration on Cultural Diversity to show that the international community deemed cultural products capable of having a major impact on public morals.<sup>56</sup> However, this trend appears even clearer in *EC – Seal Products*. The dispute was about an import ban imposed by the EU on seal products. The EU justified it on the ground that some hunting and killing methods adopted in certain States (mainly Canada and Norway) had raised moral concerns among the EU population due to their cruelty.<sup>57</sup> In addition to pieces of EU legislation, the EU referred to recommendations of the Office International des Epizooties (Guiding Principles for Animal Welfare), other WTO Members' measures on seal products based on moral grounds, as well as the 'philosophy of animal welfare' and its connection to 'a long-established tradition of moral thought' worldwide.<sup>58</sup>

This trend may thus reflect a general mistrust among WTO Members towards the application of the *US – Gambling* doctrine. Indeed, the arguments mentioned should be only *ad abundantiam*, but instead they played

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<sup>53</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.63, 7.89, 7.94, 7.205, 7.332, 7.509.

<sup>54</sup> *Ibid*, para 7.98.

<sup>55</sup> *China – Audiovisual Products*, Report of the Panel (n 30), paras 2.iff.

<sup>56</sup> *Ibid*, para 7.751.

<sup>57</sup> *EC – Seal Products*, Report of the Panel (n 13) paras 2.iff.

<sup>58</sup> *Ibid*, para 7.408.

a prominent role in WTO Members' lines of defence. Even though the AB interpretation of 'public morals' is meant to enhance regulatory autonomy, it seems that Member States would rather rely on evidence stemming from the international forum, due to its highly persuasive value. This could be Member States' response to the reciprocal lack of confidence the judicial bodies have implicitly expressed hitherto, as I have explained above.

In *Colombia – Textiles* the conclusion that fighting money laundering was an issue of 'public morals' was rather straightforward, even if the international community had not shared the same view. There was a well-established line of legislation tackling the issue, and most of all money laundering was punished as a crime in Colombia.<sup>59</sup> Therefore, it referred by definition to 'standards of right and wrong conduct', as the WTO interpretation of 'public morals' requires. Moreover, in *US – Gambling* WTO adjudicating bodies had already recognised that anti-money laundering policies may legitimately justify trade restrictions.<sup>60</sup>

However, it is worth noting that all the evidence submitted by Colombia was of a legislative kind, either of national or international origins. The Panel thus decided on this exclusive basis.<sup>61</sup> From a general point of view, national legislation may assure a high degree of certainty, as its evidentiary value is less volatile and questionable compared to that of opinion polls or statements by religious leaders, for example.<sup>62</sup> However, WTO adjudicating bodies should handle this kind of evidence with care.

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<sup>59</sup> *Colombia – Textiles*, Report of the Panel (n 14) para 7.205.

<sup>60</sup> *US – Gambling*, Report of the Panel (n 22) para 6.492. See also *US – Gambling*, Report of the Appellate Body (n 30) para 301. The Panel in *Colombia – Textiles* explicitly mentions this judicial precedent, see para 7.338.

<sup>61</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.335-7.338. This is not a new feature in the Panels and the AB legal reasoning. In *EC – Seal Products*, EU pieces of legislation amounted to a major portion of the evidence submitted. Leaving aside the evidence showing that the international community shared EU moral concerns, they were the only ground on which the Panel decided that animal welfare was felt as a moral concern by European citizens. See *EC – Seal Products*, Report of the Panel (n 13) paras 7.415ff.

<sup>62</sup> For instance, in *EC – Seal Products* the EU adduced several opinion polls to prove that the objective of its import ban, namely seal welfare, was felt as a moral concern

In particular, legislation should be in line with a society's contemporary beliefs in order to be deemed relevant proof under Art. XX(a).<sup>63</sup> Otherwise, labelling an issue as one of ethical concern would require 'little more than the sponsor of a legislation'.<sup>64</sup> Therefore, the Panels and the ABs should also take into account several context-dependent elements in order to determine whether national legislation could be of some relevance. For instance, they could verify whether there is a well-established legislative history behind the challenged measure, showing that the latter belongs to a coherent context that has persisted through the years. They could also consider whether or not the measure in question followed an ordinary *iter legis*. Furthermore, they could also take into consideration whether there have been political referenda or relevant court decisions surrounding the issue, as well as protests carried out by social or cultural movements. Also, as the Panel did in *Colombia – Textiles*, the fact that the Member State has undertaken several international commitments related to the moral ground invoked should be assessed.

## V. APPLYING THE MORAL CLAUSE

### 1. The 'Design and Structure' of the Measure

Showing that 'public morals' in Colombia could encompass money laundering was not enough for the Panel to conclude that the compound tariff was designed to protect public morals. According to the Panel, Colombia failed to demonstrate (1) first that, if a product's price was low enough to trigger the application of the compound tariff, it was *necessarily* because it had been undervalued; 2) second that its undervaluation was

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by the European population. See *EC – Seal Products*, First Written Submission by the European Union, WT/DS400, 21/12/2012, paras 194ff.

<sup>63</sup> Panagiotis Delimatsis, 'Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on *US – Gambling* and *China – Publications and Audiovisual Products*' (2011) *Journal of International Economic Law* 257, 259.

<sup>64</sup> Joost Pauwelyn, 'The Public Morals Exception After Seals: How to Keep It in Check?' (*International Economic Law and Policy Blog*, 27 May 2014) <<http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html>> accessed 29 December 2016.



*necessarily* serving money laundering purposes.<sup>65</sup> In other words, the Panel acknowledged that among the imported products affected by the compound tariff there could have also been those undervalued for money laundering purposes. However, Colombia's measure had too wide a scope of application, because it was also able to affect products that did not constitute a threat to public morals. The Panel thus concluded that Colombia had failed to demonstrate that the measure was designed to protect money laundering, as a *necessary* connection between the compound tariff and the alleged objective had not been shown.<sup>66</sup>

However, the Panel's implicit admission that a connection between the measure and the objective could at least be plausible was enough for the AB to reverse the Panel findings on this specific issue. Even if it eventually confirmed that the challenged measure was not justifiable under Article XX GATT, the AB considered the measure at least 'designed' to protect public morals. According to the AB, 'if the measure is not incapable of protecting public morals, there must be a relationship between the measure and the protection of public morals'.<sup>67</sup> This potential connection may result from the 'content, structure and expected operation' of the measure, i.e. evidence such as text of statutes and regulations, the measure's legislative history, and its objective.<sup>68</sup> If it exists, then one needs to conclude that the measure was designed to protect public morals. The AB thus set a very low threshold for the 'design' step of the analysis, consistently expanding the zone of legality within which WTO Members are free to operate by virtue of Art. XX(a). The equation between 'designed to protect public morals' and 'not incapable of protecting public morals' ultimately affects the responding State's burden of proof, making it considerably lighter.<sup>69</sup>

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<sup>65</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.362ff.

<sup>66</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.399-7.400.

<sup>67</sup> *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.68.

<sup>68</sup> *Ibid*, para 5.80.

<sup>69</sup> With regard to the issue of the burden of proof in WTO law, see Joost Pauwelyn, 'Defenses and the Burden of Proof in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions under International Law* (Oxford University Press forthcoming), available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2863962](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2863962)> accessed 23 February 2017.



The AB conclusion is imbued with an inherent logic: if there is at least a chance that a measure accomplishes its task, then its design and structure clearly are 'not incapable of protecting public morals'. The mere fact that the measure is capable of restricting both morally dangerous trades and morally neutral ones does not lead automatically to the conclusion that the measure is not designed to protect public morals. The measure will probably result as disproportionately trade-restrictive, but this will be ascertained in the second step of the test, i.e. the necessity test, where the measure's qualitative and quantitative contribution to the objective pursued will be assessed. In other terms, the AB clarified that the 'design' step is a matter of *whether* the measure could make any contribution to the accomplishment of its purpose, whereas the 'necessity' step is about the *quantum* of the contribution.<sup>70</sup>

## 2. The Necessity Analysis

Once a measure's design and structure are found appropriate to protect 'public morals', the judicial review needs to focus on the necessity of the measure at stake. The necessity analysis is not an unique feature of Art. XX(a) GATT, as subparagraphs (b) and (d) demand the same benchmark. Moreover, Art. XIV GATS includes symmetrical provisions. WTO case law has fostered an interpretative unification of the necessity analysis. First, the Panel in *Thailand – Cigarettes* maintained that the term 'necessary' had the same meaning under both subparagraph (b) and (d).<sup>71</sup> Then the Panel in *US – Gambling* interpreted the necessity requirement of Art. XIV(a) GATS

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<sup>70</sup> *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.103: 'in an analysis of necessity, a Panel's duty is to assess, in a qualitative and quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution. [...] whereas an assessment of whether the measure is 'designed' to protect public morals focuses on determining whether the measure is or is not incapable of protecting public morals, an examination of the measure's contribution to the protection of public morals focuses on determining the degree of such contribution, in a qualitative or quantitative manner'.

<sup>71</sup> *Thailand – Cigarettes*, Report of the Panel, BISD 37S/200, 7/11/1990, para 74.

following the same case law.<sup>72</sup> Finally, the Panel in *China – Audiovisual* applied the same test when interpreting Art. XX(a) GATT.<sup>73</sup>

The test developed through the case law may be split into two main tiers: the 'Weighing and Balancing' (WAB) formula and the 'Least Trade-Restrictive Means' (LTRM) paradigm. This two-tier test is the offspring of a long interpretative effort started in the GATT era. Even though they now constitute two features of a unitary concept, the two steps of the test emerged in different moments in time.

The initial interpretation of necessity consisted only in the LTRM test. According to the Panel in *US – Section 337*, a measure could have been deemed 'necessary' as long as a less trade-restrictive measure was not available.<sup>74</sup> If such a measure existed, then a State would have been bound to use it.<sup>75</sup> This test was further improved by the Panel in *US – Gasoline*, where it stated that WTO Members enjoy absolute freedom to choose the value to pursue and to set the level of protection they deem appropriate.<sup>76</sup> Moreover, the following case law specified that the alternative measure should be 'reasonably available' to the responding State. This means that first, the alternative measure should permit the responding State to preserve the same degree of protection initially sought. Second, it should not impose an undue burden on the responding State, in terms of e.g. administrative costs or technical difficulties.<sup>77</sup> It rests upon the complaining party to identify possible alternatives that the responding party could take.<sup>78</sup>

However, the Appellate Body in *Korea – Various Measures on Beef* introduced a preliminary step in the necessity analysis, i.e. the WAB formula. According to the Appellate Body, an assessment of the necessity of a measure requires a 'process of weighing and balancing' of at least three factors: (1) the importance of the interests and values protected; (2) the contribution of the

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<sup>72</sup> *US – Gambling*, Report of the Panel (n 22) para 6.448.

<sup>73</sup> *China – Audiovisual Products*, Report of the Panel (n 30) paras 7.782ff.

<sup>74</sup> *US – Section 337*, Report of the Panel (n 16) para 5.26.

<sup>75</sup> *Ibid.*

<sup>76</sup> *US – Gasoline*, Report of the Panel (n 16) paras 6.22 and 7.1.

<sup>77</sup> See *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 180; *EC – Asbestos*, Report of the Appellate Body (n 39) paras 172-174.

<sup>78</sup> *US – Gambling*, Report of the Appellate Body (n 30) paras 309-311.

challenged measure to the objective pursued; (3) the trade-restrictiveness of the measure.<sup>79</sup> These factors would then interact according to some general rules of thumb. First, '[t]he more vital or important those common interests or values are' and the greater the measure's contribution to the objective pursued, 'the more easily the measure might be considered 'necessary''.<sup>80</sup> Second, a measure with a 'relatively slight impact upon imported products might more easily be considered 'necessary' than a measure with intense or broader restrictive effects'.<sup>81</sup>

In subsequent disputes, from *EC – Asbestos* to *Colombia – Textiles*, the WAB test was always deemed as an unavoidable step of the test by the Panels and the AB. However, in *Colombia – Textiles* it appears to have even gained a logical prominence within the structure of the necessity test. Both the Panel and the AB treated the measure's compliance with the WAB formula not only as an autonomous aspect of their analysis, but as a logical condition in order to move forward to the LTRM part of the test. The Panel in *Colombia – Textiles* was explicit when it maintained that only '[i]f the *preliminary conclusion* is that the measure is necessary, the result should be confirmed by comparing the challenged measure with possible, reasonably available, WTO-consistent or less inconsistent alternatives that could have less trade-restrictive effects while making an equivalent contribution to the achievement of the objective pursued'.<sup>82</sup> The AB then confirmed the Panel's approach, describing the LTRM test as merely a potential step of the test that '*in most cases*' may follow the application of the WAB formula.<sup>83</sup> Coherently, both the Panel and the AB considered irrelevant a comparison

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<sup>79</sup> *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 164.

<sup>80</sup> *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15), para 163.

<sup>81</sup> Ibid, para 163. The Appellate Body here clearly echoes Alexy's famous interpretation of balancing as optimization: see Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 102: 'the greater the degree of non-satisfaction of, or detriment to, one principle, the grater must be the importance of satisfying the other'.

<sup>82</sup> *Colombia – Textiles*, Report of the Panel (n 14) para 7.310 (emphasis added).

<sup>83</sup> *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.102 (emphasis added).

with possible alternative measures, once they had found that Colombia had failed to demonstrate that the measure was necessary at the WAB tier.<sup>84</sup>

Nevertheless, this seems to constitute a significant logical flaw in the Panel's and the AB's legal reasoning. In particular, the WAB paradigm itself raises more questions than it answers, since it factors in the importance of the protected interest. WTO case law expressly acknowledged that Members pursuing a legitimate domestic goal should be able to choose their 'own level of protection'.<sup>85</sup> This imposes a judicial self-restraint that may hardly coexist with the WAB exercise, as the 'level of protection' sought is a direct consequence of the importance of the protected interest. Moreover, if WTO judicial bodies had to decide which value should prevail in a conflict of rights, the judicial review would be at odds with the WTO negative integration paradigm.<sup>86</sup> Finally, giving leeway to WTO Members to set the importance of the value pursued is coherent with a holistic interpretation of the moral clause.

If it is up to WTO Members to decide what constitutes 'public morals', then for the same reasons they should be the ones entitled to express the importance of a certain moral concerns, according to their own society's hierarchy of values. Leaving to the WTO adjudicating bodies the power to decide on the importance of the interests and values protected would then be at odds with the high deference accorded in the first step of the test. Therefore, the first factor of the WAB formula should be untouchable by definition. For its part, the Panel in *Colombia – Textiles* did not question Colombia's claim that fighting money laundering constitutes a 'social interest

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<sup>84</sup> *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.115; *Colombia – Textiles*, Report of the Panel (n 14) para 7.447.

<sup>85</sup> *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 176.

<sup>86</sup> Filippo Fontanelli and Giuseppe Martinico, 'Browsing the XX Files: Necessity in the GATT, and Why It Is Not Like Proportionality in the EU' [2013] Xi Nan Zheng Fa Da Xue Xue Bao 32, 38; Donald H Regan, 'The Meaning of Necessary in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 World Trade Review 347, 349; Jan Neumann and Elizabeth Turk, 'Necessity Revisited: Proportionality in World Trade Organization Law after *Korea-Beef*, *EC-Asbestos*, and *EC-Sardines* (2003) 37 Journal of World Trade 199, 232, claiming that balancing sensitive issues requires a strong sense of democratic legitimacy.

[...] vital and important in the highest degree'.<sup>87</sup> Moreover, in order to reach this conclusion, it considered the same evidence assessed in the 'design' step of the test and applied a similar legal reasoning.<sup>88</sup> It thus followed the Panels' approach both in *US – Gambling* and in *China – Audiovisual Products*. In these disputes the Panels were highly deferential when assessing the importance of the interest pursued, and mostly relied on the same evidence they had considered in the 'design' step of the test.<sup>89</sup> As in *Colombia – Textiles*, the interest in question were found to be of the highest importance in the Member State's society.<sup>90</sup>

The WAB test might then focus on the measure's contribution to the objective and its trade-restrictiveness. However, the assessment of these two factors leaves the door open to a wide range of questions, which are clearly exemplified in *Colombia – Textiles*. In this dispute, the AB clarified that the 'examination of the measure's contribution to the protection of public morals focuses on determining the *degree* of such contribution, in a qualitative or quantitative manner'.<sup>91</sup> This constitutes the main distinction between the analysis of the contribution and that of the design of the measure. While the latter addresses *whether* the challenged act is capable of protecting public morals, the former pays attention to *how much* protection the measure may assure. However, the AB has not set any benchmark in order to carry out such an assessment. How then should a Panel determine the degree of contribution of the measure at stake? Which aspects should it factor in? And which would be the specific features of high contribution? And of low contribution? The Panels' assessment would then risk being arbitrary and scarcely transparent.

Nonetheless, a way out from this maze of questions may be found inside the necessity test itself, specifically in the LTRM paradigm. The Panels' legal reasoning would certainly gain in clarity if a measure's contribution was

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<sup>87</sup> *Colombia – Textiles*, Report of the Panel (n 14) para 7.408.

<sup>88</sup> *Ibid.*, paras 7.404ff.

<sup>89</sup> *US – Gambling*, Report of the Panel (n 22), para 6.492; *China – Audiovisual Products*, Report of the Panel (n 30) para 7.817.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.103 (emphasis added). See also *Colombia – Textiles*, Report of the Panel (n 14) para 7.423.

appraised in relative rather than absolute terms. In other words, it would be easier for a Panel to assess whether a measure's contribution is *higher* or *lower* than that of an alternative measure reasonably available, instead of *high* or *low* in general terms. In this way, a definition of what constitutes a high or low contribution would not be needed. Moreover, were the Panel to rule out a measure without being sure that an alternative one is available, Members' freedom to regulate would be seriously jeopardised.

Colombia's compound tariff may constitute a relevant example. First the Panel, then the AB could not carry out thoroughly the WAB test because of a lack of evidence in Colombia's allegations.<sup>92</sup> Consequently, the measure had to be ruled out, since it failed the WAB test. In particular, the measure's degree of contribution to the objective pursued could not be determined in light of the available information.<sup>93</sup> On the one hand, the Panel acknowledged that the interest protected was 'vital and important in the highest degree'. On the other hand, it found that the measure was highly trade-restrictive. Now, consider for a moment a hypothetical scenario in which the burden of proof was satisfied, but still the measure failed the WAB test because its contribution to the objective pursued was deemed insufficient to balance out its trade-restrictiveness. The Panel and then the AB would thus reject Colombia's defence. Yet, if there is no alternative measure that may pursue Colombia's objective to fight money laundering, should that moral concern be deprived of any form of protection? In other words, before stating that a measure is disproportionately trade-restrictive, should not the AB verify that it is not the only possible way to protect a 'vital' interest?

In the light of all this, the LTRM test seems the most appropriate tool to reach the best compromise between trade-restrictiveness and the right to regulate. In addition, it excludes the need for Panels and the AB to engage in a likely intrusive balancing between legitimate non-trade values and free trade interests.<sup>94</sup> Moreover, even admitting for a moment that the WAB's rationale is sustainable, it results of no practical added use. As a matter of fact,

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<sup>92</sup> *Colombia – Textiles*, Report of the Panel (n 14), paras 7.423, 7.430, 7.437, 7.445; *Colombia – Textiles*, Report of the Appellate Body (n 12) paras 5.110, 5.115, 5.116.

<sup>93</sup> *Colombia – Textiles*, Report of the Panel (n 14) paras 7.414 ff.

<sup>94</sup> Regan (n 86) 350-353.



the LTRM test already factors in the WAB's features of the measure's contribution and trade-restrictiveness.<sup>95</sup> The remarkable advantage of the LTRM test is that the assessment of the reasonable availability of an alternative measure does not imply second-guessing a Member State's hierarchy of values. Indeed, a measure is reasonably available if it is able to assure the same level of protection while not entailing additional enforcement costs. The problem then is not how a Member State should allocate its funds, which is also a policy choice modelled after a particular hierarchy of values, but the focus is on how the same budget may be invested in a more WTO consistent trade measure. What thus comes into question in the LTRM analysis are mostly technical issues, characterised by a higher degree of certainty and objectivity. This may allow WTO adjudicating bodies to push their review to a deeper tier, judging the technicalities and the appropriateness of the *means* adopted by a Member State, rather than the *end* itself.<sup>96</sup>

WTO's version of the balancing test should then be absorbed by the LTRM analysis in only one holistic reasoning. The necessity test would then be premised on one question: whether the same level of protection may be sought by a less trade-restrictive measure. The answer should be positive if there is a 'reasonably available' alternative, i.e. if its enforcement does not entail unreasonably high costs for the regulatory State.

## V. FINAL REMARKS

To put it in geometrical terms, Art. XX(a) GATT represents the intersection of two planes: the first, horizontal, one is the ideological struggle between non-trade and trade values; the second, vertical one is the institutional tension between WTO adjudicating bodies and WTO Members, and

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<sup>95</sup> Fontanelli and Martinico (n 86) 38: 'the WAB does not have much to share with a real proportionality test, nor does it allow for express cost-benefit analysis' and that 'the LTRM test is apt to ascertain the necessity of a measure, the WAB serving merely as a warm up test'.

<sup>96</sup> In more general terms, see Mavroidis, *Trade in Goods* (n 9) 254, maintaining that WTO is about the justiciability of *means* rather than *ends*. See also *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 176.



directly concerns the allocation of power.<sup>97</sup> As WTO's number of Members is continuing to grow, the moral clause is likely to play an increasingly important role in legal and political dynamics inside the organization. However, since the moral clause lay dormant for more than five decades, several hermeneutical hurdles still need to be overcome.

In *Colombia – Textiles* WTO adjudicating bodies were called to apply the GATT moral clause for the fourth time in its history. For the most part, they followed the previous case law, thus reinforcing what is now becoming to look like a more consolidated interpretation of the Art. XX(a) two-tier test. The AB confirmed that Member States' culturally-oriented regulations deserve a high degree of deference. In particular, the AB helped clarify the applicable threshold in the 'design' step of the analysis. A measure will now be deemed designed to protect 'public morals' if it is not incapable of reaching this goal. The threshold for compliance has thus been considerably lowered.

At first glance, it may appear that a scarcely intrusive standard of review in the first part of Art. XX(a) test may jeopardise the WTO edifice, giving leeway to the enforcement of highly trade-restrictive measures. Member States could merely label a protectionist measure as a protection for 'public morals' (and provide appropriate evidence) to have it justified under Art. XX(a) GATT. However, a highly deferential scrutiny on what constitutes 'public morals' may be balanced out by a more stringent one in the subsequent steps of the test, namely the necessity analysis and Art. XX GATT *chapeau*. Adopting this perspective, the judicial review would focus less on the values at stake and more on the technical aspects of a measure's enforcement.

In particular, Art. XX GATT *chapeau* guarantees that the application of a measure does not amount to an arbitrary and unjustifiable discrimination. Once it has been verified that the measure complies with one or more of Art. XX GATT substantive provisions, the focus thus shifts to whether its application constitutes a discrimination among 'countries where the same conditions prevails'.<sup>98</sup> The issue under the spotlight is how the measure is enforced *vis-à-vis* WTO Members. This is a relative assessment relying on the measure's objective implementation, but there is no room for a judgment

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<sup>97</sup> Kapterian (n 44) 90.

<sup>98</sup> Mavroidis, Bermann and Wu (n 7) 709ff.

concerning the importance of the interests and values protected.<sup>99</sup> The necessity test may also provide for such a guarantee if it is correctly carried out. Nevertheless, the logical structure the Panel and the AB gave to their necessity analysis in *Colombia – Textiles* raises concerns. The application of the two-step test conferred logical prominence to the former, while describing the latter only as a potential and conditional phase of the test. However, the WAB formula may turn into a highly intrusive and scarcely transparent judicial review, being at odds with the negative integration principle on which the WTO is premised. On the contrary, the LTRM paradigm provides WTO judicial bodies with a clearer and simpler benchmark in order to conduct a comparative analysis. Most of all, the LTRM test does not imply a judicial scrutiny involving a Member State's morally-based policy choices. In contrast, it concerns the technical aspects of the measure's enforcement.<sup>100</sup>

Clarifying the role of the WBA formula – if there should be one – should be a priority for the Panels in future disputes, since it now appears as the most critical aspect of Art. XX(a) GATT test for compliance.

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<sup>99</sup> Marwell (n 4) 829ff.

<sup>100</sup> Marwell (n 4), 827ff.



## BOOK REVIEWS

BARBARA HAVELKOVÁ, *GENDER EQUALITY IN LAW: UNCOVERING THE LEGACIES OF CZECH STATE SOCIALISM* (HART PUBLISHING 2017)

Elena Brodeală\*

### I. DESCRIPTION OF THE BOOK

Critical Legal Studies and Feminist Jurisprudence, that were mainly developed in the West in the 1970s, are with some exceptions missing from post-Socialist Central and Eastern European ('CEE') scholarship. The formalist approach to law inherited from the State Socialist era and the so-called 'allergy to feminism'<sup>1</sup> blocked the application of these critical approaches to the study of CEE legal systems. This gap in the literature is partly addressed by Barbara Havelková's book '*Gender Equality in Law. Uncovering the Legacies of Czech State Socialism*'. This is the first book since 1989 to apply a feminist and critical studies methodology to the legal system of a CEE country. It is therefore indispensable to any scholar writing about gender and equality in CEE and a must-read for anyone with an interest in understanding the CEE legal culture(s) and societies.

The starting point of the book is the observation that 'gender equality law is not doing well in Czechia'.<sup>2</sup> The book then endeavours to explain why. Its overall argument is that the difficulties of gender equality law in Czechia are caused by four factors: (1) conservative assumptions about women's role in society, (2) a refusal to see gender as socially constructed and to acknowledge that it is an important axis ordering society, (3) a limited understanding of

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<sup>1</sup> This is the term used in Barbara Einhorn, *Cinderella Goes to Market: Citizenship, Gender, and Women's Movements in East Central Europe* (Verso 1993) 182–215.

<sup>2</sup> Barbara Havelková, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart Publishing 2017) 1.

discrimination, and (4) a reticence to use legal means to fight discrimination and advance gender equality.<sup>3</sup>

Intrinsic to building the argument of the book is the historical analysis. By inquiring into the Socialist past of Czechia, the book sheds light on how current conceptualizations of women, gender, law, equality and rights are path-dependent on State Socialism. As the author masterfully shows, the legal situation of gender equality in Czechia (and CEE) today cannot be understood without engaging in an 'archaeological' study of the ideas underlying the current conceptions of gender and equality. This approach, in the words of the author, is best characterized as a 'feminist legal genealogy'.<sup>4</sup> Engaging in reconstructing such a genealogy makes Havelková's book extremely intellectually enriching. As the author explains, every reader can describe the book in different ways: as a doctrinal analysis that points to the flaws of anti-discrimination law, as an inquiry into Czech gender legal history, as an intellectual history of the conceptualization of gender and equality, or even as an analysis of the legal discourse around gender issues in Czechia.<sup>5</sup> In my view, all these descriptions are accurate and I found the idiom 'feminist legal genealogy' cleverly tailored and fit to label the methodology needed to understand the theoretical underpinnings of gender equality in law. Perhaps this idiom should become a more commonly used one for this type of legal analysis.

In terms of content, the book revolves around the central theme of anti-discrimination and equality law in Czechia. In addition to this, the book also touches upon the regulation of different domains relevant for gender equality, like gender-based violence, sexuality, reproductive politics and parental leaves, as well as upon more general aspects related to post-Socialist societies. These include issues such as the rejection of ideologies like feminism after the fall of State Socialism, or characteristics of post-Socialist legal cultures like the disrespect for legal norms imposed in a top-down fashion by external players such as the European Union.

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<sup>3</sup> Havelková (n 2) 4.

<sup>4</sup> Ibid 11.

<sup>5</sup> Ibid.

The book is divided into two parts. The first part is dedicated to the situation of gender and the law under State Socialism, while the second part tackles the development of gender equality in law during post-Socialism. Each part is divided into four chapters that mirror each other.<sup>6</sup> Such mirroring gives the readers the opportunity to fully appreciate the development of gender equality in law, both during State Socialism and post-Socialism. The chapters look at regulation of women and gender (chapter 2 during State Socialism and chapter 6 after State Socialism), at the conceptualization and use of law and rights (chapter 3 and chapter 7), at the conceptualization and use of equality and non-discrimination (chapter 4 and chapter 8) and, lastly, at the difficulty of conceptualizing gender, the gendered order of society and the inequality that derives from it (chapter 5 and chapter 9).<sup>7</sup>

## II. CONTRIBUTIONS AND DISCUSSION

In my opinion, the book makes three important contributions: first, to feminist social and legal reform in Czechia, second, to comparative (feminist) legal studies in CEE, and third, to international and transnational feminist (legal) scholarship.

### 1. *The Contribution to the Feminist Social and Legal Reform in Czechia*

By exposing the gender bias of the law in Czechia and by discussing the origins of the flaws of its equality and anti-discrimination laws, the book should raise awareness among legal practitioners, lawyers and judges regarding the way law perpetuates inequality. Furthermore, by pointing to the sources of gender inequality in the law, the book should also provide women's groups and those interested in promoting gender equality in Czechia with a basis for building a political agenda. Yet, when discussing the normative side of her study, Havelková argues that the book does not aim to build a project of legal reform. She explains that her book 'is not normative in the sense of developing an overreaching vision for law reform in relation to the problems of gender conservatism [that were] identified'.<sup>8</sup> By making this statement, Havelková presumably aimed to be cautious not to mix her role as

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<sup>6</sup> Havelková (n 2) 7.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 15.

a researcher with that of an activist. Personally, I do not think that such caution was necessary. Quite the contrary, in my view, the merit of the book lies precisely in its potential to trigger social and legal change. This even more considering that in other parts of the book, Havelková herself seems to advocate for reform. For example, in Chapter 9, which is suggestively called 'Wanted: Gender and Feminism', the author emphasizes the need for second-wave radical feminism approaches in Czechia<sup>9</sup> and calls for further developing feminist legal scholarship in the country.<sup>10</sup>

## 2. *A Stepping Stone for Comparative (Feminist) Legal Studies in CEE*

Being the first monograph to study the legal system of a Central and Eastern European country from a feminist perspective, the book stands as an example of how to use the feminist methodological toolkit to study the law of the countries in the region. It therefore contributes to the legal debates on gender equality in CEE and serves as a stepping stone for comparative feminist legal studies in the post-Socialist space and beyond. Of course, it would have been extremely interesting to prove empirically whether the analytical framework of this book can be applied to more CEE countries. Yet, the single case study was, in my view, a thoughtful choice. Gender equality law the former Socialist states is generally seriously under-researched<sup>11</sup> and the availability of sources is limited.<sup>12</sup> For this reason, to be able to do serious comparative work on gender equality law in CEE, the study of single cases is needed. As Havelková explains in her methodological part,

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<sup>9</sup> Havelková (n 2) 292–295.

<sup>10</sup> Ibid 295–298.

<sup>11</sup> There are of course articles on different topics pertaining to gender equality, but very few undertake a legal approach and further research is needed to fill the gap existent in the literature. For a comprehensive gender studies bibliography in CEE see Mary Zirin and others, *Women and Gender in Central and Eastern Europe, Russia, and Eurasia: A Comprehensive Bibliography* (Routledge 2007).

<sup>12</sup> For example, in the case of Czechia, the author explains the difficulties she had to deal with in accessing court cases on gender related matters Havelková (n 2) 238–239. The same is the case with Romania, the country I am currently researching, or with other countries in the region.



country case studies allow for a more complex analysis and leave space for bringing together a wider variety of sources.<sup>13</sup>

Although this book is a single-case study and does not provide factual information about other CEE countries, it nevertheless contributes to comparative law by offering an analytical framework to study other countries.<sup>14</sup> For example, some of its findings apply not only to Czechia, but also to neighbouring countries, and could thus provide a starting point for scholars working on similar topics in other CEE jurisdictions. Such findings include: rejecting equality legislation due to the so-called 'backlash' against Communism or preserving gender conservative measures inherited from the former regime;<sup>15</sup> the reluctance in adopting or applying the EU-imposed reversed burden of proof in anti-discrimination cases;<sup>16</sup> or the more general misapplication (or non-application) of gender equality legislation in CEE, as the adoption of such legislation did not result from genuine internal commitment to equality and women's rights, but rather from pressures linked to EU accession.<sup>17</sup>

Another important contribution is the book's ability to bring to the fore some of the characteristics of Czech and Central and Eastern European legal

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<sup>13</sup> Havelková (n 2) 19.

<sup>14</sup> Ibid

<sup>15</sup> The best case that exemplifies the 'backlash against Communism' manifested as a rejection of the equality measures promoted by the former regime is the case of rejecting the measures to promote women in politics adopted by the Communist regime see Drude Dahlerup and Milica Antic Gaber, 'The Legitimacy and Effectiveness of Gender Quotas in Politics in CE Europe' (2017) 54 *Teorija in Praksa* 307, 308.

<sup>16</sup> See for example the case of Romania in Raluca Maria Popa, '*Issue Histories Romania: Series of Timelines of Policy Debates*' (Institute for Human Sciences (IWM), Vienna 2007) 7; Reticence of the courts to applying the reverse burden of proof was also brought up into discussion in the case of Hungary. See Csilla Kollonay Lehoczky, 'The Significance of Existing EU Sex Equality Law for Women in the New Member States. The Case of Hungary' (2005) 12 *Maastricht Journal of European and Comparative Law* 467, 488.

<sup>17</sup> See Kristen Ghodsee, Lavinia Stan and Elaine Weiner, 'Compliance without Commitment? The EU's Gender Equality Agenda in the Central and East European States' (2010) 33 *Women's Studies International Forum* 1.

cultures such as formalism, disregard for the law<sup>18</sup> and scepticism around using law as a tool for social change.<sup>19</sup> Of course, assessing and describing legal culture generally raises difficult methodological problems. Yet, the book successfully provides legitimate sources and concrete examples to support claims regarding the CEE legal culture that for a non-CEE legally trained audience are not self-evident.

The book also does an excellent job at explaining how equality developed and how it was enshrined in the Eastern European legal landscape as compared to Western Europe. Havelková explains that in Western Europe there are generally 'three phases of equality and anti-discrimination law: [...] 1. The elimination of men's legal privileges; 2. The adoption of anti-discrimination legislation; and 3. The rise of substantive and transformative equality'.<sup>20</sup> Then, she explains that Czechia and the other post-Socialist states skipped the second phase. While Western European countries were introducing anti-discrimination guarantees, Socialist States were treating 'sex equality as a proclamation, but not an anti-discrimination right'.<sup>21</sup> In the particular case of Czechia, Havelková establishes that the word 'right' was used in a limited way in legislation, while the word 'discrimination' did not exist at all in legal texts.<sup>22</sup> Furthermore, no system for vindicating these rights existed<sup>23</sup> and equality was seen as a 'policy pronouncement' to be enforced by the state and not through individual claims before courts.<sup>24</sup> In this way, Socialist States turned to achieving substantive equality without resorting to non-discrimination rights. As Havelková shows, due to the Marxist-Leninist ideology that saw class as the main axis for oppression, substantive equality was limited to socio-economic levelling and was achieved through redistribution policies.<sup>25</sup> Thus, the Socialist States generally lacked politics of recognition to address 'stereotyping, gender bias, devaluation of women and

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<sup>18</sup> Havelková (n 2) 193–196.

<sup>19</sup> Ibid 70–71, 201.

<sup>20</sup> Ibid 86–87.

<sup>21</sup> Ibid 90.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 91.

<sup>24</sup> Ibid 91–92.

<sup>25</sup> Ibid 92–94.

the feminine'.<sup>26</sup> This concrete finding points to Nancy Fraser's argument that achieving equality requires both politics of redistribution (i.e. socio-economic politics) and of recognition (i.e. socio-cultural politics),<sup>27</sup> and can be seen as one of the broader learnings from the State Socialist period.

### 3. 'Eastern' Perspectives on Feminist Legal Theory

This last observation leads us to the contribution of the book to feminist (legal) literature which is particularly developed in Anglo-Saxon academia. As already explained, the author borrows the feminist legal methods developed in the West and applies them to an Eastern European country. By exposing the tension between 'Western theories' and the 'Eastern reality',<sup>28</sup> Havelková challenges the universalism of Western theories and offers new perspectives. The example of Czechia shows how non-religious societies, or ideologies rejecting religion from the organization of societies such as State Socialism, can also give birth to patriarchal law and policies. The example furthermore shows that the feminist critique of the public/private divide cannot be applied in the East in the same way as in the West. State Socialism and its repressive measures led to a retreat of the citizens into the family. Thus, the family started to be conceptualized as a 'refuge', a place for peace and freedom where State intervention was not desirable. Moreover, during State Socialism women themselves appeared to prefer to withdraw into the private sphere of the family in order to avoid the repression taking place in the public sphere and the triple burden they had to perform: in the socialist field of production and at home by being in charge of household and childcare.<sup>29</sup> Therefore, as Havelková's book shows, the motto of the second-wave feminists that 'the personal is political' cannot be applied in the same way to post-Socialist countries.<sup>30</sup>

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<sup>26</sup> Havelková (n 2) 84.

<sup>27</sup> Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age', in Nancy Fraser (ed), *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge 1997).

<sup>28</sup> Havelková (n 2) 23.

<sup>29</sup> Ibid 40, 56–57.

<sup>30</sup> Ibid 293.

However, even if the book correctly underlines that State Socialism did not disestablish the public/private divide, it misses to point to another particularity of the private sphere during that period, namely that the private sphere encompassed a replica of the public/private divide. In other words, the family in the State Socialist East was different not only because citizens, men and women, preferred it to the repressive public sphere, but also because it came to entail a public sphere where citizens could exercise their civil and political rights. I am referring here to the 'fractal theory' developed by Susan Gal in her essay 'A semiotics of the Public/Private Divide'.<sup>31</sup> Gal argues that during State Socialism, the family, which was previously seen as private, started to encompass the public/private divide as it became a space where citizens' freedoms, such as freedom of speech or assembly, were openly exercised. In this setting, as the public/private division was replicated in the private sphere, so was the gendered division of labour. Consequently, women had to take care of the household to support the public sphere division within the private.

Another interesting issue in this book that should spark debate for Western and Eastern readers alike, is the need for second-wave (radical) feminist approaches in Czechia<sup>32</sup> and in CEE more broadly. As the author shows, second-wave feminism that developed in the West around the 1970s, could not follow the same track in Socialist Central and Eastern Europe. The 'woman's question' tackled in an authoritarian fashion by the Socialist regime in Czechoslovakia, and perhaps more broadly in the Socialist space, referred only to issues related to family, labour and public life.<sup>33</sup> Second-wave feminist demands linked to issues such as 'reproduction, sexuality, sexual orientation and identity or gender based violence'<sup>34</sup> were generally disregarded before 1989. It is only after the fall of Socialism that second-wave feminism appeared in the region. Yet, at the same time, third-wave feminism was emerging in the West, emphasizing that the ideals of gender equality could not be reached without taking into account differences between women (e.g. ethnicity, sexual orientation, disability). In this context, while I agree with

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<sup>31</sup> Susan Gal, 'A Semiotics of the Public/Private Distinction' (2002) 13 *A Journal of Feminist Cultural Studies* 77.

<sup>32</sup> Havelková (n 2) 292–295.

<sup>33</sup> *Ibid* 17.

<sup>34</sup> *Ibid* 18.

the author that, as second-wave feminists have argued, we must become more aware of the gendered order of society before focusing on the identitarian demands brought up by third-wave feminism, I also think that this idea is open to debate. This is because of the different streams of feminism that contest radical feminism on ideological grounds, and the fact that second and third-wave feminism might already coexist in CEE. Against this background, research and reflections on the women's movement and demands in Czechia and CEE more broadly would nicely complement Havelková's book. More single country studies on gender and the law in CEE, or more in-depth legal studies of different dimensions of gender (in)equality such as gender-based violence, reproductive and sexual rights, political representation or labour market discrimination would also be a good supplement to the book. Given the excellent analytical framework offered by this pioneering study in the field of gender legal studies in CEE, I hope to be reading such studies soon.



GEOFFREY SAMUEL, A SHORT INTRODUCTION TO JUDGING  
AND TO LEGAL REASONING (EDWARD ELGAR PUBLISHING 2016)

Rūta Liepiņa\*

Attempts in formalising law have shown that judging and legal reasoning goes beyond the mere knowledge of the substance of law and direct application of the rules.<sup>1</sup> Geoffrey Samuel in his textbook *Short Introduction to Judging and to Legal Reasoning*<sup>2</sup> has successfully captured some of the core ideas of judging and legal reasoning throughout time. Starting the journey at the point where legal reasoning initiated – Ancient Roman times where judges used bottom-up methods to reason from practical cases by applying the rules and focused on the actions – the author guides the reader to the modern days, where legal reasoners are expected to perform increasingly complex analyses and balance various interests at stake, incorporating a mix of the past legacy and new analytical methods.

There is a vast literature covering the topic of judging and legal reasoning from various perspectives.<sup>3</sup> Samuel masterfully constructs a web tying these distinct approaches together to show a more holistic view of legal reasoning. In comparison with some other textbooks in the field, this book has the advantage of capturing several centuries worth of work into a well-written guide, avoiding unnecessary verbiage. The author is inspired by Mitchel Lasser's<sup>4</sup> analysis and presents his account through a contrast between the so-called 'official portrait' and the 'unofficial portrait' of legal reasoning. This

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<sup>1</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994); Richard A Posner, *How Judges Think* (Harvard University Press 2010).

<sup>2</sup> Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning* (Edward Elgar Publishing 2016).

<sup>3</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Vol 5, Transaction Publishers 1962); Trevor Bench-Capon and Giovanni Sartor, 'A model of legal reasoning with cases incorporating theories and values' [2003] *Artificial Intelligence* 97.

<sup>4</sup> Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2004).



comparison provides a helpful approach for law students at their early stages to contextualise some of the abstract ideas of legal theory and provides real life examples from legal practice.

The overall goal of the book is to provide the reader with the essential skills and knowledge base to understand what it means to reach a legal decision, and what tools and reasoning methods the judge can employ to justify such decisions. It asks for instance, 'to what extent is judging and legal reasoning guided or influenced by particular theories about law and legal knowledge' or 'does the judge simply apply the code to the circumstances or does the legal decision making involve more complex reasoning levels?'.<sup>5</sup> While the author manages to answer only some of the questions posed, he enables the reader to consider these questions seriously by providing a well-curated source of reference.

## I. OVERVIEW OF THE BOOK

The book is divided into two parts: firstly, introducing the reader to what judging and legal reasoning has been in the past, and, secondly, providing an original analysis of the dichotomy of the views of the current state of the matters in this area of legal theory. The book is thoughtfully designed to encourage the readers to familiarise themselves with some of the original texts and cases. Such an exercise allows the reader to understand both the concepts and substance of the relevant law.

In the first part, the author walks the reader through the historical developments of judging and legal reasoning, starting from the early Roman law and leading up to the modern interpretation methods.<sup>6</sup> The author shows how the legal thought has changed through the years by presenting the prominent methods dominating the field, and emphasising what has been understood as the subject of the law. There is a great effort of revealing the true complexity of the law, for instance, by showing that there is no single correct way of interpreting statutes in all legal situations.<sup>7</sup>

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<sup>5</sup> Samuel (n 3) 1-2.

<sup>6</sup> Ibid 5-36.

<sup>7</sup> Ibid 23.

The second part of the book introduces and compares the official and unofficial portraits of judging and legal reasoning. The official portrait presents judging and legal reasoning from the insider's perspective, protecting the values that are important to law and those that are shown through legal education and legal decision-making. The unofficial portrait focuses on an external view on legal reasoning that, in Samuel's book, has been taken from social sciences and film studies. There is an overlap between the two. However, it is clear that both portraits are applicable to different contexts, and that neither of them is able to illustrate the full complexity of legal reasoning and decision making.

The author has chosen two characteristics that accommodate the comparison between the official and unofficial portraits – the level of observation and the type of analysis applied to the approaches. Firstly, Samuel discusses the differences between analysing law from internal and external perspectives. The official portrait is intended to present the internal views of the judges as they believe legal reasoning is and should be. It shows a formal view of the matters. In contrast, the unofficial view is represented by the social scientists who would analyse the law from an external point of view and consider what can be observed in reality.

More interestingly, the second level of comparison is based on the type of analysis performed in each of the portraits. The official portrait is linked with the authority paradigm, which emphasises the importance of respecting the order and rules, and focuses on interpretation instead of criticising the current system. The unofficial portrait uses the inquiry paradigm, which is a common approach in the natural sciences, looking for the explanation of the phenomenon observed, and take the system of law as the observable. Both sets of approaches face certain challenges in explaining judging and legal reasoning. For instance, they reveal the difficulties of the internal justification of the judge's decision-making in an objective manner.

Lastly, introducing some less traditional approaches, Samuel has chosen to present in a novel way how some ideas from film studies can be applied as useful tools for analysis. Despite the fact that law has usually been associated with text-based reasoning, he argues that legal knowledge also deals with non-

written expressions employing visual associations.<sup>8</sup> For instance, he uses an example of deploying metaphors in the court that would paint a picture that abstracts from the particular case, and, thus, allows the reasoners to model the rules and facts in a new way.

## II. DISCUSSION

There are four points that I would like to contribute to the discussion here: firstly, I wish to present some additional interdisciplinary approaches that could have provided a better overview of the legal reasoning and decision-making and that have been omitted by the author; secondly, I believe, there should have been more emphasis on the beginnings and developments of the formal approaches that have influenced a lot of the interdisciplinary work of law, logic and computing science conducted at the moment; thirdly, I will argue that there is a limited scope for the application of the representation theory and similar results could be achieved by or in collaboration with such alternatives as the linguistic analysis; and fourthly, I wish to add some further considerations about the future challenges of the judges and legal reasoners that could have benefited the final discussions in the book.

### 1. *Interdisciplinarity*

I believe that the picture drawn by the author of the legal reasoner and decision-maker could have been improved by considering a more diverse set of interdisciplinary fields. While the author focused on some interdisciplinary influences (theology, evidence studies) in understanding legal reasoning and legal decision-making, there are numerous other approaches that could have provided more insights to the readers. For instance, there has been a lot of work done to understand the mind of a judge from a medical perspective. Psychologists and neuroscientists have identified many weaknesses in human reasoning that judges are no exception to.<sup>9</sup> These include biases, overreliance on expert opinions, limited ability to reason with numbers and statistical information. Another example can be shown through

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<sup>8</sup> Samuel (n 3) 94.

<sup>9</sup> See for example, Brian L Cutler, Hedy R Dexter and Steven D Penrod, 'Expert Testimony and Jury Decision Making: An Empirical Analysis' (1989) 7 *Behavioral Sciences & the Law* 215.

the political analysis of legal judgements. Many agree that law and judges cannot be considered as completely independent from legislative and executive powers, as it is often influenced by the political views and policy matters, and also partly depends on the subjective beliefs of the reasoners. Such inconsistencies and subjectivity – in the author's words 'hunches'<sup>10</sup> – are not represented in the official portrait of reasoning. Furthermore, natural sciences are commonly concerned with closed systems in which the phenomenon is explained. Law is fluid in its nature and does not easily accommodate formal proofs due to the complex subject matters that are embedded in a human made system.<sup>11</sup> Some other fields that provide useful insights in the analysis of decision-making include economics, politics, linguistics, gender studies, anthropology, etc. At the same time, it is understandable that such endeavour might go beyond of what has been intended for this textbook.

## *2. Formalism in the Past and Current Discussions*

In the first chapter, the author identified the beginnings of some of the formal methods in the law by explaining Wilhelm Leibniz's (1646 – 1716) and Christian Wolff's (1679 – 1754) mathematical approaches solving legal cases using deduction. It would have been useful to also mention John Henry Wigmore's (1863 – 1943) approach of legal reasoning charts formalising some parts of legal decision-making from facts. Nowadays, these ideas have regained their popularity among formalists with the raising interest in argumentation, automatization and artificial intelligence applied in the law.<sup>12</sup> A brief discussion of these approaches would have provided an additional layer of interdisciplinarity to the overview provided by the author, and introduced topics that might be omitted in some other law curriculum that is still mainly focused on classical approaches to the law. Furthermore,

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<sup>10</sup> Samuel (n 3) 129.

<sup>11</sup> Ibid 133-135.

<sup>12</sup> Trevor Bench-Capon, Paul Dunne, 'Argumentation in Artificial Intelligence' (2007) 171(10) Artificial Intelligence 619.

exposure to the formal theories might reduce the remaining stigma against numbers and statistics in the courtrooms and legal discussions.<sup>13</sup>

### 3. *Representation Theory*

Samuel introduces the representation or image theory as one of the more modern alternatives to analysing law. It puts emphasis on the use of metaphors and characters to explain legal scenarios in different environments. In a way, the use of 'images' aims to simplify legal concepts and hypothetical scenarios to better explain them to both legal reasoners and layperson involved in the process of adjudication. However, the brief introduction of the representation theory does not yet justify its usefulness in legal analysis. The example given was based on case where the liability of the school on a field trip had to be decided. It showed the different ways opposing parties presented the contrast between persons (in this case, the school girls) and things (in this case, the zoo) by creating to different mental images justifying their decisions.<sup>14</sup> I argue that such analysis could have also been presented through linguistic analysis that has already established links with legal reasoning.<sup>15</sup> Law and language analysis focuses on the way legal reasoners understand and use language to express and justify their decisions. Linguistic analysis provides useful tools for the *persona* and *res* analysis that Samuel claims to be untangled by the representation theory. Indeed, for more convincing outcomes the representation theory could be closely linked with the language analysis of the judgements and other legal texts to provide a clearer understanding of the complex concepts used.

### 4. *The Future of Decision-Making*

The author mostly focused on the legacy of the past and the current approaches to judging and legal reasoning. The book would have benefited from a brief section on the future of decision-making and modern influences

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<sup>13</sup> Norman Fenton, and Martin Neil, 'Avoiding Probabilistic Reasoning Fallacies in Legal Practice using Bayesian networks' [2011] *Australian Journal of Legal Philosophy* 36, 114.

<sup>14</sup> Samuel (n 3) 107-109.

<sup>15</sup> Peter Meijes Tiersma, Lawrence Solan, *The Oxford Handbook of Language and Law* (Oxford University Press 2012).

in this field. I believe that with the legal rules and cases themselves becoming increasingly complex, it is the legal reasoners that are expected to cope with the changes and keep up with the time. The burden on judges are (at least) twofold. On the one hand, there is the substance argument, where the judges are expected to keep up with the current changes in the legal system that are becoming increasingly complex. Moreover, judges are required to have a comprehension of the increasingly technical facts of the case (statistical evidence, medical evidence, etc.). On the other hand, there is the (meta-) analytical argument of judges being criticised for not implementing newest methods of reasoning in their decision-making. As it was shown through the claims made in the official portrait, judges perceive legal reasoning from an internal point of view, and are not necessarily concerned with the external approaches. There is yet to come an internal or external theory that would seem attractive and efficient enough to be considered and implemented in the courts.

One solution to alleviate the burden on judges, is to look at the tasks that are increasing in complexity but do not necessarily require a trained legal reasoner. For instance, in criminal law, it is common to rely on forensic evidence. With the techniques of forensic evidence developing due to new practices and technologies, the field itself has become far more advanced than, say, 20 years ago. Judges are not expected to become forensic specialists to be able to make a decision in a criminal case. Therefore, some changes in the ways the evidence is presented in the case, so that the judges (and possibly the jury) could have a better understanding of the facts presented and their impact to the case, is encouraged by the field specialists. However, there are many aspects of judging that have been described to be less technical and logical. Even though the robot judges might not be seen in the foreseeable future, there are many tasks in the law firms and courts that will no longer require a human input.<sup>16</sup>

While automatization can provide many benefits, due to its early stages in development, it also poses some risks in legal decision making. It has already been shown that there is a tendency to misinterpret and overestimate the

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<sup>16</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press 2014).

importance of numeric data in the courtrooms.<sup>17</sup> Furthermore, at this point it has not yet been decided as to who is to be held responsible if the algorithm becomes 'biased' towards a certain group of people. That is to show that due to the undefined nature of legal reasoning and decision-making, it is not yet possible to capture its essence in a single theory or programme.

### III. CONCLUSION

This book is a good introductory level resource to any law student and any other curious mind interested in law and legal theory. It covers the basics of what both practitioners and academics understand as the exercise of decision-making and the processes of reaching legal conclusions.

Connecting all these theories back to legal practice, I agree with the author that:

which model dominates at any one moment will not be a matter either of correspondence or of the reliability of its coherent structure; it will be a matter of consent among those who make up the discipline of law.<sup>18</sup>

To sum up, Samuel has created a concise guide to judging and to legal reasoning that will leave the reader with sufficient knowledge and wish to explore this area in more depth. Despite there being a number of fruitful approaches to judging and legal reasoning, each of which explains an aspect of legal reasoning, none of them is able to provide a full account of the phenomenon. The main lessons that can be learnt from this book are related to understanding the complex nature of legal decision-making and the burden that has been put on the judges when reaching legal conclusions. This book is recommended to law students and practitioners alike.

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<sup>17</sup> Fenton and Neil (n 14).

<sup>18</sup> Samuel (n 3) 165.